

## **NOTES AND COMMENTS**

### **IMPOSING COST IN PRE-TRIAL DIVERSIONS: EXPLORING THE ALTERNATE FOR UNDOING WRONG IN WRONGFUL PROSECUTION**

#### **Abstract**

In the times when the principle of ‘presumption of innocence’ is under attack<sup>1</sup> and resulting in increased instances of wrongful prosecution, it is imperative to discuss the methods to cushion the causes and consequences of such prosecution. This paper evaluates the efficacy of pre-trial diversions such as compounding, plea-bargaining and quashing to curb infructuous prosecution. The alternate for sentence in a pre-trial diversion is the imposition of cost to deter the false and vexatious prosecutions which results in wastage of time, money and resources of court machinery as well as the parties. The fresh and innovative approach of the courts in imposing costs as a breath of fresh air has been appraised.

*“To raise new questions, new possibilities, to regard old problems from a new angle, requires creative imagination and marks real advance in science”*

- Albert Einstein

#### **I Introduction**

CRIMINAL JUSTICE system of a nation is a vignette of its social, cultural, economic and political realities. It speaks volumes about the respect for basic human rights of the victims, accused, the role and approach of the state and the fundamental principles considered inviolable. “Presumption of innocence” has been regarded as one such sacrosanct fundamental principle of procedural fairness in the criminal law and recognized as a basic “human right”<sup>2</sup> not only in Western European, Anglo<sup>3</sup>- American legal systems but also in other legal systems such as Brazilian, Columbian, Iranian, Russian, South African and Indian. It also finds a well-defined space in international conventions such as ECHR, UDHR, Canadian Charter of Rights and freedoms, *etc.* But, despite the National and International recognition<sup>4,5</sup> of this cardinal legal principle,<sup>5</sup>

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1 Andrew Ashworth, “Four Threats to the presumption of Innocence” 123(1) *South African Law Journal* (2006).

2 Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Bloomsbury Academic, 2010).

3 Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” 67(3) *Modern Law Review* 402-434 (2004).

4 Universal declaration of Human Rights 1948, art. 11.

5 Pamela Ferguson, “The Presumption of Innocence and its role in the Criminal Process” 27 *Criminal Law Forum* 131-158 (2016).

in recent times the incidences of false allegations of crime has become a matter of public concern in number of legal systems.<sup>6</sup>

The importance of this principle lies in its role of securing the “just result” by not only providing a restorative justice to the victim who has suffered the crime but also by protecting the wrongful prosecutions. It is being rightly argued that wrongful prosecutions are not only detrimental to the persons so prosecuted but also to the victim for the simple reason that the ‘offender’ in its spirit goes unpunished.<sup>7</sup>

The Indian criminal justice system has a colonial legacy and is largely adversarial in nature. It finds its roots in the “Due Process Model”, consequentially “presumption of innocence” plays a very prominent role in criminal trials whereby the judiciary decides on the guilt of the accused by applying the ancillary principles namely, “proving beyond reasonable doubt” and if not so proved giving the benefit of doubt to the accused.<sup>8</sup>

However, having all the due regard to the procedural safeguards, any criminal justice system is not infallible. There are incidents of wrongful prosecution as well as wrongful convictions. This work focusses on the former *i.e* wrongful prosecution, also evident in the Crime in India Report of NCRB 2020- Out of total 44,17,740 persons charge-sheeted for penal Crimes, 6,34,229 persons were convicted, 5,03,044 persons were acquitted and 55,650 persons were discharged.<sup>9</sup> The persons wrongfully prosecuted were just 13% less than that of those convicted.

The plight of the wrongfully prosecuted is exacerbated by the delay<sup>10,11</sup> in trials<sup>12</sup>, lack of access to bail<sup>13</sup> as a result long terms of pre-trial detention<sup>14,15</sup> which consequently

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6 Shima Baradaran, “Restoring the Presumption of Innocence” 72 *Ohio State Law Journal* 723 (2011).

7 R.C Nigam, *Principles of Criminal Law*, 226 (Asia Publishing House, New Delhi, 1965).

8 Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Vol. 1, (March, 2003).

9 National Crime Record Bureau, Crime in India 2020.

10 Yashomati Ghosh, “Indian Judiciary: An Analysis of the Cyclic Syndrome of Delay, Arrears and Pendency” 5(I) *Asian Journal of Legal Education* 21-39 (2017).

