## LT. COMMANDER PASCAL FERNANDES

*v.*

## THE STATE OF MAHARASHTRA & OTHERS

*September* 28, 1967

[M. HIDAYATULLAH, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.]

*Criminal Law Amendment Act* (46 of 1952), *s.* 8(2) *and Criminal Procedure Code* (*Act* 5 *of* 1898), *ss.* 337 *and* 338—*Power to tender pardon under Criminal Law Amendment Act—If exercisable only on the application of prosecution—If governed by s.* 540, *Cr.P.C.—Matters to be considered before tendering pardon.*

Three superior Government officers, an upper division clerk and four others were being tried before the Special Judge, appointed under s. 6 of the Criminal Law Amendment Act, 1952, for various offences including criminal misconduct under s. 5(2) of the Prevention of Corruption Act, 1947. The clerk applied to the Court praying that he should be made an approver and examined as a prosecution witness. The application was opposed by the other co-accused but the Special Judge, acting under s. 8(2) of the Criminal Law Amendment Act, tendered a conditional pardon to him and ordered that he should be examined as an approver and witness for the prosecution. The appellant, who was one of the co-accused, filed a revision in the High Court. In the High Court, the prosecution stated that it had no objection to the grant of pardon to the clerk and that it even welcomed it. The High Court thereupon confirmed the order of the Special Judge.

In appeal to this Court, the appellant contended that : (1) differences between ss. 337 and 338 Cr. P. C., and s. 8(2) of the Criminal Law Amendment Act, show that the powers of the Special Judge, in tendering pardon under s. 8(2), are limited to an application by the prosecution in that behalf and that the Special Judge could not act *suo motu;* (2) the powers of the Special Judge under s. 8(2) are circumscribed by the considerations that underlie s. 540 Cr. P. C., and that therefore he could not acquit one accused so as to be able to convict another; and (3) the Special Judge had not exercised his discretion judicially and properly.

*Held*: (1) Under s. 7(1) and (3) of the Criminal Law Amendment Act, notwithstanding anything contained in the Criminal Procedure Code, the offences under ss. 161 or 165 or 165A I.P.C., and s. 5(2) of the Prevention of Corruption Act, 1947, shall be tried only by a Special Judge. Therefore, in the case of an offence under s. 5(2) of the Prevention of Corruption Act, under s. 337(1) Cr.P.C., a Magistrate, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence, may tender pardon to him; but when that person has accepted the tender of pardon and has been examined under s. 337(2), the Magistrate must, without making any further enquiry send the case to the Special Judge for trial under s. 337(2B). The provisions of s. 337(1) thus apply at the stage of investigation or inquiry before the case reaches the Special Judge. When there is no such tender of pardon to any one, the case shall be forwarded for trial, to the Special Judge and his powers commence after he

A has taken cognizance of the case and are available to him throughout the trial. When the case is before him, a tender of pardon can only be by him. But where the offences are other than those under ss. 161, 165, 165A, I.P.C. and s. 5(2) Prevention of Corruption Act, when there is a committal by the Magistrate under s. 337(2A), s. 338 Cr.P.C. provides that the court to which commitment is made could not only tender pardon itself, but could also order the committing Magistrate or District Magistrate to do so. Such a power is not available to the Special Judge, because, there is no commit-
B ment when he takes cognizance. These differences, in the powers of the Special Judge and the courts constituted under the Criminal Procedure Code do not, however, show that the powers of the Special Judge could only be exercised if the prosecution moved first. On the contrary, there is nothing in the language of the section to show that the Special Judge must be moved by the prosecution. The section is enabling and its terms are wide. Therefore,
C the Special Judge may consider an offer by one of the accused to turn approver. [701 F-G; 703 B-E, H; 704 A].

(2) Section 540, Cr.P.C., confers powers on the court to summon material witnesses at any stage of any inquiry or trial or other proceeding under the Code. The considerations for summoning persons as court witnesses are different from the considerations on which a tender of pardon is made. It is not, therefore, possible to
D read s. 540 either with ss. 337 and 338, Cr. P.C., or with s. 8(2) of the Criminal Law Amendment Act. [704 B-D].

