

**Speech Delivered
by
Hon'ble Mr. Justice D.Murugesan, Judge, High Court Madras
at
South Zone Regional Judicial Conference
on
Enhancing Timely Justice : Strengthening Criminal Justice Administration
on
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In this morning in Session 9, we have structured discussion on the topic "Safeguarding Constitutional Rights in Criminal Justice Administration".

Criminal Justice System is essentially an instrument of social control, and society considers some behaviours so dangerous and destructive that it either strictly controls their occurrence or outlaws them outright. The objectives of Criminal Justice System are basically:

- i) To prevent the occurrence of crime
- ii) To punish the persons found involved in crimes.
- iii) To rehabilitate them
- iv) To compensate the victims in a fitting manner.
- v) To maintain law and order in the society
- vi) To deter the offenders from committing any criminal act in the future.

Despite variation that exists across the country, there are three common interacting and interdependent components in any Criminal Justice System, viz., Law Enforcing Machineries, Courts and Correctional Institutions. Each component plays a unique role that supports society's need for justice and safety, and each operates by exercising discretion within the parameters set by law. The administration of criminal justice is, therefore, a complex issue and all the above components should exercise their powers and discharge their duties as expected by law.

Over the last two days, much has been discussed on topics like, Planning and Management for Timely Justice, Key Challenges facing Criminal Justice Administration, Causes and Solutions for the Sharing Best Practice as well as the Identifying Areas for Improvement, Role of Courts in Criminal Justice and so on. I do not venture to go into those areas again, rather would concentrate on some of the areas where we could bestow our attention. They are:

- I. Right of the Accused
- II. Juvenile Justice
- III. Victims of Crimes
- IV. Child witnesses and Child Sexual Abuse
- V. Correctional Institutions
- VI. Differently-abled Witnesses and Accused
- VII. Mentally Challenged

I. Right of the Accused:

Article 20 – Protection in respect of Conviction for offences

- ✓ No person can be convicted of any offence except for violation by law in force at the time of commission of offence.
- ✓ No person shall be subjected to penalty greater than prescribed in law.
- ✓ No person shall be prosecuted and punished for the same offence more than once.
- ✓ No person accused of any offence shall be compelled to be witness against himself.

Article 21 – No person shall be deprived of his life and personal liberty except according to the procedure established by law.

Article 22 – Protection against arrest and detention in certain cases.

II. Juvenile Justice:

It has long been accepted that children coming in conflict with law, because of their physical, emotional and mental immaturity, and they cannot be equated with adults in terms of their culpability and accountability to crime. It is widely held that delinquency is not merely an act of social deviance on the part of children but also a symptom of the failure of society to bring them up as wholesome individuals.

United Nations Standard Minimum Rule

- (i) A Juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.
- (ii) The Juvenile justice system shall emphasize the well being of the Juvenile and shall ensure that any reaction to Juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offences.
- (iii) Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to

confront and cross examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

(iv) The Juvenile's right to privacy shall be respect at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling.

(v) In principle, no information that may lead to the identification of a juvenile offender shall be published.

(vi) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

(vii) Whenever possible, detention pending trial shall be replaced by alternative measures such as close supervision, intensive care or placement with a family or in an educational setting or home.

(viii) Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

(ix) While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they

may require in view of their age, sex and personality.

Some of the areas to be concentrated in this behalf

1) As soon as the complaint is registered and taken up for investigation, it is the duty of the investigating officer to satisfy himself as to the age of the accused. Satisfaction to be arrived by the police officer can be of many ways, which I am not inclined to elaborate for the purpose of our discussion.

2) When an accused is produced before the Magistrate and if the Magistrate entertains a doubt that the accused may be a juvenile, he should follow the procedure prescribed under Section 7 of the Juvenile Justice Act. Ascertaining the age assumes importance to avoid certain undesirable consequences. In the event an accused who is actually a juvenile is treated as an adult and remanded to prison, he is forced to stay along with adult offenders, who may also include hardened criminals. The failure of the Magistrate to follow Sec.7 will result in serious violation of the valuable rights of a juvenile.

3) In case, if the juvenile at the time of commission of offence is prosecuted as an adult offender, and convicted even at the stage when the case is heard, the Supreme Court has, on many occasions, remanded for ascertaining the age of the juvenile at the time of committing the crime and in the event of verification, it is found that he was a juvenile on the date of commission of offence, the entire trial is vitiated necessitating fresh trial by the Board.

4) One other area where the Courts should have the attention is that when more than one accused are involved in a case and one of the accused is juvenile and his case is split up, till such time the case against the adult offenders are completed, the records are not forwarded to the Juvenile Board, thereby the juvenile is kept in juvenile home for long number of years. This grey area must be attended to and a solution should be arrived. In my opinion, in such cases, as soon as the trial in respect of adult offenders is over, the records shall be immediately transmitted to the Board.

offence factor in juvenile behaviour – Board dealing with them must keep the following in mind.

