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EFFECTS OF THE COVID-19 LOCKDOWN ON CRIMINAL PROCEDURE

- Aesha Anurag Shah, Gayatri Puthran & Shourya Tomar*

ABSTRACT

The Indian judicial system, taking cognizance of the global outbreak of COVID-19, has adopted certain measures to curtail the spread of the virus in the country. Most courts and tribunals are not functioning. The Supreme Court has said that only “urgent matters” will be dealt with during the period of the lockdown. The Court also decided to promote e-filing of cases and virtual court proceedings, thereby attempting to maintain social distancing without compromising justice. The apex court has also extended the period of limitation to file legal proceedings after taking suo moto cognizance of the challenges faced by the public to comply with general law of limitation during lockdown.¹ The Delhi High Court also passed an order stating that interim orders passed by High courts and all subordinate courts that expire on 16-03-2020 would stand extended till 15-05-2020. Routine matters were also adjourned as lawyers could not adequately prepare for representations in matters pertaining to stay, bail and paroles.

This paper discusses the impact of COVID-19 and the lockdown on different stages of criminal trials including registrations of FIR’s, investigation, bail and court proceedings. The implication and viability of virtual proceedings in criminal cases are also discussed, along with measures to ensure a fair trial even in these extenuating circumstances.

PRE-TRIAL

Registration of FIR

Registration of a First Information Report (FIR), under section 154 of the Code of Criminal Procedure (CrPC), does not entail the physical presence of a person at the police station. But the court in *Ramsinh Bavaji Jadeja v State of Gujarat*² held that all telephonic messages about the commission of a cognizable offence cannot be treated as an FIR. If the message given is cryptic, as was in *Somabhai v State of Gujarat*³, then it cannot be treated as an FIR. This leads to a delay in filing an FIR, especially during this pandemic, because the police would prioritize and be engaged in enforcing Covid-19 guidelines. The implication of this delay, as aptly put by the Supreme Court in *Thulia Kali v State of Tamil Nadu*⁴, is that the report will be ‘bereft of the advantage of spontaneity’⁵ and a colored version of reality after consultation and deliberation might creep into it. This might lead the court to suspect the credibility of the FIR lodged. Although FIR can be lodged online in multiple languages, most people in India are not technologically equipped to do so, and the service is available only in 11 states⁶.

* Students, BBA LLB (H), Jindal Global Law School

¹ Rajdev Singh and Pathik Choudary, ‘India: COVID-19 and Indian Courts’ (*Mondaq*, 2 April 2020)

<<https://www.mondaq.com/india/litigation-contracts-and-force-majeure/911550/covid-19-and-indian-courts>> accessed 14 May 2020.

² (1994) 2 SCC 685.

³ AIR 1975 SC 1453.

⁴ (1972) 3 SCC 93.

⁵ Ibid.

⁶ Diganth Sehgal, ‘How does one file a complaint/FIR during lockdown’ (Ipleaders, 30 April, 2020)

<<https://blog.ipleaders.in/one-file-complaint-f-r-lockdown-can-go-police-station/>> accessed 15 May, 2020.

Moreover, with the closed lower courts, the magistrate would be unable to direct the registration of an FIR under Section 156(3) of CrPC⁷ on refusal of a police officer to do so under Section 154.

Investigation

In a non-cognizable offence, the proceedings would be at a standstill after the registration of a complaint as the lower courts are closed and the police cannot begin investigation in such a case unless there is a warrant issued by a magistrate as per Section 155(2) of CrPC.

Investigation in case of a cognizable offence would also be affected because of Covid-19⁸. Firstly, even though a police officer can investigate under Section 156 of CrPC, a police report under Section 157 of CrPC cannot be sent. This would disable the magistrate to have any control over the investigation by issuing directions under Section 159 of CrPC. The police would also be unable to apply for the remand of the accused under Section 167 of CrPC as they cannot detain the accused beyond 24 hours without a warrant as per Section 57 of CrPC. Apart from incapacitating the police to investigate the accused any further, the accused can also tamper with evidence upon release as they cannot be produced in front of the magistrate for the time-being.

The power of the police officer to require attendance of the witnesses under section 160 of CrPC would be impacted as well because it will be considered unsafe/inconvenient for the persons being called for investigation. Moreover, medical examinations, like in section 164 of CrPC would have to be conducted subject to the safety of sending a person to the hospital during this pandemic. The limited number of district courts that are functioning through videoconferencing are hearing only urgent matters and bail pleas. This process has been described to be full of hurdles and frustration by the lawyers, as they struggle to convince the judges that the matter is urgent⁹. Even the few lower courts that have started¹⁰, or will start functioning soon, will not be operating full-time and will be restricted to urgent matters.

