NATIONAL JUDICIAL ACADEMY

NATIONAL CONFERENCE ON SENTENCING, PROBATION AND VICTIMOLOGY [P-1423]

16TH&17THNOVEMBER, 2024

PROGRAMME REPORT

PREPARED BY:

DR HUMAYUN RASHEED KHAN,

PROFESSOR, NATIONAL JUDICIAL ACADEMY, BHOPAL

Overview of the Conference

The National Judicial Academy organized a two-day National Conference on Sentencing, Probation and Victim compensation on 16th& 17th November, 2024. The conference aimed to draw attention of judges from district judiciary towards issues and challenges in sentencing procedure, death sentence issues, mandatory pre-sentence report, individualized sentencing enquiry, sentencing policy under New Criminal Laws, rehabilitative and reformative justice, and artificial intelligence and sentencing justice. The conference involved discussion on approaches towards sentencing policy and practice while enhancing the skills of judges by providing theoretical perspectives and deliberating on pragmatic requirements in the context of latest judgements particularly ***Manoj v. State of M.P., (2023) 2 SCC 353***, ***In Re: Policy Strategy for Grant of Bail, 2022 SCC Online SC 1487***, *and* ***State of Wisconsin v. Eric. L. Loomis, 2015 AP 157-CR***. The conference facilitated participant judges to comprehend the substantive and procedural aspects relating to probation of offenders in upholding the edifice of the administration of justice. The conference also aimed to acquaint participant judges with the legislative mandate of compounding of offences and effective utilization of compounding in criminal cases. The evolving horizons and general principles of plea bargaining were also discussed. The scheme of victim compensation and application of mind while recording reasons for awarding or refusing compensation, and changing role of victim in the criminal justice system also formed part of the discourse.

Session 1: Sentencing Procedure: Issues & Challenges

Speakers: Justice D. K. Upadhyaya, Justice Joymalya Bagchi & Justice Ashwani Kumar Mishra

The session was commenced with discussion on the relevance of the Constitution for district judiciary. It was stated that the Constitution is the grund norm and all laws emanates from the Constitution. The fair trial is a constitutional requirement and is traceable to the Criminal Procedure Code and Bharatiya Nagarik Suraksha Sanhita, 2023. The importance of public confidence on courts was highlighted, and the importance of right to hearing was explained. It was stated that people have confidence in the Indian justice delivery system because of its fairness of procedures, which prevent conviction of innocent persons.

The session proceeded on the premise that unlike the United States of America, India awaits a policy on sentencing. The recommendations of the Malimath Committee on Reforms of Criminal Justice System (2003) and the Committee on Draft National policy on Criminal Justice, 2008 (also known as the Madhava Menon Committee) were referred. ***Jagmohan Singh v. State of U.P., AIR 1973 SC 947*** was cited to emphasise the fact that a very wide discretion is provided to the trial courts in the matter of determining the degree of punishment and that has resulted in disparities in sentencing. Emphasis was placed on the competing interests in sentencing *viz the* expectations of society, interests of the victim, and the liberty of accused.

The factors that are required to be taken into consideration before imposition of sentence were discussed regarding ***Gurmukh Singh vs State of Haryana (2009) 15 SCC 635***. The theories of sentencing were alluded to as basis of sentencing practices. The task of balancing aggravating and mitigating circumstances was dwelt and the judicious exercise of discretion was emphasized. The reformative theory of punishment was examined, and emphasis was placed on the principles and objectives of restitutive and reformative justice. In ***Chhannu Lal Verma v. State of Chhattisgarh AIR 2019 SC 243*** it was observed by the Apex Court that in the matter of probability and possibility of reformation of criminal, it is seen that a proper psychological and psychiatric evaluation is hardly done. Without the assistance of such psychological or psychiatric assessment and valuation of the criminal, it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated.

The cardinal factors of "uniformity" and "proportionality" in sentencing practices in order to prevent arbitrariness and rope in the rigor of certainty in punishment which is considered to be a more effective deterrent than the bare quantum of a sentence were highlighted. ***Rajbala v. State of Haryana, (2016) 1 SCC 463*** was quoted to explain the imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed. ***Shyam Nrain v. State (NCT of Delhi), (2013) 7 SCC 77*** was quoted for establishing that the purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes.

