THE PLIGHT OF TRIAL IN ABSENTIA: AN ANALYSIS IN REFERENCE TO THE OPERATIVE CRIMINAL PROCEDURAL LAWS

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ABSTRACT

The following article deals with the litigious question of Trial in Absentia, broadly expounding on the concept of trial conducted in the absence of the accused, its implications and the exigency in modification of the relevant criminal procedural law in India. This article acknowledges the subsisting dilemmas encountered by the Indian Judiciary in determining whether the accused's absence is wilful or subject to genuine reasons. The authors have made a cumulative attempt to explain the divergent procedure assumed by the Indian Judiciary in dealing with the absconding accused persons. Additionally, the article explores varied international perspectives on the subject matter citing judicial interpretations of the concept and the associated policies of different countries. It also deliberates on the available legislative provisions in light of the issue and its legal scope in the national and international domain.

The Indian Judicial System embarks on several impediments in the course of promoting and advocating justice because of the undue delays in disposal of a case. Unless the procedural impasse causing postponements are identified and redressed, mere augmentation of the human resources and existing legal avenues cannot usher the constitutional vision of expeditious justice. The presence of the accused during the trial is of paramount importance for the attainment of fair justice. However, the courts might dispense with the attendance of the accused in exceptional circumstances and the situations prompting the courts to undertake such steps have been extensively discussed through this legal discourse. The present work thus, is a modest effort to study the necessity of the complex issue that requires a delicate balance between the rights of the accused and interests of justice to proceed with trials in absence of the accused, the gaping lacuna in the criminal procedural laws of India and the suggestive legal measures in dealing with the same.

INTRODUCTION

The term '*Trial in Absentia*' is a Latin terminology precisely implying a criminal proceeding held in absence of the accused person. In an ideal scenario, the accused is provided an opportunity to challenge the evidence adduced against him in the trial but, if the same opts to wilfully absent himself or absconds or surrenders his right to be present, waives his inherent fundamental right of being represented during the trial. As a consequence, futile attempts to deliberately frustrate the functioning of juridical systems could boomerang against the accused person, on appropriate adjudication by the court.

The criminal justice system has been conscientious and scrupulous before convicting an accused for any alleged crime. A well-known adage customized into criminal justice is 'Let hundred criminals be set free but no innocent person must be incriminated'. The rationale behind penning down such exhaustive criminal legislations embodying conventional principles and judicial doctrines is, to protect the rights of the accused and setting the provision of benefit of doubt in order to uphold fairness and eliminate arbitrariness in the legal framework. One of the cardinal principles of natural justice ensuring the accountability and transparency in the operative system is-audi alterem partem that mandates the court to listen to both parties namely, the applicant and the opposing parties before the pronouncement of a reasoned decree.

"Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial- The interests of the accused and the public and to a great extent that of the victim to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences…..It is a constant, ongoing development process continually adapted to new changing circumstances, and exigencies of the situation-peculiar at times and related to the nature of crime, persons involved- directly or operating behind, social impact and societal needs and ever so many powerful balancing factors which may come in the way of administration of criminal justice system."[1]

However, in the context of the mooted issue of an absconding accused, the postulates cannot be applied strictly to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation"; and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.[2]

[1] National Human Rights Commission v. State of Gujarat and Ors. (2009) 6 SCC 342.
[2] Union of India v. W.N. Chadha (1993) SCC (Cr) 1171.

OBJECTIVE

The intent of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'CrPC') is to prescribe an efficacious procedure for the prosecution of an accused by bringing him/her to discipline, if proven guilty. Any defect or discrepancy cannot defeat or undermine the principles of justness, fairness and reasonableness, on which it has its foundation or, be so pedantic so as to frustrate the object of furthering the ends of justice.[3] What is the range and limits of procedural fairness is no longer res integra and has been settled by a long line of judicial pronouncements on this point.[4]

