

## INDEPENDENT DECISION MAKING: DOES MORE MEANS BETTER?

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### ABSTRACT

*This study emphasize upon the discretionary powers of the authorities, i.e. Police and Prosecutors during pre-trial stage. According to Simon Bronittand Philip Stenning in Understanding Discretion in Modern Policing-“Discretion is a legitimate aspect of modern policing, though its scope and limits are poorly understood.” There are three main agencies involved in the Criminal Justice System, Police, Prosecutor and Judge. Justice system cannot be achieved by monopoly of one legal official. Police and Prosecutor can contribute much more if pre-trial discretion is conferred upon them. They can conclude the case at foremost stage only. The main problem in India is that the courts are overloaded as there is no filtration at pre-trial stage. Courts are flooded with lots of cases. Police, in some cases can dispose the less serious cases at its own level and forward only serious cases before the magistrate. Non- Participation of Prosecutor at pre-trial stage is what the quality of justice has been compromised upon. Prosecutor can charge more effectively than police, as he is well familiarized with the laws. For fair and efficient investigation there must be appropriate division of power between Police and Prosecutor. The Law Commission Report of India in 14<sup>th</sup> Report supported total separation between the Police department and Prosecution. Discretion is a key part in Criminal Justice System. This study also deals with the comparative study of pre-trial discretion of authorities in different countries all over the world e.g. France, Germany, U.S.A. and England.*

**Keywords:** Pre-Trial, Discretion, Authorities, Comparative Study.

### INTRODUCTION

Components of the criminal justice system such as law enforcement officers, prosecuting attorneys, judges, correction officers and probation officers are faced with independent decision making throughout criminal justice process. Police and Prosecutor can assist in filtration of cases by discarding trial of unwanted matters. Discretion is key part in criminal justice system process. Pre-trial discretion in the hands of police and public prosecutor leads to effective and accountable criminal justice system. 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. Discretion is plastic, shaped and given form to some extent by the institutions of law and legal arrangements and more substantially by decision makers' framing behavior. In criminal proceedings, discretion plays a significant role in supplementing as statutes cannot provide for every circumstance. However, the extent or type of discretion differs depending on the systems of criminal justice.

### PART OF POLICE AND PROSECUTORS

#### POLICE

Administratively police is independent from directorate of prosecution and judiciary. As a principle, it is said that the courts does not possess any superintending jurisdiction over police. The Police are the chief scrutinizing agency of the state. Pre-Trial discretionary power has been provided to the police officers under various laws in India. As section 23 of Police Act, 1861 provides that it shall be the duty of every police officer to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisance, etc.

As a principle, it is said that the court does not possess any supervisory jurisdiction over police and their investigation.<sup>13</sup> There is clear cut and well demarcated sphere of activity for the police in crime detection and that is the Executive power of the State.<sup>14</sup> The power to grant bail also gives discretionary power in the hands of police. But, bail can only be a matter of discretion if the offence is non- bailable. Discretion used by police must not be offhand, obscure and absurd.

The arrest decisions of police are not supervised by the prosecutors. After the accused person is arrested by the police officer, post- arrest procedure is ensured and it is here, where his pre-trial discretion power is applied. A police officer has the power to conduct searches in emergent situations without warrant from

<sup>13</sup>T. T. Anthony v. State of Kerala, 2001 (2) ALD (CrI) 276 (SC)

<sup>14</sup>State of Bihar v. J.A.C. Saldamna, AIR 1980 SC 326

courts under section 165, Crpc. The police officer can carry on the investigation even after the release of the accused person under section 169 and if sufficient evidence against him is found submit a report under section 173.

## PROSECUTOR

The prosecutor is the chief specialist of the criminal law. Prosecution of the accused is the duty of the executive which is carried out through the institution of the prosecutor. He must be well-versed in the law, reliable, upfront and virtuous. Discretion to withdraw from prosecution is that of the Public Prosecutor and he cannot surrender his discretion to someone else. He is an officer of the court and is responsible to the court itself.<sup>15</sup>

In *M.C. Mehta v. Union of India*, court held that the present law provides the decision to prosecute exclusively to police and public prosecutor has no power. However, once police files a charge sheet before court, the power to review the police decision is with the magistrate.

It might look like that Police and Prosecutor shares same interest in Indian Criminal Justice System. But, in practicality their responsibilities and powers are different. Police maintains law and order in the state, while prosecutors bring the case of state before court.

If we analyse, it seems to us that position of prosecutors is weak. It must be build up stronger. Filtration done by him would reduce the flowing of cases in the courts.

