CRIMINAL TRIAL- RECENT CHANGES IN SUBSTANTIVE & PROCEDURAL LAW

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The constitution of Pakistan as originally framed provided by clause (3) of Article 175 that the Judiciary shall be separated progressively from the executive within three years from the commencing day. The commending day was defined in clause (2) of Article 265 14th day of August, 1973. By various constitutional amendments the period of three years was extended to fourteen years and even the constitutionally prescribed fourteen years expired on the 14thof August, 1987. During this period of fourteen years, no progressive step was taken, not to my knowledge, for achieving this constitutional mandate. The most unfortunate part is that even after over a year of the expiry of the prescribed period, as much unawareness and unconcern is being shown as during the preparatory period. Now the citizens of the country are invoking and have invoked the constitutional jurisdiction of the High Court for getting from the Government this constitutionally ordained duty performed. A very sad reflection on prevailing state of affairs.

In any other set up one would have thought that the use of the word progressive would have given a fair indication of the legislative intent. All the necessary ground work should have been undertaken and completed by the date prescribed in the Constitution. One would have thought that the Federal Government at its level and the Provincial Governments and the High Courts at their level would have set up Committees with a mandate to meet periodically, say once a quarter, to ensure the compliance with the constitutional requirement in letter and spirit. The task is not easy. By separation the burden of the judiciary is bound to increase manifold. I had occasion to point out elsewhere that the supervisory role prescribed for the High Court and the District judges over the subordinate Judicial officers is not being performed with that regularity and thoroughness as is prescribed under the law and the rules framed or is required currently. In this state of affairs without strengthening the supervisory role the taking up of the additional responsibilities of the Magistrates would be adding to the problems. The supervisory role of the High Courts and of the District Courts can straight away be revitalized by the last Law Commission's recommendation for appointment of Judicial Ombudsman and an inspection Wing working under it, so that all that is required by law is done in accordance with law. Another factor which requires deep and sound handling is the personnel management. The requirement of Magistrates and the supervision over them by the District and Sessions Judges and their terms and conditions of service and prospects of promotion and integration into formalized judicial service, all deserve immediate attention. In the absence of proper attention to these ancillary but necessary matters not only the judicial work is likely to suffer but also the reputation and the capacity of the judiciary to come up upto the expectation of modern age.

Some recent changes in the law necessitate repeated crash training programmes for Presiding Officers of criminal trial courts in order to acquaint them with the needs of the time, the object of the legislation and the amendments and their understanding and implementation. In the first place, in order to induct the Islamic principles in the criminal law of the country, the Hadood Ordinances have been enforced which cover offences against property, Qazf, Zina, Prohibition. The Evidence Act has also been recast. In order to make the administration of criminal justice more effective and speedy, the distinction between the summons procedures and the warrant procedure has been done away with and so also the commitment proceedings. There has been made a provision for almost automatic bail where the accused is in custody and has been kept too long pending his trial, investigation or appeal after conviction. Speedy procedures and separate Courts for speedy trials have been set up. I do not propose to give an exhaustive discourse on Criminal Trial Procedure as such but only point out some of the shortcomings and deficiencies which we have been noticing while hearing the appeal etc.

COMPLIANCE WITH SECTION 241-A OF THE CODE OF CRIMINAL PROCEDURE.

Section 241-A Cr.P.C. requires for the benefit of the accused certain steps to be taken and their compliance ensured by the trial Court. In all serious criminal cases instituted on Police report, copies of statements of all witnesses recorded under section 161 and 164 and the Inspection Notes recorded by an Investigation Officer on his first visit to the place of occurrence are required to be supplied free of cost to the accused not less then seven days before the commencement of the trial. Similarly, in complaint cases, the complainant has been placed under duty to supply a copy of the complaint and the gist of the evidence which he is likely to adduce at the trial. The strict non-compliance of this provision has been taken to be not fatal to the proceedings but the proceedings get vitiated if the accused is able to point out, and his burden is very small indeed, that he has been prejudiced at the trial by the non-compliance with this provision. Therefore, it is very necessary that the trial Courts ensure the compliance with these provisions and even if at an intermediary stage an omission is found to have taken place or a new witness is sought to be introduced, rectification should follow and the statement of such witness should be supplied. Non compliance or improper compliance with this

provision entails long argument and lengthy discussions in judgment on the effects thereof and all this can be avoided if the persecutor is placed under a duty and the trial Court ensures its compliance at the very initial stages.

RELIANCEON EVIDENCE COLLECTED DURING INVESTIGATION AND ON THE OPINION OF THE INVESTIGATION OFFICERS.

The complaint as well as the accused both at times feels dissatisfied with the conduct of the investigation by the Police. Repeated requests are, therefore, made and the cases get reopened for investigation either by the same agency or by a more specialized agency or by a superior officer. It is a power of the Police which can not be controlled directly by the courts in the absence of Law. Inevitably sometimes the Investigating Officers form conflicting opinions about the veracity of the complainant's case or the culpability of the accused. At the trial it is the effort of the counsel to get such opinion of the Investigating Officer which is considered to be a very considered and objective opinion brought on record and courts at times unwittingly utilize it along with the other evidence for forming their own opinion with regard to the merits of the case. It should be realized that such opinion formed by the Investigating Officer are inadmissible in evidence and should not be at all brought on record. If all they have been inadvertently brought on the record they should be expressly excluded from being considered along with the other evidence.