Criminal Law is settled on the point that if there is substantial compliance with the procedure and the accused is not prejudiced and has got a fair opportunity to defend himself, the trial is not vitiated unless the accused can exhibit evidence of substantial non-compliance leading to prejudice to his defense.[5] In *Jayendra Vishnu Thakur v. State of Maharashtra and Another*[6], the Court held that the rights of accused are statutory in nature and form a part of the fasciculi of fair trial rights which are recognized by Section 273 of the Code of Criminal Procedure, 1973 and instruments like International Covenant on Civil and Political Rights, of which India is a signatory. Article 14(3)(d) of the International Covenant on Civil and Political Rights encapsulates the aforesaid statutory rights-

In the determination of any criminal charge, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) *** *** *** (b) *** *** *** (c) *** *** ***

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"[7]

[3] Dr. M.R. Reenivasa Murthy, Dr. k. Syamala and Mr. Abhinav Prakash, *A Study On Major Bottlenecks In Procedural Laws Affecting Expeditious Conclusion of Criminal Trials and Measures needed to remove such Bottlenecks*, Judicial Academy Jharkhand Accessible at https://jajharkhand.in/wp/wp content/uploads/2017/05/major_bottlenecks.pdf
[4] Maneka Gandhi v. Union of India, AIR (1978) SC 597.
[5] Supra 3.
[6] 2019 SCC OnLine SC 523.
[7] Kader Khan v. State of West Bengal (2022) SCC OnLine Cal 1038.

RELEVANT LEGISLATIVE PROVISIONS AND CASE LAWS IN INDIAN CONTEXT

Elucidating upon the applicable legislative provisions, the term 'absconder' has not been defined in the CrPC but finds its relevance in other provisions of criminal law like Sec. 87[8], 90(a)[9] of CrPC and Section 172 of the Indian Penal Code, 1860[10] (hereinafter referred to as the 'IPC'), where an absconder is said to be the person who designed to make himself inaccessible to the processes of law. The trying Courts undertake a significantly distinct approach in the cases of absconding accused which has been illustrated as hereinunder:

a) It has to be established beyond any reasonable doubt by the prosecution that he was available at the time of commission of the alleged offense but thereafter ceased to be present after the occurrence of the such crime.

b) When the Court issues summons directing appearance of the accused and thereafter if the Court is satisfied with the material evidence in support of deliberate regular abstinence from attendance in court, the same court might proceed under Sec. 82 of the CrPC[11].

c) Arrest warrant may be issued against the accused by the court in the event of non-appearance without any reasonable excuse. Furthermore, if the Court has reasons to believe that the accused may attempt to delineate any immovable property within its local jurisdiction or beyond, the Court could direct attachment of such property in pursuance to Form 7 of Second Schedule of the CrPC. The direction is in order to compel appearance of the accused, as has been entailed under Sec. 83 of the CrPC[12].

d) Likewise, if the case involves a single accused person against whom proceedings under Sec. 82 of the CrPC have been initiated, the Court shall mandate its shift from the relevant register to the register of long pending cases.

e) In the event of the non-availability of all accused persons within a reasonable time, the Court might split up the case to avoid unnecessary delays in enquiry and trial of the accused persons that are in attendance, in congruence with the equity principles. If the absconding accused

[8] See Sec. 87 of the CrPC, 1973.
[9] See Sec. 90(a) of the CrPC, 1973.
[10] See Sec. 172 of the IPC, 1860.
[11] See Sec. 82 of the CrPC, 1973.
[12] See Sec. 83 of the CrPC, 1973.

appears subsequently and is produced before the Magistrate Court, it would comply with the provisions of Sec. 207 and 208 of the CrPC[13] and commit the case to the Court of Sessions indicating the number assigned for the split-up case.[14]

f) The Trial Courts are also insisted to effectively put Sec. 299 of the CrPC to practice which is not only an exception to the ordinary rule that, evidence in a criminal trial is to be recorded in presence of an accused but also, a departure from the general rule of relevancy engrafted in Section 33 of the Evidence Act[15] which permits the evidence of a dead witness to be used against an absconder in a successive trial. In this regard, reference may be drawn to the *Nirmal Singh v. State of Haryana* case[16] which has upheld the contemplated exception.

