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Right to Fair Defense: Concept of Disclosure of Criminal Evidence in India

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ABSTRACT

The Constitution of India guarantees the right of a fair trial to the accused which includes a fair chance to defend. It is the duty of the state to ensure a fair investigation and fair trial to the accused. Our criminal system is besieged with various problems, of them, one of the various forms of prosecutorial and police misconduct includes improper and timely disclosure of the information to the accused and withholding exculpatory evidence. Whether anything should be supplied to the accused beyond the material which the prosecution relies upon has been a subject of debate. The accused is not only entitled to the material which the prosecutor relies upon to prove his guilt but also to the material which could even undermine the prosecution's case. Unfortunately, in India, there is no statutory framework obligating the prosecutor for the performance of such duty but the prosecution represents the state, and the state must uphold justice and prevent wrongful prosecution. This article is intended to highlight the prevalent process of fair disclosure in our country, the progress made lately and the way forward.

I. INTRODUCTION

The right to a fair trial to an accused is one of the fundamental guarantees of human rights and the rule of law, aimed at ensuring the administration of justice. This right encompasses a right to a speedy impartial trial, right to be heard, fair defense², and presumption of innocence until proven guilty. Denial of a fair trial is as much injustice to the accused as is to the victim and the society.³In the process of delivering justice, the liberty of an accused cannot be interfered with except under due process of law.⁴

The principle of Audi alter partem means giving the accused an opportunity of effective and substantial hearing. Truncated evidence, half-hidden evidence given to the accused or placed before the Court, does not amount to effective hearing. Under this principle, the accused would have the right to access the evidence which is in his favor which the prosecution is

¹ Author is a student at University of Mumbai Law Academy, India.

²Nirmal Singh Kahlon v. State of Punjab, AIR 2009 SC 984.

³Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat &Ors. , (2004) 2 RCR (Criminal) 836.

⁴Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1.

unwilling to produce in the Court and whose disclosure does not harm the public interest.⁵

Fair disclosure is one of the fundamental issues in a criminal justice system. "Disclosure" technically refers to the process of obtaining relevant material in a criminal procedure. It is a duty on the prosecution to disclose the evidence which they place reliance upon to incriminate the accused. This also includes the evidence which might undermine their case and assist the defense.⁶

In India, the prosecutor is not bound by any statutory duty to furnish information in favor of the accused for his defense. Under the provisions of the Criminal Procedure Code of India (hereinafter referred to as 'Cr. P. C.')

the regard to disclosure of documents is a limited right. The Code does not contain any provision for providing "all" the evidence collected by the investigating agency. The provisions of the Code provide precepts which govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during the investigation and upon which they rely.⁷

II. INTERNATIONAL PERSPECTIVE

The process of development of this issue globally can be recalled in the landmark judgment by the Supreme Court of the USA in *Brady v. Maryland*⁸ (widely referred to as the Brady rule). In this case, the court declared that the right to put up a defense means a complete defense. Failure to disclose favorable material information and where suppression of such information might exonerate the accused, the prosecutor violates the fair process of law guaranteed to the accused under the Fourteenth Amendment to the US Constitution.

With respect to Article 6 § 1 of the European Convention on Human Rights, the European Court of Human Rights has considered that it is the duty of the prosecution authorities to disclose to the defense all material evidence in their possession for or against the accused.⁹

In England, the statutory framework of the country imposes a duty of disclosure on the public prosecutor and the defense. Criminal Procedure and Investigations Act, 1996 provides a legal requirement for the prosecutor to disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the

⁵Jayeshbhai Khemchandbhai Patel v. State of Gujarat, 2017 (2) GujLH 580.

⁶Attorney General's Office, *Attorney General's Guidelines On Disclosure*, GOVERNMENT OF UK (June 22, 2020),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf.

⁷Jayeshbhai Khemchandbhai Patel v. State of Gujarat, 2017 (2) GujLH 580.

⁸*Brady v. Maryland* 373 U.S. 83 (1969).

⁹*Rowe and Davis v. The United Kingdom*, ECHR 2000-II.

case of the accused.¹⁰ In its absence, it violates fair trial. The Attorney General Guidelines on Disclosure for investigators, prosecutors and defense practitioners on the application of the disclosure regime supplements the statutory framework. But one should not consider this rule as an absolute right as for the instances of national security, public interest, sensitive information, safeguarding fundamental rights of other individuals, the information can be withheld.¹¹

III. EVOLUTION OF THE CONCEPT IN INDIA

The criminal jurisprudence in India provides for a limited but no mandatory duty of disclosure. The police have the unfettered right and are not obliged under the law to place on record any evidence which goes contrary to their case. According to the law, the right of the accused with regards to disclosure of documents is a limited right which flows from the codified law¹². Though Cr. P. C. provides for a duty of disclosure, it is restricted to the disclosure of evidence on which the prosecution proposes to rely upon during the trial. Brady rule is missing in our criminal jurisprudence.

