

Judicial Anomalies at Pre-Trial Stage

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Introduction

Crime is never treated as part of any society unless it has become a practice. In such circumstances, we call it positivism in criminology. A school of thought which associate its self with the theories of Italian criminologist and psychiatrist namely Cesare Lombroso (1835–1909). Pakistan judiciary has been very strident for addressing criminal justice system. As August Supreme Court held, “Supreme Court observed that existence of a high degree of political and administrative apathy had translated into failing criminal justice system”¹. Similarly, Hon’ble Islamabad High Court held, “State has neglected the most crucial part of the governance system for the past seven decades because it is obvious that Criminal Justice System was never our priority”².

Judiciary as Supreme Component

At time it feels like that certain executive components of our criminal justice system are not performing as required by the law, however being a student of criminal law, the most supreme component of the system is judiciary. Judiciary play role in cementing the strongest pillar of criminal justice system i.e. Investigation³. Judiciary has 2-tier role. Pre-trial stage and the trial stage. It will not be out of place to mention that pre-trial stage is the most tactful stage because it involves the decision of arresting any person and depriving him from his liberty.

Magisterial Role of Judiciary

Judiciary plays a role in filtering the police investigation in the shape of a Magistrate. The Criminal Procedure Code 1898 (CrPC), which is considered as a bible for the procedure of substantive criminal law in Pakistan, revolves around a “Magistrate”. It has very less to do with Police as compared to a Magistrate. A riveting fact that word “Magistrate” is used about more than 1000 times in the CrPC as compared to “Police” which is used around 300 times only. The legislator placed a Magistrate as a check for the actions of the police. Unfortunately, the role of a Magistrate in today’s criminal justice system is not more than a post office box. Only forwarding the police reports (Challans) and sending the accused persons to Judicial custody without scrutiny. Scrutiny has already been defined by the superior courts that Magistrate was

¹ 2015 SCMR 1724

² “Aftab Vs State” CrI Appeal # 55/2016 of Islamabad High Court, Islamabad.

³ PLD 2020 JOURNAL “Investigation is more than collection of evidence”

empowered to agree with the police report or to form a contrary view after scrutiny of the entire material available before him.⁴

It was held, “The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function...”⁵

Magistrate has a role of endorsing or repudiating the acts of police through the powers vested to him in Criminal Procedure Code 1898. Pakistan criminal justice system has an extra ordinary acquittal rate of more than 80 to 90 %. Careful analysis of the acquittals revealed that most of the time the pre-trial proceedings become the source of such acquittals. It is pertinent to mention here that acquittals are a positive sign for a healthy society but not after facing the agony of a trial for years. The solution to this problem is to install an effective firewall i.e. strong magisterial system so that weak cases can be eradicated before their inception. This will improve the efficiency of our judicial system as only filtered cases with strong evidences will be able to reach to the trial stage. Burden of judiciary will also decrease and disposal will be of contested matters.

Basic Practices

Some of the very basic practices exercised at pre-trial stage which strengthen the case of prosecution are:

- Arrest/ Bail
- Physical/ Judicial remand
- Identification Parade
- Recording of statement under section 164 CrPC

Besides legislations, each and every one of the above mentioned step is supported by a long list of landmark judgments but unfortunately we are still not able to coup with the situation in bringing uniformity as per law for the improvement of our criminal justice system.

Criminal Anomalies

1. Arrest

A right which is recognized by the Constitution of Pakistan is terribly practiced without any fear of accountability. In Pakistan there is a high rate of getting bail after arrest because most of the cases are either bogus or not properly investigated. Whereas in developed countries, every possibility will be exercised to avoid any arrest but once enough material is collected against a person, then he is apprehended and the chances of getting bail gets very bleak. The reason is that they take all the precautions before depriving any person from his liberty.

