

Right to Fair Trial for the Victim – Changing Paradigm in 21st Century

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Abstract

The concept of fair trial is the foundation stone of any justice delivery mechanism for the prevention of miscarriage of justice. While the general concept of 'fair trial' should mean a 'trial' in which there is no biasness or prejudice against any party to trial or the cause, yet it is considered, to be the trial wherein there is no biasness against the defendant/accused only. But a trial can be fair only when the whole of the prosecution procedures has been fair-minded and reasonable, and it is extended to all the participants of the criminal justice system along with the accused. Thus, this paper attempts to investigate the scope of the concept of fair trial and observe whether it can be extended to the other players of the criminal justice system, especially the victims of crime.

Keywords: Defendant, Fair Trial, Human Rights, Pre-trial Procedures, Right, Victims, etc.

I. Introduction

A trial primarily aims at ascertaining the truth and it must be fair to everyone – the accused, the victim and the society at large. The concept of 'fair trial', being the keystone of any criminal justice system, is a method to prevent miscarriage of justice and upheld 'rule of law'. It is not only to protect the suspect or the defendant but also to make the society safer and stronger. With this basic guarantee, not only the subject will have confidence that justice will be done but also there will be trust in the government system. While the general concept of 'fair trial' should mean a 'trial' in which there is no biasness or prejudice against any party to the proceedings or the cause, yet, it is considered to be a trial wherein there is no prejudices against the defendant/ accused only. It is based on the idea of 'fair play' in a criminal trial giving a fair chance to the

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defendant to defend his/her case against the powerful State. The United Nations describes this right as a 'fundamental' guarantee of human rights, and it cannot be alienated to anyone, for the preservation of rule of law. This concept of fair trial is generally understood as to mean 'the trial process taking place in the open court by an impartial judge' to ensure that individuals are protected from arbitrary and unlawful deprivation of basic rights and freedom. It extends to the procedures outside the Court *i.e.* pre-trial and post-trial procedures as well and this can be understood when the European Court of Human Rights³ has stated that 'the principle of fair trial contained in Article 6 of ECHR is not limited to the trial, but also to the whole proceeding, of which the trial is only the culmination'. The Indian Judiciary has held similarly in many cases like *Rattiram & Ors*⁴, *NHRC*⁵ case and in *Zahira Habibullah Sheikh (2004)*⁶, it has held that the concept of fair trial "is reflected in numerous rules and practices.....fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and judicial calm". Thus, the view of 'fair trial' being only fairness in trial procedure is only in literal sense and one should not forget that the concept of fair trial has broadness in its concept as it extends its purview to both pre-trial and post-trial procedures. After all, a trial can be fair only when the whole of the prosecution procedures has been fair-minded and reasonable, and it is extended to all the participants of the criminal justice system along with the accused.

Thus, the researcher wants to investigate the scope of the fair trial and see if the concept of the right to fair trial can be extended to everyone (including the victim), for better administration of justice. Unless the prosecution has granted a fair trial to the victims of crime along with the accused, the criminal justice system will not be entrusted with faith by the common people and with this perspective in mind, the researcher aims to discuss the normative approach of the concept of the fair trial and investigate if the fairness in prosecution system can be understood in terms of fair trial to the victims in this paper. In the first

³ *Imbrioscia v. Switzerland*, (1993) Ser. A no. 275, p. 13: (1994) 17 EHRR 441 (ECHR); *John Murray v. United Kingdom*, (1996) Ser. A, p. 26 (ECHR).

⁴ *Rattiram & Ors. v. State of M.P. Transport Inspector of Police*, 17 February, 2012.

⁵ *National Human Rights Commission vs. State of Gujarat & Ors.*, 1 May, 2009.

⁶ *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.*, Appeal (Crl.) 446 – 449 of 2004.

part, the researcher will also study the various human rights instruments and investigate whether the concept of fair trial is meant only for the accused or there is protection for the victims of crimes also. The next part will re-assess the scope and limit of the concept, to find whether the right to fair trial could be extended beyond the accused to the other parties of the justice system. In this part, the researcher will study various supreme court judgements which talks about the concept of fair trial. Finally, the paper will be concluded with necessary conclusion with the hope of elaborating the limit of the concept of fair trial from the accused and extending it the victims of crimes and the witnesses.

