

INDIAN LAW INSTITUTE, NEW DELHI  
KARNATAK UNIVERSITY

SEMINAR

ON

CRIMINAL LAW

( December 17 - 21, 1978)

at

Dharwar

LEGAL AID IN CRIMINAL PROCEDURE

by

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Life and personal liberty is most precious thing for every individual and every effort is necessary to protect it till one is convicted by a court according to procedure established by law. It is for this reason that right against deprivation of life or personal liberty except according to procedure established by law has been guaranteed under Art. 21 of the Constitution of India. Also for this very reason, the Indian law presumes an accused to be innocent and puts it on the prosecution to prove his guilt beyond reasonable doubt before he can be convicted and punished.

If prosecution alone were to lead verdict without right of cross examination by the accused or only the prosecution were to give arguments without any arguments in defence being put forward, no person even though accused wrongly would escape.

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conviction and punishment. No prosecutor will place before the court evidence damaging to his case, or point out pitfalls in the evidence or argument placed by him before the court. The court is a human being likely to be swayed to conclusion against the accused by the persistent one-sided arguments, specially when it has heavy load of work on hands.

For this reason, the constitution of India by its Article 22(1) directs that when a person is arrested for any offence, he shall not be denied the right to consult and to be defended by a legal practitioner of his choice. A large majority of Indians are very poor and illiterate, living on a below subsistence level. In spite of all knowings to protect their life and personal liberty, they, when inculpated in any criminal case, find themselves helpless in the matter of engaging a lawyer for their defence, for want of funds. On account of illiteracy, they cannot plead for themselves before the court. The result is that substantial number of them has to rot in jails for quite a long time as under trials. The question whether such persons can claim from the State the right to free legal aid has been before the court from time to time. The American Supreme Court has recognised the right of undefended accused to have lawyer at the cost of the State. In Gideon's Trumpet Case (1965) 372 U.S. 335 Black J. of that court observed: "Not only these precedents but also reasons and reflections require us to recognise that in our adversary system of criminal justice, any person hauled into court who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants - accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide

spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him". Indian Supreme Court has not however recognised it as part of the requirement of fair trial (Tara Singh v. State of Punjab, A.I.R.1951 S.C. ). The Supreme Court also other High Courts have contented themselves by interpreting section 340 of old Cr. P.C. 1908 and Art. 22 of the Constitution of India to mean only giving of opportunity to accused to be defended by a lawyer of his own choice and so engage on him if at his own cost. The provisions have been held to be enabling ones. They have not been held to be casting any duty on the State to provide free legal assistance to the poor.

The Law Commission of India in its 14th Report (1952) recommended that free legal assistance should be provided to undefended accused without sufficient means, tried before the Court of Sessions. In its later (48th) Report, the Commission suggested making provision of free legal assistance by the state for all accused who are undefended by a lawyer for want of means. However, only former recommendation has been adopted in the new Criminal Procedure Code. Sec. 304 of this Code provides that where, in a trial before the Court of Sessions, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader the court shall assign a pleader for his defence at the expense of the state.

The State has not taken upon itself the responsibility of providing free legal aid in non-sessions cases though this forms bulk of all criminal cases. The problem of the accused getting lawyer of his choice as per Art. 22(1)

of the Constitution also remains unresolved. The accused may not be able to complain at law for non-availability of this choice in view of the wording of art. 22(1); any imposition of a counsel without consulting the accused may nevertheless be suspected specially when state is one of the parties in criminal cases. Any such unagreed to engagement of lawyer when read as imposition direct or indirect, would be self destructive and cut at the root of the philosophy of legal aid. On the other hand State cannot cater to the extravagant claims of an accused for a very expensive lawyer of his discriminating taste. Since the Distt. Authorities are maintaining a panel of lawyers, wherefrom one is drawn for a particular case, the indigent accused may be allowed to have any one from the same. This may meet the objection to a large extent.

Scales of remuneration for empanelled lawyers are modest. For example an empanelled lawyer in Punjab gets Rs. 16/-, Rs. 32/-, and Rs. 100/- per day for appearance respectively before Sessions Court, High Court and Supreme Court. These are quite unattractive specially in present day age of high prices. These call for upward revision. Such revision cannot, however, be substantial in view of financial limitations. Accordingly, senior lawyers do not and will not generally get themselves empanelled and the accused in consequence will get only junior lawyers. This qualitative difference can put him at a disadvantage unless the lawyer puts in very hard labour and at the same time court by its own questions on prosecution witnesses and by correcting the lawyer when found going astray, helps him so that just decision becomes possible in the case. This indulgence from the Court would in no way be objectionable, if kept within proper limits and would rather be called for by way of its duty to do justice in the matter... This finds judicial approval in various cases like Sessions Judge Nallore v. Intha Ramana Reddy, 1 A.W.R. 340 Kunnuman Mohamad v. State of Kerala, A.I.R. 1963 K. r. 51 and Shikhi Abdul Aziz v. State of Mysore 1974, 2 Ker. L.J. 378. This will also make the lawyer more vigilant in handling such cases, to his definite advantage of getting established in the profession in the times to come.