In summary, most of the cases would either be stuck at the complaint or investigation level, thereby increasing the workload of the courts manifold when they reopen fully. The obvious solution to this would be to allow magistrates to virtually take cognizance of offences, accept a police report under Section 157 of CrPC, and issue warrants under 155(2) to fuel the investigations for a non-cognizable offence.

Bail

The Supreme Court has directed each state to constitute a 'high powered committee' to determine the class of prisoners that can be released or granted interim bail or parole, as they deem fit.¹¹ The courts are expected to factor in the nature of the offence, the punishment given and severity of the crime. To help prevent the spread of the virus in prisons, the apex court has thus asked all high courts to release prisoners who are convicted or undertrial for crimes with punishments less than 7 years, with or without fine, provided that they were not given the maximum sentence for committing the crime.

⁷ *Ramdev Food Products v State of Gujarat* (2015) 2 MLJ CrI 112.

⁸ 'Investigations severely hit by lockdown, says Crime Branch Chief' (*New Indian Express*, 27 April, 2020) <<https://www.newindianexpress.com/cities/kochi/2020/apr/27/investigations-severely-hit-by-lockdown-says-crime-branch-chief-2135707.html>> accessed 15 May 2020.

⁹ Usha Das, 'Coronavirus, Lawyers Struggle with Video-conferencing Facilities' (*Outlook India*, 14 April 2020) <<https://www.outlookindia.com/newscroll/coronavirus-lawyers-struggle-with-video-conference-facilities-at-district-courts/1802273>> accessed 15 May 2020.

¹⁰ 'Lower Courts to Function Between 11 pm to 2 pm, from Today in Bengaluru' (*India Legal Live*, 21 April, 2020) <<https://www.indialegallive.com/top-news-of-the-day/news/lower-courts-function-11-2-pm-today-bengaluru-urgent-matters-will-be-heard-93145>> accessed 15 May 2020.

¹¹ https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_1_8_21570_Order_23-Mar-2020.pdf

Section 167(2) of the CrPC stipulates that the time period an arrested person has can be legally remanded and specifies the maximum time the police can take in order to file the report. The detained persons are eligible for bail after 90 days for crimes with punishments varying between 10 years and life imprisonment and after 60 days for crimes with punishment of less than 10 years, if the police do not file a charge sheet within the stipulated time. After the completion of the said time, the magistrate is divested of the power to further remand extension of the time even on the basis of an incomplete or preliminary report.¹² This has been done to uphold the right of personal liberty of detained persons upon failure of completion of investigation.

In light of the order passed by the Supreme Court for extension of the limitation period, there have been opposing views with respect to the scope of limitation extending to Section 167 of CrPC. The Madras High court itself has passed two opposing judgments on this matter. In *Settu v The State*¹³, the accused was granted bail on the reasoning that since the Supreme Court did not explicitly mention extension of time for completion of investigation, the accused is still entitled to default bail. However, in the case of *Kasi v State*¹⁴ the court observed that the order passed by the apex court is applicable for the period of investigation as required by 167(2). The court said that it would be unfair if the accused benefited from the inability of the investigations officer to conduct the investigation due to the lockdown. The Uttarakhand High¹⁵ Court also said that Section 167 only sets the limit of detaining power of the magistrate without charge, the investigation can still continue if the accused is not under detention, thereby stating that default bail must be granted irrespective of the limitation order. The Supreme Court has now raised the issue of whether extending the limitation period will apply to the provision under 167 (2) of the CrPC. In the 2018 case of *Achpal v state of Rajasthan*¹⁶ the Supreme Court upheld the constitutional rights of an accused under the purview of Section 167. The court held that “any attempt to extinguish the right of default bail is henceforth not permissible to any authority.”¹⁷ The court has also often upheld the principle that right to personal liberty under Article 21 cannot be compromised even in a state emergency unless by due process and procedure of law. The objective behind Section 167(2) of CrPC is to ensure speedy investigation and disposal of the case, and to ensure the accused are not violated of their rights under Article 21 of the Indian Constitution. If such extensions are allowed, the objective of the law will be defeated.

