

SESSIONS TRIAL

Justice V. Ramkumar

Depending on the gravity of the offences and the punishment prescribed therefor, criminal trial under the Code of Criminal Procedure, 1973 (Cr.P.C for short) has been classified into two viz., Magisterial trial and Sessions trial. The first schedule to the Cr.P.C. is divided into two parts namely, Part I and Part II. Column I of the first part of the first schedule enumerates the list of offences punishable under the Indian Penal Code and Column 6 thereof indicates the court by which those offences are triable. Those courts are either the Magistrate's courts or the courts of Session. The second part of the first schedule deals with offences punishable under other laws. In the absence of any specific provision under such other laws regarding investigation, inquiry or trial, the procedure prescribed under the Cr.P.C. for the same shall be applicable by virtue of Sec.4 (2) of Cr.P.C. If under the special law the offence is punishable with imprisonment for life or imprisonment for more than 7 years, then by virtue of the second part of the I schedule to Cr.P.C. the offence shall be triable by a Court of Session.

THE OBJECT OF CRIMINAL TRIAL

2. Criminal trial is meant for doing justice not only to the victim but also to the accused and the Society at large. (Ambika Pd. V. State (Delhi Administration)-2000 SCC CrI.522). Every criminal trial is a voyage of discovery in which truth is the quest. The primary object of criminal trial is to ensure fair trial which is guaranteed under Art.21 of the Constitution of India. A fair trial has, therefore, two objects in view. It must be fair to the accused and must also be fair to the prosecution. The trial must be judged from this dual point of view. (**Vide T.H.Hussain v. M.P.Modkakar-AIR 1958 SC 376**). It is, therefore, necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform. The object of criminal trial is thus to render public justice by punishing the criminal. It is also important to remember that the trial should be concluded expeditiously before the memory of the witnesses fades out. The recent trend

is to delay the trial and threaten the witnesses or to win over the witnesses by promise or inducement. These malpractices need to be curbed and public justice can be ensured to the satisfaction of all concerned only when trial is conducted expeditiously. (**Vide Krishnan v. Krishnaveni-1997 SCC CrI.544 = AIR 1997 SC 987**). The public interest demands that criminal justice is swift and sure, that the guilty is punished while events are still fresh in the public mind and that the innocent is absolved as early as is consistent with a fair and impartial trial. (**M.S.Sherif v. State of Madras- 1954 CrI.L.J.1019**). If unmerited acquittals become the general rule, they tend to lead to a cynical disregard of the law. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. **Vide Gangadhar Behera V. State of Orissa- 2000 (3) CrI.L.J.41 SC and Shivaji Sahebrao Bobade v. State of Maharashtra- AIR 1988 SC 1998**.

3. In getting the true fruits of the real object of criminal trial, it must always be kept in view that a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of the witnesses. Every case in the final analysis would have to depend upon its own facts. (**Vide State of Punjab v. Jagir Singh – AIR 1973 SC 2407**).

4. The Apex court had taken judicial notice of certain distressing and unethical tendencies in *Swaran Singh v. State of Punjab- AIR 2000 SC 2017* wherein it has been observed as follows:

“It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the

whole day and then he finds that the matter is adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. The appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the courts, district courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recordings”.

5. The sole aim of the law is approximation of justice. A Judge is looked upon as an embodiment of justice. Assurance of fair trial is the first imperative in the dispensation of justice. It cannot be denied that one of the most valuable rights of our citizens is to get a fair trial free from an atmosphere of prejudice. This right flows necessarily from Art.21 of the Constitution of India which makes it obligatory upon the State not to deprive any person of his life or personal liberty except according to the procedure established by law. (**Vide Smt.Menaka Sanjay Gandhi v. Miss.Rani Jethmalani- 1979 S.C.468**)

6. One of the components of fair procedure in the administration of criminal justice is that the accused has the opportunity of making his defence by a legal practitioner of his choice. This is his constitutional right guaranteed under Art.22 of the Constitution. In order to give effect to this constitutional right it has been embodied in the directive principles of State policy as provided under Art.39 A of the Constitution of India that the State shall secure equal justice and free legal aid by a suitable legislation or

scheme or any other way to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. That right has also been statutorily accepted and incorporated in Sec. 303 Cr.P.C. which provides that any person accused of an offence before a criminal court or against whom proceedings are initiated under the Cr.P.C. may of right be defended by a pleader of his choice. The directive under Article 39 A of the Constitution has been translated into reality by the enactment of the Legal Services Authorities Act, 1987.

THE PRESUMPTION OF INNOCENCE

7. One of the cardinal principles which should always be kept in our system of administration of justice in criminal cases is that a person arraigned as an accused is presumed to be innocent unless and until proved otherwise. Another golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case- one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused is to be accepted. (**Vide Kaliram v. The State of H.P.-AIR 1973 SC 2773, Sheo Nandan Paswan v. State of Bihar- AIR 1983 SC 194- Nishar Ali v. State of U.P.- AIR 1957 SC 366**). Even in an appeal against acquittal, the presumption of innocence in favour of the accused is not weakened and in considering an appeal against acquittal, the High Court has to keep this presumption in mind. (**S.A.A.Biyabani v. State of Madras- AIR 1954 SC-645, Ram Jog v. State of U.P.-AIR 1974 SC 606; Rajendra Rai v. State of Bihar – AIR 1974 SC 2145, Autar Singh v. State of Punjab- AIR 1979 SC 1188, State of A.P. v. Anjaneulau – AIR 1982 SC 1598, Babu v. State of U.P.- AIR 1983 SC 308, Ramji Surjiya v. State of Maharashtra-AIR 1983 SC 810 and Chandra Kanta Deb v. State of Tripura- AIR 1986 SC 606**). In paragraph 40 of the Constitution Bench decision of the Apex Court in **B.R.Kapur v. State of T.N. – 2001 (7) SCC 231** it has been observed that when a lower court convicts an accused and sentences him, the presumption that he is innocent comes to an end.