Non Session cases of indigent accused for which no obligatory provision for free legal aid has been made in Sec. 304 Cr. P.C. are, as already submitted, quite large in number. If such persons are really to avail of right of equal protection before the law as contemplated in Art. 14 and if they are really to be assured of their personal liberty, requisite arrangement for their proper defence is necessary. State funds can no doubt be allocated for their defence in view of addition of entry 11A (Administration of Justice) in concurrent list and art. 38A in the chapter of Directive Principles of State Policy. This article lays before the State the ideal of providing free legal aid to citizens suffering from economic or other disabilities. The State may not however be able to spare sufficient funds to meet the need in all such cases for sometime more in view of demands of developmental activities. One of the solutions may be to be selective and refuse this assistance to such types of offenders who do not deserve free aid in view of their past conduct or in view of nature of their present offence. Other way out, and also the most important way out, is organisation of this aid from voluntary sources.

Habitual offenders, opiates, drunkards, gamblers, smugglers, economic offenders, offenders under the Arms Act or those violating social legislations like Anti Dowry Acts, Untouchability Laws may be excluded from the purview of free legal aid schemes as the offenders are either those who would be committing, in accordance with their habit, further degradation on society after being relieved from the charge, or are those who are stigma on the face of the society and deserve to suffer on their own. After these exclusions defence can be arranged for remaining categories of indigent accused by pooling human and monetary resources of the state and public.

There is necessity that skill at law whether of lawyers, law teachers or law students is collected to the maximum on gratuitous basis and with the same structure for free legal aid at local, District, State and National level may be raised. The lawyers may be made conscious of

nobility of their profession and in consequence of their responsibility towards indigent members of the society. The Advocates Act may be amended to make it obligatory for each lawyer to handle specified number of cases free of charge every year. Being for laudable public interest, it will be reasonable restraint on Constitutional right to profession of the lawyers and views of the amendment will be unassailable. The Advocates Act may also be amended to enable law teachers, who are otherwise well up in law, to handle without any payment, cases of indigent entrusted to them by the above proposed body. Services of final year students of law can be availed of to do the work of hunting the law and drafting of applications appeals, under supervision, for cases of the indigent and in the process, get more depth in their study of law with the help of live cases. This will also help them in getting social reorientation and realism of life, so necessary to equip them well for the profession. As an incentive, this work may be considered as part of their practical training prescribed for award of Law Degree.

As practice of law is a means of livelihood, free service can not be expected from the profession beyond a limit. If the problem of free legal aid to the poor is to be solved when the State by itself cannot own the entire financial responsibility funds have to be collected from different sources for supplementing state grants and placed at the disposal of Free Legal Aid Authority constituted at State level under the supervision and guidance of this authority. Free legal aid societies need function at local, district and High Court level and senior most judicial officer, executive officer, prosecuting officer, Dignitary of Bar Association, Social worker and Head of Law teaching institution if available at a particular level should be its members. The concerned local body needs a clerk and one lawyer on retainer basis with location of office, preferably in the courts. This suggestion is based on the necessity that whenever client comes, he should be able to find someone to look into his problem. It is necessary to do so in order to provide him with, so badly needed, feeling of seriousness about

the mission of the legal aid society, and also for the purposes of insuring that he does not fall victim to unhealthy practices of touts, during his waiting hours. Experience with existing legal aid clinics has not been happy to the desired extent on account of absence of this facility at the moment. Funds are needed for this nucleus staff, other incidental expenses of office, process charges and fees of lawyers empanelled for the purpose. Besides grant from the State, these have to come from contributions of individuals, corporations and other voluntary organisations. As an incentive, such contributions may be got declared exempt from income-tax in the hands of the society and such societies should be got registered under Income Tax Act as charitable institutions so that the contributions to the society can be claimed as deductions by contributors. Since legal aid societies have also to meet the need for legal assistance to the poor in civil and other types of cases, the funds of the society should be augmented by voluntary contributions from successful assistees. Suitable provision should be made in law for passing on costs awarded to successful assistees to Legal Aid Society concerned.

A peculiarity in criminal cases of the poor is that since they are unable to engage lawyer for grant of bail, they remain in jails as under-trials. Majority amongst them are without families, are uneducated and are arrested as vagrants. Others, specially in border districts, are those arrested for offences under official Secrets Act and their families are unaware about their internment. They are, therefore, unable to approach legal aid agencies directly or indirectly. Accordingly there arises unusual problem of locating them and then providing them necessary legal aid. Accordingly it becomes necessary to have some liaison of the legal aid society with the prison authorities, so that the latter furnish necessary information and facility of interview with the accused, to the representative of the society.

As to eligibility of a person for getting aid from the society, the question may not pose very serious difficulty in criminal cases of the type proposed to be covered by the scheme; personal liberty is most precious thing for every individual so that he normally does get himself represented by an advocate if by any means he can manage it. Unrepresented accused will generally be those who have not sufficient means. Subject to this general consideration, the society may apply means test of allowing assistance to all with income up to Rs. 300/- P.M. In view of legal presumption of innocence of accused, merit and purpose test, so essential in other cases, may not in general be invoked in these cases.

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