A COMPARATIVE ANALYSIS OF PRE-TRIAL DISCRETION WITH REFERENCE TO INDIAN CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

There are two models of criminal justice system i.e. "crime control" and "due process"[1]. Crime control i.e inquisitorial model which places emphasis on reducing the crime in society through increased police and prosecutorial powers. Due process i.e. adversarial model which focuses on individual liberties and rights and is concerned with limiting the powers of the Government. In reference to these models this study aims to explore the discretion exercised by police and prosecutor during the pre-trial stage based on the criminal justice system. These has jurisdiction chosen because of some historical link and their status as representing model of criminal justice, common law or accusatorial, the civil law or inquisitorial. Discretion at the Pre-Trial stage refers to such discretion which empowers the Police and the Prosecutor to dispose the case at the initial stage on the basis diverse criteria. In criminal proceeding discretion plays a significant role in supplementing the role of court as statutes cannot provide for every circumstance[2]. Police and Prosecutor can assist in filtration of cases by eliminating trial of undesirable matters. Police is the chief investigating agency of the State and the court does not possess any supervisory jurisdiction over police and their investigation power. At the investigating stage the police officers can conclude the case by exercising their discretion as offence may be minor, or by warning the accused on the ground of insufficient evidences. However there must be some checks and balance over the police authority for fair investigation and they should be made accountable.

[1] Packer, Herbert L, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford (1968).
[2] Choe, D.H., *Discretion at the Pre-Trial Stage: A Comparative Study*, Springer Science + Business Media, Dordtecht 2013.

The prosecutor is the sole gate keeper of the criminal proceeding, who initiates the criminal proceeding and can conclude the case by exercising considerable discretion. Prosecutor may exercise checks and balance. Prosecutor can play a significant role at the charge stage because he is well acquainted with the law than police and able to charge according to the real act of the offender and according to the relevant evidences. Prosecutor may also exercise the discretion to prosecute and not to prosecute by forwarding only serious cases and minimize the burden of the court by eliminating the fake and irrelevant cases. Due to the role of prosecutor It is very essential that there should be cooperation between the police and public prosecutor and some discretion also be granted for the effective and efficient criminal justice system.

LITERATURE REVIEW

Articles:

- Cristina Langella, *US Supreme Court Places a Check on Plea Bargains*, 26 May 2012, Pace International Law Review

"What is to be done in cases in which a lawyer's incompetence caused the client to reject a favorable plea bargain?"

In the United States, a small amount of cases actually go to trial. Instead, criminal cases are mainly disposed of when the defendants plead guilty. In fact, statistics prove that 97% of federal convictions and 94% of state convictions were the results of guilty pleas. Under the US Constitution, criminal defendants have a right to effective counsel during plea negotiations. Recently, the Supreme Court has placed on check on plea bargains. Based on two recent cases that reached the Supreme Court, the Court concluded that defense counsel has not been giving defendants' effective and adequate legal advice when their client should accept a "fair deal." As a result, the Supreme Court held that new constraints must be in place during any plea negotiations in order to protect defendant's 6th Amendment right to effective counsel. Essentially, this would stop defendants from receiving bad legal advice about favorable plea offers.

- D.H. Choe, *Discretion at the Pre-Trial Stage: A Comparative Study*, Springer science + Business media Dordtecht 2013.

This article highlighted the various discretion lies with the police and prosecutor at the Pre-Trial stage. Also emphasis on the comparative study on the various discretion power within police and prosecutor.

- Ho Hock Lai, *Liberalism and the Criminal Trial*, 32 Sydney L. Rev. 243 (2010).

The article has highlighted the two different views taken in different jurisdiction on the extent of interference permissible by Magistrate during investigation.

- Maja Daruala, G.P Joshi et.al. (eds), *Police Reform too Important to Neglect too Urgent to Delay*, Commonwealth Human Rights Initiative, Sarvodya Enclave New Delhi. July 2005.

This article dealt with the fact that the need of the reform in the police system to make efficient criminal justice system. Any discussion on police reform in India eventually gravitates towards the demand for replacing the Police Act of 1861 with legislation that is more in keeping with the times and prevailing democratic values. The Police Act, 1861 was enacted by the British in the aftermath of the Mutiny of 1857 or the First War of Independence. The British, naturally at that time wanted to establish a police force that would suit the purpose of crushing dissent and any movement for self-government. This Act continues to this day in most states of India despite far reaching changes in governance and India's transition from being a colonized nation to a sovereign republic. The government and its police today are obliged to respect political diversity and guarantee a climate of peace in which people feel secure in the exercise of their rights and the protection of their freedoms. Because these sentiments are not reflected in the legislation governing the police, it has contributed to the police remaining outside the loop of prevailing democratic values. It is also the primary reason for the police being perceived by many as the handmaiden of the political elite rather than as an organization that provides essential services through ensuring peace and security to the people.