BENEFIT OF DOUBT

8. The criminal jurisprudence, no doubt, requires a high standard of proof for

imposing punishment to an accused. But it is equally important that on hypothetical grounds and surmises prosecution evidence of a sterling nature should not be brushed aside and disbelieved to give undue benefit of doubt to the accused. (**Vide State of U.P. v. Ram Sevak and others-2003 (1) Crimes 461 (SC)**). The law should not be stretched morbidly to embrace every hunch hesitancy and degree of doubt. Our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic – (**Vide Shivaji v. State of Maharashtra – AIR 1973 SC 2622**). Doubts must be actual and substantial as to the guilt of the accused person arising from the evidence or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt; but a fair doubt based upon reasons and common sense. Uninformed legitimization of trivialities would make a mockery of administration of criminal justice. **AIR 1988 SC 2154 – State of U.P. v. Krishna Gopal**.

9. The criminal law has a purpose to serve. Its object is to suppress criminal enterprise and punish the guilty. In this process it must however be ensured that reasonable doubts alone are given to the accused. (**Vide State of Kerala v. Narayanan Bhaskaran – 1991 Cr.L.J.238 = 1991 (2) KLT 217**).

RELEVANT PROVISIONS AS TO SESSIONS TRIAL

10. Chapter XVIII of Cr.P.C. starting with Sec.225 and ending with section 237 deals with provisions governing the trial before a Court of Session. Sec.225 Cr.P.C. enjoins that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor. Sec.193 Cr.P.C. provides that except as otherwise expressly provided by the Cr.P.C. or any other law, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Cr.P.C. There are statutes like the N.D.P.S. Act, 1985, wherein it is provided that the special court manned by a Sessions Judge shall take cognizance of an offence under the Act without the case being committed to it. In such cases it may be permissible for the Sessions Court to take cognizance of the offence without a committal

of the case by the Magistrate concerned. But there are other enactments such as the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989 which are silent regarding commitment. Trial under those statutes is also to be conducted by a Court of Session. In **Gangula Ashok v. State of A.P. – 2000(1) KLT 609** the Supreme Court of India held that the mandate under Sec. 193 Cr.P.C. is applicable to the special courts manned by Sessions Judges trying offences under the SC/ST (Prevention of atrocities) Act, 1989 and that those courts cannot take cognizance of the offences under the said Act without the case being committed to them by the Magistrates concerned.

11. When the accused appears or is brought before court pursuant to the commitment of the case, the Public Prosecutor should open the case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. After considering the record of the case and the documents submitted along with such record and after hearing the submissions of the accused and the prosecution, if the judge considers that there are no sufficient grounds for proceeding against the accused, he shall discharge the accused giving reasons for doing so. If, however, the judge is of the opinion that there is ground for presuming that the accused has committed the offence he may frame the charge against the accused in writing. At this stage the Sessions Judge is entitled to consider only the documents produced by the prosecution along with the charge sheet. The accused is not entitled to produce or cause production of any document at this stage for the consideration of the Sessions Judge. The charges shall be read over to the accused and explained to him and he shall be asked as to whether he pleads guilty of the offence charged or whether he claims to be tried for the charge. If the judge is of opinion that notwithstanding the conclusions of the police, the offence that is actually made out is not one exclusively triable by a court of Sessions then he shall frame a charge against the accused and transfer the case for trial to the Chief Judicial Magistrate who shall try the case as if it were a warrant case instituted on a police report. Even though Sec.229 Cr.P.C. gives discretion to the judge to convict the accused, in case he pleads guilty, the charge in a sessions case being for grave offences, it is desirable that the accused is not straightaway convicted. The proper course would be to call upon the prosecution to prove its case by adducing evidence. Where the accused does not plead guilty the court shall call upon the prosecution to adduce evidence in

support of its case. Evidence for the prosecution shall be taken on a day-to-day basis. After the conclusion of the prosecution evidence, the accused is to be examined under Sec.313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. After the examination of the accused the court has to post the case for hearing under Sec.232 Cr.P.C. If after hearing the prosecution and the defence the judge considers that there is no evidence to indicate that the accused committed the offence with which he is charged the judge can record an order of acquittal under Sec.232 Cr.P.C. This is a very vital stage of the sessions trial and observance of Sec.232 Cr.P.C. and Sec. 233 Cr.P.C. at the appropriate stage is mandatory. (See **1992(2) KLT 227 – Sivamani v. State of Kerala**).

12. After hearing under Sec.232 if the accused is not acquitted thereunder, the accused shall be called upon to enter on his defence and to adduce any evidence which he might have in support thereof. After the conclusion of the defence evidence, if any, the case has to be taken up for arguments. After hearing the arguments, the court has to pass the judgment in accordance with Secs.353 and 354 Cr.P.C. If the judgment is one of conviction and the judge does not proceed to invoke the benevolent provision of the Probation of Offenders Act, 1958, he shall hear the accused on the question of sentence and then pass a sentence in accordance with law. This in short is the procedure to be followed in the ordinary murder trials before a Court of Session.

