COMPARATIVE STUDY OF HUMAN RIGHT UNDER TRAIL

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Human rights are inalienable rights and every human is entitled to such rights by birth. During the procedure of trail under criminal justice system in India the procedure is so long and stretched that these basic rights of both the parties are under question to a very great extent. The criminal justice system works on the very well settled principle of innocence and presumes the accused to be innocent and all the burden of proof is on the prosecution. And all those basic rights that are mentioned under the law are to be given to the accused, mere investigation saying that he has committed any offence would not take away his rights, but the other side of the coin is not in every case is the accused innocent and may be because of the presumption of innocence the prosecution is under undue pressure of burden proof. The author in this paper has discussed and compared the human rights of both the parties' i.e the accused and the victim, and tried to draw a comparison of state and human rights or natural rights of both the parties. The paper focuses on the rights that the legislation has given to the accused and a situation of prosecution where the presumption of innocence acts as a boom for one party and curse for another.

KEY WORDS- inalienable rights, presumption of innocence, burden of proof, investigation

INTRODUCTION

Trial, a stage in criminal justice system that is very difficult to answer from where it begins. There is a common perception that as the court takes cognizance of the case the stage of "trial" starts but there is a distinction of the beginning of trail stage in the cases trial able by magistrate and that of trial able by session. Supreme Court under common causes said that the cases trail able by session are only considered under trail after the Magistrate frame the charges.

Trial may go on for years and any stretched period of time and the parties that are under the trial are subjected to number of problems.

Human rights that are considered to be inalienable rights that are guaranteed by the Constitution and many other international organization. Every citizen weather an accused or the prosecution have certain rights and that cannot be taken away by the courts during the pendency of the trails.

This paper discusses about these rights of both the parties and with special emphasis on prosecuting rights.

PROSECUTION RIGHTS

The main objective of the criminal trial is to determine whether an accused person has violated the penal law and where found guilty, to prescribe the appropriate sanction. Prosecution is an executive function of the state and is usually discharged through the institution of the prosecutor. The burden of proof rests on the prosecution as per the prescribed standard of proof. The prosecutor faces several problems in proving the guilt of the accused person. Some of these problems fall beyond the scope of his duties and responsibilities. The legal framework, the law enforcement infrastructure and the quality of the personnel operating within the legal system, amongst other factors, considerably affect the conviction rate. In the first part of the paper, our group has defined conviction rate, and analyzed the reasons for variation in rates in different countries. The group has discussed some of the problems which may arise in proving the case in a court from the perspective of the prosecutor under four categories relating to investigation, prosecution, trial, and legal and systemic factors. The group has also proposed solutions to some of these problems.

The right to a speedy trial is a fundamental human right. It has been affirmed in the Universal Declaration of Human Rights 1948 and enshrined in the constitution's and statutes of some countries. Speedy trial is a vital element in the administration of criminal justice. In fact, unnecessary delay in the trial constitutes a denial of justice. The prevention and control of crime as well as the effective rehabilitation of the convict are enhanced by speedy trial. The prosecutor is at the centre stage of a criminal trial and plays a leading role in its conduct. In the second part of the paper, the group has examined some of the laws and practices which prevail in different countries where this right is guaranteed. Factors affecting the realization of a speedy trial have also been discussed from the perspective of the prosecutor. Sentencing is the final stage of a criminal trial. An appropriate sentence is one which strikes a balance between the

preservation of social order and the rehabilitation of the convict. The participation of the prosecutor in sentencing and the stage of the such participation differ depending on the legal systems as practiced in different countries. Sentencing remains the prerogative of the presiding judge/magistrate who usually enjoys wide discretion, and the recommendations of the prosecutor are not binding on him. In the third part of this paper, the group discussions revealed problems which may arise in the sentencing process. The countermeasures proposed therein, are intended to ensure that the prosecutor effectively assists the court in arriving at an appropriate sentence.