Books

- B Uma Devi, Arrest, Detention and Criminal Justice System, Oxford University Press, New Delhi (2012).

This book dealt with the issues of arrest and pre-trial detention. In part II of this book, constitutional parameters of detention pending investigation and trial have been laid down. The right to life and personal liberty is the most cherished one of all the human rights. The enjoyment of all other rights depends upon this basic right. This book is a significant contribution to the literature on the right to personal liberty. This book covers the provisions of criminal law, particularly those dealing with powers of arrest and detention and the safeguards against arbitrary exercise of those powers. It deals with preventive detention, detention pending investigation and trial, and punitive detention following conviction. It makes a strong case for further safeguards to reinforce the right to personal liberty. The discussion highlights what needs to be done further to ensure full enjoyment of the most precious right. The book shows that the justifications for punitive detention, namely, deterrence, reformation, and rehabilitation have turned out to be illogical and irrational. It advocates prevention of crime and reparation rather than punishment by way of imprisonment following conviction.

- Herbert L Packer, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford (1968)

The argument of this book begins with the proposition that there are certain things we must understand about the criminal sanction before we can begin to talk sensibly about its limits. First, we need to ask some questions about the rationale of the criminal sanction. What are we trying to do by defining conduct as criminal and punishing people who commit crimes? To what extent are we justified in thinking that we can or ought to do what we are trying to do? Is it possible to construct an acceptable rationale for the criminal sanction enabling us to deal with the argument that it is itself an unethical use of social power? And if it is possible, what implications does that rationale have for the kind of conceptual creature that the criminal law is? Questions of this order make up Part I of the book, which is essentially an extended essay on the nature and justification of the criminal sanction.

We also need to understand, so the argument continues, the characteristic processes through which the criminal sanction operates. What do the rules of the game tell us about what the state may and may not do to apprehend, charge, convict, and dispose of persons suspected of committing crimes? Here, too, there is great controversy between two groups who have quite different views, or models, of what the criminal process is all about. There are people who see the criminal process as essentially devoted to values of efficiency in the suppression of crime. There are others who see those values as subordinate to the protection of the individual in his confrontation with the state. A severe struggle over these conflicting values has been going on in the courts of this country for the last decade or more. How that struggle is to be resolved is a second major consideration that we need to take into account before tackling the question of the limits of the criminal sanction. These problems of process are examined in Part II.

Part III deals directly with the central problem of defining criteria for limiting the reach of the criminal sanction. Given the constraints of rationale and process examined in Parts I and II, it argues that we have over-relied on the criminal sanction and that we had better start thinking in a systematic way about how to adjust our commitments to our capacities, both moral and operational.

- K.N.C. Pillai (ed.), *R.V. Kelkar's Criminal Procedure*, 5th ed., Eastern Book Company, Lucknow.

This book deals with topic wise organization of the subject of criminal procedure, which has better chances of success in imparting knowledge of the provisions and also in developing insight into the subject. The analysis of the relevant sections connected with each topic has been fairly adopted and even the critical appraisal of such sections in the light of judicial decisions has been much appreciated.

- Macklin Fleming, Of Crimes and Rights 151, WW Norton &co., New York (1978).

This book emphasized on the need on the prompt investigation so that the connection between the two events, namely crime and punishment, is maintained.

- William Twinning, *What is the Law of Evidence*, in William Twinning (ed.), *Rethinking Evidence: Exploratory Essays*, 1990 ed.

William Twining is Quain Professor of Jurisprudence Emeritus at University College London, and a regular Visiting Professor at the University of Miami, School of Law. His writings on evidence include Analysis of Evidence. The Law of Evidence has traditionally been perceived as a dry, highly technical, and mysterious subject. This book argues that problems of evidence in law are closely related to the handling of evidence in other kinds of practical decision-making and other academic disciplines, that it is closely related to common sense and that it is an interesting, lively and accessible subject. In recent years the emergence of evidence as a multidisciplinary field has been further stimulated by advances in forensic science, concern about intelligence after 9/11, the search for weapons of mass destruction in Iraq, and developments such as evidence-based medicine. These essays, written over a period of twenty-five years, develop a readable, coherent historical and theoretical perspective about problems of proof, evidence, and inferential reasoning, and story-telling in law. Although the book is self-standing, it is woven together to present a sustained argument for a broad inter-disciplinary approach to evidence in litigation, in which the rules of evidence play a subordinate, though significant role. This revised and enlarged edition includes a revised introduction, the best-known essays in the first edition, and new chapters on narrative, generalizations and argumentation, teaching evidence, and evidence as a multi-disciplinary subject. This book provides the theoretical background to the very practical Analysis of Evidence. It will also be of interest to anyone concerned about the role of evidence in their own discipline.