POINTS/TIPS TO BE REMEMBERED BY SESSIONS JUDGES

1) A Sessions Judge is not expected to be a mute spectator or a silent umpire. He is a dynamic functionary who has overall control over the entire trial. There may be deficiencies and inadequacies in the conduct of the case by the public prosecutor or by the defence lawyer due to lack of competence or equipment. If that is allowed to go unnoticed, justice could be the first

casualty. It may even result in uneven justice which is not a desirable thing. Sessions Judges should remember that the power of the judge to put questions to any of the witnesses or parties under Sec. 165 of the Evidence Act is a wide power. The only functionary in the criminal trial who can ask even irrelevant questions is the presiding judge. Hence, whenever the presiding judge finds that a particular point emanating from the case needs elucidation or a further probe, he should not hesitate to intervene and clarify the position. He can also press into service Section 311 Cr.P.C. in his endeavour to arrive at the truth. (**Vide Sebastian v. Food Inspector - 1987 (1) KLT 130; Ram Chandra v. State of Haryana - AIR 1981 SC 1036**).

2) Before commencement of the trial you have to ensure that the police charge sheet and the original 161 (3) statements of witnesses are before court.

3) At the outset itself it should be ascertained from the defence lawyer whether he has got copies of all the statements of the witnesses, documents including chemical report, F.S.L. report etc. If there is any undesirable conduct on the part of a defence lawyer complaining of non-receipt of copies of statements of witnesses etc. possibly with a view to get the matter adjourned and protract the trial, he should be reminded that he had no grievance of non-receipt of copies when the committal Magistrate had complied with Sec. 207 Cr.P.C.

4) Before the commencement of the prosecution evidence it is always desirable for the judge to make a personal note of the following details ascertained from the records of the case or from the public prosecutor and or from the defence lawyer:-

- a) The date, time and place of occurrence
- b) the date and time of reporting to the police
- c) the date and time of the F.I.R. reaching the Magistrate concerned
- d) The name of the deceased and his alias name, if any,
- e) the names and alias name, if any, of each accused person
- f) the date of arrest of each accused. This can be written against the names of each accused persons.

If you are fully informed in advance about the above details, you are not liable to make mistakes during the course of the trial. Similarly, if the P.P. or defence lawyer or a witness makes mistakes you can correct them or seek further clarification of the matter.

5) Framing of charge is an exercise which has to be performed with due care and caution. The police invariably file their charge-sheet in vernacular malayalam. The police charge will be in the form of a single complex sentence without any separate counts of charge. There should be a separate count of charge for each penal section. It will be useful to refer to the model charge given after each penal provision of the I.P.C. in the “Law of Crimes” by Rathanlal and Dheerajlal. If you are stating in the court charge that the accused person caused the death of the deceased by stabbing on specified parts of the human body, do not blindly follow the police charge but ensure the location of the injuries on the body of the victim from the postmortem certificate, wound certificate., inquest report etc.

6) Even when the accused pleads guilty to the charge framed against him and you are convinced that his plea is voluntarily made, please don't

proceed to straightaway convict him. This is because the charge in a Sessions Case is for a grave offence and notwithstanding the plea of guilt by the accused it is always desirable to call upon the prosecution to prove its case.

7) A disturbing trend noticed in various Sessions Courts is the adjournment of the trial contrary to the day-to-day rule enjoined by Sec. 309 (1) Cr.P.C. This is to be deprecated in the strongest language. Once the trial of a Sessions Case has begun, it should be proceeded with from day-to-day. **(Vide Avtar Singh v. Tej Singh - AIR 1984 SC 618 and High Court Circular Nos. 1/87 dated 12-1-1987 & 7/72 dated 7-6-1972).**

8) At what stage can a prosecution witness be declared hostile? It is enough if the witness deviates from his previous statements made to the police or when the Court considers it necessary to grant the permission under Sec. 154 of the Evidence Act from the witness's demeanour, temper, attitude, bearing, tenor or tendency of his answers or otherwise. The discretion conferred by the above provision should be liberally exercised. **(Vide Sat Paul v. Delhi Administration - AIR 1976 SC 294).** It is open to the party who calls the witness to seek permission of the court under Sec. 154 of the Evidence Act at any stage of the examination. **(Dahyabhai Chhaganbhai Thakker v. State of Gujarat - AIR 1964 S.C. 1563).** The P.P. can request the court to declare such a witness as hostile. Merely because the Court gave permission to the P.P. to cross-examine his own witness by declaring him hostile, it does not mean that the evidence of such a witness is completely effaced. **(Vide Anil Rai v. State of Bihar - AIR 2001 SC 3173).** It will be inappropriate to write in the deposition of a witness that he is declared

(When you were questioned by the police you appear to have made a statement as above. What have you got to say about that?)

While marking case diary contradictions of witnesses it will be better and convenient. If the same series of markings is given for the same witness. For example, if two or more case diary contradictions of a witness are to be marked, then it will be better to give the markings as Exts. D1, D1 (a), D1 (b) and so on instead of giving the markings D1, D2, D3 etc. so that all the case diary contradictions of the same witness will be in D1 series. It is important to note that the case diary contradictions which are marked through the witness will get proved only when the investigating officer subsequently deposes before court that the particular witness gave him a statement as marked at the time the witness was examined before Court.

10) There may be, in a given case, more than one accused or one witness having the same name. Ensure that no mistake is committed on account of this. After the initial mention by a witness of the full name of an accused person or a witness it is desirable to give in parenthesis the rank of the accused or the witness as A2 or C.W.2 or P.W.3, as the case may be, so that whenever the name of the same accused or witness is made mention of by a witness, his full name need not be repeated. This can help you to avoid needless confusion.

