

TRIAL OF CROSS CASES: ISSUES AND CHALLENGES

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Two different versions of the same incident resulting into two criminal cases are described as "case and counter case" by some High Courts or just "cross cases" by some others. Incidences of Cross cases are very common in trial courts. Almost in every serious criminal case we find a cross version by the Defence which requires a separate trial on its own right. Sometimes the cross version represents the truth, in most cases they are false and raised just to impede speedy trial and to defeat the prosecution and secure acquittal by making the trial complicated and confusing.

TRIAL PROCEDURE

Trial of cross cases presents a variety of ticklish practical issues and challenges. Courts have been responding to them differently. Way back in a Division Bench of the Madras High Court (Waller, and Cornish, JJ) made a suggestion¹ that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same court, and each party would represent themselves as having been the innocent victims of the aggression of the other."

Next year Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court². The learned judge said thus:

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

Unfortunately we do not have any legislative response to this problem as yet. This situation came to be adverted to by the Supreme Court thus:

"We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code³".

There is no provision in CrPC or in the Evidence Act dealing exclusively with trial of cross cases. The judiciary has evolved a procedure to fill this gap. In Nathi Lal & ors. vs. State of U.P.⁴ the procedure to be followed in such a situation has been succinctly describe by the Supreme Court thus:

¹ In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881

² See Krishna Pannadi vs. Emperor AIR 1930 Madras 190

³ Sudhir vs State (2001)2SCC688

⁴ (1990) Supp SCC 145

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other⁵.

In **State of M.P vs Mishrilal**⁶ both the parties lodged an FIR against each other in respect of the same incident. The Supreme Court while giving guidance as to the procedure to be adopted in such cases has observed as follows:-

"It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rationale behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments."

In sum, the procedure prescribed by the apex court and various High Courts in this regard is that both the cases must be tried separately and independently by the same judge and decided on the basis of evidence led in that case only without being influenced by the materials and evidence led in the other case. The procedure laid down is that first the evidence should be recorded in one case and both the parties must be heard but judgment should not be pronounced. Immediately thereafter the other case should be taken up for recording of evidence. Once the hearing is complete in both the cases both the cases should be decided simultaneously by separate judgments. The impression is that if we follow the above referred procedure major concern of fair trial to both the parties would be adequately addressed.

Though this procedure appears very simple and innocuous in theory, bristles with numerous difficulties and ticklish practical problems when cross cases are taken up for trial in actual practice.. Firstly, it requires a lot of repetitive work: both the parties virtually repeat the entire evidence in both the cases. This makes the process very cumbersome and time consuming. At the same time, it is almost impossible to insulate the mind of the judge from being influenced at least indirectly by the evidences and inferences in the other case. Humane nature and psychology can not be negated in toto. In the very nature of the things the judge would be influenced by the evidence led in the other case and inferences drawn in one case would be used knowingly or unknowingly in the other case. Secondly, the repetition of entire evidence in both the cases would invariably give rise to a lot of contradictions. No person can repeat the same statement. Some

⁵ Ibid

⁶ (2003) 9 SSC 426

subtraction or addition is bound to be there giving opportunity to the guilty party to take advantage of technicalities.

The mandated procedure requires that once the entire evidence is complete in one case, evidence should be recorded in the other case and then after hearing the arguments both the case should be decided by the same judge on same day by different judgments. The rationale behind the suggested procedure is that the accused should not be punished before his entire case is before the court. A close look at the procedure and the objective behind it would clearly suggest that it is expected of the judge that he should make up his mind regarding guilt or otherwise of the parties on the basis of the "entire case" and just not on the basis of the case of the parties in each individual case. The other objective of the mandated procedure i.e. avoidance of chances of conflicting decisions too can only be achieved if decision is taken on the basis of "whole case" and not as two independent cases. It is submitted that the objectives cannot be achieved unless the two versions are treated as two versions of the same case and not as two independent cases.

INVESTIGATION IN CROSS CASES

Investigation in cross cases too presents vexed and complicated issues. The Supreme Court has emphasized that in cross cases investigation should be conducted by one and the same investigation officer. In **State of MP vs Mishri Lal**⁷ the Supreme Court has emphasized the point by observing that

"In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice."