The Investigating Officer has also now resorted to a device to over simplify their duties. They ask the people where the crime has been committed to take oath on Holy Quran. If the number of persons taking such oath favours one version it finds acceptance by the Investigating Officer, who is ready and willing to transmit such opinion to the trial court without disclosing the concrete basis for his opinion. Not only such a procedure of investigation is to be deprecated any reference to such an opinion at the trial should also be avoided. Similarly the statement witness recorded by the Police should not be utilized except after confronting the witness with it and proving the statement in accordance with law.

PRACTICE OF SUBMITTING INCOMPLETE CHALLAN IN COURTS.

A practice has been in vogue whereby a criminal trial court is kept at the mercy of the Investigating Agency by its submitting incomplete Challan and delaying the submission of the complete challan indefinitely. The Criminal Courts have developed a tendency of treating the case instituted as from the date when complete challan is submitted. In this manner the Courts record of pendency remains unaffected and the duty of the Investigating Agency is shown to have been performed, when neither is correct. This practice has been deprecated in the case of **Noor Dad and other Vs. The State (1973 Law Notes 35)** and the courts have been directed to guard themselves against it. This decision needed wider circulation, greater attention and observance both at the hands of the Investigating Agency and at the hands of the criminal courts and their supervisory authorities. I reproduced hereunder what was recorded in that case for our guidance:-

"There is no such thing in the law as an interim charge-sheet. There is no warrant Whatsoever for the practice which is now prevalent of sending up a charge-sheet described as interim challan to satisfy the mere form of the law taking it for granted that the investigation will continue and the case not allowed to proceed. The correct positions that this charge-sheet is one upon which cognizance can and must be taken. It is true of course that despite this the police may continue its investigation; nothing in the Criminal Procedure Code prevents it and the fact of the cognizance taken does not stand in the way of further investigation. It is equally true, however, that such an investigation does not and can not be allowed to stand in the way of the trial. If the case does not proceed after cognizance it can only be as a result of the order of adjournment granted by the Magistrate u/s 344 of the Cr.P.Code, which is as much a judicial order as any order that a magistrate can pass. Only if proper grounds are shown to a Magistrate Justifying such a course he should grant an adjournment; otherwise clearly he should proceed. It is not for the investigating authority or a prosecution agency to take it for granted that upon an interim charge-sheet having been produced the forms of the law have been satisfied and they are then at leisure to proceed with the case when they please. An order of this kind by a Magistrate, I regret to say, is altogether too mechanically being made now-a-days and I sincerely hope that Magistrate in future will apply their mind judicially to see whether there exists any special reason why such an adjournment should be granted. I have no doubt that Magistrate has sufficient powers under Criminal Procedure Code to enforce compulsorily the attendance of witnesses where necessary and if that becomes necessary then I have equally no doubt that they will use their powers accordingly."

OBJECTIONS TAKEN TO THE ADMISSIBILITY OF EVIDENCE – THEIR DISPOSAL.

It is customary with our courts both Civil and Criminal to note the objections of either side to the admissibility or inadmissibility of particular evidence while it is being tendered or produced in court. They are not usually forthwith dealt with, may be for good reasons, or disposed of immediately. However, after having noted an objection to the admissibility of a piece of evidence it is necessary that it should not be altogether ignored while appraising pronouncing judgment taken note of and appropriately dealt with. For various reasons after the commitment proceedings have been done away with, the recording of evidence in criminal cases is piece-meal and spread over a long period. It, therefore, becomes difficult at the end of the trial to take stock of the objections and to deal with them. When the proceedings were from day to day and the evidence was fresh and so was objection it was easier to deal with them while pronouncing judgment.

EXAMINATION OF THE ACCUSED.

Under Section 342 of the Code of Criminal Procedure, the Court is empowered to question the accused any time with a view to enable him to explain any circumstances appearing in the evidence against him. This examination is usually done at the conclusion of the evidence. On account of the piece-meal recording of the evidence it is sometimes not possible for the Court at the stage of examination of the accused to take into account every factor which has been brought on record against him. Though the appellate courts have been showing some indulgence in condoning such mal-performance of the trial court, the duty is not well discharges if such omission takes place. Each Presiding Officer should, therefore, devise his own method of marshaling the facts brought out at various stages so as to thoroughly question the accused and not to leave any material question adverse to him unattended.

There is also now under the amended law (sub section (2) of Section 340) a duty on the accused to give evidence on oath in disprove of the charges or allegations made against him, and this responsibility of the accused may somewhat lighten the responsibility of the Presiding Officer in questioning the accused under Section 340 of the Cr.P.C. However, both the duties have to be performed in a manner to make the trial meaningful and purposive without becoming dilatory.

TAZKIA-E-SHAHOOD.