(3) Ordinarily, it is for the prosecution to ask that a particular accused out of several may be tendered pardon. But when the accused applies directly, the Special Judge must first refer the request to the prosecution, because, the State may not need an approver's testimony and therefore may not desire that any accused
E should be pardoned; or, it may not like the tender of pardon to the particular accused who may be the worst offender. It is only when the prosecution joins in the request that the Special Judge should exercise his powers. In exercising his discretion, the Special Judge must bear in mind that the interests of the accused are just as important as those of the prosecution, and, no procedure or action can be in the interest of justice if it is prejudicial to an accused.
F Also, before he tenders pardon he must know the nature of the evidence that the person seeking the pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and the other co-accused. In this case, the Special Judge made no effort to find out what the applicant had to disclose. But since the Public Prosecutor stated in the High Court that the prosecution also considered favourably the tender of pardon to the applicant, this Court would not interfere with the
G order of the High Court. [704 D-E, H; 705 B-F].

*Reg* v. *Robert Dunne*, 5 Cox Cr. Cases 507, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No 148 of 1967.

Appeal by special leave from the judgment and order dated
H July 20, 1967 of the Bombay High Court in Criminal Revision Application No. 439 of 1967.

*J. C. Bhatt*, and *B. R. Agarwala*, for the appellant.

*H. R. Khanna* and *R. N. Sachthey*, for respondent No. 1.

*A.K. Sen, Bishamber Lal* and *H.K. Puri,* for respondent A
No. 8.

The Judgment of the Court was delivered by

**Hidayatullah, J.**—This is an appeal by special leave against an order of the High Court of Bombay dated July 20, 1967 dismissing a criminal revision application filed by the appellant against an order of the Special Judge, Bombay tendering pardon B to a co-accused under sec. 8(2) of the Criminal Law Amendment Act of 1952. The appellant is being tried before the Special Judge, Bombay along with seven others for conspiracy to cheat the officers of the Naval Dockyard and under s. 5(2) of the Prevention of Corruption Act, 1947. The substantive charges against the several accused are different but it is not necessary to mention C them here. The gist of the accusation is that the several accused had entered into criminal conspiracy to cheat the authorities of the Naval Dockyard. Material purchased locally was certified to be of superior quality while it was, in fact, inferior. In this and in diverse ways the Naval Dockyard Authorities were cheated to the tune of Rs. 3,65,000 and odd. Among the array of the accus- D ed in the case are three contractors (accused Nos. 5, 6 and 7) and their servant (accused No. 8), and four Government servants of whom accused No. 1 is the appellant before us. Of the remaining three Government servants, accused No. 4 (M. M. Jagasia) was an Upper Division Clerk working as Office Supdt. at the material time drawing a salary of Rs. 200 per month. Against Jagasia there E is yet another charge, namely, that he is in possession of property disproportionate to his known sources of income which fact, if proved, is likely to lead to a presumption under the Prevention of Corruption Act. Evidence has already been accumulated, which is calculated to show that he is in possession of three motor cars, a building valued at Rs. 28,000 and odd and currency notes F in a locker of the value of Rs. 16,400 in addition to gold and other ornaments and his bank balance.

The case appears to have been previously before Mr. R. K. Joshi, Special Judge, Greater Bombay and he framed charges against the accused in the case, on the basis of material furnished by the prosecution under the provisions of s. 173 of the Code G of Criminal Procedure. The case then went before the present Special Judge, Mr. N. M. Indurkar. The case was fixed for trial from April 24, 1967. On April 20, 1967, Jagasia made an application to the Court praying that he should be tendered pardon and made an approver and examined as a prosecution witness. The reason given by Jagasia was that he had full and complete knowledge of all that had taken place between the officers and H the contractors and that he was in a position to disclose how the conspiracy was formed and the several offences committed. He said that he was making this offer "in order to unburden the mental tension and in order to help the cause of justice". He also

A stated that he had not been given any threat, promise or any inducement by any police officer and that he was making the application voluntarily.