g) In order to resort to Section 299(1) of the CrPC, the prosecutor is to establish two pre-conditions: -

i) That the accused person(s) have absconded and there is no imminent possibility of arrest of those person(s) under any circumstances and accordingly adduce materials in evidence to prove the same in the committing/trying Court during the trial of the other accused persons in the mentioned case. Thereafter, the prosecution can pray for a direction of the same court to record the evidence of the witnesses to be recorded, against the absconding accused as well.

ii) When the accused is arrested and put up for trial, if deposition of any witness is intended to be used as evidence against the accused in any trial, then the court must be satisfied that either the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without, an amount of delay, expense or inconvenience, which would be wholly irrational.[17]

h) The right to cross-examine a witness is a natural and statutory right of the litigating parties under Sec. 137 and Sec. 138 of the Evidence Act[18]. In the event of the accused wilfully waiving off such valuable right by not representing himself despite being adequately informed, the accused would have to undergo the necessary consequences for such misconduct.

[13]See Sec. 207 and 208 of CrPC, 1973.
[14] Crl. O.P. No. 2895 of 2018.
[15] See Sec. 33 of the Evidence Act, 1872.
[16] (1996) 6 SCC 126.
[17] 1 (2000) 4 SCC 41 10
[18]H. Aarun Basha v. State (2018) SCC OnLine Mad 12845.

i) Notwithstanding the above, another relevant Section 512 of CrPC of 1898[19] where the presumption of the accused absconding is put on record by the Magistrate on citation of clear evidence, corroboration of negative prospects of arrest of the accused on immediate basis also requires the Court by procedure to recite such order that the Learned Magistrate/ Judge finds the foregoing to be the case.[20]

j) Just as importantly, the Court before transferring a case in the Register of long pending cases, must be satisfied with sufficient compliance made under Sec. 87, 88 and 512 of the CrPC that administers the process of summoning the accused except cases involving irregularities under Sec. 465 and Sec. 466(1) and (2) of the CrPC[21].

TRIAL IN ABSENTIA in INTERNATIONAL SPECTRUM

A catena of judgments in favour of trial being commenced in absence of the accused persons have been cited, to uphold its widespread constitutional acceptance in the other countries. In *Poitrimol v. France, the European Court of Human Rights* (hereinafter referred to as the "ECtHR") declared, "Such a waiver (of the right to appear and to defend himself) must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance."[22]

Subject to procedural safeguards in ECtHR jurisprudence, trials in absentia are permitted in certain prescribed circumstances as follows:

(a) The accused must have knowledge of the indictment and proceedings (which must be demonstrated by the prosecution), and must have voluntarily chosen to be absent from the hearings and unequivocally states the same before the court;

(b) The accused by his behaviour implies that he waived his right to be present i.e., when a defendant is absconding;

(c) The defendant has been expelled from the courtroom for disruption or misconduct.

However, it is pertinent to mention in this context that a defendant's silence after attempted

[19] See Sec. 512 of CrPC, 1898.
[20] Ibid
[21] See Sec. 465 and Sec. 466(1) and (2) CrPC, 1973.
[22] [1993] ECHR 54.

notice does not constitute a waiver.[23]

In *Regina v. Jones*, the House of Lords held that, when an accused deliberately chooses to absent himself from trial, his complete indifference to the consequences of his actions would lead to an inference of waiver of his right to be present and legal representation during trial. Hence, discretion of the Court to try an absconder in absentia, when exercised with due care and circumspection, cannot be said to be incompatible with common law or Article 6 of the European Convention of Human Rights.[24]

R v. McHardie[25] and *R v. Serrano*[26], established that the judge has discretion as to whether to continue a trial where an accused has voluntarily absented himself or herself by escaping. Such situation has been dealt by the courts in Australia as waiver rather than non-exercise of right. Australian common law recognizes the right of an accused to be present during the course of his or her trial, but that right is not absolute in nature and can be waived. Sec. 22(2) (d) of the Human Rights Act, 2004[27] and Sec.25 (2) (d) of Charter of Human Rights and Responsibilities Act, 2006 (VIC)[28], in the Australian Capital Territory and Victoria also guarantee the right to be tried in person, and to defend oneself personally or through legal assistance.

