



Justice Md. Hamidul Haque

**“Some Loopholes and deficiencies in
the existing laws
relating to trial of Criminal Cases”**

Justice Md. Hamidul Haque
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The observations made by our highest courts reported in 4 MLR (HC) 87 clearly depict the present day nature of the crimes, the flaws in the investigation and recording of statements of the witnesses. There cannot be any controversy regarding the principle that an accused should get a fair trial. But what about the right of a person to get fair justice when his father or his son or his near and dear one is brutally murdered? The prevalent law is designed only to give protection to the accused; there are enough safety measures in the procedural law to ensure fair trial, to ensure that an accused is not prejudiced in any way. Is it not the proper time to balance the rights of both parties - the person who has been wronged and who has done the wrong? But it is strange that the civil society is little concerned about this problem. A person whose father or son has been murdered has a right to get justice. What is justice to him? He will get justice if the murderer is brought to book and punished. But when due to flaws in the procedural law, he is deprived of getting justice what will be his reaction? His confidence will be eroded, he will be totally frustrated and one will not wonder if he, on desperation, takes law in his own hand. Will such a situation be good for the society? The answer is emphatic No'. So, something must be done. What is necessary is proper amendment of the procedural law and Evidence Act to suit the present day need and to cope with the changed situation.

As regards the loopholes in the investigation of cases, I am of the opinion that the early the loopholes are removed, the better for the society. About the flaws at the investigation stage, the following observations of the High Court Division in the case reported in 4 MLR page 87 (para 12 and 14) appears to me very much appropriate:

"We have come across many cases in which due to faulty investigation accused get benefit of reasonable doubt in spite of consistent and uniform evidence of prosecution witnesses about the occurrence. As a result people of our country have been losing faith in the present system of administration of criminal justice mainly due to the failure of the police to properly investigate the case and collect the evidence."

"It is high time that the system of the investigation of the criminal case by the police alone should either be abandoned or completely reformed. Otherwise there is no change of retrieving the system of criminal justice from the malaise it has been suffering from."

Now it is felt by almost all who are concerned with administration of Criminal justice that reforms should be made first at the investigation stage. It has been found that investigation which is not made mainly by officers of the police station concerned, is not satisfactory. Such officers are not specially skilled to hold investigation which has become a very complicated task now a days. Majority view is that there should be a

separate body entrusted with the duty of investigation. A separate cell or a separate department within the police department will not be sufficient. So, a separate and independent investigation authority may be set up. This may be known as National investigation Commission headed by a Chairman. This Commission shall be a statutory body. The district level, thana level officers and even the Investigators should be recruited through Public Service Commission. Details may be worked out to ensure interference-free working condition for the officers and investigators of this Commission.

I have mentioned earlier that nature of the crimes have changed as result of which, the investigators must be highly skilled and trained. Different types of grave offences are taking place, some of the crimes are committed by groups having connection with global crime would such as drug business, smuggling of arms, gold, currency, trafficking in women and children, terrorism etc. Without proper training, ordinary investigators will not be in a position to handle such cases. Recently several incidents of bomb and grenade attacks took place and it has been reported that our investigators do not have the expertise and equipment to handle these cases. So, steps should be immediately taken to modernize the training system of the investigating staff and officers - some of them also should be sent to countries where the investigators already attained high skill and expertise in the relevant field. Such arrangement of training may be made even before constituting any separate independent investigation commission.

There shall also be a separate Prosecution service - The members of the service also shall be recruited through Judicial Service Commission for which necessary amendment may be made in Judicial Service Commission Rules. In addition to conducting criminal cases in different courts, the members of the prosecution service shall give necessary advice and guideline to the investigators specially in respect of important cases so that flaws, if any, in the investigation can be detected at the earlier stage. Only the prosecutors have full knowledge about the flaws in the investigation because such flaws are brought to the notice of the court at the time of trial by the defence to reap benefit of such flaws. So, if the flaws are detected at the initial stage in consultation with the prosecutors, remedial measures could be taken at that stage. Provisions should be made in the relevant rules for a monthly meeting of the prosecutors, investigators, representatives of the police department and district administration for monitoring the investigation of important cases. Emphasis should be given in such meetings about starting of investigation immediately after receipt of the FIR. Failure to : (a) start investigation immediately after receipt of FIR; (b) examine witnesses within reasonable time; (c) seize alambats in time; (d) make arrangement for medical examination of victim (specially in rape cases, acid burn cases etc.) (e) make arrangement of chemical examination etc. are the reasons which damage the prosecution case. These defects can easily be removed through proper monitoring.

