

WHEN POLICE AND COURTS DIFFER IN TAKING COGNIZANCE OF OFFENCES

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ABSTRACT

Under the Code of Criminal Procedure, 1973 (CrPC), a Criminal Court can take cognizance of offences and is not bound by the view taken by the Police in their report u/s 169 of the CrPC.

While administration of justice falls within the sole purview of Courts of law, the process of administration of justice requires the performance of some tasks which require the use of coercive power, which no department other than the Police are equipped to perform.

In serious cases where the Police as an investigating agency have taken a view that a particular accused person need not be proceeded against and where the Court takes a contrary stance and takes cognizance of offences qua such a person, the same Police agency is called upon to assist in performing the aforementioned tasks. While it may not *per se* interfere with the administration of justice, the fundamental principle of justice, that justice must not only be done but must most manifestly and undoubtedly be seen to be done, comes under a shadow of doubt under the present system.

The system of Sheriffs and Marshals in the United States, independent of the Police, take care of the ministerial tasks of trial.

The present Comment seeks to study the present state of the system under the CrPC and to make suggestions for incorporating into it the system of Sheriffs as a uniformed, trained, armed civil service under the command of Courts of law.

Keywords: Cognizance, Difference of opinion, Court, Police, Sheriff

POLICE REPORT AND COGNIZANCE BY MAGISTRATES

Section 190 of the Code of Criminal Procedure, 1973 provides for the different ways in which a Judicial Magistrate can take cognizance of an offence:

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a police report of such facts;
- (c) upon information received from any person other than a police officer, or upon his knowledge, that such offence has been committedⁱ.

The Police are not bound to take a particular view to conclude their investigationⁱⁱ. Similarly, the Magistrate can take a different view and take cognizance in spite of a closure report filed by the Policeⁱⁱⁱ. With the Constitutional Bench reference in *Dharam Pal and Ors. v. State of Haryana and Anr.*^{iv}, it was settled that,

“In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column no.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.”^v

Vide this reference, the Supreme Court also settled the conflicting views in the cases of *Kishun Singh and Ors. v. State of Bihar*^{vi} and *Kishori Singh and Ors. v. State of Bihar and Anr*^{vii} and upheld the view taken in *Kishun Singh* (supra), viz. that,

“the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record.”^{viii}

THE CONFLICT OF INTEREST

In cases where the Police have decided to discharge a particular person u/s 169 of CrPC and the Courts decide to proceed against such person, proceedings would commence against such person, and the same Police agency which has opined that the particular accused need not be proceeded against, is now required to assist in the prosecution of such a person.

This leads to a situation where the investigating agency is made to act against its own advice. Although the office of prosecutor is separate and distinct from that of the investigator, the former invariably depends upon the latter to trace and produce witnesses, to effect summonses and warrants and all such field-level tasks of prosecution^{ix} for which there is no other independent agency with equivalent executive and/or coercive power, like the Office of Sheriff^x in the United States.

Although such situations may not lead to an impasse in the administration of justice, it would nevertheless, be apposite to review the present system and to explore the possibility of assigning the tasks of prosecutorial field-work to another agency.

SHERIFFS AND MARSHALS

The word 'Sheriff' derives from 'Shire Reeve'^{xi} and whose functions entailed among others, the maintenance of jails and execution of the orders of the King's Court^{xii}. There are various instances of clashes between the colonial government of the British East India Company and the King's Courts^{xiii} and often resulted in contempt being taken by the King's Court or Recorder's Court against officials refusing to execute the Writs sent for execution through the sheriffs^{xiv}. In the United States, Sheriffs^{xv} perform duties of providing security to Courts and Jails and US Marshals^{xvi} perform the field-level prosecutorial functions of serving process of the Courts^{xvii}, witness security^{xviii}, management^{xix} and transport of prisoners^{xx} for the US federal Courts. Both these agencies are distinct from the Police. The Bombay High Court Original Side Rules provide for the Office of Sheriff of Bombay^{xxi} to serve the processes of the High Court within the local limits of its Ordinary Original Civil Jurisdiction through his bailiffs. These rules empower the Sheriff to arrest and detain insolvents or judgment debtors.

However, the Sheriff of Bombay does not have an armed force at his command in order to execute such arrests and has to invariably depend upon the local Police for undertaking actions of coercive nature. This would necessarily involve using an already under-staffed Police force^{xxii} to perform what are essentially the functions related to the administration of justice.