For certain Hudood offences and Tazkia-e-Shahdood is mandatory. It amounts to a trial within a trial. The credibility and the character of the witnesses can be screened as fairly and as thoroughly as can be consistent with the punishment awarded under the Hudood Ordinance. The superior courts have laid down the standard and the procedure but primarily it is for the trial court to act diligently in the matter and keep the record as perfect and thorough as possible. For Hadd punishment the foundation rests on the credibility of the witnesses and not so much on the circumstantial evidence existing or appearing. For this reason it is the single most important item in Hudood trial.

RECORDING THE AGE OF THE ACCUSED.

The instructions of the High Court emphasize the need of correctly recording the age of the accused particularly with a view to distinguish a Juvenile offender from an adult one. In the matter of sentencing, and at times in judging the question of criminality e.g. the influence of elders, the age and the background of the accused, age plays an important part. It is true both of the old age as well of the young age, the initiated as well as the uninitiated. It has been noticed that the Presiding Officers do not discharge this duty with care, of making an independent note of the age of the accused facing trial. The result is that there is lot of avoidable controversy in appeal about the exact age of the accused when the committed that crime and the record do not prove helpful in resolving it one way or the other. The trial court should know and keep in mind the peremptory words in which the High Court has in its Rules emphasized this duty.

THE SENTENCE OF FINE AND COMPENSATION.

An examination of Section 545 of the Criminal Procedure Code as also the instructions of the High Court Rules and Orders on award of compensation and costs show that the imposition of fine was intended to serve the three-fold purpose apart from punishing the convict. The first of these is for defraying of expenses properly incurred on the prosecution. The second is the payment to any person of compensation for any loss, injury or mental anguish or

psychological damage caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court. The third purpose is providing compensation to bonafide purchaser of misappropriated or stolen property etc. We all know that in this country this provision has not been worked to its full bloom. The result was that the legislature had to intervene by enacting Section 544-A in 1980 and making it obligatory on court what was earlier discretionary and left to the good sense of the courts. Even now only one category has been attended to under Section 544-A and the others are yet awaiting proper handling at your end under Section 545 Cr.P.C. The power of sentencing a convict should be so exercised as to be illustrative of the sense of justice and fairness prevailing in the Society. The complainant's role of one seeking a personal vendetta should be replaced by that of a citizen seeking an orderly and just society for himself and the posterity. Look at the increasing stakes of a complainant and the risk to the witnesses in prosecuting the criminal, all over the world.

SUDDEN FIGHT, FREE RIGHT AND SELF DEFENCE.

As student of criminal law all of us had some difficulty in properly comprehending in the first go the exact connotation of culpable homicide amounting to murder and culpable homicide not amounting to murder. It is at the trial when more common places words are used that matter gets further confused. I found both as a trial judge and as an appellate judge that in practice the confusion is confounded by the indiscriminate use of the expressions sudden fight, free fight and self-defence, all raised at the same time and these expressions are used as if they all go together. The lawyers too at time get confused and transmit their confusion to the record to obtain a benefit for the party whom they represent. However, the courts have to be very clear. Free fight is a deliberate intended act on both the sides and has nothing to do either with sudden fight or with right of private defence of person as such. Each party has to bear the full burden and none can plead mitigation either on account of sudden fight or on account of acting in self defence. If it is one sided aggression, then of course question of self defence will arise and where it does arise, the Court has further to record a finding that the right of self defence has not been exceeded. Suddenness involves absence of premeditation or forethought. Sudden fight is not free fight and no question of self defence arises in case of sudden fight. The law, laid down in 1958 in Akhtar Hussain Vs. The State (PLD 1958. SC. 251) which still holds the field illustrates this point in following words.

"The two parts of the incident must have occurred almost simultaneously. If this line of approach is adopted, the question of self defence would become merely academic. In such cases, it would be immaterial which party offers the provocation or commits the first assault in view of the Explanation to Exception 4 of Section 300 PPC. The murder of Muhammad Yaqub must in that case be taken to have been committed without permutation in a sudden fight in the heat of passion upon a sudden quarrel and it would not be said, having regard to the injuries inflicted on either side, that the offenders had taken undue advantage or acted in a cruel or unusual manner…."

In this background either it is a case of sudden fight or of free fight or of self defence never a combination of any of these.

As most of you are, or will be presiding over both the Civil and well as the Criminal Courts, it is necessary for you to keep in view the difference in handling the two types of cases. In a criminal trial the totality of the cases has to be seen and its broad features examined. A good perception of the environment from which the criminal cases come up is an invaluable aid in appreciating, understanding and analyzing the human behaviour Criminal cases have to be disposed of expeditiously without giving long adjournments. In Civil matters the piece can be more leisurely; each piece of evidence is scrutinized with care and tested for its relevancy and admissibility by reference to law. The decision is by preponderance of evidence. If you keep this difference in view you are mere likely to strike a balance in performing your duties as a judicial officer. With the increasing role of Tribunals and Personal Designate in your life you must widen your horizon must get initiated in the Rules of Business of the Governments, the formulations of Social Policies and objectives through which these are best achieved. Training at the Academy and some on he job training can best equip you for such duties.