The Trial Procedure, Its Strengthening and Expeditious Justice

■ **Dr. M.N. Buch**

The procedure for investigation of offences, taking a decision to prosecute, presenting a challan to a court, cognisance by a court and the subsequent process of trial are all given in the Code of Criminal Procedure. So far as evidence is concerned, it would be governed by the Indian Evidence Act. From the point of view of the Police as the agency for investigating and subsequently prosecuting offences, Chapter XII Cr.P.C. is of utmost importance. The Police acquires the right to investigate an offence only after it records information about the alleged commission of a cognisable offence. Under section 154 Cr.P.C. such information is called the First Information Report, the information is reduced to writing and entered in the FIR book, a copy of the FIR is required to be made available to the informant and under section 157 Cr.P.C., if the officer incharge of a police station has reason to believe that in fact a cognisable offence has been committed, then a copy of the FIR and a report thereon has to be submitted to the Magistrate having jurisdiction. Every police officer acquires the authority to investigate an offence under section 156 Cr.P.C. after the FIR and though under section 157 (1) (b) the Station Officer may, for reasons to be recorded in writing, decide not to investigate the offence, in every other case he is required to proceed with the investigation.

For the purpose of investigation the Police can summon witnesses to appear before the investigating officer under section 160 Cr.P.C, under section 161 he may examine witnesses who, by law, are required to answer all questions correctly and truthfully and the statement may be reduced to writing or recorded by audio video electronic means, with the rider that under section 162 Cr. P.C. such statements may not be signed. The only use to which the statements can be put is to contradict a witness in court. However, section 164 Cr.P.C. may be used for the recording of a statement of a witness or confession of an accused, made voluntarily, before a Judicial Magistrate. Section 162 Cr. P.C. severely restricts the credibility of any statement made before the Police by witnesses under section 161 Cr. P.C. and, therefore, they are almost worthless. Section 165 Cr. P.C. permits a police officer to conduct searches relevant to the investigation in hand. As the investigation proceeds, under section 169 Cr. P.C. if the investigating officer finds that there is insufficient evidence to justify the forwarding of an accused person to a Magistrate he may release him. If, however, there is sufficient evidence the case would be sent to a Magistrate having jurisdiction. Under section 173 when the case is presented to the Magistrate by way of a challan all the details of the evidence, the investigation and its findings will be forwarded. Where cognisance is required the challan shall state so. If on the other hand, no prima facie case can be made out against the accused, then the report under section 173 would be by way of a request to the court to permit closure of investigation, such report being called a Final Report. It would then be upto the Magistrate to decide whether he will take cognisance of the case and proceed with the trial, order further investigation or allow closure. From now on the case would be transferred to the prosecution branch and the Judiciary.

This is not a beginner's lesson in police or judicial procedures because the objective of this paper is to find ways to expedite justice. There is a general expectation that where serious crime occurs the investigation, trial and judgement will be swift, perhaps even instantaneous. If that does not happen questions are raised about police inefficiency or collusion, judicial neglect

and undue delay. This often leads to public protest. Delay can be on account of laziness, incompetence, or lack of diligence, it can occur because clues are not readily available, indepth investigation takes time. There is also the possibility of collusion between the investigator and the investigated. Delays can also occur because judicial process itself is governed by law and High Court Rules and Orders (Criminal). Whereas a court is expected to ensure that the trial proceeds with due dispatch (this is what section 309 Cr.P.C. directs) there are many reasons why the court proceedings do get postponed or become lengthy. At no stage of the trial should the accused be made to feel that he is being denied a fair opportunity to present his case and, therefore, where necessary the court has to give a suitable adjournment. What is not permissible is the use of delaying tactics by the defence and the failure of the prosecution to pursue its own case vigorously. Trial courts must ensure that every such an attempt is dealt with firmly and the trial proceeds without undue interruption.

One major cause of protracted trials is that there is failure on the part of the courts and the Police to serve process on accused persons and witnesses alike. Where the defence case is weak every attempt is made by the accused and his legal team to ensure that process is not served and, therefore, in the absence of witnesses or, as often happens, of the accused himself on the grounds that he was unaware of court proceedings, the case is indefinitely prolonged. It is a well known fact that greater the delay the more likely are the witnesses to forget the sequence of events to which they were witness and, therefore, their statements under cross examination may become contradictory or at variance with each other. If this creates a reasonable doubt about the culpability of the accused the benefit of such doubt will go to the accused and he will be acquitted despite the fact that he may well have been guilty of the offence. One of the main reasons for the very low conviction rate in Indian courts is that because of delayed recording of evidence the prosecution witnesses lose credibility and, therefore, the case of the prosecution is not proved beyond reasonable doubt. When this becomes a frequent phenomenon the public becomes disillusioned with the legal system, either takes things into its own hands by acts resembling lynch law, or forces the Police into taking short-cuts, resulting in fake encounters. Neither has a place in a society of laws, but if society wants to eliminate them it must address the fundamental question of ensuring expeditious justice without compromising on the basic principle of law that an accused is deemed to be innocent until proved guilty.