II. Pre-Trial Procedures – Relevance in Fair Trial

Pre-trial procedures in a criminal case plays an overly critical role in the fair trial in any justice delivery mechanism. The concept of fair trial does not mean only the courtroom trial but also include pre-trial, and post-trial stages and this was asserted in *Vinubhai Haribhai Malaviya (2019)*⁷ when the apex court stated that “a trial encompasses investigation, inquiry, trial, appeal and re-trial, *i.e.*, the entire scrutiny including crime detection and adjudication.....”. The importance of pre-trial procedures was upheld in *Seesa Hemchandra (2001)*⁸ wherein the Apex Court has held that ‘a fair trial in modern parlance must be a trial based on an equally fair investigation’. Regarding the absoluteness of fair trial, the Court has held that the fairness of criminal trial cannot be adjudged in absolute terms, and it must be examined in relation to the gravity of the crime, time, resources the society can reasonably afford and the prevailing social values, *etc.* The procedures prior to the courtroom trial consist of registration of FIR, medical examination of the victim, arrest and bail of the accused, statement of the victim to the Magistrate, and cognizance of the offence. Information to the police is the first step of the pre-trial procedures when an offence is committed. Thus, the fairness of criminal trial starts with the receipt of the information or FIR as it sets the criminal law in motion. But not all information is worth investigating as it may be false information also, hence the police officer or investigating officer must check the veracity of the information based on documents received, before proceeding with the investigation.⁹ Once

⁷ *Vinubhai Haribhai Malaviya v. The State of Gujarat*, 2019 SCC OnLine SC 1346.

⁸ *Seesa Hemchandra Sashissal v. State of Maharashtra*, AIR 2001 SC 1246.

⁹ *State of Haryana v. Ch. Bhajanlal*, 1992 Cri. L. J. 527 (SC).

the information is notified, it is the responsibility of the police to investigate into the matter with utmost integrity to find out the truth by ascertaining the facts and circumstances relevant to the offence. In certain crimes, the police may be informed of the causation of crime after the passage of time but delay in filing the FIR cannot be the ground for non-registering of the information if there is explanation for the delay and there is no motive for implicating the accused, especially in rape cases¹⁰. Recording the information and investigating a crime in a fair manner will result in a fair trial for both the accused and the victim. The fairness and success of the trial depends entirely on the investigating report of the police, but the public and the criminal justice system do not repose their trust in them.¹¹ The investigation of the crime is governed by the internal Standard Operating Procedure (SOP) of the Police which provides the procedures to be followed by the police during the investigation process. The rules regarding the medical examination of the accused and the victim are providing by the Ministry of Health & Family Welfare guidelines and protocols. It has been observed many a times that non-fulfilment of any procedural requirements or inadequacies of evidence or non-examination of material witnesses, mistakes in investigation and similar other factors have often contributed to the acquittals of accused leading to the failure of the criminal justice system. Even the Malimath Committee had acknowledged that such acquittals resulting from inefficient pre-trial procedures contribute to the failure of the Courts in the pursuit of truth to do justice. Regarding fair investigation, it was stated by the apex court in the case of *Babubhai* (2010)¹² that 'if the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, then it open to the State and/or High Court to direct investigation in respect of an offence which is direct and separate from the one for which the FIR had already been lodged'. The power entrusted upon the State and the High Courts by this judgment, to direct for proper investigation in case of any discrepancy in the investigation procedure indicate its importance and contribution in the fairness of trial. In *Inspector of Police, NIB, Tamil Nadu* (2010)¹³, the Court observed

¹⁰ Harbans Kaur v. State of Haryana, 2005 Cri.L.J. 2199 (SC).

¹¹ Malimath Committee Report on Reforms of Criminal Justice System, 2003. Ministry of Home Affairs. Government of India.

¹² Babubhai v. State of Gujarat & Ors. (2010) 12 SCC 254.

¹³ Inspector of Police, NIB, Tamil Nadu v. Rajangam, (2010) 15 SCC 369.

that 'a fair investigation is the very foundation of a fair trial and thus it expects that the informant and the investigator must not be the one and the same person. Thus, the concept of fair trial includes the pre-trial procedures within its ambit as per Cr. P. C. and the rulings of the Supreme Court. After all, any probability of biasness has to be forbidden for the fairness of the trial.'