In India the position of prosecutor is weak, but in many countries prosecutor has a significant role to play. Eg:- In Czech Republic, prosecutor give instructions to the police and can cancel their wrong decisions and criminal proceedings can only be initiated by prosecutor only. In U.S.A, it is the decision of the prosecutor to charge or not to charge. In Italy, prosecutor is the charging officer.

According to section 353 CrPC, it is imperative for the prosecutor to open the case by describing the charge brought against the accused, before the court of session. Another aspect of pre-trial discretion is when the accused person applies for *bail* before a police officer or a court of law and the case is not a grave one, there is no legal requirement for the court to hear the prosecutor and bail would be granted to the accused invariably.<sup>16</sup> If the offence is serious, the Public Prosecutor would be notified by the court about bail hearing.<sup>17</sup>

### Scrutinizing with Present System:

In theory, pre-trial discretion applied by the investigating bodies, the prosecutor etc. is only permissible for preventing the accused from absconding, committing further offences, tampering with evidence or influencing witnesses. Imposing restraints in such cases, while inconsistent with the fair trial which is an integral part of article 21 and based on the principle of the presumption of innocence, is justified by public policy considerations placing a premium on the sanctity of judicial process. Extended incarceration impedes effective assistance of counsel, thereby prejudicing the right to fair trial. It also imposes heavy burden on the State. Moreover, the mental trauma of imprisonment, the deplorable conditions of Indian prisons and the socio-economic impact on the defendants' families, pre-trial detention, runs afoul of the right not to be punished before judgment regarding guilt is pronounced by a competent court. It is thus imperative to determine when the presumption of innocence comes into play, what overriding considerations justify departure from the rule of respect for the accused personal liberty and whether the administration of our criminal justice system and the law of bail is effective and fair in achieving these objectives is a moot concern. Accused has many pre-trial and post-trial rights that are guaranteed in the CrPC. Some pre-trial rights are to have the knowledge that on what grounds he has been accused, right to a lawyer, opportunity to defend oneself. By virtue of section 436 the accused can claim bail as a matter of right in the cases which have been shown as bailable offences in the First schedule to the code.

It is important to note that India follows the adversarial system, where generally the onus of proof is on the prosecution to prove the case against the accused, and until and unless the allegations against him are not proved beyond the reasonable doubt, the accused is presumed to be innocent. The Indian Police Act of 1861 was legislated by the British right after the revolt of 1857 to bring in efficient administration of

<sup>15</sup> *Rajender Kumar Jain v. State*, (1980) 3 SCC 435

<sup>16</sup> Section 436 and First Schedule, CrPC, 1973

<sup>17</sup> Section 437, 438, 439 and First Schedule, CrPC, 1973

police in the country and to prevent any future revolts. This act has continued despite Indian being transformed from British colony to a Sovereign Republic. The National Police Commission, 1979-81 proposed a bill to reform the act, has not been adopted by any state. There are many instances of political interference in the matters of police. At the present, the head of police enjoys his/her tenure at the pleasure of the chief minister. There is a need to bring in police reforms so that police can be made accountable by the citizens. The present Police Act is weak in all dimensions and it needs to be replaced.

In *Directorate of enforcement v. Deepak Mahajan*,<sup>18</sup> the Supreme Court held that a person accused of an offence under FERA or Customs Act shall be entitled to remand under Section 167 (2) of CrPC. The magistrate can take the accused into custody on his being satisfied of three preliminary conditions, namely, (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the arrest or the accusation for which the person is arrested or other grounds for such arrests do exist and are well founded; and (3) that the provision of the arrestee serves the purpose of Section 167 (1).

Here, the moot question might arise that whether this provision is violative of the constitutional privilege against self-incrimination. The Law Commission in its 37<sup>th</sup> report after considering the decision of the Supreme Court in the case of *State of Bombay v. Kali Kalu Oghad*<sup>19</sup>, has expressed the view that the decision has the effect of confining the privilege under Article 20 (3), Constitution of India to only testimony written or oral. Depending upon this case, the researcher opines that Section 53 is not contrary of Article 20 (3) and that a person cannot be said to have been compelled to be a witness against himself if he is merely required to undergo a medical examination in accordance with the provisions of Section 53.

Here the researcher would like to draw the attention that Justice Balakrishnan failed to observe that “compulsion” in the form of “involuntary” administration of tests to be a witness in a criminal case is not always against Article 20 (3) and Section 161 (2), CrPC. Involuntary administration of such tests can be lawful if administered to extract information from persons who are supposed to be acquainted with the facts and circumstances of the case but are not exposing themselves or their accomplices, if any, to a criminal charge.