Despite very clear direction of the apex court, we find numerous instances where investigation is done by two different investigating officers. Two charge sheets are filed by the police holding each other aggressor in their respective cases. Often cognizance is taken on the basis of both charge sheets and charges are framed in both the cases. In the very nature of things, both the parties cannot be aggressor. If both the cases are investigated by one and the same investigating officer truthfully, sincerely and objectively it would not be difficult to find as to who was the aggressor. Ideally, only one charge sheet should be filed by the police indicating clearly as to who was the aggressor and the cross case should end up in a final closure report. It must be left to the aggrieved party to choose his future course of action. If the aggrieved party files a protest petition or a complaint as per the legal advice and cognizance is taken by the magistrate, both the cases can be tried together.

⁷ Ibid

RECORDING OF STATEMENT U/S 313 of Cr P C.

Another issue that frequently arises in disposal of cross cases is one relating to recording of the statement of accused under Section 313 of Cr.P.C. The procedure prescribed by the apex court and various High Courts requires that once the evidence is over in one case the other case should be taken up for recording of evidence. The question remains whether the statement under Section 313 Cr.P.C. should be recorded once evidence in both the cases is complete or it should be recorded just after completion of evidence in first case and once the statement under Section 313 Cr.P.C. is recorded in the first case, other should be taken up for recording of evidence. The object of statement under section 313 is to provide an opportunity to the accused to explain the circumstances appearing against him in the case. If the accused in the first case is required to give statement under Section 313 of Cr P C before his case is taken up for evidence it may lead to premature disclosure of his case which may cause prejudice to him. Though there are no clear-cut guidelines in this regard, it would be desirable if the statement under section 313 is recorded once the evidence in both the cases is complete and the whole case of the parties is before the court. Suggestions that follow would resolve the issue pertaining to recording of statement under section 313 Cr.P.C. as well.

SUGGESTIONS

It is suggested that by a suitable amendment to the Code of Criminal Procedure and the Evidence Act providing for a scheme of consolidation of cross cases should be introduced. The salient features of consolidation would be as follows:-

- Both the cases must be investigated by one and the same IO who should as far as possible state which party was the aggressor. He should try to come up with one charge sheet.
- If two charge sheets are filed in any case or in cases where the accused has filed a complaint case as a counter case, both the cases must be consolidated and treated as one case in which rival parties have different versions.
- Rule of evidence applicable should be preponderance of probabilities vis a vis parties instead of proof beyond reasonable doubt. This is because the happening of incident is admitted to by both the parties with the rider that each has his own version. In such a situation rule of evidence should be preponderance of probability instead of proof beyond doubt.
- Both the cases should be consolidated and evidence should be recorded in one case which should be marked as leading case. The case registered first should be made leading case. The evidence recorded in the leading case should be read in both the cases. In fact the two cases must be treated as one for all practical purposes.
- Both the cases should be disposed of by a single common judgment.

The procedure suggested would make the trial of cross cases easier and smooth, without being unfair to either of parties.

This may be criticized on the ground that the established principles of criminal jurisprudence are being given a go-by inasmuch as evidence recorded in one case is being used in another case as also the rule of proof in criminal cases is not being strictly followed. But a closer look would reveal that the criticism has no force. If parties are different and the evidence is not being recorded in the presence of the other party against whom it is going to be used then one can legitimately say that such type of evidence should not be used. But if the rival parties have different versions and in presence of both the parties evidence is being recorded, then perhaps there cannot be any grievance on this count.

It may also be argued that only the procedure prescribed by the apex court and various High Courts can guarantee compliance with the fundamental norms of a fair criminal trial including the protection given to the accused in Article 20, 21 and 22 of the Constitution. Fair trial requires that the accused should not be compelled to disclose his case before the entire case of the prosecution is out and that the right of accused to keep silent throughout the trial should not be compromised. The argument is that if both cases would be consolidated and evidence is recorded in one case the status of the accused vis a vis a fair criminal trial would be compromised and protection given to an accused would melt down. True, if the cases are 'consolidated' as we understand the term in civil jurisdiction, many aspects of fair criminal trial as we recognize them would vanish. But that is the demand of situation which arises because of peculiar character of a cross case. As regards premature disclosure of Defence case, in cross cases the accused come up with disclosure of his case right from the very beginning of the case. So the argument that the accused would be compelled to disclose his defence before the prosecution case is out, loses vigour. The requirement is that the accused shall not be compelled to disclose his version, but, if he has already made his Defence version known to the whole world voluntarily how can it be said that he is being compelled to disclose his case before the evidence of prosecution is over?

Rights of an accused vis a vis a fair criminal trial must be respected, but, at the same time, we should not be hyper technical and far away from realities. The criticism that consolidation of cross cases would compromise with the concept of fair criminal trial is more imaginary than real. Fairness demands that cross cases should be tried as one case.