As far as the coercive processes of Criminal Courts under the CrPC are concerned, the task is performed through the Police with no separate agency like that of the Sheriff to do so.

AT THE CRIMINAL TRIAL

In a criminal trial before a Magistrate, the conduct of prosecution may be done if so permitted by the Magistrate, at the hands of persons other than the designated Public Prosecutor^{xxiii}. However, the same is not true for the Court of Sessions, where a de-facto complainant cannot appoint an Advocate of his/her choice without sanction from the State Government^{xxiv}. Thus, in a Sessions-triable case, the de-facto complainant who may be a victim of the offence complained against, is bound to be represented by the Public Prosecutor.

In a Sessions-triable case where the Police have taken an adverse view and sought to discharge some or all of the accused and where the Court has taken the view that such an accused person deserves to be proceeded against, the ministerial tasks of the prosecution would be conducted through the same Police Station that has investigated and sought to discharge the accused persons. Although this per se does not interfere in the process of administration of justice, it makes a call upon the very same Police Station to assist in the prosecution of persons it has sought to relieve from prosecution. The Police are essentially, an investigating agency and the work of serving of the Courts' processes, can be undertaken as seen *supra* by other agencies like Sheriffs and Marshals.

In the case of a Court which has taken a view previously on a particular issue or subject matter, it is customary to recuse from hearing a fresh matter which may have the same issue in contention. The same amount of fairness is expected from the executive branch as from the judicial branch of government^{xxv}. Therefore, an executive agency that has already taken a view which is contrary to that taken thereafter by the Court trying the case, should in all fairness, be made to recuse from participating in the trial of the matter, be it only by way of serving of

processes and procuring the presence of witnesses. It is a trite notion that justice must not only be done, but must most manifestly and undoubtedly, be seen to be done^{xxvi}.

The researcher submits that no matter which branch of government deals with any aspect of the administration of justice, its conduct must be seemingly above criticism or doubt, all the more because in serious cases, which are exclusively triable by the Court of Sessions, the victim/de-facto complainant/first informant has no control over the manner in which the prosecution is conducted, as seen *supra*. The task of serving processes of a Criminal Court, ensuring the security of witnesses, procuring their presence and ensuring that they are not tampered with is a serious one and ought to be handled by a specialised agency which is separated from the investigating agency.

CONCLUSION AND SUGGESTIONS

1. It is submitted that instituting a distinct service, who may be styled as Sheriffs (different from the present day office of Sheriff of Mumbai, which is a non-uniformed, civilian post), which would be a trained, uniformed, armed branch of the administration of justice and amenable to the command of the Court, is the need of the day to ensure the absence of bias in the administration of justice.
2. The researcher recommends that the role of the Police in the criminal trial, should not be more than being witnesses of investigation conducted by them, and the present day task of assisting the prosecution in performing its tasks of service of processes, execution of summonses and warrants, witness security, procuring the presence of witnesses and ensuring that they are not tampered with, should be gradually handed over to the Sheriff's Department.
3. The Sheriff's Department as contemplated, should be answerable to the Chief Justice of the High Court under whose purview the Criminal Court functions and should not have any connection whatsoever with the executive branch of government. The recruitment could be done at two levels – Sheriff Deputy Superintendent (comparable to Deputy Superintendent of Police) and Marshals (comparable to Police Constable). Ranks similar to the ones used in the Civil Police hierarchy may be used, which could be organised thus:

- i. **Director General of Sheriffs** (Comparable to DG of Police)– under the direct command of the Chief Justice of the High Court and in overall charge of the Sheriff’s Department.
- ii. **Additional Director General of Sheriffs** (Comparable to ADG of Police) – under the command of the DG of Sheriffs and answerable to the High Court and District Courts within their territorial jurisdiction.
- iii. **Sheriff Inspector General** (Comparable to IG of Police) – In overall charge of the Sheriff’s department in a Range and answerable to the District Courts within their territorial range.
- iv. **Sheriff Deputy Inspector General** (Comparable to DIG of Police) – In charge of the overall departmental control of the Sheriffs in the Districts under the direction of the Sheriff IG and answerable to District Courts and Courts of Judicial Magistrates (Processes of Courts of Executive Magistrates could be served through the local police).
- v. **Sheriff Superintendent** (Comparable to Superintendent of Police) – In direct charge of the functioning of Sheriffs within a District, under the directional charge of the Range Sheriff IG and Sheriff DIG and answerable to the District Court and Courts of Judicial Magistrates within the District.
- vi. **Sheriff Deputy Superintendent** (Comparable to Deputy Superintendent of Police) – In overall charge of the functioning of Sheriffs in a particular taluka, under the direction of the Sheriff Superintendent and answerable to the Court of Judicial Magistrate within the taluka.
- vii. **Sheriff Assistant Superintendent** (Comparable to Assistant Superintendent of Police) – In charge of divisions within the taluka, answerable to the Court of Judicial Magistrate and under the direction of Sheriff Superintendent and answerable to the Court of Judicial Magistrate within the division.
- viii. **Sheriffs** (Comparable to Inspector of Police) – In charge of such areas within a division as may be directed and under the direction of the Assistant Sheriffs and answerable to the Court of Judicial Magistrate where such Sheriffs may be posted.

- ix. **Bailiffs** (Comparable to Assistant Inspector of Police) – to act upon the directions and under the directions of Sheriffs and to perform other ministerial tasks of the Court.
- x. **Deputy Bailiffs** (Comparable to Sub-Inspector of Police) – to assist Bailiffs and to act upon and assist Bailiffs and Sheriffs in performing their tasks.
- xi. **Marshals** (Comparable to Police Constable) – to perform the task of regulating order within Courts and under the direct control and command of the concerned Court and under the departmental direction of the Sheriff.

It is hoped that a distinct system of enforcing the Court's orders and processes will ensure that the cause of justice is served by giving effect to the principle of justice being done and being seen to be done.

ENDNOTES

ⁱ Section 190, CrPC

ⁱⁱ *Abhinandan Jha and Ors. v. Dinesh Mishra*, AIR 1968 SC 117

ⁱⁱⁱ *Ibid*

^{iv} AIR 2013 SC 3018

^v *Ibid*

^{vi} (1993) 2 SCC 16

^{vii} (2004) 13 SCC 11

^{viii} AIR 2013 SC 3018

^{ix} Section 23, Police Act, 1861 (Act 5 of 1861)

^x Bureau of Justice Statistics: Office of Justice Programs, 'Sheriffs' Offices', <https://www.bjs.gov/index.cfm?ty=tp&tid=72>, Accessed on 18th April 2019

^{xi} Definition of 'Sheriff': Merriam Webster Online Dictionary: <https://www.merriam-webster.com/dictionary/sheriff>, Accessed on 19th April 2019

^{xii} Kiralfy, A. K. R., 'Potter's Historical Introduction to English Law', Universal Law Publishing Co., New Delhi (2010), Chapter 2, page 92

^{xiii} Jain, M. P., 'Outlines of Indian Legal & Constitutional History', Wadhwa, Nagpur, 6th Edition (2006), Chapter XIX, Page 255: *Aga Mohd. Jaffer v. Mohd. Saduk*, I.D. (O.S.), IV 363

^{xiv} Inagaki, H. PhD Thesis 'The rule of law and emergency in colonial India The conflict between the King's Court and the government in Bombay in the 1820s', King's College, London, 2016. Retrieved from https://kclpure.kcl.ac.uk/portal/files/57786626/2016_Inagaki_Haruki_1254855_thesis.pdf on 19th April 2019

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^{xxii} National Crime Records Bureau. Crime in India Statistics Report Year 2013. <http://www.ncrb.gov.in/StatPublications/CII/CII2013/Chapters/17-Police%20strength,%20expenditure%20and%20infrastructure.pdf>. Retrieved on 19th April 2019

^{xxiii} Section 302, CrPC : *Dhariwal Industries Ltd. v. Kishore Wadhvani and Ors.*, AIR 2016 SC 4369

^{xxiv} *Shiv Kumar v. Hukam Chand*, (1999) 7 SCC 467 : *Dhariwal Industries Ltd. v. Kishore Wadhvani and Ors.*, AIR 2016 SC 4369. Followed in SLP (Criminal) No. 2240 of 2018, Order dated 14th May 2018

^{xxv} *A. K. Kraipak and Ors. v. Union of India and Ors.*, AIR 1970 SC 150

^{xxvi} *R. v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256 : [1923] All ER Rep 233