11 S.N Sharma, “Fundamental Right to Speedy Trial: Judicial Experimentation” 38(2) *JILI* 236-42 (1996).

12 Vidhi Centre for Legal Policy, Inefficiency and Judicial Delay: New Insights from the Delhi High Court (2017).

13 S.D Balsara, “Bail not Jail- Empty the Prisons” 22(3) *JILI* 341-350 (1980).

14 Vrinda Bhandari, “Inconsistent and Unclear: The Supreme Court of India on bail” 6 *NUJS Law Review* 549 (2013).

15 Thomas Weigend, “There is only one Presumption of Innocence” 42 *Neth. Journal of Legal Philosophy* 193(2013).

leads to higher chances of taking plea of guilt,<sup>16</sup> thus putting the basic premise of ‘innocent until proven guilty’ in jeopardy.

The over-crowded prisons, incidence of recidivism and high acquittal rates points towards something amiss about the system. Cases are dragged into a quagmire of technical details for years and even decades, while the victims of injustice continue to suffer. Their suffering is aggravated by the severe rigours of pursuing complicated and expensive legal procedures. There is very little attempt to arrive at an amicable settlement.

This paper combs through wrongful prosecution, the available legal safeguards, evaluates the idea of pre-trial diversions as an outlet to wrongful prosecution and imposition of cost as ‘justification’ or ‘compensation’ for wrongful prosecution. The cost of trial and sentencing, alternatively called as the traditional mode of disposal of case is remarkably humongous, however both the process entails a certain ‘cost’. This paper argues in the favour of imposition of cost as an alternate to imprisonment, because the latter has many disadvantages such as churning out hardened criminals.<sup>17</sup> The recent judgment of High Court of Delhi in *Mamta Devi v. State of NCT of Delhi*<sup>18</sup> directing both the parties to clean Yamuna River under the supervision of Delhi Jal Board for 45 days as cost while quashing the FIR and the criminal proceedings in the exercise of its inherent power under section 482 of the Code of Criminal Procedure 1973, has paved the way for further discussion on cost in pre-trial diversions as an alternative and effective remedy for wrongful prosecution to discourage false and vexatious cause.

## II Legal safeguards against wrong prosecution

Wrongful prosecution is a prosecution (civil or criminal) instituted without a probable case and that terminates in favour of defendant.<sup>19</sup> It amounts to violation of various fundamental rights of the wrongfully prosecuted such as right to life and liberty,<sup>20</sup> right against arbitrariness (right to equality of law),<sup>21</sup> right to protection in respect of conviction for offences<sup>22</sup> and protection against arrest and detention.<sup>23</sup> It is tantamount to abuse of legal procedure and creates a new, innocent victim *i.e.*, the person wronged, who can sue for tort damages.

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16 The Code of Criminal Procedure 1973, 229, 241, 252 and 253.

17 Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Vol. 1, (March, 2003).

18 2022 LiveLaw (Del) 558.

19 West Bengal State Electricity Board v. Dilip Kumar Ray AIR 2007 SC 976.

20 The Constitution of India, art. 21.

21 *Id.*, art. 14.

22 *Id.*, art. 20.

23 *Id.*, art. 22.

Apart from the remedy in tort law, the criminal procedure law contains adequate safeguards against events leading up to wrongful prosecution and its aftermath such as- procedural mandates for arrest<sup>24</sup> and how the same must be effected in exceptional circumstances only when necessary,<sup>25</sup> where offence pertains to punishment of less than seven years,<sup>26</sup> right to be informed of grounds of arrest of right to bail,<sup>27</sup> right to meet an advocate of one's choice during interrogation,<sup>28</sup> right not to be detained for more than 24 hours,<sup>29</sup> mandatory of filing of an affidavit regarding compliance of section 154 before coming to the via complaint and seeking remedy under section 156(3),<sup>30</sup> right to bail,<sup>31</sup> right to default bail if investigation cannot be completed in the requisite time frame<sup>32</sup> and discharge if no *prima facie* case can be established against the accused.<sup>33</sup> The Code also provides remedy for wrongful prosecution in the nature of compensation for accusation without reasonable cause<sup>34</sup> and a compensation not exceeding Rs. 1000 for groundless arrest.<sup>35</sup>

The magistrate who has heard the case and discharges or acquits the accused, may if he thinks that there was no reasonable ground for making the accusation, ask the complainant to pay compensation. The compensation amount should not exceed the amount of fine that the magistrate is empowered to impose. The complainant shall be liable to undergo simple imprisonment for a period not beyond 30 days upon default in payment of compensation.

The legal safeguards to prevent wrongful prosecutions are apposite however the sanctions in the Code are inadequate and thus unlikely to prevent such wrongful and vexatious prosecutions. Also, the high ratio of acquittals and discharge indicates to some extent the incidents of wrongful prosecution.

Another way out though not a complete remedy to curb wrongful prosecution is the pre-trial diversions such as compounding,<sup>36</sup> plea-bargaining,<sup>37</sup> withdrawal of case by

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24 Mandatory compliance of s. 41A, CrPC 1973.