11) Very often the defence would elicit from the prosecution witnesses that even before the lodging of the F.I.S. the police had come to the scene of crime and questioned the witnesses and had taken their statements.

This is obviously to offset the F.I. statement with a view to request the court to discard the F.I.S. as one hit by Sec. 162 Cr.P.C. Make sure whether the visit of the police was only to ensure some unconfirmed report which they might have received about the occurrence and whether their questioning of persons was only towards that end.

12) Barring the statutorily exempted category, hearsay evidence is not acceptable as legal evidence in view of the implied prohibition under Sec. 60 of the Evidence Act. Very often non-occurrence witnesses may testify before court that other persons told them that the accused had stabbed the deceased and so on. Such statements as such need not be recorded unless they constitute res gestae evidence, extra judicial confession or any other exempted category.

13) Where during the course of the trial if one or more accused are found absconding then their bail should be cancelled immediately. There are then two options available to the court. One is to merely issue arrest warrant against them and continue with the trial. The other alternative is to stop the trial and issue arrest warrant and initiate steps under Sections 82 and 83 of Cr.P.C. By following the second course, trial of the case gets disrupted. Use your discretion after evaluating the situation.

14) Supposing an accused person who is of unsound mind is committed to the court of Session, it is an illegal committal because it is for the committal Magistrate himself to conduct an enquiry under Sec. 328 Cr.P.C. In a case of wrong committal the Sessions Judge does not have the power to set aside the committal and send it back to the committal court. He

can only refer the matter to the High Court by invoking the power under Sec. 395 (2) Cr.P.C.

15) The ordinary presumption about a witness is that every witness testifying on oath before a court of law is a truthful witness unless he is shown to be unreliable or untruthful on any particular aspect. Witnesses solemnly deposing on oath in the witness box during a trial upon a grave charge of murder must be presumed to act with a full sense of responsibility of the consequence of what they state (**Vide State of Punjab v. Hari Singh - AIR 1984 SC 1168**). Generally speaking a witness may be classified into three categories, namely:

- i) wholly reliable
- ii) wholly unreliable
- iii) Neither wholly reliable nor wholly unreliable .

In the case of categories (i) and (ii) the court should have no difficulty in coming to the conclusion about the credibility or otherwise of the witness. It is with regard to the 3rd category of witnesses that the court will have to be circumspect and will have to look for corroboration in material particulars by way of direct or circumstantial evidence. (See **Vadivelu Thevar v. State of Madras - AIR 1957 SC 614; State of Punjab v Tarlok Singh - AIR 1971 SC 121; Phool Chand v. State of Rajasthan- AIR 1977 SC 315**).

In Bhogin Bhai Kirji v. State of Gujrat - AIR 1983 SC 753, the apex court observed certain characteristics about an ordinary witness.

- 1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on

the mental screen.

2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore, cannot be expected to be attuned to absorb the details.

3) The powers of observation differ from person to person. What one may notice, another may not. An object, or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5) In regard to the exact time of an incident or the time duration of an occurrence, usually people make their estimates by guess work on spur of the moment at the time of interrogation and one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time sense of individuals which varies from person to person.

6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.

7) A witness though wholly truthful, is liable to be overawed by the court atmosphere and piercing cross-examination made by counsel and out of nervousness mixes up facts, gets confused regarding sequence of events, or fills up details from imagination on the spur of moment. The subconscious mind of

the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of psychological defence mechanism activated on the spur of the moment.

Every person who witnesses a murder reacts in his own way. Some are stunned, some become speechless and some stand rooted to the spot. Some become hysteric and start wailing, some start shouting for help. Those others who run away to keep themselves as far removed from the spot as possible are not necessarily incredible yet others rush to the rescue of the victim even going to the extent of counter attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that they did not react in a particular manner is to appreciate the evidence in a wholly unrealistic unimaginative way. (**Vide Rana Pratap v. State of Haryana - AIR 1983 S.C. 680**).

16) 313 EXAMINATION - Complex sentences should not be put to the accused. Questions co-relating the material objects and the result of their chemical examination, if incriminating, are to be put to the accused. Sometimes incriminating circumstances are elicited during the cross examination of witnesses. If those circumstances are sought to be relied on, the court can do so. But if a conviction is being based on such circumstances then they should be put to the accused. See also Point 27 (n) and (nn) at page 22.

17) Very often the material objects and the result of chemical

examination are not properly co-related. Make sure that the investigating officer is asked to identify each item in the F.S.L report with reference to the material objects produced before court.

18) The court cannot insist that the accused shall keep on standing during the trial particularly when the trial is long and arduous. (**Vide Avatar Singh v. M.P. - 1982 SC 1260**). The Supreme Court directed all High Courts to make provision in this regard in their criminal manuals.

19) The court has, under the proviso to Sec. 327 (1) Cr.P.C., the power to order that any particular person, witness or police officer not under examination shall not remain in the court room. A general direction can be given to the Public Prosecutor that occurrence witnesses to be examined are not allowed to remain in the court hall till their turn arrives. When the accused objects to the presence of a police officer or other person inside the court hall, the trial judge has to consider his objections, having regard to the intelligence and the susceptibilities of the class to which he belongs and such other relevant circumstances (**See State v. Charulata Joshi - AIR 1999 SC 1373; Kasi Iyer v. State of Kerala - 1966 KLT 452 = AIR 1966 Kerala 316**).