Session 2: Death Sentence: Changing Contours

Speakers: Justice Joymala Bagchi & Justice Ashwani Kumar Mishra

The session commenced with an open-ended question: Is death penalty a deterrent? It was said that we have increased the death penalty under BNS, 2023 as it now stands for eighteen offences as compared to the erstwhile IPC, 1860, under which only twelve offences attracted death penalty. The major issue is whether this increase in the number of offences for the death penalty is supported by any empirical research. The trial courts need to focus on the balancing test, where due importance should be accorded to aggravating and mitigating factors in making final determination on quantum of sentence in death penalty cases.

Then the sentencing parameters in death sentence cases were examined, referring to the 'triple tests' of aggravating circumstances, mitigating circumstances, and the rarest of rare doctrine. The guidelines in death sentence cases were discussed, referring to the judgments in ***Bachan Singh v. State of Punjab* (1980) 2 SCC 684** and ***Machhi Singh v. State of Punjab(1983)3SCC470***. It was also said that *Machhi Singh's case* diluted the *Bachan Singh* judgement. The Supreme Court of India in order to regulate the enormous discretion available to trial judges, evolved the doctrine of 'rarest of rare' case in *Bachan Singh judgement* more than four decades ago so that the most severe punishment of the death penalty may not be awarded casually. Ever since then, the question of what constitutes 'rarest of rare' cases has been examined and explored by the Apex Court on several occasions.

The judicial exploration and examination of the 'rarest of rare' doctrine was extensively covered by the resource persons. It was highlighted that since the death penalty is inseparably connected to life and awarding capital punishment irretrievably takes away the most precious fundamental right of the convict, it may be taken away only when the elimination of the convict from society becomes necessary and the other option is completely foreclosed. The deliberations covered the areas of enormous discretion of trial judges in the context of capital punishment offences, persistent disparities concerns, crime test, criminal test, rarest of rare test in the light of the leading judgements of the Apex Court during the preceding four decades.

The discussion in the session also extended to cover the law laid down in ***Sangeet v. State of Haryana, AIR 2013 SC 447, Mofil Khan v. State of Jharkhand, (2015) 1 SCC 67, Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, Pappu v. State of U.P., (2022) 10 SCC 321, Swamy Shraddananda (2) v. State of Karnataka, AIR 2008 SC 3040, Santa Singh v. State of Maharashtra, (2019) 7 SCC 1*** *etc.* The case of ***Gopal Singh v. State of Uttarakhand (2013)7SCC545*** was highlighted, wherein it was observed that "just punishment is the collective cry of the society. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence."

The session concluded on the note that the goal of reformative punishment requires that trial courts must inquire and explore the reasons for reformation and rehabilitation in analyzing the mitigating factors.

Session 3: Commutation of Death Sentence

Speakers: Justice D.K. Upadhyaya & Justice P.S. Dinesh Kumar

The session commenced with the discussion on the obligation of the sentencing court to hear the accused on the question of sentence, which is imposed by Section 235 (2) of the Criminal Procedure Code and Section 258(2) of Bharatiya Nagarik Suraksha Sanhita, 2023. It was pointed out that the obligation 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 that 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) or Section 258(2) of Bharatiya Nagarik Suraksha Sanhita, 2023 arises only after the conviction is recorded. What remains is the question of the 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) or Section 258 (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 that operate are of an entirely different order than those that come into play on the question of conviction.

Then the discourse turned towards ***Santa Singh v. State of Punjab, (1976) 4 SCC 190*** in which the Supreme Court had held that a separate stage should be provided after conviction when the court can hear the accused in regard to the factors bearing on sentence and then pass proper sentence on the accused—the nature of the offence, the circumstances of the offence (extenuating or aggravating), the prior criminal record of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. The court had also noted that care would have to be taken by the court to see that the hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonized with the requirement of expeditious disposal of proceedings.

The most intense and extensive discussion in this session was on the subject of 'individualized sentencing inquiry.' The Supreme Court of India has recently emphasized the 'element of flexibility' in considering the case-specific factors relating to crime and criminal. It has been said that sentencing is not a mathematical equation and ought not to be seen as one, and the trial court must focus on equally considering the aggravating and mitigating circumstances and arrive at an individualized sentencing outcome on a case-by-case basis. The court has, therefore, introduced a mandatory Pre-Sentence Report (PSR) in capital offences ***(Manoj and others v. State of Madhya Pradesh, (2023) 2 SCC 353).***

The Supreme Court said that there is an urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in the majority of cases reaching the appellate stage. It is, therefore, necessary that the trial court should elicit information from the accused and the State both. The State must produce at the appropriate stage, material which is preferably collected beforehand, disclosing psychiatric and psychological evaluation of the accused in offences carrying a capital sentence. This will help establish proximity to the accused person's frame of mind at the time of committing the crime vis-à-vis mental state at the time of sentencing to evaluate the progress of accused towards reformation achieved during the incarceration period.