STATEMENT OF PROBLEM

Pre-trial discretion can play a pivotal role in administration of justice. Discretionary powers in the hands of police and prosecution can not only improve the efficiency of criminal justice system, but also provide quality justice.

There are three main agencies involved in the criminal justice system, Police, Prosecutor and judge. But no criminal justice system can only be judge centric i.e. justice cannot be achieved by the monopoly of one legal actor in the criminal proceeding. Police and Prosecutor the other two actors in the criminal justice system can contribute much more if pre-trial discretion conferred on them. In Indian criminal justice system Magistrate plays a significant role, every

case in spite of its seriousness sent to the court for its further proceedings. No criminal justice system can be work on the monopoly of one legal actor. Co-operation between these organs is necessary at different stages. At the pre-trial stage police and prosecutor can play a vital role by exercising discretion, they can conclude the case at initial stage only, police would be more accountable if there is role of prosecutor in pre-trial stage.

The courts in India are overburden as there is no filtration of cases at pre-trial stage and every matter reported is forwarded to the Magistrate. This has chocked the courts with cases and has made them inefficient. Police is the agency which crime is reported and it initiates investigation and forwards the case to court for taking cognizance. However in suitable cases the police can conclude the case at the initial stage by exercising the pre-trial discretion. It can forward serious and deserving cases to the court which would ensure fewer burdens on the courts and improve the working of the court.

Quality of justice is also compromised due to non-participation of Prosecutor at pre-trial stage which leads to defective appraisal of evidences. As prosecutor is well acquainted with the law, he knows which evidences are more relevant in a particular case and would gather only those evidences which could sustain scrutiny in the court. Further prosecutor can charge more effectively than police because prosecutor has more knowledge about the law and he can charge the accused in the proper manner according to appropriate law.

Police being the sole investigation agency became dictator. Division of power between Police and Prosecutor at pre-trial stage will make them accountable to each other and amounts to fair and efficient investigation. Because police initiate the investigation and are non-accountable this leads to arbitrary character of the police and less effective investigation. There could be a prosecutor role in this stage i.e in appraisal of evidences, at the time of charge which create the accountability for both police and prosecutor and leads to an effective investigation.

HYPOTHESIS

Pre-trial discretion in the hands of police and public prosecutor leads to effective and accountable criminal justice system.

RESEARCH QUESTIONS

1. Whether Pre-Trial discretion exercised by Police and Prosecutor can improve efficiency of criminal justice system and provide access to quality justice?
2. Whether Prosecutors can be vested with quasi-judicial power in the Indian criminal justice system?
3. Whether Prosecutor can exercise checks and balance on the investigative power of Police?
4. Whether discretionary power should be vested with the Police at the pre-trial stage?
5. What would be the effect of pre-trial discretion on the Indian criminal justice system?
6. What structural changes need to be incorporated before vesting pre-trial discretion in the hands of police and prosecutor?

OBJECTIVE OF STUDY

To study in essence the effect of pre-trial discretion at the hands of Police and Prosecutor. The quest of the study is to find out whether overall efficacy of Indian criminal justice system can be increased by vesting Pre-Trial discretion.

SCOPE OF STUDY

The scope of research includes the examination of chapter XII of CrPC dealing with investigation of criminal cases and emphasizing on the role of Prosecutor and police in every stage of investigation and some part of the Fundamental Rights which emphasis on the illegal detention by Police officer. This includes examining the provision beginning from the role of a Police from the time of receiving the First information Report and role of Public Prosecutor in that stage. This study also includes some articles on the role of the Police and Public Prosecutor which helps in describing the discretion at different stages before the trial.

RESEARCH METHODOLOGY

The methodology of the present research would be doctrinal, emphasizing on the provisions of the Code of Criminal Procedure, 1973 dealing with the functioning and role of Police and Public Prosecutor at the pre- trial stage. Further analysis will be made of the case laws and some articles on the same issue at different stages in the investigation.