In **Shylendra Kumar v. State of Bihar - 2002 SCC Cri. 230 = AIR 2002 SC 270** the apex Court has directed that the investigating officer must be present at the time of trial of murder cases and if he fails to be present, the Sessions Judge must issue summons to him.

20) Courts should make deprecatory remarks about serious lacuna or irregularity in the investigation by an investigating officer only when it is

absolutely necessary. Courts should bear in mind the time constraints of the police officer in the present system, the ill-equipped machinery they have to cope with, the traditional apathy of respectable persons to come forward for giving evidence in criminal cases etc. which are realities which the police force has to encounter with while conducting investigation. (**Vide State of West Bengal v. Mir Muhammed Omar - AIR 2000 SC 2988**).

21) Criminal justice should not be allowed to become a causality for the wrongs committed by the investigating officers. The conclusion of the court in a criminal trial cannot be allowed to depend solely on the probity of investigation. Even if the investigation is illegal or even suspicious, the court can independently scrutinize the rest of the evidence uninfluenced by ill-motivated investigation. Otherwise, criminal trial will plummet to the level of investigating officers ruling to roost. (**Vide State of Karnataka v. Yarappa Reddy - JT 1999 (8) SC 10 = AIR 2000 SC 185**).

22) During the examination of the investigating officer before court, no objection can be taken to his referring to the case diary files while answering questions. He is expected to answer questions only with reference to what he has recorded during investigation. (**State of Karnataka v. Yarappa Reddy - 1999 (3) KLT 456**).

23) When a witness makes mention of the name of the another witness during his testimony before court, ascertain whether the other witness is a charge witness or not and if he is a charge-witness, after writing his name indicate his rank as charge witness. (For example CW3). If that charge witness has already been examined as a prosecution witness then give the rank assigned

to him when he was examined before court.

24) The evidence of witnesses shall ordinarily be taken down in the form of a narrative. (See **Section 276 (2) Cr.P.C.** After recording the evidence of each witness it has to be read over to the witness in the presence of the accused as enjoined by Sec. 278 (1) Cr.P.C. If the witness denies the correctness of any part of the evidence then the correction should not be carried out in the deposition but instead the judge has to make a memorandum incorporating the objection raised by the witness and the remarks of the judge. (See Sec. 278 (2) Cr.P.C.). The record of evidence should be signed both by the witness as well as by the judge. If for any reason the witness has to leave the witness box and his examination is thereafter resumed, then the oath has to be administered again.

25) Examination of Child Witness: Sec. 118 of the Evidence Act states that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them or giving rational answers to those questions by reason of tender age, extreme old age or disease whether of body or mind, or any other cause of the same kind. As per the provisions of the Oaths Act, 1969, oath or affirmation has to be made by all witnesses who may be lawfully examined or who may give or be required to give evidence before a court of law. However, the proviso to Sec. 4(1) of the Oaths Act says that where the witness is a child under 12 years of age and the court is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of oath or affirmation, then such witness need not make any oath or affirmation and the absence of such oath or

affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of such witness to state the truth. Thus if the child witness is above 12 years of age, oath or affirmation, as the case may be, is a must. But if the child witness is below 12 years of age then the court has to ascertain whether the witness understands the nature of the oath or affirmation. In order to evaluate the testimonial competence of the child witness in this behalf, the court has to conduct a *voire dire* examination of the child witness. The record of such examination also should be part of the deposition of such child witness.

26) The Sessions Judge can take cognizance of the offence only against those accused persons who are committed to him by the Magistrate concerned. If he has to add a new accused person whose complicity is discernible from the prosecution records, then the Sessions Judge will have to address the High Court for correction of the committal order or will have to wait until the stage for exercise of his power under Sec. 319 Cr.P.C. is reached. **(Vide AIR 1998 SC 3148).**

27) Sitting in the appellate jurisdiction the High Court has been coming across several mistakes committed by the Sessions Judges in their depositions, record of proceedings, judgments etc.

a) Supposing Charge Witnesses CWs 1 to 6 are scheduled for a particular day and all of them turn up and the Public Prosecutor examines only C.Ws 1,3,5 and marks four documents, 10 MOs and two case diary contradictions and he gives up the other CWs.

i) What will be your record of proceedings for that day ?

“CWs 1 to 6 present. CWs 1, 3 and 5 examined as PWs 1 to 3 respectively. Exts. P1 to P4 and D1 and D2

marked. MOs 1 to 10 marked. CWs 2, 4 and 6 given up. For further evidence(succeeding date)".

ii) You have to ensure that your Bench Clerk obtains necessary endorsements with initials of the Public Prosecutor in the charge-sheet against those C.Ws who are given up.

iii) Supposing the examination of one C.W. in attendance cannot be completed due to paucity of time and his examination is to be continued on the next day, what will be the record of proceedings to be made ?

"CW7 examined in part as P.W.4. Exts. P6 to P8 marked. MOs 11 and 12 marked. P.W.4 bound over to tomorrow".