While filing Charge sheet under section 173(5)¹³ of the Cr. P. C. the police is required to submit documents or relevant extracts whom the prosecution proposes to rely upon and only those statements of witnesses whom the prosecution proposes to examine. The police using their wisdom only forward such documents to the Magistrate required for proving the guilt of the accused.

Section 207¹⁴ of Cr. P. C. forms the foundation of the right of the accused to defend. It is the statutory right of the accused to receive and claim copies of documents which the prosecution has collected during the investigation and upon which they rely. In *V.K. Sasikala v. State*¹⁵ the court went for a broader interpretation of the section. The court held that if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favors the accused, the court must concede a right to the accused to have access to the said documents **if so claimed**. Though the right of the accused is established, it depends on the willingness of the accused to come forward and claim such document of which he has knowledge is being

¹⁰ Criminal Procedure and Investigations Act 1996 § 3(1)(a).

¹¹ Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice*, THE NATIONAL POLICE LIBRARY UK (June 22, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf.

¹² *SidharthaVashisht @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1.

¹³ Code of Criminal Procedure 1973 § 173(5).

¹⁴ Code of Criminal Procedure 1973 § 207.

¹⁵ (2012) 9 SCC 771.

concealed from him. But in the instances where the prosecution does not disclose a significant material which might have bearing on his case and the accused is not aware of the existence of such material, such material may never come into light leading to a serious miscarriage of justice. The defense of the accused is prejudiced and his right to a fair trial is breached without him knowing about it.

Our existing criminal justice system in the country is besieged by huge pendency of criminal cases and inordinate delay in their disposal. Thus, the right to seek discharge is a valuable right under a criminal justice system. It helps the court to filter out meritless cases and to remove the unnecessary burden of the cases when the judge is of the opinion that there is no sufficient ground to proceed with the trial. This right is broadly classified under Section 227¹⁶ and Section 239¹⁷ of the Cr. P. C. (depending upon the nature of the offence). This power is with the court but the material that the court can look into at this stage is very limited. Whether at the stage of framing of charges the trial court should look into only the prosecutor's material or can it call for defense material is a dispute. In *Satish Mehra v. Delhi Administration*¹⁸, the Supreme Court took the view that defense material can be seen at the time of framing of the charge, but the decision was overruled in *Debendra Nath Padhi*¹⁹. Here it was observed that the court cannot look beyond the material that the prosecution relies upon in order to decide whether the accused should be discharged or taken to trial. Thus, the accused has no right to place before the court any material at the time of framing of charges. However, in a recent judgment of the Supreme Court in *Nitya Dharmananda*,²⁰ the court was faced with the issue whether an accused could file an application under Section 91²¹ of the Cr. P. C. before framing of the charge to summon documents, statements of witnesses collected in the course of investigation but not disclosed in the police report. In this case, material not in favor of the prosecution was not made part of the police report. The court held that only material of sterling quality which could have bearing on the framing of charges, such material to be summoned. However, the word 'sterling quality' does not have any clear meaning and is open to courts for interpretation adding to the confusion and already existing lack of clarity on the issue.

Though there has been a shifting stand in the judgments by the Supreme Court and subsequent decisions of the High Courts, the scope of fair disclosure has continuously

¹⁶ Code of Criminal Procedure 1973 § 227.

¹⁷ Code of Criminal Procedure 1973 § 239.

¹⁸ (1996) 9 SCC 766.

¹⁹ *State Of Orissa vs Debendra Nath Padhi*, (2005) 1 SCC 568.

²⁰ *Nitya Dharmendra vs. Gopal Sheelavan Reddy*, AIR 2017 SC 5846.

²¹ Code of Criminal Procedure 1973 § 91.

evolved to ensure a fair trial to the accused mandated under the Indian Constitution irrespective of the absence of strong disclosure requirements in the code itself. The accused must be provided with favorable evidence, collected by the investigating officer notwithstanding its effect on the prosecution's case and allow him to place reliance upon the same while arguing for discharge to make the discharge proceedings more effective. Till now the settled principle of law has been to assume that the material brought on record by the prosecution is true while dealing with discharge applications²². If all relevant material to the case, even exonerating evidence is placed before the court, the valuable time and resources of the courts can be spared from going for trial proceedings.