How does one achieve such a happy state of affairs? Let us begin with start of the legal process, the FIR and the investigation of an offence. The Police in India is very short handed. For example, in Madhya Pradesh there is one policeman for approximately 834 citizens, whereas the international average in developed countries is one policeman to about 165 citizens. In order to achieve a ratio of one policeman for 250 citizens the Madhya Pradesh Police would have to triple its strength. In a greater or lesser degree this is true of almost all the states in India. Lack of adequate manpower means that we cannot move towards separation of law and order and other police functions from investigation functions and an overworked, over strained police is hard put to finding the manpower and the time for consistent investigation of crime. Therefore, investigation itself is not from day-to-day because the same officer may have to rush for VIP duty on one day, law and order duty on another day, with investigation of an offence being fitted in to what spare time is available. It is a fact of which we may take due notice without further evidence that where investigation is relentless and accused persons are under constant pursuit, clues come to light more easily and the Police is able to gather information about who has committed an offence and evidence of his culpability. An investigator does not have to be brilliant, but he has to be diligent, systematic and persistent. Under the present system it is only

high profile crimes which receive such attention, whereas all other offences are dealt with on the basis of as and when an investigating officer is available.

If we want justice to be swift we must attend to the investigating wing of the Police and ensure that it has adequate and properly trained manpower. To this must be added the need to develop our forensic capabilities so that investigation of crime becomes more and more scientific. The Soli Sorabji Committee on police reforms has suggested that the investigation in every heinous offence must be accompanied by a proper forensic report from a forensic science laboratory. At present forensic science is neglected in the matter of police priority. The laboratories are few and far between and in the majority of cases either the forensic report is so delayed that it becomes meaningless, or it is perfunctory, or it is downright misleading. If every police station had a scene of crime team and adequate forensic backing many crimes would quickly be solved on the basis of forensic indications or forensic evidence.

Even with all the scientific backing, solving a crime requires what can best be called plodding police work. A team searching the neighourhood of an offence, talking to people to collect impressions, recording statements and then following up clues is the backbone of investigation. Local knowledge of the modus operandi of criminals and the identity of people who might be involved in a particular type of crime, rapport between the police station staff and the citizens so that anything unusual is noticed and the information conveyed to the Police, are very important in the prevention and investigation of offences. This is where the Crimes Records Bureau would be of great help because accessing its files could narrow down the search for a criminal. This is where the training and orientation of every single policeman down to beat constable has to be upgraded so that IT and other modern tools of communications are universally used by the Police. This would include radio communication, hand held beat to police station communicators, personal mobility and use of internet to access information, all of which have to become tools as important to the Police as the rifle or the baton. This is an area where much needs to be done because if IT becomes an important tool of investigation the speed of investigation is substantially increased. This should be extensively used by superior police officers to monitor and guide investigation under sections 36 and 158 Cr.P.C. This would encourage honest and quick investigation of offences.

In order that there should be successful prosecution there has to be constant interaction between the investigating team and the prosecution branch. Formerly the prosecution branch in the magisterial courts was under the Sperintendent of Police, whereas in the Court of Session a government appointed public prosecutor conducted cases. The panel from which the public prosecutor and additional public prosecutors would be appointed is prepared by the District Magistrate in consultation with the District and Sessions Judge. Under section 251 A Cr.P.C. the State Government is now permitted to appoint a Director of Prosecution under the Home Department. This post is independent of the Police and generally the Director of Prosecution is a judicial officer on deputation from the High Court. A major complaint of the Police is that now the prosecutors no longer coordinate with the Police and this is adversely affecting the successful pursuit of court cases. I do not think that this is a matter which cannot be sorted out and a system of constant mutual consultation cannot be established in which the investigator, the Police and the prosecutor and the Public Prosecutor for the district cannot coordinate with each other. District Attorneys in the United States and the Crown Prosecuting Service in the United Kingdom do not seem to face a similar problem and we should be able to evolve our own

system. I am not saying that the complaint of the Police is necessarily correct, but the issue should be addressed and amicably settled.

Let us come to the issue and service of process, which is done largely by the court mohrrairs, or policemen attached to the Reader of the Magistrate or Judge to assist him in this task. In the present day world of rapid communications surely the High Courts can develop a system whereby courts can issue summons, etc., by SMS, through internet or by various other processes of electronic communications. If a record of such communication is kept, again electronically and if the messages are shown to have been received that should be legally deemed to be service of process, with coercive means becoming permissible for default. Courts may also be allowed to use courier services, with payment being made only on every process which is duly served. That would be a powerful incentive to ensure service of process. In any case it is disgraceful that cases should be delayed on account of failure of service.

