

TRIAL OF CROSS CASES: ISSUES AND CHALLENGES

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Two different versions of 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 Cr P C 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. In **Sudhir vs State of MP**⁷ explaining the rationale behind the procedure Hon'ble Justice Thomas of the apex Court has observed as follows:-

The practical reasons for adopting a procedure that such cross cases shall be tried by the same court can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

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 parties virtually repeat the entire evidence in both the cases. This makes the process very cumbersome

⁵ Ibid

⁶ (2003) 9 SSC 426

⁷ 2001 Cri LJ 1072

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 the⁶ 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 in statement of witnesses. No person can repeat the same statement twice: some subtraction or addition is bound to be there. Invariably, in cross examination the lawyer relies heavily upon the statement given by the witness in the other case. He also puts questions referring to the statements of other witnesses thereby giving an opportunity to the guilty party to take advantage of technicalities. This cannot be prevented by the court.

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 arguments of parties in both the cases they 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 not just on the basis of the case of one party in his 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. The suggestions in this regard have been discussed in detail herein after.

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**⁸ 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 the very clear direction of the apex court, we find numerous instances where investigation in cross cases is done by two different investigating officers. Two charge sheets are filed by the police holding the other parties aggressor in their respective cases. Often cognizance is taken on the basis of both charge sheets and charges and framed in both the cases. Further complication arises where one case is triable

⁸ supra at 6

exclusively by the Court of Sessions and the other is tryable by a Magistrate. 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 out 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.

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 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 completed 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 only after the evidence in both the cases is complete or it should be recorded just after completion of evidence in each case without waiting for completion of evidence in the other case. Often it is argued by the counsel for the accused that his statement under Section 313 of Cr.P.C. should be recorded only after completion of prosecution evidence in the cross case. This is vehemently objected by prosecution side of the first or main case. The insistence of the defence that the statement of accused under section 313 CrPC should be recorded only after completion of his evidence in the cross case, is not without a basis. Naturally, the accused in the first or the main case would like to give his statement under section 313 Cr P C only after the entire evidence is complete in both the cases. This is so because in that situation he would get full opportunity to meet the entire case against him. 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. Also, if there is some thing against him in the cross case, he would never get any opportunity to meet that circumstance. Though there are no clear-cut guidelines in this regard, it would be desirable if the statement of parties 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. In cross cases both the parties are prosecution witness in their case and accused in the corss case, so the statement under Section 313 Cr.P.C should be recorded only after recording of entire evidence in both the cases. 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.

These suggestions 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. In the suggested procedure entire evidence would be recorded in presence of both the parties. If parties were different and the evidence were not being recorded in the presence of the other party against whom it is to be used, then one could 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 entire evidence is being recorded, then perhaps there cannot be any grievance on this count. In fact only technically it can be said that cross cases are two cases, but factually the two cases are just two versions of one and the same case.

It may also be argued that compliance with the fundamental norms of a fair criminal trial including the protection given to the accused under Article 20, 21 and 22 of the Constitution, can only be ensured by observing the procedure prescribed by the apex court and various High Courts. 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 accused should not be compelled to become witness against himself. 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 traditionally 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 and protected, 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.