It was pointed out that now the State, must for an offence carrying capital punishment at the appropriate stage, produce material before the trial court on psychiatric and psychological evaluation of the accused on age, early family background (siblings, protection of parents, any history of violence or neglect)**,** present family background (surviving family members, whether married, has children, etc.), type and level of education, socio-economic background (including conditions of poverty or deprivation, if any), criminal antecedents (details of offence and whether convicted, sentence served, if any), income and the kind of employment (whether none, or temporary or permanent, etc.), other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

The Supreme Court further said that the above information should mandatorily be available to the trial court, at the sentencing stage. The accused should also be given the same opportunity to produce evidence in rebuttal towards establishing all mitigating circumstances. The information regarding conduct and behaviour of accused in jail, work done or the activities performed by him and other related details should be called from the jail authorities (Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard by the High Court after a long time from the date of conviction or confirmation by the High Court, a fresh report is recommended from the jail authority. The jail authorities must include a fresh psychiatric and psychological report, which will further evidence the reformative progress, and reveal post-conviction mental illness, if any. The session concluded with the note that all the trial courts in death penalty cases must mandatorily seek a report from prison authorities, probation officers, and health professionals before awarding the sentence.

Session 4: Sentencing Policy under New Criminal Laws & Victim Compensation

Speakers: Justice Anoop Chitkara, Prof. (Dr) G.S.Bajpai & Mr. Anil Kishore Yadav

This session started with discussion on the new criminal laws which was said to be a welcome change as these laws address many issues that were long pending, such as the enhancement of fines, making the penal law compatible with the modern technological changes and community service as the penal law was more than 160 years old and the law of evidence was more than 150 years old. It is significant that offenses against the human body, women, and children are reorganized at the beginning of the BNS, with specific provisions for each category. It was highlighted that BSA acknowledges the shift from traditional paper-based documentation to electronic forms of communication & data storage in contemporary India. It helps ensure that the legal system is equipped to handle cases involving digital evidence. Now a greater role for technology has been recognized and accorded in the collection of evidence.

It was said that the introduction of 'community service' as a form of punishment **(Section 4 of BNS)** is a significant step towards the realization of reformatory jurisprudence on the ground. The legislature has now offered 'community service' as a form of punishment for certain minor offenses. These include public servant unlawfully engaging in trade **(S. 202 BNS)** non-appearance in response to a proclamation **(S. 209, BNS),** attempt to commit suicide to compel or restraint exercise of the lawful power of public servant (**S.226, BNS**), petty theft on return of theft money **(proviso to S.303, BNS),** misconduct in public by a drunken person (**S. 355, BNS**), and defamation [**S. 356(2), BNS**].

During the discussion, the participants pointed out that the newly introduced concept of 'community service' is unexplained, as the law merely states that service which the court considers beneficial to the community is 'community service'. It is explained in **Section. Section 23 of BNSS,** which says 'community service' shall mean the work which the court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration.

What could be beneficial to the community is not explained. It consequently gives a huge space of discretion to the magistrate in determining what community service a convict should be asked to perform or what the duration of community service should be. It was pointed out that we need to look towards the examples of other countries to decide these matters. The prevalent practice in the USA, France, Spain, U.K., and Australia would indicate that the duration of community service varies from 01 day to 30 days for petty offences, and 31 days to 180 days for serious offences.

The deliberations highlighted that a careful reading of various provisions of Bharatiya Nyaya Sanhita, 2023 indicates that the penal law has now become very stringent as the punishment has been increased for various offenses, fines have been enhanced for a large number of offenses (about 83), and minimum mandatory sentence introduced for many offenses (about 23). Some of the offenses for which punishment has been enhanced relate to offenses against women and children such as misuse of innocence of a child (**Section. 95** of BNS, 2023), punishment for voluntarily causing grievous hurt resulting in the persistent vegetative stage (**Section.117 (3)**, buying child for purposes of prostitution, etc.(**Section 99, BNS**), five or more persons causing grievous hurt (Mob lynching) on the ground of race, caste or community, sex, place of birth, language, personal belief, or any other similar ground [**Section. 117 (4)**].

