HARYANA STATE LAW COMMISSION

SIXTH REPORT

Recommendation to Amend Third Proviso to Sub-Section (2) of Section 309 of The Code of Criminal Procedure, 1973

Government of Haryana

HARYANA STATE LAW COMMISSION

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Government of Haryana

HARYANA STATE LAW COMMISSION

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There is general/moral approach that no person should be punished without giving him proper opportunity of being heard or that no person should be condemned unheard. There is proviso to sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973 (herein after called Cr.P.C.) which is not in accordance with the aforesaid principle of law and justice because justice should not only be done but it should appear to have been done. With this analogy, Haryana State Law Commission has taken up this matter i.e., 3rd proviso to Section 309(2) of Cr.P.C. for consideration and necessary amendment, if any.

2. After trial in a Criminal Case the accused is either acquitted or convicted. Acquittal of an accused, terminates the proceedings. Conviction of an accused,

terminates the proceedings only after a sentence is passed.

3. The Code of Criminal Procedure, (1898) did not expressly provide an opportunity of hearing to an accused person, after the Court recorded a finding of guilt and convicted the accused. After convicting the accused, the Court would impose such sentence as it considered proper without giving any opportunity of hearing to the accused on the question of sentence. The Code of Criminal Procedure, 1973, for the first time, incorporated a provision to give an opportunity of hearing to the accused on the sentence to be imposed.

4. This area of concern about denial of any opportunity to the accused to make his submission, factual as well as legal, regarding the sentence to be imposed, was remedied by the introduction of sub-section (2) to Section 235 and sub-section (2) to Section 248 Cr.P.C. The principle of hearing the accused even in a summons case has been recognized by judicial decisions. The same are reproduced below:

"Section 235 (2): If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law".

"Section 248 (2): Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of Section 325 or Section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law."

5. The power of the Court to postpone or adjourn enquiry or trial proceedings is recognized/regulated by Section 309 of the Cr.P.C which reads as follows:

"Section 309: Power to postpone or adjourn proceedings

(1) In every inquiry or trial, the proceedings shall be continued in every from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following

day to be necessary for reasons to be recorded;

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376AB, section 376B, section 376C or section 376D, section 376DA,section 376DB of the Indian Penal Code, the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement

shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that -

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness, and pass such orders as it thinks

fit dispensing with the examination- in-chief or cross-examination of the witness, as the case may be.

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted in include, in appropriate cases, the payment of costs by the prosecution or the accused".

6. As there would be no knowing whether the accused would be pronounced guilty or not till the judgment is pronounced in open Court, he would not be in a position to lead evidence and make his submissions about the sentence to be imposed. It is only after the accused is pronounced guilty that he would be in a position to consider what evidence he should lead and what submissions he should make about the sentence. The convicted person has a right to be heard on the

question of sentence. Such a hearing is not confined merely to oral submissions of the accused but extends an opportunity to accused to produce evidence or other materials bearing on the question of sentence. In **Bachan Singh v/s State of Punjab (AIR 1980 SC 898)**, the Supreme Court has held that if a request is made by either the prosecution or the accused, the Judge should give the parties concerned an opportunity of producing evidence or materials bearing on the question of sentence. The Supreme Court has explained on the special responsibility of the Judge in this behalf in **Muniappan v/s State of Tamil Nadu (AIR 1981 SC 1220)** wherein the Supreme Court has observed as follows:

> *"The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence.*

All admissible evidence is before the Judge but that evidence itself often furnishes a clue to the genesis of the crime and the motivation of the criminal. It is the bounden duty of the Judge to cast aside the formalities of the Court-scene and approach the question of sentence from a broad sociological point of view. The occasion to apply the provisions of Section 235(2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. Questions which the Judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The Court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction."

7. In ***Allauddin Mian and others, Sharif Mian and another v/s State of Bihar*** **(AIR 1989 SC 1456 (1))**, the Supreme Court at paragraph 10 of the judgment has held that if the choice of sentence is made without giving the accused an effective and real opportunity to place his antecedents, social and economical background mitigating and extenuating circumstance, the Court's decision on the sentence would be vulnerable.

8. ***In M.C.D. v/s State of Delhi and another*** **(AIR 2005 SC 2658),** the Supreme Court, dealing with the scope of Section 4 of the Probation of Offenders Act, has held that, release on probation under Section 4 of the Probation of Offenders Act, would be illegal without opportunity to file a conduct report of the accused by the Probation Officer. Time has to be given to the Probation officer to submit his report about the accused.