- (i) Economic security does not necessarily guarantee emotional security and parents often end up meeting a child's wants but not needs and that the parents may be present in the home but not available to the children. Sometimes parents may be available to the children but only to impart knowledge rather than give the child of themselves, their values and their beliefs. If the family as controlling factor is lacking, children are more likely to violate society's norms.
- (ii) Delinquency is attributed to bad companions, adolescent instability, mental conflicts, extreme social suggestability, early sex experience, love of adventure, obscenity and violence in pictures, school problems, poor recreations, excessive street life, vocational dissatisfaction, poor physical structure, sudden impulses, bad habits obsessive education, ill health or premature puberty.

Sentencing Policy.

After the 2009 Act has come into force, the Board, though records the conviction, does not impose any sentence, but has to follow the procedure enumerated under Sec.15 of the Act, viz., to allow the juvenile to go home after advice of admonition, to participate in group counseling, to order the juvenile to perform community service, to order the parent of juvenile or the juvenile himself to pay a fine, if he is above 14 years of age and earns money, to direct the juvenile to be released on probation of good conduct and place him under the care of parent or guardian or other person and so on.

Judicial Attitude on Juvenile Prisoners

In *Munna v. State of UP* (1982) 1 SCC 546, Justice PN Bhagwati and Justice RS Pathak highlighted the miserable plight of Juvenile Prisoners – Juvenile delinquency is, by and large, a product of social and economic maladjustment. Even if it is found that these Juveniles have committed any offences, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter the Jail. Moreover the object of the punishment being reformation, we fail to see what social objective can be gained by

sending to jails where they could come into contact with hard criminals and lose what ever sensitivity they may have to finer and nobler sentiments.

III. Victims of Crimes.

Criminal law, which reflects the social ambitions and norms of the society is designed to punish as well as to reform the criminals, but it hardly takes any notice of by product of crime, ie. its victim.

Citizens have a right to life safely in their homes and to walk on the streets safely and there is a violation of that right every time a successful crime is committed against them. It is the duty of the state to ensure the safety of citizens. It is true, of course, that, however good the security, it may not be possible to prevent crime altogether.

The Poor Victims of crime are entirely overlooked in misplaced sympathy for the Criminal. Most of the times, the victims, instead of being looked after, are contributing towards the care of prisoners, who are well looked after in the prison. In fact, it is a secret truth in our criminal jurisprudence that the victims of crime seldom attract due attention.

The Code of Criminal Procedure, 1973, Sec.357 and Probation of Offenders Act, 1958, Sec. 5 empowers the court to provide compensation to the victims of crime. However, it is noted with regret that the courts seldom resort to exercising their powers liberally. Perhaps taking note of the attitude of the subordinate courts, the Apex Court directed the attention of all courts to exercise the provisions under Sec.357 of the Cr.P.C. liberally and award adequate compensation to the victim, particularly when an accused is released on admonition, probation or when the parties enter into a compromise. No doubt in recent years, the Supreme Court and High Courts by invoking Art.21 of the Constitution have tried to give some compensatory relief to the poor victims of illegal detention at the hands of the executive.

IV. Child Sexual Abuse and Child witnesses

Child Sexual Abuse

In recent times, a large number of sexual abuse of children particularly the children engaged in domestic service is reported. According to the report of State Crime Records Bureau, 2008, the child sexual abuse cases in Tamil Nadu are increasing every year. The report says that a child is sexually abused in Tamil Nadu every second day. 125 cases in the year 2006, 141 cases in the year 2007 and

265 cases in 2008 were filed. I am certain that the figures do not reflect the reality since many such cases are not reported.

Though Juvenile Justice Act recommended the setting up of Special Police wing to handle such cases, I understand that the recommendation has not been acted upon. In my opinion, if Special Courts are constituted to try such cases, they will be in a better position to understand the nuances of such cases, which cannot be clubbed with regular criminal cases. The approach of the investigating officer in matters like this requires expertise to investigate such crimes. One more aspect namely when a child sexual abuse cases are tried and the trial drags on for years, it will have a serious effect on the child and therefore, an amendment for a time stipulated trial on these cases is necessary.

Child witnesses

The competency of a witness is the condition precedent to the administration of oath or affirmation, and is a question distinct from that of his creditability when he has been sworn or has been affirmed. Under section 118 of the Indian Evidence Act, every person is competent as a witness unless the Court considers that he is prevented from considering the question put to him or from giving

reasonable reason because of the factor of age i.e.; tender or extreme age. This prevention is based on the presumption that children could be easily tutored and therefore can be made a puppet in the hands of the elders. In this regard the law does not fix any particular age as to the competency of child witness or the age when they can be presumed to have attained the requisite degree of intelligence or knowledge. To determine the question of competency courts, often undertake the test whether from the intellectual capacity and understanding he is able to give a rational and intelligence account of what he has seen or heard or done on a particular occasion. Therefore it all depends upon the good sense and discretion of the judge. The trial court is the best judge in the matter of deciding the competency of such a witness as the child himself/herself appears before the Court. The trial Court has the opportunity to see the witness, notice the witness's demeanors, record the evidence and thereafter, on scrutiny accept the testimony. In this context, it is useful to refer the decision of the Supreme Court in *Tahal Singh v. State of Punjab* AIR 1979 SC 1347.