You have to ensure his attendance before the court on the next day.

b) Very often the various columns in the calendar statements are not seen filled in properly Sessions Judges will do well by directing the staff under their control to ensure that High Court Circulars 10/72 dated 1/7/1972 and 2/1989 dated 22-6-1989 are scrupulously adhered to.

c) In very many cases neither the judgment nor the proceedings paper show compliance of Sec. 232 Cr.P.C. Very often the accused are called upon to enter on their defence before reaching the stage under Sec. 233 Cr.P.C. Compliance of Secs. 232 and 233 Cr.P.C. by the Sessions Judges is mandatory. (**Sivamani v. State of Kerala - 1992 (2) KLT 227 and Radhanandan v. State of Kerala - 1990 (1) KLT 516**).

d) The specific version of the defence as stated during examination of the accused under Sec. 313 Cr.P.C or as stated in the separate written statement filed under Sec. 233 (2) Cr.P.C. very often do not find a reference in the judgment. This has to be done.

e) The law does not envisage a person being convicted for an offence without a sentence being imposed. Every conviction should be followed by a sentence. (**Vide T.K. Musaliar v. Venkatachalam - AIR 1956 SC 246, Varghese v. State - 1986 KLT 1285; Thampi Sebastian v. State of Kerala - 1988 (1) KLT 247 and Saidu Mohamamed v. State of Kerala - 2005 (4) KLT 46**).

f) **The judgment:-** Sec. 354 Cr.P.C. inter alia stipulates the contents of the judgment that is to be pronounced by a criminal court. It should contain the points for determination and the decision on each point and the

reasons for the decision. The judgment should also specify the section of the Indian Penal Code or any other law under which the accused is convicted or acquitted. In case, the accused is acquitted, apart from stating the offence of which he is acquitted the judgment should direct that he shall be set at liberty. If he is in custody the judgment shall state that he shall be released from prison forthwith unless his continued detention is necessary in connection with any other case. When a person is sentenced to death, the sentence should direct that he be hanged by the neck till he is dead. A death sentence shall be imposed subject to confirmation by the High Court for which purpose the proceedings shall be submitted to the High Court as provided under Sec. 366 Cr.P.C.

g) Even when an accused person is acquitted on the ground of unsoundness of mind, the judgment should, as enjoined by Sec. 334 Cr.P.C., record a finding whether such accused committed the acts (such as causing the death by stabbing or other means) attributed to him. In such a case the court shall not forthwith set him at liberty or release him from custody. He will have to be directed to be detained in a Government mental health centre or ordered to be delivered to any relative or friend upon an application by such relative or friend and on his furnishing security to the satisfaction of the court as provided under Sec. 335 Cr.P.C. This is because of the homicidal or dangerous propensities already exhibited by the accused. Such accused ordered to be detained in the mental health center will be subject to further orders of the State Government under Sec. 339 Cr.P.C. (See the concluding portion of the decision in **Sheela v. State of Kerala - 2005 KHC 2079 and Hussain v. State of Kerala - 2005 (3) KLJ 12 = ILR 2005 (4) Kerala 239**).

h) Very often inadmissible statements made by investigating officers are blindly recorded by Sessions Judges. The defence lawyer might ask the investigating officer whether a particular charge witness made a particular statement before him when he questioned the said charge witness. The investigating officer may readily answer the question. The defence lawyer is not entitled to ask such a question the answer to which would be in clear violation of the bar under Sec. 162 Cr.P.C.

Instances are not rare when statements of investigating officers from the witness box that when the accused was asked regarding the manner of perpetrating the crime he explained the same and the alleged version of the accused as given by the investigating officer is recorded by the Sessions Judge. This is clearly illegal.

i) An accused member of an unlawful assembly not armed with deadly weapon cannot be convicted under Sec. 148 IPC with the aid of Sec. 149 IPC. (See **Kattintavida Suresh v. State of Kerala - ILR 2005 (4) Kerala 543 = 2005 (3) KLJ 241**).

j) Imprisonment of life means imprisonment for the remainder of the biological life of the convict unless the sentence is commuted or remitted by the appropriate authority. Hence the life imprisonment does not expire at the end of 14 years or 20 years. (AIR 1961 SC 600; AIR 1980 SC 2147; 1976 (3) SCC 470; 1991 SCC (Cri) 845 and AIR 1991 SC 2296). Consequently, the question of setting off under Section 428 Cr.P.C. the period of detention undergone by an accused as an undertrial prisoner against a sentence for life imprisonment, can arise only if an order is passed by the appropriate government either under Sec. 432 Cr.P.C. or under Sec. 55 I.P.C. read with Sec. 433 (b) Cr.P.C. (Vide **Kattintavida Suresh v. State of Kerala - 2005 (3) KLJ 241**).

k) Life imprisonment is necessarily rigorous. (Vide **Ranjit Singh v. Union Territory of Chandigarh and another - AIR 1991 SC 2296**). Hence, by virtue of Sec. 66 I.P.C., the imprisonment which the Court can impose in default of payment of fine to which an accused is sentenced under Section 302 I.P.C., can only be rigorous. (Vide **2006 (1) KLT 78 - Suresh v. State of Kerala**)

l) When a recovery falling under Sec. 27 of the Evidence Act is sought to be proved through the investigating officer, the necessary word or words indicating authorship of concealment are not seen elicited in many cases.

m) There is an unwholesome practice of administering oath to a prosecution witness and thereafter giving up the witness. This has been deprecated by the High Court. (See **1988 (2) KLT 394 & 1966 KLT 136**) Tendering a witness for cross-examination only without he being examined in chief is a procedure not sanctioned by law. Such a course may amount to giving up of the witness. See **AIR 1995 SC 1601**.

n) It is always desirable to serially number each of the questions put to the accused during his examination under Sec. 313 Cr.P.C. This will not only help the trial court to advert to any particular answer given by the accused in reply to a specific question, it will also help the appellate court to ascertain the answer, if any, given by the accused to any specified question.