The session also covered the evolving Indian jurisprudence, whereby the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged. It has also been realized that where the victims themselves have come forward to participate in a criminal proceeding, they must be afforded an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. It has recently been observed that victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.

It is noteworthy to mention that in the **154th Report of the Law Commission of India,** radical recommendations on the aspect of compensatory justice to a victim under a compensation scheme were made. Thereafter, a **Committee on the Reforms of the Criminal Justice System** in its Report in 2003 suggested ways and means to develop a cohesive system in which all the stakeholders are to work in coordination to achieve the common goal of restoring the lost confidence of the people in the criminal justice system. The committee recommended the rights of the victim or his/her legal representative (**Rekha Murarka v. State of West Bengal and another, (2020) 2 SCC 474).** The Code of Criminal Procedure (Amendment) Act, **2008** not only inserted the definition of a 'victim' under **Section 2 (wa)** but also statutorily recognized various rights of such victims at different stages of trial.

The next important case on the plight of victim which was discussed was **Jaswinder Singh (Dead) through Legal Representative v. Navjot Singh Sidhu, AIR 2022 SC 2441** where it was held that an important aspect to be kept in mind is that any undue sympathy to impose inadequate sentence would do more harm to justice system and undermine the public confidence in the efficacy of law.

The society cannot long endure under serious threats and if the courts do not protect the injured, the injured would then resort to private vengeance and, therefore, every court has to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

It was highlighted during the session that the Apex Court observed in **Jagjeet Singh v. Ashish Mishra, AIR 2022 SC 1918,** that the 'victim', which is the de facto sufferer of a crime, unfortunately had no participation in the adjudicatory process and was made to sit outside the court as a mute spectator. The victim's right to participate in criminal trial and her right to know the status of investigation, and take necessary steps, or to be heard at every crucial stage of the criminal proceedings, including at the time of grant or cancellation of bail, were also duly recognized. Various rights of the victim, including the right to appeal, right to get medical treatment, right to the protection of identity and the right to restitution were deliberated upon. It was opined that in order to give just and proper compensation and rehabilitation of victim the courts should consider various factors including loss of livelihood, age of the deceased, number of dependents, medical expenses of the victim and continuity of offence.

Session 5: Probation, Triple Method, and Interface of Technology & Law

Speakers: Justice Anoop Chitkara and Prof. (Dr) G.S. Bajpai

The last session commenced with discussing suggestions proposed in the judgment ***In Re: Policy Strategy for Grant of Bail, 2022 SCC OnLine SC 1487***. The concern was expressed that courts not granting bail to accused persons in deserving matters. The data of the National Crime Record Bureau on high number of under trial prisoners was shared and concern was expressed on delay in investigation and prosecution of cases which prevent the timely completion of trial. The historical background behind the system of probation and relevance of probation for prison reforms were discussed. Various strategies to achieve restorative justice were highlighted. Sections 360 & 361 of the Cr. P.C., and Section 19 of the Probation of Offenders Act were referred. The importance of Sections 3 & 4 of the Probation of Offenders Act was highlighted.

Thereafter, various strategies to effectively implement the probation system in the Southern States were shared. It was stated that there is a system of remanding first-time offenders in the age group of 18 – 24 years apprehended for petty offences in one sub prison where adequate measures are taken to rehabilitate them through meditation, spiritual teachings and education in remand period. For bail to such offenders, the surety of parents is ordered rather than putting difficult conditions while granting bail by invoking discretion under Sections 437 & 439, Cr.P.C. Such practices are being extended to all courts and prisons in Tamil Nadu. The low number of prisoners in Tamil Nadu was highlighted.

The judgment ***Pratap Singh v. State of Jharkhand 2005 (3) SCC 551***, dealing with issues related to the determination of juvenility was referred. The issue related to segregation of juvenile offenders with hardened criminals was highlighted, and judgments ***Jugal Kishore Prasad vs State of Bihar 1973 SCR (1) 875*** and ***Daulat Ram vs. State of Haryana AIR 1972 SC 2334*** were discussed. It was opined that courts should analyse circumstances of the case, nature of the offence and character of the offender, and then should consider Section 4 of the Probation of Offenders Act.