25 The Code of Criminal Procedure 1973, s. 41.

26 *Arneesh Kumar v. State of Bihar* 2014 8 SCC 273

27 The Code of Criminal Procedure 1973, s. 50.

28 *Id.*, s. 41D.

29 *Id.*, s. 57.

30 *Priyanka Srinastava v. State of UP* (2015) 6 SCC 287.

31 The Code of Criminal Procedure 1973, s. 436, 437

32 *Id.*, s. 167(2).

33 *Id.*, s. 227, 239 and 245.

34 *Id.*, s. 250.

35 *Id.*, s. 358.

36 *Id.*, s. 320.

37 *Id.*, s. 265A-265L.

prosecutor<sup>38</sup> and quashing by virtue of inherent power of high court.<sup>39</sup> The aforesaid pre-trial diversions shortens the length of the prosecution proceedings thus giving some respite.

### III Pre-trial diversions: An outlet for wrongful prosecution

Registering of FIR<sup>40</sup> or filing the complaint<sup>41</sup> marks the first step of initiation of a criminal proceeding. The most logical end of the criminal proceeding is either conviction upon taking plea of guilt<sup>42</sup> or the conviction or acquittal<sup>43</sup> or the discharge of the accused.

The 'Crimes in India 2020' report of NCRB recorded the following ways of disposal of IPC cases by court: cases convicted (4,53,890), acquitted (2,78,310), compounded (78,098), discharged (34,762), disposed-off by plea bargaining<sup>44</sup> (10,024) and quashed (4,920). In all the above possibilities, a judge exercises its guided discretion while adjudging a matter, manifested as sentencing which can be in the form of death, imprisonment, fine or forfeiture of property.<sup>45</sup> The judge can also resort to alternate of sentencing such as giving community service,<sup>46</sup> releasing on probation<sup>47</sup>, admonition, etc. However, it is quite likely that a situation may arise where the institution or continuance of criminal proceeding may amount to abuse of the process of the court and only quashing it will secure the ends of justice.<sup>48,49</sup> The high court can also award cost while invoking its power under section 482.<sup>50</sup>

The aforesaid stated methods of settling the matter before the trial runs its full course is also called as pre-trial diversions. It is aimed at reducing the pendency of the court, saving the time of judiciary as well as the parties and curb the cost of unnecessary

38 *Id.*, s. 321.

39 *Id.*, s. 482.

40 *Id.*, s. 154.

41 *Id.*, s. 190.

42 *Id.*, s. 229, 241, 252.

43 *Id.*, s. 232, 235, 281, 255.

44 Sonam Kathuria, "The Bargain has been struck: A Case for Plea-bargaining in India" 19(2) *Student Bar Review* 55-58 (2007).

45 The Indian Penal Code, 1860 s. 53.

46 Ayesha Arvind, "Delhi's petty criminals work off their debt to society as courts catch on to community service", *Daily Mail*, Oct. 7, 2013, available at: <http://www.dailymail.co.uk/indiahome/indianews/article-2447171/Delhis-petty-criminals-work-debt-society-courts-catch-communityservice.html#ixzz54bQ4W7gB> (Last visited on Dec. 22, 2022).

47 The Code of Criminal Procedure 1973, s. 360.

48 *R.P Kapur v. State of Punjab*, 1960 CriLJ 1239.

49 K.N Chandrashekhara Pillai, *R.V Kelkar's Criminal Procedure* (Eastern Book Company, 6<sup>th</sup> ed., 2018).

50 *Mary Angel v. State of Tamil Nadu*, (1999) SCC (cri) 1296.

litigation for both the parties. Pre-trial diversions can help tackle the burgeoning prison population<sup>51</sup> with occupancy rate of 118%, as per the Prison Statistics of India 2020. Prisons in India are over-burdened primarily due to the undertrial prisoners, who make up 76% of the entire prison population.

The pre-trial diversions assume all the more importance when the desired purpose of punishment or sentencing *i.e* reformation and rehabilitation of offenders seems a far-fetched idea. As per the Prison Statistics of India 2020, only 1490 convicted prisoners (3%) were rehabilitated out of 49,386 convicts released after completion of conviction period.<sup>52</sup> This depicts the failure of penitentiary institution in particular and the whole criminal justice administration. As a result, only the preventive and deterrence theory of punishment seems functional on the face of it. The notion of punishment being the primary point of criminal law and criminal process needs to be re-evaluated in the light of its ineffectiveness.<sup>53</sup>

The pre-trial diversions go against the idea of trial, fair adjudication of the guilt and the presumption of innocence which is the basic tenet of the criminal justice process. Nevertheless, owing to its pragmatic approach, it has been accepted across the jurisdictions. Albeit it saves the time, money and resources, it is not completely free, some cost is entailed as a result of it as discussed in the next section

#### IV Imposing cost as an alternative of sentence

The word ‘costs’ has been defined by the Wharton’s concise law dictionary<sup>54</sup> as ‘expenses incurred in litigation or professional transactions...’ while as per Halsbury’s Laws of England<sup>55</sup> cost is the sum of money which the court orders one party to pay another party in respect of the expenses of litigation incurred. Unless provided otherwise by the statute or by rule of court, the court has the discretion to order costs of proceedings.