Therefore, the conclusion drawn here by the researcher is that any person *acquainted* with the facts of a case can be *compelled* to be a witness, but such *compulsion* shall not be to expose him or his accomplices to a criminal charge, whether directly or indirectly. Even no police officer or other person in authority shall offer or make any such inducement, threat or promise as is mentioned under Section 24, IEA.<sup>20</sup> But no police officer or other person shall prevent, by way of caution or otherwise, any person from making any statement in the course of investigation, which he may be disposed to make of his own free will.<sup>21</sup>

In *Sheonandan Paswan v. State of Bihar*<sup>22</sup> the Supreme Court held that the Public Prosecutor is not an absolutely independent officer. He is appointed by the government, Central/State and is appointed for conducting in court any prosecution or other proceedings on behalf of the concerned Government. He cannot act without instructions of the Government. He cannot conduct a case absolutely on his own, or contrary to the instruction of his client. He wields discretion to withdraw prosecution, and the only limitation on this power is the requirement of court's consent. According to Justice Khalid all that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. Therefore, this power of the public prosecutor entrusted to him by Section 321, CrPC is a statutory discretion which is neither absolute nor unreviewable but is only subject to the court's supervisory functions.

The Law Commission of India has also supported total separation between the police department and the prosecution agency.<sup>23</sup> Even so, it would be desirable to make some institutional arrangement for proper co-ordination between the two agencies.

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<sup>18</sup>(1994) 3 SCC 440

<sup>19</sup>AIR 1961 SC 1808

<sup>20</sup>Section 163 (1), CrPC, 1973.

<sup>21</sup>Section 163 (2), CrPC, 1973.

<sup>22</sup>(1983) 1 SCC 438

<sup>23</sup>Law Commission of India, 14<sup>th</sup> Report.

The following suggestions are being made by the researcher in this regard:

- 1) The District Superintendent of Police should periodically review the work of the Assistant Public Prosecutors;
- 2) He should be authorized to call for information from the prosecution agency regarding the status of a particular case pending in the court;
- 3) The prosecution agency should send periodical returns to the District Superintendent of Police regarding disposal of cases in the courts;
- 4) The District Superintendent of Police should send a note annually to the District Magistrate regarding the performance of each Assistant Public Prosecutor working in his district, which should be placed in his confidential annual report/dossier; and
- 5) On its part, the police department should make available certain facilities to the prosecutors such as housing, transport, and telephones.

### **GLIMPSE OF PRE-TRIAL DISCRETION IN VARIOUS COUNTRIES**

In France, there is a system of civil law and not common law. France has dual legal system 1.Public 2. Private. There the exclusive discretionary power has been in the hands of Public Prosecutor. They have right to give instructions during investigation. The German system assumes the prosecutors function as legal scientists. The goal of “main proceeding” in Germany’s inquisitorial system is to find “substantive truth.” In America, the court system is divided in two systems namely Federal and the State each of which is independent. The Supreme Court is the sole authority to exercise its jurisdiction in a discretionary manner whenever necessary. No two state systems are alike. Their pre-trial discretionary powers vary accordingly. England and Wales have one system, Scotland has another system and Northern Island has third system. There are Senior and Sub-ordinate courts in England. It consists of three divisions; Queen’s bench, Chancery, Family divisions.

### **CONCLUSION**

The ultimate aim of criminal law is protection of right to personal liberty against invasion by others – protection of the weak against the strong law abiding against lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct, sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery. Pre-trial discretion must exist to provide due process to the accused, eliminate inappropriate detention and maintain community safety. The pretrial discretion also affects accused abilities to assert their innocence, negotiate a disposition and mitigate the severity of a sentence.

The accused now-a-days are more educated and well informed and use sophisticated weapons and advance techniques to commit the offences without leaving any trace of evidence. Unfortunately, the investigating officers are not given training in interrogation techniques and sophisticated investigation skills. All these factors seriously affect the prosecution. This is a major cause for the failure of the system. The burden of proof being very heavy on the prosecution, it is all the more necessary for the prosecution to be represented by a very able and competent lawyer. Lack of co-ordination between the investigation and the prosecution is another problem. This makes things worse. Apart from the main functionaries of the Criminal Justice System, others who have a stake in the system are the victims, the society and the accused. Other players are the witnesses and the members of the general public.

It is suggested by the researcher that the legal education be made an essential prerequisite for significant change in existing practices, for all system stakeholders including prosecutors, defense counsel, law enforcement, jail staff etc. The goal of pre-trial proceedings is three-fold: (1) to provide an accessible and effective recourse for citizens without having to go to court, (2) to alleviate the case-load pressure on the courts by operating as a filtering mechanism, and (3) to provide a way for public authorities to reconsider their decisions.

No single model among various countries stand a perfect model, but, it is advisable to test different options and to identify those that are most suitable for the Indian context.