The application of Jagasia was stoutly opposed by his co-accused, particularly the appellant before us. It was contended on his behalf that the granting of pardon to secure evidence, whether under the Code of Criminal Procedure or under s. 8(2) B of the Criminal Law Amendment Act, 1952, was essentially for the prosecution to consider in the first instance; that the application being made after the framing of the charges was not legally tenable; that the prosecution considered the evidence sufficient for the successful prosecution of all the accused including Jagasia himself; that the evidence against Jagasia was likely to be forti- C fied by the presumption under the Prevention of Corruption Act and that the grant of pardon to him would be an act of favour to him and highly prejudicial to the defence of other accused. The Special Judge, Greater Bombay, after hearing arguments tendered a conditional pardon to Jagasia and ordered that he shall be examined as an approver and witness for the prosecution. Simul- D taneously the learned Judge ordered that Jagasia's statement be recorded by the police under s. 162(161) of the Code of Criminal Procedure and copies thereof supplied to the other accused in good time before the hearing next started.

The appellant herein filed revision in the High Court and urged the same grounds which we have set out above. The pro- E secution in the High Court stated that it had no objection to the grant of pardon and that it even welcomed the opportunity of having the evidence of an approver, through tender of conditional pardon to Jagasia. The High Court, after hearing the arguments, passed the order, now under appeal, upholding the tender of conditional offer of pardon to Jagasia.

F In this appeal Mr. J. C. Bhatt contends that the powers of the Special Judge in tendering conditional pardon under s. 8(2) of the Criminal Law Amendment Act are limited to an application by the prosecution in that behalf and the Special Judge cannot act *suo motu* without being invited by the prosecution to consider the tender of pardon to one of the accused before him. G Mr. A. K. Sen in supplementing the arguments on behalf of one of the respondent co-accused further urged that the powers of the Special Judge in securing additional evidence are circumscribed by considerations that underlie s. 540 of the Code and therefore he can act in the interests of justice only and not with a view to granting an acquittal to one of the accused so as to be able to convict another. Both the learned counsel also urge that H in the present case the discretion, if any, vested in the Special Judge under s. 8(2) of the Criminal Law Amendment Act has not been judicially or even properly exercised. On behalf of the State, Mr. H. R. Khanna contends that the powers of the Special Judge to grant pardon are untrammelled and that the sections

both in the Code and in the Criminal Law Amendment Act bearing upon the tender of pardon with a view to securing evidence are not conditioned by any of the considerations on which learned Counsel on the other side rely. He also submits that the discretion is properly exercised because Jagasia is an insignificant person compared with the contractors and the superior officers and they are mainly responsible for defrauding the Government of much of the money alleged by the prosecution. A B

Before we discuss the validity or propriety of the tender of pardon to Jagasia we shall refer briefly to the statuory provisions on the subject of the tender of pardon. The topic of tender of pardon to an accomplice is treated in the twenty-fourth chapter of the Code as part of the general provisions as to inquiries and trials. Sections 337 to 339 and 339A contain all the provisions which refer to courts of criminal jurisdiction established under the Code. The Special Judge created under the Criminal Law Amendment Act, 1952 (Act 46 of 1952) is not one of them. For the cases triable by Special Judges under the Criminal Law Amendment Act a special provision is to be found in s. 8(2) of that Act, for tender of pardon to an accomplice, as part of the procedure and powers of Special Judges. The section is set out below*. The second sub-section necessarily differs in some respects from the provisions of the Code because the procedure of trial before the Special Judge is different, but on the tender of pardon by the Special Judge the provisions of ss. 339 and 339A of the Code apply. The tender of pardon by the Special Judge is deemed by fiction to be one tendered under s. 338 of the Code for C D E

*"8. *Procedure and powers of special judges*—(1) A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 1898), for the trial of warrant cases by magistrates. F

(2) A special judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of sections 339 and 339A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under section 338 of that Code. G

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898 shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special judge; and for the purposes of the said provisions, the court of the special judge shall be deemed to be a court of session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge shall be deemed to be a public prosecutor. H

(4) . . . . . "

purposes of sections 339 and 339A. That section is set out below**.

