GROUP 3

ISSUES CONCERNING PROSECUTION IN RELATION TO CONVICTION, SPEEDY TRIAL AND SENTENCING

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I. INTRODUCTION

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 consitutions 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 center 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.

II. HOW WELL DOES THE PROSECUTION ESTABLISH ITS CASE AGAINST THE DEFENDANT?

A. Preface

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.

B. Conviction Rate

The conviction rate may be taken to mean the ratio of cases convicted out of the total number of cases decided in a given year.

Our group is of the view that the conviction rate is a reasonably good indicator of the efficiency and efficacy of the criminal justice system prevailing in a country. Of course, there is a limitation to the significance of the conviction rate as an indicator of prosecutorial efficacy. Distinctive conviction rates are caused by the differences in the evidential standard required at the initiation of prosecution, more fundamentally the differences in the role of investigators and prosecutors to refer cases to the court. In countries where a considerably low evidential standard is required to send a case to court, it should be tasked to pass judgement of conviction or non-conviction based on such prosecution, the conviction rate is systematically lower than the countries requiring a higher evidentiary standard. A high conviction rate, however, is not the primary objective of the criminal justice system.

Notwithstanding the aforesaid, a high conviction rate may be indicative of methodical and painstaking investigations and effective prosecution. On the contrary, an excessively low conviction rate definitely indicates unsuccessful and ineffective prosecution.

It should be made clear, however, that it is not the mandate of the prosecutor to secure conviction at any cost. He is required to be fair, impartial and must present all the facts, including facts and circumstances favorable to the offender, before the court for an appropriate decision. This is the general practice in most common law countries, where the prosecutor does not have the authority to withhold a case from prosecution.

Our group realizes that no conviction handed down by the court of first instance

is final until confirmed by the highest court in the event of an appeal. However, as no published data is available in relation to the decisions of appellate courts, data regarding the convictions as rendered by the courts of first instance is used. Similarly, the convictions obtained through the plea bargaining process shall be dealt with in this paper.

C. Overview of Conviction Rate in Some Countries

1. England and Wales[1]

The conviction rate in England and Wales was 90.6 percent in 1992-93; 90.2 percent in 1993-94 and 90.3 percent in 1994-95. It may, however, be added that the newly created Crown Prosecution Service has the power to withdraw a case from prosecution under certain circumstances. Further, about 85 percent defendants pleaded guilty.

2. India[2]

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, 30.3 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.

3. Indonesia[3]

The overall conviction rate was 98.4 percent in 1994. Of offenders, 84.17 percent were sentenced to terms of imprisonment and others were fined/paroled or given minor sentences.

4. Nepal[4]

According to a survey conducted in 20 districts of Nepal in 1996, the average conviction rate was found to be 16 percent.

5. Japan[5]

The conviction rate in Japan is extremely high. In District Courts, it was 99.91 percent in 1994; 99.92 percent in 1995 and 99.94 percent in 1996 in cases wherein the defendant had pleaded guilty. In cases wherein the defendant had not pleaded guilty, the conviction rate was 97.73 percent in 1994; 97.92 percent in 1995 and 98.01 percent in 1996. In Summary Courts, the conviction rate was 99.79 percent in 1996 wherein the defendant had pleaded guilty and 94.90 percent in cases wherein the defendant had not pleaded guilty. In grave offences such as homicide, robbery, bodily injury, rape or larceny, the acquittal rate is as low as between 0.1 to 0.3 percent.

6. Republic of Korea[6]

Conviction rate in 1993 was 99.5 percent. It was 99.11 percent in murder; 99.87 percent in robbery; 99.74 percent in rape and 99.59 percent in bodily injury cases. In special code offences, conviction rate was 99.61 percent.

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[1] Mr. G.D. Ethrington's paper on "The Crown Prosecution Service and the Public Interest" published in UNAFEI Resource Material Series No.49, p. 93.

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

[3] Bureau of Central Statistics, Government of Indonesia, 1994, p. 26.

[4] As per country paper presented by the participant of Nepal in this course.

[5] The White Paper on Crime, 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 112.