III. Normative Concept of Right to Fair Trial and India

'Fair trial is the foundation of rule of law and criminal justice system'¹⁴ as accepted by any legal system. The Black's Law Dictionary¹⁵ has defined the concept of 'fair trial' as "a trial by an impartial and disinterested tribunal in accordance with regular procedures". The concept of 'fair trial' is generally used in relation to such criminal trials in which the constitutional and legal rights of the accused are safeguarded by the prosecution system. Thus, this right is generally understood to be indistinguishably connected with the defendant's right to confront and cross-examine witnesses in criminal matters (Hoopes, 2009)¹⁶ and not with other players of the prosecution system *e.g.*, victims and witnesses.

This right as a basic guarantee is upheld by the European Convention on Human Rights (ECHR)¹⁷ (Article 6), International Covenant on Civil & Political Rights (ICCPR)¹⁸ (Article 14), Universal Declaration of Human Rights (UDHR)¹⁹ (Article 10 & 11), *etc.* in the form that is expected as a norm in any legal system. The basic rights of fair trial as provided in the ICCPR includes the

¹⁴ SCC Online Editorial. 4thSep, 2020, (May 27, 2021.), <https://www.sconline.com/blog/post/2020/09/04/fair-trial-is-the-foundation-of-the-rule-of-law-and-criminal-justice-system-islamabad-hc-rules-in-favour-of-extending-another-chance-to-the-govt-of-india-to-appoint-a-counsel-for-k/>

¹⁵ BRYAN A. GARNER (Ed.), BLACK'S LAW DICTIONARY. (Seventh Edition, West Group. 1999).

¹⁶ Lindsay Hoopes, The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium. 32 HICLR. 305 (2009).

¹⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁸ International Covenant on Civil and Political Rights, United Nations, General Assembly resolution 2200A (XXI) of 16 December 1966.

¹⁹ Universal Declaration on Human Rights, United Nations General Assembly Resolution 217A, 10 December, 1948.

right to a public hearing, right to be informed, right to legal counsel and right to examine and have examined witnesses against him along with the right not to be compelled to testify against himself. Article 10 of UDHR provides that every accused is entitled to fair and public trial in full equality by an independent and impartial tribunal in the determination of his rights and obligations. The Declaration on Justice to Victims (1985)²⁰ is a specialised human rights instrument meant for the victims' rights and it says that a victim of violent crime has the right to access justice delivery mechanism, right to participate in the prosecution, and right to get legal assistance during the prosecution process. It is worth noting that all these human rights instruments points towards the right to fair trial of the accused or defendant only and not of other parties to the prosecution. The concept of fair trial includes both pre-trial and post-trial rights, like right to information, right to lawyer, right against self-incrimination, *etc.* but all these rights are guaranteed to the accused and the other players of the criminal justice system do not find an express mention in these instruments. The logic behind guaranteeing more rights to the accused is that he/she is standing against the powerful State prosecution mechanism, and it is believed that victims do not need rights as their freedoms are not at stake.

In spite of the importance of the right to fair trial of the accused, there is no denial to the fact that the victim's right to fair treatment and access to justice deserve equal importance in the eyes of law. After all, victims are person like the accused, with rights and freedoms and crime constitutes a violation of these human rights as well as an act against the State.²¹ Appreciating this fact, the United Nation's Declaration of Basic Principles of Justice for Victims of Crime²² has attempted to recognise the rights of victims as human rights and failure to guarantee the access to justice to the victims of crimes as human rights violations in 1985. The Declaration guarantees the right to fair treatment and access to justice to the victim and his/her immediate family and the dependants. It states that every victim must be treated with compassion and

²⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. General Assembly Resolution 40/34 of 29 November 1985

²¹ Jo-Anne Wemmers, Victims' rights are human rights: The importance of recognizing victims as persons. TEMIDA. Pp. 71 – 84. (2012). DOI:10.2298/TEM1202071W.

²² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. General Assembly Resolution 40/34 of 29 November 1985.

respect for their dignity, and this becomes even more necessary when the victim is of sexual violence. Beside the dignified treatment, the victims are expected to grant fair, expeditious redress, restitution, and access to justice. This Declaration provides that victims must be informed of their rights for accessing justice and proper assistance throughout the prosecution process, like that of the accused. After all, it is the victims who sets the criminal justice mechanism in motion by giving information to the police. Following the Declaration, the victims of crime have been granted with few rights under the Criminal Procedure Code (Cr. P. C.) regarding filing of FIR and identification of the accused in India.

The victim of crime has the right to inform the police regarding the crime and is entitled to give copy of information 'free of cost' and where the prosecuting officers deny to act upon such information, they can enforce the right by writing to the Superintendent of Police.²³ There is provision (Sec. 439, Cr. P. C.) which empowers the victim to move the Court for the cancellation of bail granted to the accused, if there is reasonable grounds²⁴. Sec. 301 provides for the appointment of special prosecutor on request, from the victim's side, who will act under the direction of the public prosecutor. Beside these rights, the female and child victims deserve special rights and attention, which the criminal justice system has failed to get in the procedural code and this condition is more painful in case of female victims of sexual violence. Also, the legal provisions have failed to address the needs of the victims to be treated with dignity, to render access to the justice mechanisms, and to rehabilitation.²⁵ Muralidhan (2004)²⁶ has rightly said that the response of the legislature to the needs of the victims of crimes against women has not been adequate and impulsive. The law has somehow failed to address the need of the female victims to be treated with dignity and respect despite enacting enhanced punishments and by shifting the burden of proof in such offences. There have been broad parameters laid down by the Supreme Court for assisting the

²³ Sec. 154 of Cr. P. C.

²⁴ R. Rathinam vs. State, (2000) 2 SCC 391. (India)

²⁵ S. Muralidhan, (2004). Rights of Victims in the Indian Criminal Justice System. International Environmental Law Research Centre. National Human Rights Commission Journal. (June 6, 2021) <http://www.ielrc.org/content/a0402.pdf>.

²⁶ Ibid.

victims of sexual violence in *Delhi Domestic Working Women's Forum's* case (1995)²⁷ but they are neither followed by many in practice nor there are any concrete provisions legislated. Not only this, there are many more cases which laid down various principles for the fair trial of the victims, but without benefit. There is no denial that few States have formulated certain measures for the assistance of the female victims of crimes against women, but the fruitfulness of those measures still raise questions on their effectiveness. Still the victims in most cases remain unrepresented and unassisted in the courtroom and they are not treated more than just witness of the crime. The whole environment for victim's right to fair trial depends upon the mindset or perspective of the Judge.

IV. Reassessing the Scope & Limit of the Right to Fair Trial

'Trial is the finding out by due examination of the truth of the point in issue or question between parties, whereupon judgment may be given'²⁸. It is quite surprising to note that the normative understanding of the concept of 'fair trial' talks about protecting the rights of the defendant only and not of others. But the term 'fair' itself means 'impartial, just, equitable, disinterested, unbiased' and so on. 'Fairness' means 'free of biases and prejudices' but when the definition of fair trial as understood by various legal document talks about protecting the rights of defendant to make the trial fair. Also, while assessing the scope of the concept of fair trial, it seems to be clear that it is not confined within the meaning of the procedure that takes place in the Court but also the pre – trial and post – trial procedures, which takes place outside the Court. And that's the reason the concept of fair trial has considered certain rights which are necessary before the actual trial takes place, *i.e.* rights during arrest, right to be informed, right of *habeas corpus*, *etc.* However, the concept of fair trial is always seen in the purview of the accused although there are rights provided for the victim as well. It must be remembered that when the term itself direct towards unbiased trial, how can it leverage or tilt towards one party of the trial and not towards others, or towards a single process and not the entire process of trial. Although most legal systems maintain the right to fair trial as a guarantee only for the defendant, yet there are perspectives which demonstrates the concern for providing a balanced and unbiased right to fair trial amongst all players of

²⁷ Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14.