The importance of fair disclosure cannot be less emphasized when we look at the famous Arushi Talwar case²³. The purple pillow cover evidence caught the attention of everyone. The pillow cover was seized by the investigation team from compounder Krishna's (one of the early suspects later discharged) premises and was sent to the Centre for DNA Fingerprinting and Diagnostics (hereinafter referred to as '**CDFD**'). The CDFD's report recorded Hemraj's (the other deceased) DNA. This indicated Krishna's presence in the flat while Hemraj was murdered. It was probable that the CBI did not properly read the report and in haste recorded the same with the court (an exculpatory piece of evidence, as a piece of evidence relied upon by the prosecutor to prosecute the Talwars) as later the CBI to cover up what was unfolded and was undermining their case they argued that the CDFD had made a typographical error of mentioning it as Krishna's pillow instead of Hemraj (establishing their theory that the Talwar couple murdered their daughter). But the other supporting materials did not support the prosecution. Later after three years, the CDFD clarified the contentions of the prosecution creating a serious shadow of doubt as noted by the High Court.²⁴

As a settled principle of law, in criminal matters, the accused has the right to defend himself on the material relied upon by the prosecution. If the prosecution does not place on record any such document in the court, the accused will not have access to it. It now leaves the onus on the accused who may or may not have the ability to access the documents. This case presents a wider picture of the possible consequences in the absence of fair disclosure provisions.

²²State of Karnataka Lokayukta Police Station Bengaluru v. M. R. Hiremath, AIR 2019 SC 2377.

²³Dr. Mrs. Nupur Talwar v. Central Bureau of Investigation & Anr., AIR 2012 SC 1921.

²⁴ANIRUDDHAGHOSAL & KAUNAIN SHERIFF M, *AARUSHI TALWAR MURDER CASE: KEY EVIDENCES THAT CAUGHT ATTENTION*, THE INDIAN EXPRESS, JUNE 25, 2018.

IV. ROLE OF THE PROSECUTOR

In a criminal justice system, one cannot undermine the valuable role played by the prosecutor in ensuring fair trial. In *Shiv Kumar v. Hukum Chand and Anr.*, the court was of the opinion that a Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused but is expected to be couched in fairness not only to the Court and to the investigating agencies but the accused as well. If an accused is entitled to any legitimate benefit during the trial the Public Prosecutor should not conceal it rather it is his duty to make it available to the accused²⁵. Thus, this case provides for a wide duty of disclosure on the public prosecutor. According to the Bar Council of India's rules on professional conduct of the advocates, it provides for an advocate acting as a prosecutor that his prosecution must not lead to the conviction of an innocent and that the suppression of material capable of establishing the innocence of the accused shall be scrupulously avoided²⁶. Though a standard of professionalism is expected from the prosecutor there is no statutory duty obligating the disclosure duties on the prosecutor. In *Manu Sharma's* case the judge expounded that though the right of the accused with regards to disclosure of documents is a limited right but at the same time if a document which has been obtained bona fide and has bearing on the case of the prosecution, in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused²⁷. While the judiciary is striking a balance between the lack of statutory framework and rights of the accused, the role played by the prosecutor for fair disclosure to ensure a fair trial is vital.

V. WAY FORWARD

While the law is intended for a fair and free trial to the accused, and the judiciary has been upfront in making the criminal justice process fair to the accused, there is still a long road ahead to make it fairer. The courts must come up with well-defined standard procedures and guidelines as to the process of fair disclosure.

While the Supreme Court has remarked that the obligation and role of the prosecutors in relation to the disclosure cannot be equated with that of the system prevalent in the English Courts but at the same time the demand for fair trial cannot be ignored²⁸. The Parliament is responsible to make reforms in the laws hence, it must step up to do its part and make a law

²⁵ (1999) 7 SCC 467.

²⁶ Bar Council of India Rules under the Advocates Act 1961, Rule 16.

²⁷ *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1.

²⁸ *Id.* at ¶91.

which lays out a clear blueprint for increasing disclosure of material evidence and avoid arbitrary practices. A clear mandate for disclosure of favorable information, as well as comprehensive rules for the disclosure process, would have a significant impact on preventing wrongful convictions. The legislators will have to take into consideration the issues like decoding information that is material and favorable to both, time-bound disclosure, challenges that will arise in future due to increasing scale of digital material generated by police investigations, clearly defined exceptions to disclosure provisions including public interest or sensitive information. In the Indian system, the prosecutor only gets involved during the process of trial. Thus, the possibility of concealment cannot be ignored at the stage of investigation too. The law must provide for the accountability of police and the prosecutor for any misconduct. The legislature must also look into the need for competent prosecution lawyers²⁹ and effective co-ordination between investigators and prosecutors without undermining the authority of the prosecutor.

Wrongful prosecution leads to loss of faith in the justice system. While fair disclosure is vital, in the case of wrongful prosecution, an acquittal is not enough. The accused must not only be properly compensated but provided assistance to lead a respectful life³⁰. Proper investigation, fair prosecution, and impartial judges are fundamental to a judicial process. To make our Criminal Justice System more effective we require new laws and rectification of inefficiencies in the system at the same time. We gave ourselves the Constitution of India and we must follow it in letter and spirit.

²⁹Dr. Justice V. S. Malimath Committee, *Report of the Committee on Reforms of Criminal Justice System* (March 28, 2003).

³⁰ 277th LAW COMMISSION OF INDIA REPORT, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies*, August 30, 2018.