⁴ 2017 PCRLJ 1559, 2002 SCMR 63, 1997 SCMR 304

⁵ AIR 1945 PC 18 Emperor vs Khwaja Nazir Ahmed on 17 October, 1944

Our superior courts have time and again emphasized the same but could not make it part of practice. Ordinarily no person should be arrested only because he has been nominated as an accused person in the FIR or in any other version of the incident⁶. Protection against arbitrary arrest and detention was part of the right to liberty and fair trial.⁷ Courts while dealing with bail and the justifiable exercise of power of arrest had to maintain a balance between two fundamental but conflicting demands of personal liberty of the accused on one hand and the investigational right of the police on the other hand⁸.

2. Identification Parade

Identification parade is a tool used by investigators for identifying the culprits who are unknown to the witness but can be recognized only through their face. Although we are living in an era of technology and taking in consideration such tool is nothing more than a stigma for the system. However, without going into the merits and de merits of the identification parade. It is better to restrict ourselves to the topic i.e. criminal anomalies. The sanctity of this tool is directly proportional to the multiple factors. Time is one of them and is computed from the date of arrest till the time of parade. The Magistrate is bound to make sure that the parade is free from all sort of interruptions. In routine the parade is conducted in Jails. However, there is no uniformity in this routine. Venue of the parade has always been a disputed question of law. In the recent judgment of August Supreme Court in case title Muhammad Hayat & others Vs State⁹, it was held that law does not restrict the prosecution to necessarily undertake the exercise of test identification parade within the jail precincts. However, there are contrary views with respect to conducting identification parades in police stations.¹⁰

It was also held that process of test identification parade had to be essentially carried out, having regard to the exigencies of each case, in a fair and non collusive manner, free from the taints of prejudice.¹¹

3. Statement U/s 164 CrPC

⁶ PLD 2021 SC 708

⁷ 2014 SCMR 1349

⁸ PLD 2020 SC 456, AIR 2012 SC 830

⁹ 2021 SMCR 92

¹⁰ PLD 2019 SC 488

¹¹ 2020 SCMR 1013

Statement under section 164 CrPC enjoys a very high place at the time of appreciating the evidence if its sanctity is maintained to the extent of voluntariness and truthfulness. It is recorded throughout Pakistan with a variation of forums which sometimes becomes source of confusion for the trial court while appreciating the statement as a piece of evidence. Leaving aside the rest of Pakistan, even Islamabad do not practice any uniformity between its 2 divisions i.e. East and West. In West division of Islamabad, especially empowered Judicial Magistrates record the statements whereas in East division the statements are recorded by Executive Magistrates. This is the total picture of Pakistan and unfortunately the Judiciary is unable to address such practices which create ambiguities in the process of law. Such minor discrepancies often become reason of acquittal in cases of capital punishments.¹²

4. Physical / Judicial Remand

Unfortunately, the law of remand has been left foundling by the courts who are adamant to pamper the investigators instead of correcting the procedures adopted by them. It is the most powerful stage when the liberty of a person is at the mercy of the Magistrate because it is the orders of the Magistrate which empowers the investigator to continue with the physical custody of the accused. Even the fate of the accused person whether he is going to Jail or Home is also in the hands of the Magistrate¹³. A power scarcely exercised may be because of positivism in criminology.

Conclusion

Laconically speaking, Criminal Justice system has 3 components

- i) Investigation
- ii) Trial
- iii) Jail/ Correction System

However, Judiciary has a check on every stage and works as a filter for police to refine the investigation process. Similarly, the any of the party if not satisfied with the verdict of a court always has an appellate Judicial forum to redress his grievances. Lastly, it is again the duty of the judiciary to make sure that their orders are executed in letter and spirit. No doubt there are shortage of resources for the Magisterial courts all over Pakistan besides other challenges. However, the responsibilities of Magistrates at the pre-trial stage are constitutional duties as they involve arrest and detention and must be performed with the same level of vigilance and importance as Constitution of Pakistan enjoys as primary legislation.

¹² 2003 SCMR 1419

¹³ PLD 2012 LHC 260