HOW WELL DOES THE PROSECUTION ESTABLISH ITS CASE AGAINST THE DEFENDANT TO OVERCOME THE PRESUMPTION OF INNOCENCE

The preservation of life and property is one of the fundamental functions of the state. Over the millennia, the state has endeavored to perform this function through various institutions. Crime and criminality are as old as humanity itself and their total elimination appears to be beyond human ingenuity. The investigative, prosecutorial, adjudicatory and correctional institutions aim at containing criminality within socially acceptable limits. The state causes sanctions to be imposed upon the criminals commensurate with the gravity of their crimes. Any violation of the law is investigated by the competent agencies and if a prima facie case is made out, a charge sheet/bill of indictment is filed in the competent court. Prosecution is conducted by the prosecutor on behalf of the state. The court adjudicates the case on the basis of evidence adduced and either convicts the offender or acquits him. The court imposes the sentence on the convict after it has heard him and the prosecutor. The aforesaid procedure is followed in most jurisdictions, with occasional variations to punish the offender as per the procedure established by law. The correctional services attempt to rehabilitate him.

Conviction Rate

Under the Indian Penal Code offences, the conviction rate was 47.8 percent in 1991 and 42.1 percent in 1995. In 1995, the conviction rate for grave offences was as follows: murder, 37.0 percent; culpable homicide not amounting to murder, 36.3 percent; rape, 30 percent; kidnapping and abduction, 303 percent; robbery, 34.1 percent; and burglary, 42.7 percent. However, for the Special and Local Laws, the conviction rate was 85.8 percent in

1995. This is largely explained by a high conviction rate in traffic related offences i.e., 90.4 percent.[i]

Problems in Proving the Guilt of the Defendant

The conviction rate in countries like Indonesia, Japan and the Republic of Korea is very high, whereas in countries like India it is relatively low. It is now proposed to examine problems in proving guilt particularly in the context of countries having a low conviction rate. The problems are divided in four categories, namely;

(a) Investigation;

(b) Prosecution;

(c) Trial; and

(d) Legal and systemic problems.

BASIC PROBLEMS IN THE TRIAL DEFENDANT RELATED

(a) Insufficiency of evidence due to poor investigation

The investigating agencies are required to collect all available evidence during investigations. If painstaking and timely investigations are not conducted, valuable evidence maybe lost. Sometimes the police11 fail to collect vital evidence from the site such as blood stains, fingerprints and other evidence in cases of physical violence, due either to lack of training or inefficiency. At times, the statements of key witnesses are not recorded as their importance in proving the case is not understood. Statements may also be recorded in a casual and slipshod manner by the investigating officer which leaves gaps in the evidence. Occasionally, the police fail to work in collaboration with forensic experts. As a result, forensic evidence is not collected for use against the offender. The police may send cases to the court even when the evidence is insufficient for reasons of expediency.

(b) Inexperience and inadequate qualification of investigating officers

Investigations are often conducted by low-ranking officers who are new in service and lack experience. As the caliber of such officers is not high, they may be deficient in

procedures. Hence their inability to conduct quality investigations. The lacunae left are often harmful in trial.

(c) Non-separation of investigative staff

Even though some countries have set up specialized investigative agencies to handle specific category of crimes, the police still remains the main investigating agency to handle general crimes. In most countries, investigations are conducted at police stations where the police handle both investigations and duties to maintain social order. No staff is earmarked exclusively for investigative work. Generally, the police gives preference to activities related to the preservation of social order which results in lack of sustained and systemic investigation, inordinate delay and the consequential loss of valuable evidence.

(d) Poor supervision by the superiors

Sometimes senior officers are unable to monitor and supervise investigations in a timely manner due to heavy work load or indifference. Hence, vital lacunae are left in cases and are exploited at the trial stage.