[6] The White Paper on Crime published by the Government of Korea, 1993, p. 182.

7. Thailand

The conviction rate ranges between 97 to 98.40 percent from 1991 to 1993, as per statistics published by the Attorney General's Office. However, we have been informed that a large proportion of these convictions are reversed by the appellate courts.

8. United States of America[7]

The conviction rate turned by the federal courts in the U.S.A. was 82.7 percent for all offences in 1993. The rate in grave offences was as follows: murder, 78.6 percent; negligent manslaughter, 78.3 percent; assault, 76.3 percent; robbery, 92.5 percent; rape, 80.2 percent; and kidnapping, 64.0 percent. It may, however, be added that 90 percent of the convicts pleaded guilty and another 1 percent pleaded nolo contendere. The remaining 9 percent were convicted at trial.

9. Others

No published data is readily available about Costa Rica and China. Our group is, however, informed that the conviction rate in Costa Rica was 56 percent in 1996. In China, it was 99.75 percent in 1994 and 99.5 percent in 1995[8].

In Sri Lanka, the conviction rate was 86 percent in grave crimes in 1996[9] .

In the Sindh Province of Pakistan, the conviction rate was 40.96 percent in 1993; 36.86 percent in 1994 and 50.88 percent in 1995[10].

D. Analysis of Conviction Rates

The conviction rate is largely affected by the quality of investigation and the standard of proof prescribed by law to send the case to trial. The propensity of offenders to plead guilty also has a significant bearing on the conviction rate.

In Japan and the Republic of Korea, the conviction rates are extremely high. In these countries, prosecutors have the statutory discretion not to initiate prosecution due to insufficiency of evidence. They also have the authority to conduct investigation in addition to directing, guiding and supervising investigations conducted by the police. Resultantly, only strong cases are sent up to the courts. Further, in Japan 92 percent of offenders plead guilty, and the Japanese Criminal Procedure Code provides for exceptions to the hearsay rule in certain circumstances, which help in proving the cases. These factors largely explain the high conviction rate. In Indonesia, the conviction rate is also extremely high. This is largely explained by strict screening made by prosecutors at the pre-trial stage.

The conviction rates turned out by the U.S. federal courts are fairly high, even though 90 percent of convictions (including murder cases) are based on pleas of guilt. The same is true of England and Wales.

At the other end of the spectrum are countries like India and Sri Lanka. The conviction rate in Penal Code Offences in India was as low as 42.1 percent in 1995. The conviction rate in the Sindh Province of Pakistan is also comparatively low. In these countries, the standard of proof required for conviction is much higher than the one required for sending a case to the court. In most countries, cases are sent for trial on the basis of "prima facie" evidence. At the same time, the cases should be sent to the court where there exists "prima facie" evidence. The evidence should be such that the defendant has a case to answer.

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[7] Compendium of Federal Justice Statistics, 1993, U.S. Department of Justice, p. 43.

[8] As per responses to our questionnaire received from the participants from China and Costa Rica.

[9] As per the lecture paper presented by Mr. D. P. Kumarsingha, Additional Solicitor-General, Attorney-General's Department, Sri Lanka, in this course.

[10] As per the country paper presented by the participant of Pakistan in this course.

However, the case is required to be proved "beyond reasonable doubt" in court to secure a conviction. The evidence required should be conclusive in nature and inconsistent with the innocence of the defendant. Furthermore in most countries, the defendant is presumed to be innocent until proved guilty. The burden of proof wholly rests on the prosecution and only shifts as per the conditions prescribed by law.

This low conviction rate is also due to the inadmissibility of confessions made before the police; the lack of binding legal provisions for compelling the suspect/defendant to give samples of his blood, handwriting and fingerprints, etc. and the negligible percentage of offenders who plead guilty unlike the practice prevailing in England, Japan, the Republic of Korea, the U.S.A., etc.

Our group discussed whether prosecution initiated by police prosecutors undermines their capacity to establish the case against the defendant. There were several opinions about the validity of police prosecution.

E. 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.

1. Investigation-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 police[11] 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

[11] Hereinafter, we use the word "police" as a typical example of investigating agencies.