Mr. J. C. Bhatt contends on the basis of differences between s. 8(2) of Act 46 of 1952 and ss. 337 and 338 of the Code that the powers of the Special Judge are different and can only be exercised if the prosecution moves first. We shall consider if the differences such as they are lead to any such conclusion. To begin with it may be noticed that the action of the Special Judge is deemed to be action under s. 338 of the Code for purposes of ss. 339 and 339A which apply equally. It is not necessary to refer to ss. 339 and 339A in detail. The former provides that where a pardon has been tendered under s. 337 or 338 and the Public Prosecutor certifies that the person who accepted it has not wilfully complied with the conditions, the person may be tried for the offence for which pardon was tendered but not jointly with the co-accused and the prosecution must in that trial prove that the conditions had not been complied with. The statement made by the person may be tendered in evidence against him but a prosecution for the offence of giving false evidence in respect of such statement is entertainable only with the High Court's sanction. Section 339A lays down the procedure for trial. The sections being applicable equally to tender of pardon under the Code and under the Criminal Law Amendment Act, no inference can be drawn as suggested.

We next proceed to consider the differences between s. 338 of the Code and s. 8(2) of the Criminal Law Amendment Act. The fiction in the latter part of s. 8(2) is only this that the tender of pardon is to be deemed to be one under s. 338 for purposes of applying ss. 339 and 339A. The whole of s. 338 is not applicable. The power to order the Committing Magistrate or the District Magistrate to tender pardon is not available to the Special Judge because the fiction does not cover that part of s. 338. Similarly, the opening words of s. 338 "at any time after the commitment" are inappropriate to trials before Special Judges because there is no commitment. It is obvious that the powers of the Special Judge commence only after he has taken cognizance of the case, and they are available to him throughout the trial. No conclusion such as is suggested by counsel can be drawn.

We may now proceed to consider the differences between s. 337 and s. 8(2). To do this we must look at some sections of the Criminal Law Amendment Act. Special Judges are appointed by

**"338. *Power to direct tender of pardon*—At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person."

the State Governments under s. 6 of the Criminal Law Amendment Act to try the following offences, namely:— A

(a) an offence punishable under s. 161, section 165 or section 165A of the Indian Penal Code (Act XLV of 1860) or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947); B

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

Sub-section (1) of s. 337 provides that "in the case of C an offence triable exclusively by the High Court or Court of Session or any offence punishable with imprisonment which may extend to seven years or any offence under ss. 161, 165, 165A,... the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, *at any stage of the investigation or inquiry into or trial of the offence,* with a D view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof". The E proviso makes provision for situations where the offence is under enquiry or trial. The section applies when the offence is not before the *Special* Judge for trial. This will appear presently. The remaining sub-sections of s. 337 are procedural. Sub-section (1A) enjoins the recording of reasons for tendering pardon and the giving of a copy on payment or free of cost to the accused. Sub- F section (2) lays down that a person accepting pardon shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (2A) requires that if the Magistrate has reason to believe that the accused is guilty of an offence, the accused shall be committed to the Court of Session. Sub-section (2B) is an G exception to sub-section (2A). It provides:

"(2B) In every case where the offence is punishable under section 161 or section 165 or section 165A of the Indian Penal Code or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been ex- H amined under sub-section (2), then, notwithstanding anything contained in sub-section (2A), a Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952."