(e) Lack of qualified personnel

Logistics and financial resources investigating agencies do not have well qualified officers in sufficient numbers. Often they after have excessive work load and the quality of investigation is adversely affected. Efficient investigation necessitates qualified personnel commensurate with the work load. Besides, lack of resources such as transportation, communication and office equipment may affect the quality of investigations. Investigating agencies suffer from these constraints in some countries.

(f) Lack of cooperation and coordination with prosecutors

The prosecution is separate from the police in most countries and they often function under separate ministries. In countries where the prosecutors do not enjoy the statutory authority to guide and supervise police investigations, they are not usually consulted by the police during investigation even when legal advice is necessary. Sometimes, prosecutors are consulted but their directions are not complied with due to departmentalized perceptions.

(g) Lack of practice and other forms of malpractice

In some countries, investigations are not always conducted in a fair and just manner due to extraneous factors such as lack of probity amongst the investigators, political

pressures, etc. This leads to various forms of malpractice which include the failure to record statements from key witnesses or the intentional manipulation of statements with a view to screening the offenders.

PROSECUTION RELATED PROBLEMS

Public prosecution is an executive function of the state which is conducted by the prosecutor. It is his primary responsibility to prove the guilt of the defendant. Public prosecution, inter alia, has a significant bearing on the conviction rate. The problems in efficient prosecution are enumerated hereinafter.

Inadequate or delayed scrutiny by the prosecutor

In Indonesia, Japan, Maldives, Nepal, the Republic of Korea and Sri Lanka, the prosecutor has absolute authority to determine whether a case should be sent for trial or not, and he alone determines if the evidence is sufficient. In some countries, the case file is sent to the prosecutor for screening at the pre-trial stage, even though he does not make the final decision. Sometimes, the prosecutor does not conduct proper screening due to heavy work load or other extraneous factors. In Sri Lanka, the police sends the case file to the Attorney General's Office for advice. Scrutiny may take a long time, and it may be too late for the State Counsel to make any meaningful suggestion to the police, to improve the quality of investigations. Hence, relatively weak cases are sent to court.

IS SPEEDY TRIAL REALIZED?

Preface Courts are the citadels of justice—they are the vanguards of life, liberty and property. They radiate the last ray of hope to those in despair. Indeed courts perform a very vital role in society. They have the enormous task of deciding cases and controversies so that justice may be rendered. The fulfilment of this duty by the court in promptly resolving controversies is necessary for the people's continued belief in them and respect for the law.

What is Speedy Trial?

Speedy trial is considered a fair process conducted within a reasonable period of time. Our group considered speedy trial an indicator of the efficiency of a criminal justice system because where it exists:

• There is a faster flow of cases.

• It may facilitate the writing of court judgements.

• There will resultantly be more cases heard and disposed of.

• Litigation expenses are reduced as cases may be heard and completed in one or more court sessions. • Tension on the part of the parties, especially those in police or prison custody, will be eased, since the pendency of a case is reduced to the minimum period. People will, thus resort to the judicial process instead of taking the law into their hands.

"Justice delayed is justice denied" runs the proverb. Delay in the criminal justice system is a matter of major concern. It raises a number of issues of legal significance, some constitutional, others of statutory dimensions.

It cannot be denied that speedy trial is in the interest of both the defendant and the society. It is a guarantee to the defendant against his infinite incarceration without trial, (if he is in custody) and tends to minimize anxiety if he is admitted bail. Speedy trial serves the public interest in that it minimizes the possibility of the defendant jumping bail or influencing witnesses. Besides, pre-trial incarceration is costly and delayed trial may cause key witnesses to suffer from memory loss, or become unavailable. It is difficult to determine a precise time frame for a speedy trial. However, speedy trial not only means the commencement of trial within a statutory prescribed time frame from the time the suspect is arrested, it also encompasses the completion of the trial within the legally prescribed time frame. It is the endeavour of our group to address these issues in the light of legal and constitutional provisions prevailing in some countries.