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 transparency 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.

2. Prosecution-related

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.

a) 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.

b) Inadequate supervision of investigations

In countries where the prosecutor is vested with the authority to supervise investigations, he may not exercise it sufficiently due to heavy work load or indifference. There is not always adequate cooperation with the police in the discharge of supervisory functions.

c) Inadequate preparation for trial

To conduct a trial is one of the most important functions of the prosecutor. It is observed that sometimes the prosecutors are not prepared for the trial and fail to examine the witnesses in a professional manner. As a result, court time is wasted.

d) Delay in trial

This is a serious problem in some countries and may be fatal to the prosecution. Due to delayed trials, some witnesses may die, suffer from memory loss, or lose all interest in prosecution. Some defense counsels apply for adjournments on flimsy grounds further contributing to unnecessary delay in trials. The prosecutor should oppose such applications.

e) Reluctance of witnesses to testify

It is a serious problem in crimes relating to organized gangs, terrorist groups and drug offenders. The witnesses are often reluctant to testify due to fear of reprisals or because they are compromised themselves with the defendant.

f) Difficulties in obtaining and adducing forensic evidence

Forensic evidence is extremely useful in proving the guilt of the defendant. The reports prepared by experts should be tendered in court and used with the testimonies of the said experts. Sometimes these reports are not available when needed court. It is not always easy to secure the presence of the experts in court as they have other functions.

g) Non-cooperation of victims

Victims may not cooperate with the prosecution and sometimes retract their previous statements.

h) Lack of cooperation between the prosecution and the police

For successful prosecution, the need for cooperation and understanding between these agencies which cannot be over emphasized. The police is required to secure the presence of witnesses when they are needed in court. Generally, the prosecutor also ensures the execution of court orders through the police agency. Any lack of cooperation may result in inefficient prosecution and delayed trial.

i) Quality of prosecution

For efficient prosecution, it is important that the prosecutor be preferably a law graduate, have adequate experience and a good command of the law.

3. Trial-related

a) Inadequate court structures

In some countries, the problem of "docket explosion" is very serious. The courts are overburdened and their number not commensurate with the needs. This often results in delayed trials, which may be prejudicial to the prosecution.

b) Lack of resources—human or otherwise

In some countries, the courts do not have adequate support services such as stenographers, typists and interpreters, modern office equipment (i.e., computers) and telephones, which consequently affects the work of the courts.

c) Numerous and unnecessary adjournments

Cases are adjourned on flimsy grounds, often at the request of defense counsel. Sometimes prosecutors do not oppose these applications. This impedes the trial process.

d) Stay on trial by the appellate courts

It is a serious problem in some countries. Stays disrupt the court schedule and delay trials.

e) Political pressures and other extraneous factors

The court may not conduct fair and impartial trials due to political pressure and other extraneous factors. Judgements may be intentionally delayed.

4. Legal and Systemic Factors

Apart from the problems enumerated above, there are some problems which are inherent with the legal structures and systems prevailing in certain countries. These problems are as follows:

a) Exclusion of evidence

In some countries, confessions made before police officers are not admissible in evidence irrespective of the rank of the officer. Due to this legal disability, valuable evidence against the defendant is lost. Furthermore, in some countries, the defendant is not legally bound to give his fingerprints, handwritings or blood samples, etc., either during investigation or the trial. Valuable forensic evidence is thus precluded, which makes the prosecution's task all the more difficult.

b) Inadequate salaries and status of criminal justice system authorities

The salary scales of the police, prosecutors and judges in some countries are relatively low. This makes it difficult to attract suitable hands in these professions. Investigations conducted by low-ranking police officers do not invoke the confidence of the public at large.

c) Lack of coordination between the police, prosecution and prison authorities

In some countries, these departments are placed in different ministries. Prisoners are not produced in court on the appointed dates because of lack of coordination. Lack of cooperation between the prosecutors and the police officers is prejudicial to the prosecution case, as mentioned earlier.