I am fully conscious of the three universally accepted principles:

- 1) that the accused shall be presumed to be innocent unless he is found guilty on cogent evidence;
- 2) that a person cannot be compelled to be a witness against himself;
- 3) that a person accused of an offence shall be given all opportunities to defend himself i.e., one should get fair trial.

My effort is to add another principle:

the aggrieved or the victim of a crime shall also get fair justice along with the accused.

I have tried to show that some of the provisions of the existing laws, to some extent, hinders the rights of the victim though ensures the rights of the accused. My purpose is not to take away rights of the accused, but to suggest ways and means by which at the same time, the rights of the victim may also be protected. This balance may be struck only by making some changes in the existing laws.

I am also fully conscious of the abusive exercise of power by the police which I have elaborately discussed in the case of Bangladesh Legal Aid and Services Vs. Bangladesh (reported in 23 BLD 115). The questions of arrest without warrant, taking of remand, custodial death, torture by police etc. were involved in this case and suggestions and recommendations were given, even some directions were given to check the abusive exercise of power by the police. Some amendments in the relevant laws have also been suggested. Some of these suggestions and recommendations if implemented will also help the victim or the aggrieved to get justice and the person arrested may also be made accountable to some extent or he may be required to explain his position. For example, recommendation was made that the police officer after arresting a person without warrant, shall record the reasons for the arrest in his diary and shall furnish a copy of this within three hours to the arrestee and if the arrestee is not arrested from his residence, the police officer shall inform the nearest relation of the arrested person over phone or through messenger within one hour or bringing him the police station. If this recommendation is followed it will be a safe guard against false or whimsical arrest. In other words, there will be some recorded reasons for every such arrest. In such circumstances, it cannot be considered as unjust if the arrested person is required to explain his position after his arrest. The recommendation also includes that the arrested person should be allowed to consult a lawyer before he is forwarded to the magistrate. So, if the arrested person is questioned by the police to give account of anything found in his custody or to explain his movement or why he was in the place of arrest at that time etc. he will not be prejudiced.

I like to give another suggestion which relate to giving compensation to the victim or an aggrieved person. In section 15 of the Nari-O-Shishu Nirjatan Damon Am, 2000 it is provided that if fine is imposed for any offence as mentioned in sections 4 to 14 of the Am, the tribunal may treat the fine imposed as compensation to be paid to the victim or the aggrieved person. Procedure for realization of fine is mentions in sub-section (4) of section 4 and also in section 15. It will be very much proper if provision for compensation is made clearly in the other penal laws. Only punishment or imprisonment even death penalty may not compensate the loss suffered by the victim or his family. For example, when the only break-earner of a family is murdered or permanently physically made crippled, the death penalty or life imprisonment of the accused may give only mental satisfaction to the members of the family of the victim but certainly such punishment of the accused cannot feed the hungry mouths of the members of that family. Another example may also be given. Now, often we find from the reports published in news papers that many causalities take place due to rash driving. Maximum punishment under section 304B of the Penal Code is imprisonment for three years but there is no provision for giving compensation by the owner of the vehicle or by the company owning the vehicle to the members of the victim's family nor to any survivor who has been made physically crippled due to accident. In such cases and in cases of similar nature, in addition to the punishment given to the accused, if provisions are made in the respective law to give adequate compensation to the victim and members of his family, the grievances of the victim may be redressed to some extent. Even when death penalty is imposed on the accused,

provisions should be made for realization of the compensation from the property left by that convict. Procedure for realization may be made in the manner as provided in subsection (4) of section 4 and in section 15 of the Nari-O Shishu Nirjatan Damon Am, 2004.