PRESENT SITUACTION IN INDIA

India Article 21 of the Constitution of India guarantees the right to life, which has been interpreted by the Supreme Court of India to mean right to speedy trial. According to section 167 of the Criminal Procedure Code, the charge sheet must be filed against the defendant within

90 days from the date of arrest in offences punishable with death, imprisonment for life or imprisonment of not less than 10 years, and within 60 days in other offences, failing which he will be released on bail. The failure to file the charge sheet in the afore time frame, however, does not prejudice the trial. Besides, there is no law in India which prescribes a time frame for the completion of trial

Causes of Delays in Trials

Our group in its deliberations considered that delays may be classified under four categories: • court-related, • prosecution-related, • defence counsel-related, and • general.

1. Court-related Factors a) The split trial process Cases are generally tried on a piecemeal basis. This means that the trial proceedings are conducted in sessions spread out over a period of time. Usually one witness testifies for an hour or less in one hearing and then continues at the next hearing for "lack of material time", a stereotype reason stated.

b) Incompetence and ignorance of the law As a factor in unnecessary delay, our group has considered the incompetence of some judges/magistrates. The failure to keep abreast with the law and jurisprudence also causes undue delay, particularly when a judge is unfamiliar with the rules of procedure.

c) Heavy case load and poor case flow management Due to the increase in the population in most countries and the deterioration of economic conditions, considerable number of new cases are added yearly to the already overcrowded dockets of the courts. There seems to be a tendency to schedule cases over a long lapse of time. This is so because there are too many cases scheduled for a given trial date and it is impossible for the trial judge to hear them all. Those that cannot be called are re-scheduled for some other date. As a result, only a few cases are heard on any given trial date.

d) Delay caused by court personnel Delay may be caused by court personnel who are unprofessional or who lack proper managerial and technical skills. The scheduling of cases, issuance of summons, record keeping, the retrieval of information and the docketing of cases are done by court staff, thus relieving the judges/magistrates of the "housekeeping" chores of the court. Since the jobs of court staff are interrelated, the absence or incompetence of any one of them can scuttle trial proceedings, e.g., the absence of a court stenographer will cause the

postponement of all the cases scheduled for hearing and may delay the completion of records of proceedings for those cases that are appeal.

2. Prosecution-related Factors

a) Inadequate preparation and lack of evaluation of evidence The excessive workload of a prosecutor may result in inadequate preparation for trial. Additionally, the lack of cooperation between the prosecution and the investigating agencies would undoubtedly result in non-production of exhibits and/or witnesses during the trial date, hence leading to adjournment.

b) Failure to show a clear outline of proving cases Failure by prosecutors to show a clear outline as to how they intend to present their cases, makes it difficult for the court to allocate sufficient time to hear and determine cases. Factors such as documentary evidence, statements of witnesses and of the defendant should enable prosecutor to calculate the number of witnesses and the length of time necessary for their respective testimonies.

3. Defence Counsel-related Factors

a) Abuse of court process Defence counsel are known to use dilatory tactics to gain an advantage over the opposing party. By filing unnecessary motions for the review of court orders, a defence counsel hopes that the prosecution may lose interest in the case. Defence counsel think that by prolonging the cross examination of a material witness, he may become tired and will simply disappear. Other dilatory tactics include the presentation of corroborative witnesses to prove matters that have already been established; filing of writs for certiorari, mandamus or prohibition; and seeking a review of orders by a trial court.

b) Heavy volume of cases The heavy volume of cases handled by a defence counsel eventually leads to scheduling conflicts which, may result in adjournments, thereby inadvertently delaying court proceedings.

c) Incompetence and failure to prepare The heavy case load of the defence counsel may result in inadequate preparation for trial. The defence counsel thus unprepared for the trial may ask for a adjournment, thereby delaying the disposition of the case.