F. Solutions to the Problems

Our group has discussed in detail the countermeasures to overcome the problems enumerated above. Solutions to these problems are as follows:

1. Investigation-related

a) Investigation by experienced and qualified police officers

Investigations, particularly of grave crimes, should be conducted by experienced, well-trained and senior police officers. Certain statutes do prescribe the rank of officers competent to conduct investigations under special laws. However, our group suggests that investigations for serious offences be conducted by senior officers. The supervisory officers should be deeply involved in investigations from the inception to the end of the case.

b) Use of scientific methods of investigation

Forensic evidence is often conclusive in nature and difficult to rebut. Police officers should be trained to collect forensic evidence and to use other modern scientific methods of investigation.

c) Separation of investigating staff

Our group feels that specialization within the police force is essential for improving the quality of investigations. The group recommends the creation of a separate cadre of investigating officers in each police force.

d) Adequate logistical and financial resources

To improve the quality and speed of investigations, it is imperative that adequate resources—human and material—are made available to the police. Adequate budgetary provisions should be made for this purpose by the competent authorities.

e) The prosecutor and police should act in harmony on the basis of mutual trust and confidence

Our group feels that prosecutors should be involved in investigations as this may improve their overall quality.

f) Others

Political interference in the activities of the police is a fact in some countries, even though the degree may vary from country to country. The police needs to be insulated from political influence by creating a buffer between it and the political authority. The police also needs to improve its ethical standards and enhance its professional skills to better invoke greater public confidence.

2. Prosecution- and Trial-related

a) Thorough screening by the prosecutor

The prosecutor needs to meticulously screen cases so that only legally viable cases are sent up for trial. This would reduce the chances of acquittal and save the defendant from avoidable harassment (incarceration in some cases) and financial liability. In countries, where the prosecutor does not have the authority to drop prosecution of his own level, he should record his candid and categorical opinion in the case file so as to enable the competent authority make an appropriate decision. Strict scrutiny by the prosecutor would definitely lessen the burden of the courts.

b) Meticulous preparation and diligent production of parties during trial

The prosecutor should meticulously prepare both the facts and law in every case. He should review the case file, exhibits and also test witnesses, if necessary. In this regard, the ways and means of prosecutor's preparation vary, depending on the differences in the legal framework of the disclosure or discovery of evidence. Irrespective of the degree of one party's duty to disclose evidence to the other, it is always recommendable for the prosecutor to expect the potential defense and try to eliminate the room for reasonable doubt about his case. He should also secure police cooperation to ensure the production of witnesses in court on the appointed dates. The work load of the prosecutor should be kept within reasonable limits so that the quality of his output is not adversely affected.

c) Improving the court structure

In those countries that suffer from the problem of "docket explosion", the number of courts should be increased. Also, adequate secretarial services and other logistical support should be provided.

d) Strict attitude toward adjournments

The prosecutor should vehemently oppose frivolous applications by the defense counsel.

e) Improving the quality of prosecutors

Prosecutors should have a good command of the law, procedure and enough experience for effective prosecution. It is, therefore, essential that qualified personnel be inducted into the profession from the open market. This would necessitate improving the salary scales, perks and status of prosecutors.

3. Legal and Systemic Factors

a) Amendments in laws

In some countries, the law expressly excludes the admissibility of confessions made before police officers. Also in some countries, the witness statements before investigators may never be admissible as incriminating evidence (not merely as impeachment evidence) in the court without the defense's consent. Such provisions, apart from being out of line with the laws applicable in other countries, preclude valuable evidence from being adduced in court. These provisions should be considered for review by the competent authority[12]. Similarly provisions need to be incorporated in the procedural laws of some countries to compel suspects to give samples of handwriting, fingerprints, blood, etc., to the investigating agencies.

b) Mobile courts

In some jurisdictions, the transportation network is not well developed, and parties find it very difficult to attend court sessions. Besides, such travel involves extra expenditure. Setting up mobile courts in such jurisdictions may be a way of taking justice closer to the people and reducing expenditure.

c) Witness protection program

Witnesses who are reluctant to depose in court for fear of reprisals need protection from the state. In the U.S.A., there are legal provisions for the protection of witnesses, which also permit a change of their identity, their relocation and financial support until such time that they become self-reliant. This program has yielded good results in that several gangsters have been convicted on the basis of the testimony of such protected witnesses. A similar witness