The questions which cover the incriminating circumstances should be couched in simple sentences. They should not be complicated or compound sentences dealing with more than one circumstance. (**State of Punjab v. Swaran Singh - 2005 (6) SCC 101; DSR judgment**).

o) The investigating officer should depose to the exact words of the accused which distinctly led to the fact discovered. The words attributed to the accused must find a place in the deposition of the investigating officer. **Regunath v. State of Kerala - 1995 (1) KLT (SN) 24 D.B.**

p) It has come to our notice that where death penalty is awarded for a

conviction under Sec. 302 I.P.C., no separate sentence is seen awarded for the conviction for other offences. This is illegal. Separate sentences should be imposed for each of the other offences and it should be mentioned in the judgment that upon execution of the death sentence, the other sentences shall lapse.

q) The accused is convicted of murder punishable under Sec. 302 I.P.C. If death penalty is not proposed to be imposed on the accused, then the only other alternative is imprisonment for life. Since the Sessions Judge does not propose to impose capital punishment on the accused, the Judge does not hear him under Sec. 235 (2) Cr.P.C. on the proposed sentence. Is there any illegality in the above procedure ?

*Ans. Going by the decision in **Yesudasan v. State of Kerala 1986 KLT 824**, even in such a case, hearing on the question of sentence is mandatory. But in **Ram Deo Chauhan V. State of Assam – 2001 (5) SCC 714** the Apex Court observed that if a Sessions Judge who convicts the accused under Section 302 I.P.C. (with or without the aid of other sections) does not propose to award death penalty the court need not waste time on hearing the accused on the question of sentence. The court also held that in cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the judge proposes to impose death penalty) the proviso to Sec. 309 (2) is not a bar for affording such time.*

r) Under Sec. 354 (3) Cr.P.C. if the sentence imposed is imprisonment for life, the judgment has to state the reasons for the sentence and if the sentence imposed is one of death, the judgment has to state special reasons.

APPENDIX

HIGH COURT CIRCULARS

No. 1/87 dated 12th January 1987 - Disturbing trend of adjournment in Sessions Cases

Sub: Sessions Cases - Adjournments - Instructions issued.

A disturbing trend of trial of Sessions cases being adjourned, in some cases to suit convenience of counsel and in some others because the prosecution is not fully ready, has come to the notice of the High Court. Such adjournments delay disposal of Sessions cases.

The High Court considers it necessary to draw the attention of all the Sessions Judges and Assistant Sessions Judges once again to the following provisions of the Code of Criminal Procedure, 1973, Criminal Rules of Practice , Kerala, 1982 and Circulars and instructions on the list system issued earlier, in order to ensure the speedy disposal of Sessions cases.

1.(a) In every enquiry or trial, the proceedings shall be held as expeditiously as possible, and, in particular, when the examination of witnesses has once begun, the same shall be continued *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. (Section 309 (1) CrI.P.C.).

(b) After the commencement of the trial, if the court 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. If witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded, in writing. (Section 309 (2) Cr.P.C.).

2. Whenever more than three months have elapsed between the date of apprehension of the accused and the close of the trial in the Court of Sessions, an explanation of the cause of delay, (in whatever court it may have occurred) shall be furnished, while transmitting the copy of the judgment. (Rule 147 CrI. Rules of Practice).

3. Sessions cases should be disposed of within six weeks of their institution, the date of commitment being taken as the date of institution in Sessions Cases. Cases pending for longer periods should be regarded as old cases in respect of which explanations should be furnished in the calendar statements and in the periodical returns. (High Court Circular No. 25/61 dated 26th October 1961).

4. Sessions cases should be given precedence over all other work and no

other work should be taken up on sessions days until the sessions work for the day is completed. A Sessions case once posted should not be postponed unless that is unavoidable, and once the trial has begun, it should proceed continuously from day to day till it is completed. If for any reason, a case has to be adjourned or postponed, intimation should be given forthwith to both sides and immediate steps be taken to stop the witnesses and secure their presence on the adjourned date.

On receipt of the order of commitment the case should be posted for trial to as early a date as possible, sufficient time, say three weeks, being allowed for securing the witnesses. Ordinarily it should be possible to post two sessions cases a week, the first on Monday and the second on Thursday but sufficient time should be allowed for each case so that one case does not telescope into the next. Every endeavour should be made to avoid telescoping and for this, if necessary, the court should commence sitting earlier and continue sitting later than the normal hours. Judgment in the case begun on Monday should ordinarily be pronounced in the course of the week and that begun on Thursday the following Monday. (Instructions on the list system contained in the O.M. dated 98th March 1984).

All the Sessions Judges and the Assistant Sessions Judges are directed to adhere strictly to the above provisions and instructions while granting adjournments in Sessions Cases.

No. 7/72 dated, 7th June 1972- For avoidance of delay in disposing of cases by the Courts.

Sub: Criminal cases - Avoiding of delay on the part of the court in disposing of cases - instructions issued.

An instance has come to the notice of the High Court where the charge against the

accused in a case was framed in 1969 and since then, the case which had been posted for evidence, had to be repeatedly adjourned on 8 different occasions on the ground that no witnesses were present on the side of the prosecution; and it was only in 1970, after a delay of more than 18 months that one of the prosecution witnesses was made available for the first time before the court. But thereafter also, there was further protraction of the case and the case was finally disposed of only after a further delay of 11 months. And for this delay the court, the prosecution and the accused have all contributed. This is very unsatisfactory.

The High Court therefore directs that the presiding officers should pay special attention to avoid delay in the disposal of cases. Delays in cases where Government are likely to sustain financial losses should be avoided. The officers should see that such delays are avoided in future.