TRIAL

Right off the bat, there are logistical issues that may impede a criminal trial during lockdown. There have been technical issues with the NIC server which brought the hearings to a halt¹⁸. Accessibility is another major impediment to the online trial process. Electricity inaccessibility and shortages in villages make justice a commodity affordable only to the privileged. Next, the right to be heard is in jeopardy. *Samsul Haque v. The State of Assam*¹⁹ upheld the principles of *audi alteram partem* under Section 313 of CrPC. However, limited access to technology for the poor and underprivileged may make it difficult, if not impossible, to defend themselves and have a fair hearing. The solution to this

¹² *Uday Mohanlal Acharya v State of Maharashtra* (2001) 5 SCC 453.

¹³ Ayushi Mishra and Devyani Singh, ‘Right to Default During Lockdown’ (*Live Law*, 25 May, 2020) <<https://www.livelaw.in/columns/right-to-default-bail-during-lockdown-157300>> accessed 27 May 2020.

¹⁴ *Ibid*.

¹⁵ *Vivek sharma v state of Uttarakhand* (2000) SCC OnLine Utt 1144

¹⁶ *Achpal v State of Rajasthan* (2019) 14 SCC 599.

¹⁷ *Rakesh kumar paul v State of Assam* (2017) 15 SCC 67.

¹⁸ Supreme Court of India, Notice dated 19 May, 2020. <https://main.sci.gov.in/pdf/Notice/19052020_125411.pdf> accessed 22 May 2020.

¹⁹ (2019) SCC Online 1093.

as envisaged by the Supreme Court is appointing an amicus curiae to make required facilities available to litigants²⁰.

Parties in a criminal trial have a right to be represented by legal counsel under Article 22(1) of the Constitution and Section 303 of CrPC. Access to such counsel, however, may be impeded by the lockdown. This is especially true for the poor and underprivileged, who struggle with this even during normal circumstances.

The right to speedy trial has been facing serious incursions during the lockdown. This is a right that's inherent in Section 309 of CrPC. It is also a constitutional right²¹ – it has been held to be inherent to the right to life and dignity under Article 21 of the Constitution of India. In *Hussainara Khatoon v. Home Secretary*²² it was held that “no procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21”. This may mean that the Supreme Court's directions to only pursue *urgent* cases is unconstitutional. Unconstitutional or not – it is still a massive disadvantage to the accused. This trend of limiting the right to speedy trial, however, is not exclusive to India. In USA, the Speedy Trial Act is even suspended in certain Courts²³.

Recording of witness and expert testimony is an essential part of a trial, and goes a long way in ascertaining the facts of the case. The prosecution, defense²⁴, and the Court itself²⁵ have the right to call upon witnesses. In light of the lockdown and shift to virtual courts, this stage of the trial remains largely unaffected. Permitting the recording of witness statements through video-conferencing is already an established precedent in certain circumstances, like witnesses with poor health or avoiding costly travel²⁶. Therefore, this is one part of the trial that has already been digitized in the past. Precedents in this line for criminal law have been laid down in the following cases: in *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors*²⁷ the court upheld *J.J. Merchant (Dr) v. Shrinath Chaturvedi*²⁸ in which it was held that “there can be video conferences or asking questions by arranging telephonic conference and at the initial stage this cost should be borne by the person who claims such video conference”. This case allowed even cross-examination by video conferencing – which again is an important part of the criminal trial. Relying on this case, the Court in *Malay Kumar Ganguly* permitted recording expert evidence through video conferencing. Another criminal law precedent is *Nipun Saxena and Ors. vs. Union of India (UOI) and Ors*²⁹ where it was held that if the witness “due to supervening circumstances is unable to physically attend the Court to record evidence” then video conferencing is permitted. Indeed, the global pandemic is a “supervening” circumstance which would qualify for using video conferencing. Therefore, the current position of law is already adept to permit recording of witness and expert testimonies online.

²⁰ Krishnadas Rajgopal, ‘Coronavirus: Restrictions on Court Hearings Lawful, Says Supreme Court.’ (*The Hindu*, 6 April 2020) <www.thehindu.com/news/national/coronavirus-restrictions-on-court-hearings-lawful-says-supreme-court/article31274285.ece> accessed 15 May 2020.

²¹ S.N. Sharma, ‘Fundamental Right to Speedy Trial: Judicial Experimentation’ [1996] 38(2) JILI, <www.jstor.org/stable/43927473> accessed 13 May 2020.

²² (1980) 1 SCC 81.

²³ Patricia Hurtado, ‘Speedy-Trial Right Suspended for a Year in U.S. Border Court’ (*Bloomberg Quint*, 3 April 2020) <www.bloomberquint.com/onweb/right-to-speedy-trial-suspended-for-a-year-in-u-s-border-court> accessed 13 May 2020.