[12] For reference, Article 322, paragraph 1 of the Code of Criminal Procedure of Japan provides as follows:
"A written statement made by the accused or a document which contains his statement and is signed and sealed by him may be used as evidence against him, if the statement contains as admission by the accused of the fact which is adverse to his interests, or if the statement was made under such circumstances as secure a special credibility. However, where the written statement or document contains an admission by the accused of the fact which is adverse to his interests and there exists any suspicion that the admission has not been made voluntarily, it shall not be used as evidence against the accused as well as in cases prescribed by Article 319, even though the admission is not a confession of a crime."
Also, Article 321, paragraph 1, item 2 of the same Code provides for the exception to hearsay rules, approving on the following conditions the admissibility of a written statement made by a person other than the accused, or a document which contains his statement and is signed and sealed by him:
"As regards the document which contains a statement of a person given before a public prosecutor, where he does not appear or testify on the date either for the preparation for public trial or for the public trial because of death, unsoundness of mental condition, missing, staying outside of Japan or being so physically incapacitated that he cannot testify, or where he, appearing on the date above mentioned, has given a testimony contrary to or materially different from his previous statements; however, in the last case this shall apply only where there exist special circumstances, because of which the court may find that the previous statements are more credible than the testimony given in the course of interrogation on the date above mentioned."

protection program may be launched in countries affected by organized crime and terrorism.

III. IS SPEEDY TRIAL REALIZED?

A. 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 fulfillment 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.

B. 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 endeavor of our group to address these issues in the light of legal and constitutional provisions prevailing in some countries.

C. Present Situation in Some Countries

The legal and constitutional provisions prevailing in some of the countries are as follows:

1. 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.

2. Indonesia

The Indonesian Criminal Procedure Code prescribes the time frame of detention of a suspect at pre-trial stage. If the arrest is made by police, the maximum detention period is 20 days, which may be extended to 40 days by the prosecutor and another 60 days by the District Court, the total being 120 days. Detention is ordered by the District Judge is 150 days. The Code also prescribes the maximum period of detention by the High Court to 150 days and the Supreme Court to 170 days. If the trial or appeal is not finalized within the above time frame, the defendant has the statutory right to be released on bail but it would not prejudice the ongoing trial.

3. Japan[13]

Article 37-1 of the Constitution of Japan guarantees the right to a speedy trial. Furthermore, Article 253-2 of the Public Officers Election Law, mandates completion of the trial within 100 days from the date of the institution of a case in respect of election fraud and other election related offences.

As per the statistics published by the Supreme Court of Japan, the average time for the completion of trials by district courts was 3.3 months in 1994 and 1995, while in 1996 it was 3.2 months. The average number of trial dates was 2.8 months. In summary courts, the average time taken for trial was 2.3 months in the aforesaid years. The average number of trial dates was 2.4 months. This means that the disposal in summary courts was faster than in the district courts.

4. Nepal

The Common Code ("Muluki Ain") of Nepal (Part II, Section 14) prescribes the time frame for the completion of a trial by the court. If the case pertains to an area located adjacent the court; the time limit is 6 months. This may be extended to 1 year for cases wherein the cause of action lies in remote and distant areas.

The Public Offences Act, 1972, empowers the police to arrest a suspect without warrant if he is found to be indulging in street violence, teasing or the molestation of women, obstructing public servants in their duties; disrupting public transportation; power supply lines or postal services; illegally occupying public property or indulging in any acts harmful to the society, etc. The police are mandated to file the charge sheet against the arrested person within 7 days of arrest in the court of Chief District Officer. As per this Act, if the Chief District Officer does not complete the trial within 90 days, the defendant will be released on bail but the trial will not be prejudiced. Section 6 of the Act, however, mandates the completion of trial within 90 days.

5. Republic of Korea[14]

The Republic of Korea has enacted a law, the Special Act for Speedy Proceedings, 1981, which prescribes a time frame of six months for the completion of a trial. The Appellate Courts have four months within which to complete the proceedings[15].