As a result of a long movement, in the United States, England, New Zealand the rights of the victims to get compensation either from the offender or from the state fund has been recognized by making necessary enactments. In the United States this movement started as far back as in the year 1960 and the state of California was the first State to provide compensation to crime victims. Subsequently, Federal Acts such as Victim and Witness Protection Act, 1982, the Victims of Crime Act, 1984, Federal Justice Assistance Act, 1984, Child Abuse Victims Rights Act, 1986 etc. were passed. Victim Rights Clarification Act of 1997 has permitted victim to observe the whole proceeding of criminal trial and victim has been given a right of addressing the court during sentencing proceeding. I have referred to all the above facts to emphasize that there is large number of people who are now very much conscious about the rights of the crime victims and different countries already made enactments to ensure rights of the crime victims. Even the U.N. General Assembly in 1985 passed International declaration on the Rights of Victims of Crime and the Abuse of power. But we are still lagging behind about taking measures to ensure rights of the victims of crime though the other countries already have taken such measures. So, my suggestion is that such measures may be taken without any delay and necessary amendments be made in the existing laws or a separate law may be enacted.

I am of the opinion that if enactment is made to pay adequate compensation to a victim or members of the family, this will also act as a deterrent.

To sum up, my recommendations are as follows:

1) There shall be a separate Prosecution Service, the members of which shall be recruited through

Judicial Service Commission, necessary amendment may be made in the Judicial Service Commission Rules, 2004.

2) There shall be a separate independent investigation commission and the investigators and other officers shall be appointed by the Public Service Commission. Chairman and two other members shall be appointed by the Government for a fixed period of 4/5 years. Provisions should be made so that they may work independently.

3) Investigators shall be given special training in criminal investigation which is considered as an art and science because of the increase in number of organized crimes and globalization of crime.

4) Modern scientific equipments be provided to the investigators and special laboratories including a laboratory for DNA test shall be set up without any delay.

5) Investigation shall be started within twenty four hours of receipt of the FIR or order of the Magistrate / Court.

6) All material witness including eye-witnesses shall be examined as far as practicable on the date of first visit of the Investigating officer at the place of occurrence.

7) Important details of examination of such witnesses be reduced into writing, the questions put to the witness and the answers given by him shall be clearly noted.

8) Statement of eye-witnesses and material witnesses in cases of grave offences may be recorded in audio cassette, if that is not possible, under section 164 of the Code such statements shall be recorded.

- 9) Statement of all important witnesses shall be reduced into writing, after reducing into writing, the statement shall be shown to the maker and if he approves it to be correct, his signature shall be obtained.
- 10) Power be given to the police-officer to ask relevant questions to a person arrested by him about the offence, about any object found in his possession, if he is arrested from the place of occurrence about his presence in that place or where he was at the time of occurrence of etc. Before asking such questions, the person shall be cautioned that court may draw any presumption which the court may deem proper if he remains silent and does not answer the questions.
- 11) Similar power may be given to the Investigating officers.
- 12) All the police officers and the investigating officers should be clearly instructed not to torture the accused either physically or mentally or otherwise.
- 13) Power may also be given to the court to ask the accused at the time of framing charge against him whether he shall disclose his defense on which he likes to rely at the time of trial, and after conclusion of the evidence for the prosecution, whether he shall give evidence in support of the defense which he disclosed at the time of framing charge. Such questions may be asked by the court only after giving caution to the accused that if he refuses to disclose his defense or chooses not to give evidence, the court may draw such inferences which may appear proper.
- 14) Two sections may be added in chapter XX and XXII of the Code in the light of suggestion no. 13.
- 15) There shall be monitoring committee in each district comprising of Public Prosecutors, supervising officers of the investigators, investigators, one representative each of the district administration and police administration.
- 16) There shall be pre-trial conference in which the Public Prosecutors and Investigators shall discuss the questions relating to leading evidence in a case, conducting the case attendance of witnesses, the defense case, the weak sides of the prosecution case, the points on which the defense is likely to assail the prosecution case etc. In this meeting, strategy shall be determined to conduct the case most efficiently and effectively. Such meeting shall be held at least fifteen days prior to trial date of a case.
- 17) Steps be taken for protection of the key witnesses when there is any intimidation from the side of the accused.
- 18) Section 103, 161, 162 of the Code Criminal Procedure and section 27, 103, 105, and 106 of the Evidence Act shall be amended in the light of the suggestions given.
- 19) In the light of the suggestions given, suitable provision may be added in the Police Act, 1861 and Police Regulations of Bangladesh as to the power of police officers and investigation officers.
- 20) Provisions should be made in the existing laws for payment of adequate compensation to the victim or members of the family of the victim in the light of suggestions given or separate enactments may be made providing such compensation.
- 21) Measures in the light of the suggestion given should be taken to save the witnesses form harassment and intimidation. A separate enactment for the purpose may also be considered.

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