9. Section 75 of the Indian Penal Code provides for enhanced punishment in respect of persons who have been previously convicted for offences under Chapters

XII and XVII of the IPC. In the event of omission to frame a charge in this behalf, Section 211(7) of Cr.P.C empowers the Court to frame a charge. In the event of the accused denying the charge, the prosecution would be obliged to prove the previous conviction by tendering evidence with the right of rebuttal to the accused. This would take some time. Therefore, parties have to be given reasonable time to produce evidence relevant for the purpose of imposing appropriate sentence. Sections 360 and 361 of the Code relate to Courts' power to order release or not on probation of good conduct or after admonition. Again, the stage at which this power has to be exercised is after conviction of the accused. For that purpose, the mandatory requirement of calling for a report from the jurisdictional Probation Officer has to be satisfied. Such a report of the Probation Officer would have to be called only after recording a finding of guilt of the accused. Necessarily, it needs some time.

10. As pointed out by the Supreme Court, in the aforementioned decisions, the accused has to be afforded reasonable opportunity for tendering evidence relevant for determination of the quantum of sentence

to be imposed. Necessarily, some reasonable time is required for the prosecution as well as the defence. It is in this background, we have to examine the effect of Section 309 of Cr.P.C.

11. The object of Section 309 is to regulate the power of the Court in adjourning the Criminal Proceedings. The principal object being to ensure expeditious and speedy trial of cases. We are addressing ourselves in this report only to the third proviso to sub-section (2) of Section 309 which says that no adjournment shall be granted for the purpose only for enabling the accused person to show cause the sentence being imposed on him. The language of this proviso makes it clear that it is mandatory and has the effect of denying with the Court the right to adjourn the case for the purpose only to enabling the accused person to show cause against the sentence proposed being imposed on him. We have to read this proviso in the context of the responsibility cast on the Court under Sections 235 and 248 of Cr.P.C of giving an opportunity of hearing to the accused on the quantum of sentence being imposed on the convicted person. We have already discussed above, the law laid down by the Supreme Court in

various decisions that the opportunity of hearing on the question of sentence is a reasonable opportunity which requires reasonable time to be given to the accused to produce evidence and materials on the appropriate nest of sentence to be imposed. But the third proviso to sub-section (2) of Section 309 of the Cr.P.C prohibits the Court from granting adjournment of the case for the purpose of only enabling the accused person to show cause against the sentence proposed to be imposed on him. If the proviso remains to be in existance, the Court has to deny an opportunity to the convicted person of showing cause against the sentence proposed to impose on him for which purpose he may need to produce oral and documentary evidence. It must be remembered that the Supreme Court in case Menaka Gandhi v/s Union of India (AIR 1978 SC 597) laid down that while prescribing the procedure for depriving a person on his life or personal liberty, the procedure prescribed should be reasonable, fair and just. If it is otherwise the statutory provision has to be struck down as violating Articles 18 and 21 of the Constitution which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

12. We have therefore no hesitation in coming to the conclusion that the third proviso to sub-section (2) of Section 309 is manifestly unjust, unfair and unreasonable as it has the effect of denying the most valuable right to the convicted person on producing evidence and materials to enable the court to award proper sentence. That being the position, we are of the opinion that the third proviso to sub-section (2) of Section 309 Cr.P.C is required to be deleted.

RECOMMENDATION

13. For the reasons stated above, the Commission recommends that Code of Criminal Procedure, 1973 may be amended by deleting the third proviso to Sub-Section (2) of Section 309 which reads as follows:

> ***"Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."***

Note: Section 309 of the Code of Criminal Procedure, 1973 has been enacted under Entry 2 of Concurrent List 3 to the Constitution of India. Therefore, Parliament as well as the State Legislature have concurrent power to enact laws to regulate Criminal Procedure. As the Parliament has already enacted the Code of Criminal Procedure, 1973, Article 254 of the Constitution comes into play. It provides that where the law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provision

repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for consideration of the President and has received his assent shall prevail in that State. It is, therefore, clear that the amendments proposed above can be passed by the Haryana Legislature and reserved for consideration of the President. After receipt of the assent of the President, the amendment can come into operation in the State of Haryana.

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