It may be pointed out that non-completion of trial in the above time frame does not prejudice the trial. The available data shows that only 55.3 percent of cases were disposed of by the District Courts within three months. This disposal was 70.6 percent in the Summary Courts. However, within six months the disposal

[13] The White Paper on Crime, 1996, Government of Japan, p. 7.

[14] The White Paper on Crime, 1993, Government of Korea, p. 181.

[15] Article 22 of said Act reads, "A judgement must be pronounced within six months in the court of the first instance calculated from the day when the public action was instituted, and within four months in the court of other levels calculated from the day when the record of proceedings was sent".

in both the courts went up to, 97 percent and 96.47 percent respectively.

6. United States of America[16]

The right to a speedy trial has been guaranteed by the sixth Amendment in the Constitution of the U.S.A. It was followed by the Federal Speedy Trial Act, 1974[17]. According to the aforesaid Act, an indictment or information is to be presented to the defendant within 30 days from arrest or issuance of summons, with a 30-day extension if no grand jury is in session. If the accused person pleads not guilty, he must be brought to trial within 70 days, but not less than 30 day from the date of information or indictment or from the date he appeared before a judicial officer of the court in which the charge is pending, whichever of the dates occurs last. In computing this time period, the Act specifically excludes any period of delay resulting from other proceedings concerning the accused person, etc. The U.S. Supreme Court while interpreting the law has recognized the right to a speedy trial to be a relative one[18].

The statistics published by the Justice Department indicate that the average time for trial disposal in U.S. federal courts was 8.2 months in 1993. Felony cases on average took 9.5 months; violent offences 7.8 months; property offences 8.4 months; drug offences 10.8 months; and misdemeanors only 3.3 months. The time taken was less in cases wherein a plea of guilty was entered.

In some countries, the law prescribes the time frame for the commencement of the trial from the time of arrest of the suspect. There are also laws which set a time limit for completion of trial. Our group is of the view that speedy trial is in the interest of justice and also protective of the human rights of the defendant. It reflects on the efficiency of the criminal justice system.

The group feels that trials must be completed with utmost speed but refrained from prescribing any time frame as this would depend on the nature of the case, the legal framework, in which the trial is being conducted, geographical and infrastructure-related factors.

In some of the countries where a common law system is predominant, it inevitably takes a certain period of time to complete a trial by adversarial court proceedings. Due process requires a hearing wherein both parties present evidence to establish the facts of the case, and the burden of proof, lies with the prosecutor. It has been observed however, that while "the search for truth is best aided by allowing both parties to argue the same question, the process is time-consuming".

The group also emphasizes that the quality of trials should not be compromised, for the sake of speed.

D. Causes of Delays in Trials

Our group in its deliberations considered that delays may be classified under four categories:

- court-related,
- prosecution-related,
- defense 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

[16] Compendium of Federal Justice Statistics, 1993, U.S. Department of Justice, p. 44.

[17] 18 U.S.C.A. sections 1361-3174.

[18] Criminal Justice Administration, by Frank. W. Miller and Robert O. Dawson, p. 752, "The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

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 "house keeping" 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. Defense Counsel-related Factors

a) Abuse of court process

Defense 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 defense counsel hopes that the prosecution may lose interest in the case. Defense 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 defense 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 defense counsel may result in inadequate preparation for trial. The defense 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 defense counsel is not provided the defendant by the state, they apply for adjournment on the ground that they were still making arrangements for such defense counsel. In this respect, the courts found it difficult to deny them their constitutional right to defense counsel and grant such applications.