In the event of errors made during trial, *B v. France*[29] propounded the guaranteed right to a retrial where there is any ambiguity surrounding an accused's knowledge of proceedings and a trial in absentia resulting in a conviction. The state must guarantee a retrial in the event of the defendant being apprehended subsequently lest the trial in absentia shall become illegitimate and unlawful.

The Bangladesh Criminal Procedure Code, 1958 amended its legislation to incorporate the provisions relating to trial in absentia. Sec.339B of the Act, 1958 provides that:

"(1) Where after the compliance with the requirements of 142 section 87 and section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order

[23] Colozza v. Italy, App. No. 9024/80, Eur. Ct. H.R., ¶ 28 (1985)
[24] [2002] UKHL 5.
[25] [1983] 2 NSWLR 733.
[26] [2007] VSC 209.
[27] See Sec. 22(2) (d) of the Human Rights Act, 2004.
[28] Sec.25 (2) (d) of Charter of Human Rights and Responsibilities Act, 2006 (VIC).
[29] [1992] ECHR 40.

published in at least two national daily Bengali Newspapers having wide circulation], direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence.

(2) Where in a case after the production or appearance of an accused before the Court or his release on bail, the accused person absconds or fails to appear, the procedure as laid down in sub-section (1) shall not apply and the Court competent to try such person for the offence complained of shall, recording its decision so to do, try such person in his absence."

According to Sec.339B, in spite of issuing all processes, if the accused does not appear or cannot be arrested, the Court can take steps to hold trial in absentia in complaint and police cases. However, compliance with Sec. 89 (restoration of attached property under Sec. 88), Sec. 88 (attachment of property of person absconding), and Sec. 339B is an imperative before resorting to the method outlined under Sec. 339B. After publishing a public notice in at least two national Bangla dailies, the court may proceed to take cognizance and conduct the trial without the accused, once it has reasons to believe that there is no immediate prospect of the accused's arrest or that he is purposefully avoiding the trial by absconding.

PREDICAMENTS and DILEMMAS faced by INDIAN JUDICIARY

The apparent dilemma that the judiciary prima facie experiences is that, it cannot be concluded if the accused is wilfully abstaining from appearing before the court or there exists an actual/reasonable deterrent which is restricting the accused from appearance. Many eminent jurists believe this wilful absence to be forfeiture rather than waiver.

The current predicament of the courtrooms coupled with the provisions of the CrPC, present the accused with an opportunity where he can actively avoid the adjudicatory process. When the accused excuses himself from the court of law by absconding, he eventually impedes and defers the process of investigation, inquiry and ultimately the trial itself. In *Surya Baksh Singh v. State of U.P.*[30], the apex court admitted that there has been an increase in instances where the convicts file appeals with a view to avoid the sentences awarded to them. Criminals indulge in the practice of filing appeals, obtaining bail and thereafter disappearing from the unsecure statutory clutches of the legal system. This issue has been the concern of several Law Commissions, over the years but is yet to be addressed.

[30] (2014) 14 SCC 222.

The quandary that the judiciary faces for the non-appearance of the accused during trial must be done away with since, the right to speedy justice which is implicit to Art. 21 of the Constitution of India gets grossly transgressed and therefore the purpose of the judiciary gets thwarted in the process. The victim might have to face unjustified prejudice for the repeated absence of the accused, as we are aware that '*justice delayed is justice denied*'. The law empowers the system to summon the accused during the examination stage and the courts have to ensure that they have made sufficient efforts to intimate the accused to administer his appearance in the proceedings, exempting exceptional circumstances. The courts do not dispense with the presence of the accused at the initial stance but due to persistent absence from the proceedings, if the court deems fit, it can resume the proceedings in absence of the accused to circumvent the process of adjudication. With stringent regulations, the option of absconding shall not be conceivable for the accused. And finally, if the trials proceed steadfastly, this will also assist the court in proper collection of evidence.