Courts have weaponised the instrument of imposing cost to recompense the successful party for the expenses undergone and/or to keep the frivolous and vexatious litigations at bay. The court exercises its discretion in imposing cost<sup>56</sup> in civil cases on various

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51 The Wire, “The Burgeoning Share of Undertrial Prisoners”, *available at*: [the.wire.in/rights/indianjails-undertrials-prisoners](http://the.wire.in/rights/indianjails-undertrials-prisoners) (last visited on Dec. 10, 2022).

52 Ministry of Home Affairs, National Crime Records Bureau, Prison Statistics of India (2020).

53 R A Duff, “Process, not Punishment: The Importance of Criminal Trials for Transitional and Transnational Justice”, Minnesota Legal Studies Research Paper Series Research Paper No- 14-03 (2014), *available at*: <http://ssrn.com/abstract=2387601>.

54 Wharton’s Concise Law Dictionary, Universal Law Publishing Co., New Delhi, 16<sup>th</sup> ed. (2013)

55 Halsbury’s laws of England, 4<sup>th</sup> ed., Vol. 12, 414 (1998).

56 The Code of Civil Procedure 1908, s. 35.

grounds- compensatory costs<sup>57</sup> in respect of false or vexatious claims or defences,<sup>58</sup> costs for causing delay<sup>59</sup> or awarding cost to the party whose claim succeeds.<sup>60</sup>

On the similar lines, the criminal courts are empowered to impose costs to be paid: by the party/parties proceeding under section 145, 146 or 147 in respect of expenses incurred including that of witnesses and pleader's fees; under section 342 for dealing with an application for filing a complaint or appeal and by the accused upon conviction in non-cognizable cases.<sup>61</sup> The cost imposed by the court is usually payable to the aggrieved party, *albeit* in cases where the parties have entered into a compromise and want the proceedings to be quashed,<sup>62</sup> the court becomes aggrieved for the wastage of its precious judicial time, when it is already burdened with pendency of cases. Therefore, where parties settle the matter and proceed for quashing, the court imposes costs on both the parties. Thus, costs could be either for the purpose of meeting the expenses of the litigation as it can be exemplary to prevent the abuse of the process of the court or to secure ends of justice or giving effect to any order passed under the code.<sup>63</sup>

The power of the high court to impose costs to prevent the abuse of the process of law or otherwise to secure the ends of justice<sup>64</sup> has also been reiterated by the Supreme Court. The courts have come up with innovative ways of imposing cost in cases of quashing such as community service at a hospital,<sup>65</sup> cost to be deposited in different welfare funds.<sup>66</sup> Yamuna cleaning.<sup>67</sup>

### V Conclusion

The wrong done in prosecuting someone wrongfully cannot be undone at any cost whatsoever. The loss of dignity, self-respect, economic disruption, low morale brought out by wrongful prosecution and pre-trial detention is irreconcilable. However, safety valves such as pre-trial diversions and imposition of costs to deter vexatious prosecutions can cushion the death knell blown by wrongful prosecutions.

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57 The Code of Civil Procedure 1908, s. 35: Limited to Rs. 3000 or the pecuniary limit of the court.

58 The Code of Civil Procedure 1908, s. 35A.

59 *Id.*, s.35B.

60 *Id.*, s. 35.

61 *Id.*, s. 359.

62 *Id.*, s. 482.

63 *Mary Angel v. State of Tamil Nadu*, [1999] INSC 209

64 The Code of Criminal Procedure 1973, Section 482.

65 *Mabendra Singh alias Sunny v. The State & Ors*, CRL.M.C.852/2021

66 Army Welfare Fund Battle.

67 *Mamta Devi v. State of NCT of Delhi*, 2022 LiveLaw (Del) 558.

It is pertinent to note the Supreme Court<sup>68</sup> guidelines for graded imposition of cost on parties who unduly delay compounding of offence under the NI Act.<sup>69</sup> The cost imposed shall increase with every delay in settling the matter. This has been done to encourage compounding at earliest stage so that burden on the system is reduced and expeditious justice is done. The similar measure can be adopted in cases of other IPC and special law offences so that resolution is not done at the fag end of the trial.

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68 *Damodar S. Prabhu v. Sayed Babalal*, 2010 (5) SCC 663.

69 Negotiable Instruments Act 1881, s. 147.

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