E. Measures to Be Taken for the Realization of Speedy Trial

To combat delay and reduce the court backlog, our group considered the following measures:

1. To exercise better case control, the trial court judges should conduct an inventory of their cases to determine the actual number of cases pending in their respective courts. The cases could then be categorized into those which are pending trial, those adjourned for judgement and those which have been completed but are pending appeal. It is, therefore, important for judges to allocate their time so as not only hear and determine cases but also to dispose of pending cases.
2. With regard to effective court management, the Supreme Court should urge judges to observe strict rules of punctuality and minimum hours of daily work. The presiding judges should closely supervise their clerks of court to ensure that they perform their functions in an appropriate manner.
3. Judges should observe the rules of procedure regarding issues such as restraining orders or preliminary objections, and act promptly on all motions and interlocutory applications before the courts.
4. The courts should make appropriate schedules for trials by seeking the cooperation of the parties concerned. More than one court session should be allocated in advance and most desirably on consecutive trial dates.
5. The prosecutor should be able to calculate the time necessary to present his case, and propose a concrete schedule for the case. This will enable the court to plan the time frame for the cases with a view to avoiding unnecessary delay in trial.

6. Witnesses and exhibits should be produced and tendered on the relevant dates. This objective may be achieved with the cooperation between prosecutors and the investigating agencies. Additionally, prosecutors must assure the security of witnesses by ensuring that their legal rights are strictly observed during their respective testimonies. This security should be extended to the witnesses before and even after testimony to avoid possible intimidation. Prosecutors should therefore liaise with the investigating agencies dealing with the case to achieve this objective.
7. Our group observed that for effectiveness and efficiency in the administration of justice, there is a need for professional training of judges/magistrates and prosecutors before they join their respective professions. This will ensure that all legal issues are addressed in view of a fair application of the law.
8. The prosecutor should scrutinize the case files by anticipating the rebuttal of the case by defense counsel.

IV. IS THE APPROPRIATE SENTENCE IMPOSED ON DEFENDANTS?

A. 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.

B. Present Situation

1. An Overview of Sentencing Process

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 defense 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 defense 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 defense 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 defense counsel may produce witnesses to present mitigating circumstances. In this case, the defense 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.

2. Involvement of Prosecutors

The prosecutor may be involved at various stages of criminal proceedings from investigation to sentencing:

a) Plea bargaining

Plea bargaining in a criminal case is the process whereby the defendant and the prosecutor work out a mutually satisfactory disposition of the case subject to court approval, which usually involves the defendant's pleading guilty to a lesser charge or to only one or more of the counts of an indictment in return for a lighter sentence than that possible for the graver charge.

b) Examination of witnesses

As mentioned above, in some countries like Japan, the defense counsel calls witnesses (relatives, employers, friends, etc.) only to disclose mitigating circumstances to the court. By examining the witnesses, the prosecutor can ascertain whether they present sufficient guarantees that they will care for the convict.

c) Closing argument

The closing argument is the final statement made by the prosecutor and the defense counsel respectively to a jury, or the court summing up the evidence that they think the other has failed to establish. The prosecutor may disclose the past criminal record of the defendant and argue that the defendant's past record is not good, therefore, maximum punishment should be imposed on him. At this stage, in some countries like Japan, the prosecutor recommends specific punishment, that is, the type of penalty, the nature and duration of the term of imprisonment and/or the sum of the fine.

d) Victim Impact Statement

In cases where the victim experiences loss over and above the ordinary pain and suffering, this fact may be revealed to the judge after the defense has pleaded for mitigation. The judge may take this into consideration in sentencing. This is to ensure a fair and equitable sentence. This system is in practice in New Zealand and Singapore.

e) Appeal

In most countries, the prosecutor can appeal to the higher court if the sentence passed by the lower court is insufficient or excessive in proportion of the gravity of the offence. In case the defendant was sentenced to excessive punishment when he was not represented at trial, the prosecutor may, to discharge his duty impartially, appeal the sentence. In some countries, namely, the Philippines and the U.S.A., to protect the defendant from double jeopardy, the prosecutor cannot appeal in the event of an acquittal.

In addition to the above involvement, prosecutors may collect evidence relating to sentencing and select the appropriate procedure and competent courts for initiating prosecution.

C. Problems in Obtaining Appropriate Sentence

The following are some problems, which adversely affect the appropriate sentence:

1. In some countries, the opinion of the prosecutor is not considered. Opinions are divided as to whether the prosecutor should participate in the sentencing process. Our group discussed the pros and cons of the

matter and is generally of the view that the prosecutor should partake in the process. This is because he is a unique position to provide the court the viewpoints not only of the victim but also the law enforcement agencies. His intervention is also essential as he may restrain a judge with a propensity for leniency. The group was the opinion that legislative reform may be necessary in those countries where the prosecutor does not enjoy such authority.