4. General

a) Our group considered other general factors such as lack of discipline and moral probity in the execution of different functions. External pressure and interference from politicians and/or other senior government officials with vested interests in particular cases and other forms of malpractice such as corruption within the criminal justice system were also considered contributory to unnecessary delay in trials. In addition, the group observed that sufficient initial and continued professional training was lacking in the judiciary and the prosecution.

b) Our group observed that there is wide-spread poverty and ignorance of the law in many developing countries, which was identified as one of the factors contributing to the delay in trials. The group cited examples where a defendant or a witness could not travel to court due to lack of bus fare or a means of transportation. In some countries where defence counsel is not provided the defendant by the state, they apply for adjournment on the ground that they were still making arrangements for such defence counsel. In this respect, the courts found it difficult to deny them their constitutional right to defence counsel and grant such applications.

IS THE APPROPRIATE SENTENCE IMPOSED ON DEFENDANTS?

What Is Appropriate Sentence?

Appropriate sentence should reflect the major objectives of punishment which include retribution, general and specific deterrence and rehabilitation. The court has wide discretionary powers in the selection of the type of punishment considering the gravity of the offence and personality of the convict. The prosecutor has professional duties as a representative of the public interest to ensure that the appropriate sentence is meted out by the court. It is for this reason that prosecutors in most jurisdictions are required to assist the court by disclosing as much information as possible relating to sentencing, that is, the circumstances of the commission of the offence and the personality of the convict.

Present Situation

The degree of involvement and the time of such involvement by prosecutors in sentencing, varies depending on the system in application in different countries. In some common law countries, the prosecutor makes general recommendations relating to sentencing at the end of the trial during the closing statement/argument. Following conviction, he is only expected to disclose the past criminal record of the convict to the court. In countries following the civil law

system, the prosecutor makes recommendations which may be detailed or not in his submissions to the court at the end of the trial. The past criminal record of the convict is contained in the case file, which is transmitted to the trial judge or magistrate before the commencement of the trial. Before imposing sentence, the court shall provide the defence counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask him if he wishes to make a statement or to present any information in mitigation of punishment. In some common law countries, the pre-sentence inquiry is a procedural step prior to sentencing at which the judge of a court may examine the pre-sentence report and all other relevant documents before imposing sentence. Sentencing is a crucial stage of criminal prosecution requiring the assistance of an appointed defence counsel. The prosecutor shall also have an opportunity to speak to the court. In Japan, during the trial, mitigating circumstances are presented to the court by the prosecutor and the defence counsel respectively. The prosecutor submits, in addition to the charge, any other aggravating evidence such as the past criminal record of the defendant. On the other hand, the defence counsel may produce witnesses to present mitigating circumstances. In this case, the defence counsel examines the witnesses in relation to mitigating circumstances. In his closing argument, the prosecutor makes a detailed recommendation for specific punishment to be determined by the court.

CONCLUSION

The importance of the role played by the prosecutor in a criminal trial cannot be overemphasized. Adequate initial and continued professional training are necessary for the efficient and diligent performance of prosecutorial functions. Furthermore, probity should be a requisite for admission into the profession. The prosecutor should adhere to the professional ethics throughout his career. There is a need for sustained cooperation between the prosecutor, the investigating agencies, defence counsel, judges, supporting staff and all persons involved in the administration of criminal justice. The quality of investigations, prosecution and trial in some jurisdictions needs to be improved. The legal framework may require substantial reforms to better respond to prevailing circumstances in different countries, so as to meet the challenges posed by the sophistication of crime and its transnational character resulting from technological advancement. These reforms can only materialize where there is a firm political commitment and necessary funds are made available by the competent authorities .The group fully

understands and respects the systems prevailing in different countries. The political, social and economic conditions of some countries may not be conducive to the implementation of some of the measures proposed. The intention of the group is to make meaningful contributions with a view to optimizing the efficacy of the different systems and practices.

[i] As per data published by National Crime Records Bureau, Ministry of Home Affairs, Govt. of India, in Crime in India, 1995