²⁸ EARL JOWITT. DICTIONARY OF ENGLISH LAW.

criminal justice system. In *NHRC vs. State of Gujarat*⁽²⁰⁰⁹⁾²⁹, the Supreme Court has held that –

“The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society.....It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with..... Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”

In *Zahira Sheikh Abdullah's case*³⁰, it was held that “Fair trial means a trial in which a bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated”. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that act through the State and prosecuting agencies. In *Vinubhai Haribhai Malaviya's case*³¹, it was observed that “Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victims, his near and dear ones as well as of the community at large and therefore, cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Article 20 and 21 of the Constitution of India.” Thus, there are plethora of cases that says that the right to fair trial should not only be extended

²⁹ National Human Rights Commission vs. State of Gujarat & Ors., 1 May, 2009.

³⁰ *Zahira Habibullah Sheikh &Anr. v. State of Gujarat &Ors.*, Appeal (Crl.) 446 – 449 of 2004.

³¹ *Vinubhai Haribhai Malaviya v. The State of Gujarat*, Appeal (Crl.) 478 – 479 of 2017.

to the accused/defendant but also to victim. Granting rights to the victims will empower them to prosecute the violators of rights and seek justice. With this perspective only, there are several provisions provided in Cr. P. C. for ensuring the fairness of trial from victim's side as well, e.g. having a lawyer from his/her side beside the State Prosecutor (Sec. 301). However, there is no denial that the service of lawyers is taken by the ones, who are both aware and can afford; and such service is not availed by the ones who cannot afford it or unaware of this right. After all, there is no concept of free legal aid guaranteed to the victims, who cannot afford it. This disparity in the exercise of rights by the victims, definitely influence their right to fair trial. The presence of the victims' lawyer can ensure that he/she is heard and informed about the prosecution process of the accused. In spite of this, the prosecution machinery is more concerned with the rights of the defendant than that of the victim and the only concern shown regarding the victim is that of restorative or compensatory justice. Even the victim is not seen to exercise the rights granted by the criminal justice system and the reason behind this might be due lack of awareness about the rights. After all, a victim not only seeks economic justice to be done against the injuries caused but also expects that real justice is done and this can be done only when he/she is aware of her rights to fair trial as provided by the Cr. P. C.

V. Analysis & Conclusion

Fair trial promotes the quality of justice by preventing an innocent person from getting unnecessary penalised and pre-trial procedures by the police, the doctor, and the Magistrate, forms the foundation of the fair trial in a criminal justice system. From the above discussion, it is seen that the concept of fair trial is connected to both pre-trial and trial procedures as observed from the provisions of Cr. P. C. and various judicial pronouncements but the awareness with respect of rights is quite low in our country. It is an extremely elusive term as well as qualified one, depending upon the necessity of the situation. Also, the concept is extended to all players of the criminal justice system through various judicial pronouncements of the highest court and the Cr. P. C. as over emphasis on the accused tend to overlook the concerns of the victims in criminal proceedings. But the problem with the concept is that people or the prosecution do not tend to understand it in terms of victims or witnesses, except the accused. This mindset is further enhanced by the lack of awareness of the rights of the victims themselves, enhancing their further victimisation. Also, at times even if they

remain aware of their rights, they are unable to exercise them due to poverty and lack of voice of the victims. The concept of free legal aid is not extended to the victims like that of the accused, which should be extended to the poor and vulnerable victims, who cannot afford to have one to assist the State Prosecutor. The victims' advocate will assist the Public Prosecutor, who remains busy with the duty of prosecuting the accused and he/she has no time to attend the victim with care and compassion and keep the victim informed about the procedures and progress of the case. The helpless and unaware victim remains in the prosecution process, being nothing more than a witness. There is no denial that the accused's right to fair trial needs to be safeguarded against the State prosecution system, but the scenario is also true for the victims, who are vulnerable. The situation is even worse when the victim is a woman, prosecuting the sexual offences meted upon her and their rights demand equal protection against the patriarchal prosecution system. Unless justice to the victim of crimes is considered as the pivotal point of criminal proceedings like that of the accused, the system is improbable to reinstate the balance as a fair procedure in the quest of truth.³² After all, Justice must not only be done, but must appear to be done when one observes it.

³² G. S. Bajpai, (2012). Criminal Justice System Reconsidered: Victim and Witness Perspectives. Serials Publishing, pp. 3