Voir dire test:

Under this test, the Court puts certain preliminary questions before the child which have no connection with the case, in order to know the competency of the child witness. Some examples of the questions asked under this

test can be that regarding their name, father's name or their place of residence. The court should fully satisfy after hearing the answers to these preliminary questions, as to the capability of the child to understand these questions and to give rational answers thereto.

In this regard, I may also refer that a set of guidelines were issued by the Madras High Court to be followed by the Judicial Officers and they are:

- a) The Courts should treat the child as friendly as possible and avoid "secondary victimization" of children;
- b) Close circuit television and video-conferencing could be used to limit the strain inflicted on a child witness;
- c) While child witnesses are being examined, the judges shall ensure that the court room is not overcrowded and that there is a free atmosphere and, therefore, it is preferable that the proceedings are held in-camera;
- d) If the child has a language problem, then a lady who is familiar with the particular language may be allowed to remain in the court room;
- e) If the presiding officer feels, in view of the mental condition of the child, that a lady doctor or a social worker may be allowed to remain in the

court room, the judge shall freely invoke the powers vested with him in that regard;

f) The child witness may be made to sit down and if required, sufficient breaks may be given during the recording of evidence, with the child remaining in the room;

g) The Presiding Officer may also speak to the child informally so that the child feels self-assured and speaks freely;

h) In case of child sex abuse or rape, a screen or some such arrangements may be made where the victim or witnesses do not see the body or face of the accused; and

i) The question put in examination on behalf of the accused, insofar as they directly relate to the incident, should be given in writing to the presiding officer, who may put them to the victim or witness in a language which is clear and not embarrassing.

I may also refer a recently 10 year old child gave evidence in Mumbai terror attack case identifying the accused and that the child did not have any problem to depose.

V. Correctional Institution.

The above discussion relates to the Safeguarding Constitutional rights in criminal justice administration by Courts. Now, let me move on to Correctional Institution.

Corrective measures are carried out by several agencies, such as Prisons, Juvenile Homes, Borstal schools and authorities under the Probation of Offenders Act.

Prison

Prison is a vital arm of the Criminal Administration System. The Penal System in the modern times has undergone several changes and the focus is now on reformation and rehabilitation and not retribution and punishment. Human rights are inalienable and every inmate of the prison has a right to be treated with dignity. The inmates in prison are being provided with skills so that their labour will be usefully utilized and also afford an opportunity for them to earn during the period of incarceration. These skills will also be useful to them to pursue gainful occupation when they are finally released from the prisons.

Prison justice.

Justice delayed is justice denied. This is more so in criminal cases where the liberty of an individual is at

stake and in jeopardy. The irony is that in all such cases, it is the poor and the weak who are the victims of the criminal justice system and not the rich who are able to get away. The plight of undertrial prisoners came to the notice of the Supreme Court of India in the landmark case of *Hussainara Khatoon vs. State of Bihar* in 1979, wherein it was disclosed that thousands of undertrial prisoners were languishing in various jails in the State of Bihar for periods longer than the maximum term for which they could have been sentenced, if convicted. While granting a character of freedom for undertrials who had virtually spent their period of sentences the Court said their detention was clearly illegal and was in violation of their fundamental rights guaranteed under Art.21 of the Constitution of India. The court further said that speedy trial is a constitutional mandate and the State can't avoid its constitutional mandate and its constitutional obligation by pleading financial or administrative inability.

Unless there is introspection the part of all concerned with the criminal justice system, issues relating to jail reforms, improvement in the prisoner's condition, and better administration of justice will continue to remain on paper.

Prison reform

It is well recognized that as long as certain types of offenders are to be segregated from society in the interest of public safety, and are expected to return as better human beings than what they were incarcerated, the institution of prison will have to play an importance in the dispensation of justice.

Apart from the imperativeness of bridging the gap that exists between societal expectations and operational realities, the prisons administration has to run on the premise that its rehabilitative function can be accomplished only in an atmosphere that fosters human rights of persons in custody and generates among them a will to improve their quality of life. In this respect, the Supreme Court of India, discarding its erstwhile, hands off, doctrine in favour of a judicial intervention when the rights of prisoners are found in jeopardy, has already enunciated three basic principles (i) a person in custody does not become a 'non-person', (ii) a prisoner is entitled to all human rights within the limitations of imprisonment and (iii) there is no justification for aggravating the suffering which is already inherent in the process of incarceration. Accordingly, the Apex Court has issued a number of directives for prison authorities to afford

prisoners all such facilities for self improvement and correctional therapy as are consistent with their conditions of imprisonment.

Modernisation of prison administration.

Government should have to take conscious efforts for modernization of prisons to improve the infrastructure of prisons, living condition of prisoners and also to provide housing facility for the prison personnel.

VI. Differently-abled witnesses and Accused.

VII. Mentally Challenged.