Moreso, it is important to note that the unnecessary dilatory process leaves the witnesses reluctant and demoralized to appear before the court since their ultimate motivation is to see that the matter disposed of at the earliest and dodge lengthy lawsuits. In cases of prolonged delays, even the evidence stands at the risk of being tampered or being lost or becoming irrelevant to the context of the case. Similarly in cases where there are multiple accused and some of them are absconding, the victim has to go through the process of testifying after the arrest of different persons. This situation can be well imagined in a case of gang rape where the victim of the crime may be subjected to tremendous mental anguish and torment innumerable times, due to arrangement of multiple test identification parades and inordinate delays in testifying the absentee accused(s).

FINAL OBSERVATION

Justice P.N. Bhagwati had stated*, "We cannot allow the dead hands of the past to stifle the growth of the living present. Law cannot stand still; it must change with changing social concept and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then it will either stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore*

constantly be on the move adapting itself to the fast-changing society and not lag behind."[31] The Delhi High Court in a recent case of *Sunil Tyagi v Govt. of NCT*[32] took note of the evasions present in the provisions of the code in Sec. 82 and 83 and also made manifold suggestions through which these gaps can be bridged and the offenders can be prevented from misusing the procedure.

On noticing an alarming trend of abscondence of the accused affecting expeditious trial, the apex court in *Hussain and Anr. V. Union of India*[33] had quoted Sec. 399B of Bangladesh CrPC and observed that appropriate authority must take cognizance of the said law. However, to much disappointment, there has been no amendment in the criminal procedural laws, with respect to trial in absentia of an accused person till date.

The Judicial Academy Jharkhand in a detailed report proposed the following incorporation in Sec. 299 Sub-Section (1) of the CrPC by substituting the existing provision as:

299. Inquiry and Trial in absence of accused:- Sub-Section (1) Notwithstanding anything contained in the code, if it is proved that an accused person has absconded, and there is no immediate prospect of arresting him, the trial of the case shall proceed in absentia in the Court of competent jurisdiction for the offence complained of and the Court shall not be bound to recall or rehear any witness, whose evidence has already been recorded, or to re-open proceedings already held, but may act on the evidence already produced or recorded and continue the trial from the stage which the case has reached and pronounce Judgment at the conclusion of the trial.[34]

To end with, it is a well-established law that an accused is not exempted from examination under Sec. 313 of the CrPC when incriminating evidence has been produced against him by the prosecution before the Court. In such cases of constant wilful abstinence of the accused from the court proceedings, evidence that is put on record is on the basis of the careful discovery and inspection of the relevant documentation put forth the Court. The conviction resulting from such trial processes would not breach the principle of due process of law found in Art. 21 of the Indian Constitution provided, the trying Court within its judicial means and prudence, has exercised considerable care and efforts to intimate the alleged order of summons

[31] National Textile Workers Union Vrs. P.P.Ram Krishanan 1983 (1)
[32] CRL. MC 5328/2013.
[33] (2017) 5 SCC 702.
[34] Supra note 3.

to the accused. Therefore, we can conclude by mentioning that, needless adjournments to conduct a feigned fair trial must be discouraged when it is evident that the accused is beyond apprehension of the contours of legal discipline. The multiplicity of proceedings in the process causes unwanted delay and unwarranted distress to the victims of crime which is unjust and arbitrary for a person who eagerly knocks the court's doors in the hope of securing speedy justice. The fleeing accused could have to counter severe culpability at his own detriment for the substantial risks he has embraced by not abiding by the statutory rules and the ethical principles of the Indian Judicial system. Therefore, a more all-encompassing, flexible/pliable and an effective amendment should be made by the esteemed legislators to disentangle the complications related to the interpretation and implementation of the criminal procedural law, with regard to the conundrum emanating in 'Trial in absentia'.