No.10/72 dated 1st July 1972 - How the various columns in the calendar statements are to be filled up

Sub: Calendar statement - How the various columns in the calendar are to be filled up - Instructions issued.

It is found that the courts in the several Districts fill up in different ways the columns in the calendars relating to the dates of apprehension of accused, report or complaint and commencement of trial. The column regarding explanation for the delay is also filled up in different ways. To ensure a uniform practice to be followed by all the criminal courts in the State, the following instructions are issued.

1. The date of apprehension should be the date of arrest.
2. The date of report or complaint should be the date on which the police files the charge sheet, in respect of cases instituted on police report, and the date on which the complaint is filed in court, in respect of cases instituted otherwise than on police report.

3. The date of commencement of trial should be –
- a) in summons cases, when the particulars of the offence are stated to the accused under Sec. 242 of the Code of Criminal Procedure.
 - b) in warrant cases
 - (i) instituted on police report when the documents under section 173 of the Code of Criminal Procedure are furnished to the accused and the Magistrate satisfies himself about the same as contemplated in section 251 A (1) of the code of Criminal Procedure; and (ii) instituted otherwise than on police report, when the recording of evidence is commenced under section 252 (1) of the Code of Criminal Procedure; and
 - c) in Sessions trials, when the charge is read out and explained to the accused under section 271 (1) of the Code of Criminal Procedure.
4. Apart from furnishing the diary extract, a brief explanation for the delay should be given in the relevant column.

No. 2/89 dated 22nd June 1989 - Unsatisfactory preparation of appendix to judgments.

Sub: Unsatisfactory preparation of appendix to judgments.

It has come to the notice of the High Court that appendices to Judgments are incomplete in many respects. For example, dates of exhibits are not often mentioned. Similarly, description of official witnesses are incomplete. Whether the witness is a Doctor, Sub-Inspector or Village Officer is hardly ever mentioned. These make an

appendix valueless and time has to be spent to ascertain details, which should be readily available. Even material objects are not often properly described. Ornaments or ingots are merely described as gold. This is all part of the tendency to shirk the work.

The attention of the Subordinate Courts is therefore invited to rules 132 and 134 of the Criminal Rules of Practice and they are directed to comply with the provisions in the Rules strictly and prepare appendices carefully with complete details, so that they are useful, and make reference easy.

The Supervising Officers shall oversee effective implementation of the instructions and non-compliance with the same will be viewed seriously and appropriate action taken against those found responsible in the matter.

No. 7/58 - dated 28th February 1953.

Sub: Criminal Justice - Trial of cases in which some of the accused have absconded - Instructions regarding.

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The attention of the subordinate criminal courts is drawn to rule 36 of the Criminal rules of Practice (Travancore-Cochin) and rule 23 of the Criminal Rules of Practice (Madras). It is brought to the notice of the High Court that the directions contained therein are but sparingly followed by the Subordinate Magistrates in the cases coming up before them for trial.

The subordinate courts will pay particular attention to see that the disposal of the case as against those accused who have appeared is not unnecessarily delayed because of the absence of accused who have not appeared.

THE CRIMINAL RULES OF PRACTICE AND ORDERS
ISSUED BY THE HIGH COURT OF JUDICATURE AT MADRAS

23. When there are several accused persons in a case, and only some of them have appeared or been produced before the Court, if the Magistrate is satisfied that the presence of other accused cannot be secured within a reasonable time, having due regard to the right of such of the accused as have appeared to have the case against them

enquired into without delay, he shall proceed with the case as against such of the accused as have appeared and dispose of it according to law. As regards the accused who have not appeared, he shall give the case a new number and enter it in the register of cases received, and if it remains pending for a long time, and efforts to secure the presence of the accused have failed, and the case against the accused who have appeared has been disposed of, the Magistrate shall report the whole matter as regards all the accused to the District Magistrate, through the Sub Divisional Magistrate, if any, and the District Magistrate may direct that the case against the absent accused be removed to the “Register of long pending cases”, or if the District Magistrate is of opinion that the case against the absent accused is wholly false, he may direct that the case be omitted from the registers and the returns altogether, provided that he may at any subsequent time order the case to be entered in the register of long pending cases.

THE CRIMINAL RULES OF PRACTICE
(TRAVANCORE- COCHIN STATE)

36. Cases in which some of the accused have absconded:-

When there are several accused persons in a case and only some of them have appeared or been produced before the court, if the Magistrate is satisfied that the presence of the other accused cannot be secured within a reasonable time, having due regard to the right of such of the accused as have appeared to have the case against them enquired into without delay, he shall proceed with the cases as against such of the accused as have appeared and disposed of it according to law. As regards the accused who have not appeared, he shall give the case a new number and enter it in the register of cases received, and if it remains pending for a long time and efforts to secure the presence of the accused have failed and the case against the accused who have appeared has been disposed of, the Magistrate shall report the whole matter as regards all the accused to the District Magistrate setting forth the nature of the offence all the accused are charged with, the substance of the evidence let in against the persons tried, with the result of the trial, and also such facts as will give the District Magistrate a clear idea as to

the nature of the case against the absent accused and the District Magistrate may direct that the case against the absent accused be removed to the “Register of Long Pending Cases”, or if the District Magistrate is of opinion that the case against the absent accused is wholly false he may direct that the case be omitted from the registers and the returns altogether, provided that he may at any subsequent time order the case to be entered in the Register of Long Pending Cases. The District Magistrate shall, however, make these directions only after the expiration of three months in summons cases and six months in warrant cases from the date of the filing of the complaint.