2. The prosecutor always requests for the maximum punishment. In some countries, especially in those countries where the prosecutor enjoys enormous authority, he always requests for the maximum punishment for the defendant. This is a serious problem in sentencing. Because of the system, some prosecutors cannot participate in sentencing even when they wish to do so.
3. The police and the prosecutor may lack information about the past criminal record of the defendant. In some developing countries, the prosecutor may find it difficult to obtain the past criminal record of some convicts due to poor conservation of such records or lack of cooperation with the police.
4. Some prosecutors may be too ardent, rigid and overzealous, thereby affecting sentencing.
5. Prosecutors and judges face political, social and other problems in some countries in the form of undue pressure and external interference. Moreover, some of them purposely involve themselves in various forms of malpractice, which adversely affects sentencing.
6. The untimely and sudden transfer of prosecutors is a problem in some countries. In such a situation, the prosecutor handling a case may not be able to complete the case, and may not have the opportunity to brief the incoming prosecutor. The new prosecutor may not understand the case so as to conduct the prosecution efficiently.
7. It has been observed that the court may impose heavy punishment on one defendant and a lighter punishment on another defendant, even when they committed the same offences and they are similarly placed in life. When the convicts compare notes with each other, such disparity in sentencing may cause them some frustration and bring into focus discrimination in the sentencing process.

D. Countermeasures

As underlined above, our group revealed several problems in relation to appropriate sentencing. In a country where the above-mentioned problems prevail, necessary measures should be taken for the effective and efficient administration of criminal justice. Bearing in mind the gravity of the above problems, the group suggests the following countermeasures from the perspective of the prosecutor, the defense counsel and the court:

1. Adduce Sufficient Evidence, Disclose Mitigating Circumstances and Other Information About the Defendant to the Court

To assist the court in sentencing, the prosecutor should adduce sufficient evidence and disclose all information about the defendant and the offence he is alleged to have committed. It has been noted that prosecutors often lack information about the defendant's past criminal record. Similarly, the defense counsel may contribute to a greater extent in obtaining appropriate sentencing by disclosing all

possible mitigating factors favorable to the defendant. In some countries such as New Zealand, Singapore and the U.S.A., the victim of an offence is allowed to make a statement to the court as to the loss he has suffered as a result of the commission of the offence. The court may take the aforementioned statement into consideration to determine the appropriate sentence.

2. The Prosecutor Should File an Appeal

Where the prosecutor is dissatisfied with the sentence of the trial court, he may consider an appeal to the appellate court with a view to securing the appropriate sentence for the convict. Such legal provisions do exist in most jurisdictions and should be used to as a remedy to disparity in sentencing or to realize the objectives of punishment.

3. To Resist Undue Pressure and Other Forms of Malpractice

The prosecutor, the defense counsel and the judge should resist undue pressure and all interference in a case. None of them should try to take undue advantage. All of them should honestly adhere to the ethics of their professions.

4. To Work in Good Harmony

The prosecutor and the defense counsel usually resist till the end of a case in favor of their party, which is quite natural to some extent. But, to obtain an appropriate sentence, they should cooperate and work together, instead of being rigid. They should be flexible and objective.

5. Avoid Disparity in Sentencing

Disparity in sentencing is a serious problem and may occur due to the personal predilections of judges. The lack of sentencing guidelines and the nonavailability of data on sentencing by superior courts aggravates the problem. It is suggested that national training programs and seminars should be organized for judges, focusing on this aspect. It may be useful to widely publish important decisions in the media for judges and prosecutors. Research is necessary to determine the dimensions of the problem. The issuance of sentencing guidelines by the legislature or apex to the courts is another viable option. Available data in relation to sentencing should be computerized for easy access to judges and prosecutors. Furthermore, as prosecutors play an important role in sentencing, they should be conversant with sentencing standards and assist the court in this regard.

V. 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, defense 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.