The issues related to plea bargaining was discussed and its lack of use was highlighted. Section 229, Cr.P.C. dealing with plea bargaining and judgments **State of Maharashtra v. Sukhdeo Singh 1992 SCR (3) 480**, and ***Madanlal Ramchandra Daga v. State of Maharashtra, AIR1968 SC1267, State of U.P. v. Chandrika, AIR 2000 SC 164, and In Re Policy Strategy for Grant of Bail, 2022 SCC Online SC 1487*** were referred. The suggestions for effectuating the provisions relating to plea-bargaining were made because of the directions of the Supreme Court in ***In Re Policy Strategy for Grant of Bail, 2022 SCC Online SC 1487,*** where it was observed that in cases of under-trial prisoners, the trial courts may explain to the accused and the learned counsel appearing for accused to explore the possibility of plea bargaining. To make plea bargaining more effective, to reduce the delays in criminal justice system and growing pendency of criminal cases, it was stressed that the cause due to which plea bargaining has not been successful so far must be appreciated.

It was opined that accused persons are aware that they can prolong the trial or can get acquittal because of loopholes in the system so they don't come forward to confess their guilt in plea bargaining. Various strategies for identifying cases for disposal through plea bargaining were discussed, and the effective implementation of plea bargaining was deliberated upon. Sections 320 (1) and 320 (2) of the Cr. P. C., dealing with compounding of cases were discussed. Various issues related to the effective utilization of the compounding of criminal cases were deliberated in the session.

Thereafter, the deliberations moved towards increasing intervention of technology in the field of law and the justice system across the globe. It was emphasized that technology has now become visible everywhere, engulfing all the institutions, including the judiciary, in many parts of the world. Humanity is embracing it in a manner that was not seen before. The march of AI is one such scientific miracle that has come with excitement but unknown fear as well. The application of AI algorithms and machine learning tools will certainly assist the judges in conducting smooth legal research for their judgments and complex orders. This interesting setting is a combination of traditional and modern aspects, which prominently highlights the interrelation of law and technology.

This session explored different nuances of AI application in the administration of the criminal justice system in general and the sentencing process in particular, with specific reference to the United States, and Loomis (2016) judgment was discussed, where for the first time COMPAS algorithm was used in sentence determination.

While referring to some specific cases in the United States relating to the use of AI software in the sentencing process, reference was made to ***State of Wisconsin v*. Eric L. *Loomis, 2015 AP 157-CR,*** where the use of COMPAS, an AI software, influenced a sentencing decision. A high risk of reoffending was predicted by the software for a defendant, which the judge considered in determining the length of the sentence. This case sparked controversy as critics raised concerns about the fairness and accuracy of using AI algorithms in sentencing decisions. The debate highlighted the ethical implications of relying on AI in the criminal justice system.

Undoubtedly, considering AI tools in legal research is very helpful to judges in judicial decision-making, as it leads not only to quick disposal but also assists in producing qualitative judgments, as observed in the US, Malaysia, and elsewhere. AI algorithms may play a very positive role in deciding the length and severity of sentences in criminal cases. However, machine-based learning and analysis are dependent on the available data in which conscious or unconscious discriminatory practices may already be embedded, and as a result, the socially unconscious but intelligent machine, which functions on available data, is bound to give discriminatory, racial, unequal, and unfair analytical-computational outputs.

The unreasonable prediction regarding re-offending by the convict in Loomis's case is just the tip of the iceberg, and many more such unreasonable examples of computational analysis might come in the future. Hence, it was pointed out that it would be safe to use these algorithms, carefully verifying the re-offending chances indicated by the algorithm used in sentence determination in the future, if permitted in India. There is an urgent need to develop a comprehensive regulatory framework in India for the makers of such sentence determination algorithms before embarking on a journey to use the AI techniques in sentence determination in criminal trials failing which the AI algorithms will cause more harm to fairness and transparency than assisting the sentencing courts in dispensation of justice.

The participants were reminded that it is a bounden duty of trial courts that justice should never become a casualty in the name of quantity and quickness. A careful approach of a sentencing judge and an authenticated strategy in using AI tools can successfully overcome the potential threats of machine biases in AI algorithms used for sentence determination and may very well promote neutrality, accuracy, and transparency in the criminal justice system.

****