There are two other extremely important reforms which must be put in place in order to expedite justice. The Police should be allowed to have the statements of key witnesses recorded under section 161 Cr.P.C validated by a prosecutor, including a Public Prosecutor, Additional Public Prosecutor or Assistant Public Prosecutor. Such statements should be signed by the witness and the prohibition under section 162 Cr.P.C. should not apply. Similarly under section 164 Cr.P.C. the statement of a prosecution witness may be recorded by the Public Prosecutor of the district or an Additional Public Prosecutor duly empowered by him in writing. This should be deemed to be the equivalent of an affidavit and should be read into evidence as part of the examination-in-chief. Of course there can be further examination and certainly there would be cross examination during the course of trial, but the witness would be bound by the evidence recorded by the Public Prosecutor under oath and this means that whereas delay in trial will not affect his evidence because he does not remember what actually occurred long ago, he would also be liable to a charge of perjury if he resiled from his earlier statement. My submission is that this simple reform will help the prosecution in bringing on record the evidence of prosecution witnesses examined soon after the incident. Now deliberate delay would be of no help to the accused because the examination-in-chief would also at least partially be on record in the case.

The accused is deemed to be innocent till proved guilty. He also has the right to present his case. However, I do not know if the law permits him to go on delaying the case indefinitely because that goes beyond the right to defend himself. Unless bail is denied normally an accused person would be enlarged on bail. The dictionary meaning of bail as given in the New Oxford Dictionary of English is, “the temporary release of an accused person awaiting trial, sometimes on condition that a sum of money is lodged to guarantee their appearance in court”. Under section 436 Cr.P.C. a person arrested in a bailable offence is entitled to bail in the police station. Under section 437 Cr.P.C. a Magistrate may give bail, except in cases where the offence is punishable with death or imprisonment for life. Under section 438 the High Court or the Court of Session may grant bail to a person apprehending arrest. Under section 439 Cr.P.C. the High Court or the Court of Session has special powers to grant bail even in a case punishable with imprisonment for life. In any case bail is neither discharge of an accused or his acquittal. It is a substitution of physical custody by a legal undertaking that the accused will present himself before a court or an authority which the court directs, as and when he is called upon to do so. If the accused deliberately violates the conditions of bail, does not appear when required to do so or otherwise tries to delay court proceedings, then under section 446 A Cr.P.C bail may be cancelled, the bail bond forfeited and the accused taken into custody. My submission is that if the

court is satisfied that an accused person is deliberately delaying the trial of a case then it should substitute bail by physical custody and hold the accused in judicial custody while proceeding to try the case from day-to-day so that it is expeditiously concluded. This would be a strong deterrent to the practice of using non-appearance by the accused as a means of delaying trial.

Most judges have a complaint that defence counsel do not appear or seek adjournment on the ground that they have an overloaded cause list and on the date fixed for hearing they were busy in another court. Generally speaking, courts do seek the convenience of learned counsel when fixed the next date of hearing and it is the duty of every advocate to help the court in its proceedings by adhering to the fixed schedule. If this calls for advocates having a smaller cause list or making adjustments so that advocates appear on the due date, let this be done because after all the court itself is bound by the provisions of section 309 Cr.P.C. which discourages adjournments and encourages courts to hold day-to-day hearing. Many judges are hesitant in refusing an adjournment because they are afraid that members of the Bar will complain against them to the High Court and generally High Courts tend to be excessively lenient to the Bar. It is for the High Courts to correct this impression and support judges who adhere to the principle of expediting justice. The members of the Bar must also realise that they are officers of the court whose job it is to ensure a speedy and just trial and, therefore, they should be appreciative of judges who insist on the trial being conducted with due dispatch. If unnecessary adjournments are avoided the courts could move much faster and this is in the interest of all of us.

Two or three things more before I conclude. The first is that the High Courts and government must lay down norms of the number of Magistrates and Judges necessary to deal with cases and once a proper ratio of judge to number of cases is established, the creation of posts should be virtually automatic. If there is a sufficiency of judges, if service of process is expeditious, then cases will move forward much faster, the guilty will be punished and the innocent will be acquitted. To help in the process there must be much wider adoption of recording of evidence through audio visual means, such as video conferencing, skype and other modern means of communications in which both the prosecution and the defence examine a witness without his physical presence in court. The Supreme Court and the High Courts must totally computerise old cases which can or should be quoted as precedents so that reference to judicial decisions which have the force of law is made available to every judge through his computer. This would help prosecution and defence counsels to give suitable references to their own arguments without having to search through huge volumes of past cases. In other words, let the courts modernise and let e-governance be extended to courts also.

There is no place for lynch law in India. Speedy trial, credible recording of evidence and judgements in cases without delay would go a long way in restoring our faith in the judicial system

***