²⁴ Section 243, The Code of Criminal Procedure 1974.

²⁵ (n 24) Section 311.

²⁶ ‘Video Conferencing in Legal Cases- A facilitator to Justice’ (Lexology, 18 July 2019) <<https://www.lexology.com/library/detail.aspx?g=32fbbc15-907a-4fc1-b7d8-417b4cf0a6ce>> accessed 15 May 2020.

²⁷ AIR 2010 SC 1162.

²⁸ (2002) 6 SCC 635.

²⁹ (2019) 2 SCC 703.

The stage of sentencing is facing particularly grievous impediments. Sending someone to prison during the time of Covid-19 is dangerous, not only for the person being sentenced, but also for the prisoners already in jail. This has been described to be “virtually a death sentence”³⁰ by Activists Gautam Navlakha and Anand Teltumbde. India already has overcrowded jails with an occupancy rate of 117.6%³¹, which makes social distancing impractical. A possible solution to this problem could be either home detention instead of prison detention, or a delayed surrender date. The latter has been done by Courts overseas for high-risk individuals³². In India, Courts have allowed a change of location for surrendering, to make it less risky to travel to a prison³³.

OTHER BEST PRACTICES/SOLUTIONS

The Supreme Court in the USA, along with some federal and district courts have started operating through teleconferencing³⁴. It is pertinent to note that they are hearing oral arguments only through audio-conferencing. This can be adopted easily for those courts which do not have necessary equipment or poor electricity for video conferencing. The court stenographer can also be present on such calls to record the cases. But audio conferencing can only be an immediate solution. Eventually documents will have to be sent and received, and doing so virtually would be the only safe option during the pandemic. Hence, necessary infrastructure needs to be in place for sharing of documents as the pandemic continues.

Court staff and judges must also be trained to use technology via video lessons. A committee must be set up for formulating a procedural code particularly addressing how a case will proceed virtually. We must have a system in place to allow the litigant to be an active participant in the online proceedings; they must get intimations of hearings well in time. Lastly, a strong cyber security system is immediately needed to prevent hacking, threats, fudging of documents or manipulation by vested interests.³⁵

CONCLUSION

From this paper, we can conclude that the virtual court system is not without its faults. While there are many areas of the criminal trial process that remain unaffected, there are also impediments at every stage with equal measure. To a limited extent, it is not viable to resolve these faults. However, there are many measures mentioned throughout this paper that, if in place, can vastly improve the efficacy of the judicial system. The endeavor to enhance the workings of our justice system is of utmost importance and should be pursued seriously. It is our sincere hope that the judiciary rises to the challenge and continues to make justice fair and accessible.

³⁰ Ashish Tripathi, ‘Going to Prison in Time of COVID-19 like Death Sentence, Activists Tells Supreme Court’ (*Deccan Herald*, 8 Apr. 2020). <www.deccanherald.com/national/north-and-central/going-to-prison-in-time-of-covid-19-like-death-sentence-activists-tells-supreme-court-822811.html> accessed 15 May 2020.

³¹ *In re: Contagion in Covid-19 virus in Prisons v Unknown* (2020) SCC OnLine SC 320.

³² Dan Mangan and Kevin William, ‘Coronavirus Hits Prisons: Ex-GOP Rep. Chris Collins’ Surrender Date Delayed Two Months as Inmates, Guards Infected.’ (*CNBC*, 2 Apr. 2020). <www.cnbc.com/2020/04/02/coronavirus-in-jail-chris-collins-gets-prison-surrender-date-delayed.html> accessed 14 May 2020.

³³ ‘HC Allows Accused to Surrender in UP If Unable to Reach Delhi Due to Lockdown’ (*The Hindu*, 14 May 2020) <www.thehindu.com/news/cities/Delhi/hc-allows-accused-to-surrender-in-up-if-unable-to-reach-delhi-due-to-lockdown/article31582639.ece> accessed 15 May 2020.

³⁴ Adi Robertson, ‘Supreme Court will Start Hearing cases by Teleconference’ (*The Verge*, 13 April 2020.) <<https://www.theverge.com/2020/4/13/21219017/supreme-court-teleconference-hearing-cases-may-pandemic-shutdown>> accessed 18 May 2020.

³⁵ Dr. Lalit Bhasin, ‘Covid-19 and its Impact on the Legal System’ (*Legal Era*, April 10, 2020) <<https://www.legaleraonline.com/articles/covid-19-and-its-impact-on-the-legal-system>> accessed 18 May 2020.