A Pausing here it may be mentioned that s. 7(1) and (3) of the Criminal Law Amendment Act require that notwithstanding anything contained in the Code of Criminal Procedure or in any other law, the offences specified in s. 6(1) shall be tried by a Special Judge only and the Special Judge may also try any other offence with which the accused may be charged under the Code of Criminal Procedure at the same trial. These provisions between B them establish two periods of time in relation to the tender of pardon in so far as offences mentioned in ss. 6(1) and 7(1) and (3) of the Criminal Law Amendment Act are concerned. Before the case reaches the Special Judge the provisions of s. 337(1) of the Code of Criminal Procedure apply at the stage of investigation or inquiry. If any Magistrate therein mentioned tenders pardon C and the person who is tendered pardon is examined under sub-section (2), the Magistrate must, without making any further inquiry, send the case to the Special Judge, if the offence is one of those mentioned in sub-section (2B) above set out. In other words, just as under sub-section (2A) the Magistrate has no option but to commit the accused to the Court of Session or the High D Court, under sub-section (2B), he has no option but to stop further inquiry and send the case to the Special Judge. When the case is before that Special Judge the tender of pardon can only be by the Special Judge and it is deemed to be one under s. 338 for purposes of s. 339 and 339A as explained above. The fiction is necessary because no committal proceeding is necessary before E a case is sent to a Special Judge. The words underlined by us in s. 337(1) cannot apply to tender of pardon by Special Judges as some of the words of s. 338 do not apply to them.

It follows that the powers of the Special Judge are not circumscribed by any condition except one, namely, that the action F must be with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence. The pardon so tendered is also on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor. The disclosure G must be complete as to himself and as to any other person concerned as principal or abettor. There is no provision for the recording of reasons for so doing, nor is the Special Judge required to furnish a copy to the accused. There is no provision for recording a preliminary statement of the person.

There can be no doubt that the section is enabling and its terms are wide enough to enable the Special Judge to tender a par- H don to any person who is supposed to have been directly or indirectly concerned in, or privy to an offence. This must necessarily include a person arraigned before him. But it may be possible to tender pardon to a person not so arraigned. The power so conferred can also be exercised at any time after the case is received for trial and before its conclusion. There is nothing in the language

of the section to show that the Special Judge must be moved by the prosecution. He may consider an offer by an accused as in this case. The action, therefore, was not outside the jurisdiction of the Special Judge in this case. A

There is no merit in the contention that s. 540 of the Code of Criminal Procedure governs either ss. 337 or 338 of the Code or s. 8(2) of the Criminal Law Amendment Act. That section only confers powers on the Court to summon material witnesses at any stage of any inquiry or trial or other proceeding under the Code. That power is not to be confused with the power to tender pardon to an accused. The considerations for summoning witnesses as court witnesses are somewhat different from the considerations on which a tender of pardon should be made. It is no doubt necessary to bear in mind the interests of justice in either case but there the common factor ceases and other considerations arise. It is not, therefore, possible to read s. 540 with ss. 337 and 338 of the Code or with s. 8(2) of the Criminal Law Amendment Act. B C

The next question is whether the Special Judge acted with due propriety in his jurisdiction. Here the interests of the accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider. Before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. What is meant by public policy is illustrated by a case from Dublin Commission Court (*Reg* v. *Robert Dunne*, 5 Cox Cr. cases 507) in which Torrens, J. on behalf of himself and Perrin, J. observed as follows:— D E

> "From what I can see of this case, this witness Bryan, who has been admitted as an approver by the Crown is much the more criminal of the two on his own showing..... I regret that this witness, Bryan, has been admitted as evidence for the Crown and thus escaped being placed upon his trial. It is the duty of magistrates to be very cautious as to whom they admit to give evidence as approvers, and they should carefully inquire to what extent the approver is mixed up with the transaction, and if he be an accomplice, into the extent of his guilt.....". F G

In this case the Special Judge made no effort to find out what Jagasia had to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to offer no evidence and permit his acquittal, or (d) to enter a *nolle prosequi*. In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. Section 8(2) of the Criminal Law Amendment H

A Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for th e prosecution to ask that a particular accused, out of several may be tendered pardon. But
B even where the accused directly applies to the Special Judge, he msut first refer the reqquest to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prossecuting joins
C tendered pardon because it does not need approver's testiminy. It may also not like the tender of pardon to the the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other
D offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from
E which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favourably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon *suo motu*
F at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed.

V.P.S.

*Appeal dismissed.*