

CASE REVIEW, A NEW AVENUE FOR PROSECUTION

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Prosecution Department after passing through its embryonic phase is now pacing the new trends for qualitative services to ensure the dream justice with all the stake holders in criminal justice system. In the past it was acting as a post office for police to route the Challan to the Courts with out any observation about sufficiency of evidence. Legislature posted the intention through promulgation of Punjab Criminal Prosecution service (Constitution, Functions and Powers) Act, 2006 for filtering the criminal cases before they should go to the courts. To that end this Act has introduced a process of scrutiny of police reports and empowered the prosecutor to submit his result of scrutiny before the court about availability of evidence and applicability of offence against all or any of the offenders.

This Act under Section 10(1) has empowered the Prosecutor General to issue general guide lines to the investigating officers and the prosecutors which by law is now binding on both of them; the Prosecutor General has issued general guidelines in respect of Prosecutorial decision making keeping in view section 9(7) of the Act; according to which a prosecutor must apply two test on the police report before forwarding it to the courts i.e. Evidential Test and Public Interest Test.

It has created a room for the prosecutor to write the “result of scrutiny” which is synonymous to Case review and is undertaken by the prosecutors in foreign countries. Important to note that under Prosecution Act, Prosecutor has to Scrutinize Police Reports for police and directs the police to remove the defects in evidence U/S 9(5) and for courts about the sufficiency of evidence U/S 9(7). Usually confusion arises that if the defects in police report are highlighted by the prosecutor, it would help the defence to exploit the situation. It must be noted with clear headed message that the scrutiny for police remains within two Departments and objection in reports can not be brought on the record before the courts, nor it can be termed as public document; however after removal of defects and collection of desired evidence, the prosecutor builds his opinion that case is trial worthy on the basis of available evidence which would definitely help the court to take a quick decision to proceed and this document “result of scrutiny” would be available along with police report in the Court. What is this new concept, how it can be defined and what are the merits and demerits of its use by the prosecutors; here is the panoramic view.

DEFINTION OF CASE REVIEW

“Examination of police report/Challan in a criminal case by the prosecutor with a view to assess the evidentiary value of incriminating material against the suspects and other factors

necessitating to file a criminal charge against them with a realistic prospect of conviction before a court of competent jurisdiction”

Concept of real prospect of conviction is different than one applied by the courts after trial of the case, so establishing a prima facie case that can be resulted most probably in conviction is the yard stick of real prospect of conviction.

CASE REVIEW IN FOREIGN COUNTRIES

The power of case review is available to the prosecutors in most of the countries and police is bound to seek advice about sufficiency of evidence in a criminal case; here are the short references of countries where this power is available to the prosecutors;

England and Wales

*The Prosecution of offences Act, 1985, the basic legislation, regulating the Powers of crown prosecutors, The Director Public Prosecutors is the head of service who issues guidelines to prosecutors under Section 10 of the Act *ibid* which is called as **Code for Crown Prosecutor**; according to said code the Case Review is regulated under Rules 3.6 & 3.7, the test that is to be applied are **Full code Test** mentioned in Rule 4.1 to 4.3; Evidential stage 4.4 to 4.6, Public Interest Test 4.7 to 4.12; Threshold Test 5.1 to 5.11; review of threshold test 5.12.*

*This power authorizes the **prosecutors to stop or drop the cases** if they do not conform to evidential and public interest test and the cases do not go ahead: in this way it lessens the burden of litigation on the courts on one hand and prevents institution of frivolous cases in its inception.*

Section 22-A deals with Additional time limits for persons under the age of 18 years and Section 22-B is for Re-institution of proceedings stayed under section 22(4) or 22-A (5).Section 23 authorizes Discontinuance of proceedings in magistrates’ courts. Section 23-A, discontinuance of proceedings after accused has been sent for trial. Section 25 deals with consents to prosecutions etc.

Germany

*The status and functions of the public prosecution office are laid down by statute, i.e. by the **Courts Constitution Act** in its sections 141 to 151 and by the Code of Criminal Procedure; for*

*instance, in sections 158 to 163 but not in detail and certainly not conclusively. The provisions in the Courts Constitution Act which I shall refer to as the CCA on the status of the public prosecution office rather tend to have the character, at least in part, of guiding principles or of organizational principles, whereas the important allocations of function in the Code of Criminal Procedure are mainly drafted in the form of general clauses. The prosecutors in Germany supervise the investigation and also undertake case review on the touch stone of **evidential ad public Interest Test**; they have strong ties with police and **prosecutor is the head of investigation** and more appropriately digs out the evidence at the preliminary stage and exercise **power to stop or drop the case** or terminate the prosecution at later stage during investigation. He also informs the complainant about his decision of dropping the case; if the complainant satisfies him, he can change the decision otherwise complainant holds right to challenge that decision before the appellate authority in the Department; if the complainant still fails, he can appeal to the court against the appellate decision of prosecution Department and the decision of the court is final.*

Australia

*In Australia, the prosecutors exercise his power at three different stages i.e. the initial decision whether or not to institute a prosecution, the discretion to discontinue a prosecution and the discretion to "indemnify" a witness. Same principles are applied as are in crown prosecution service for evidential and public interest Test. All DPPs in Australia now agree that, by itself, a prima facie case is an inadequate standard of the sufficiency of evidence. Rather the standard, no matter how it is expressed, must have regard to the prospect of securing a conviction. This was equated with it being "rather more likely than not that the prosecution will result in a conviction". **(This is also known as Rule 51%)**; though common wealth prosecution policy under which the powers of prosecutors are regulated underwent many changes but finally it overweigh both the test are essential for making prosecutorial decision during case review.*

The case is kept under review and decision to continue with the prosecution is rest with prosecutors who on the availability of new evidence or any change in the circumstance during trial decide to continue or otherwise of prosecution.

Initially the Director of Public Prosecutions Act 1983 (Commonwealth) empowered the Director of Prosecution to discontinue prosecution on its own without consulting the agency who was the first informant but it was later cured in year 1991 now it is incumbent upon him to take decision of discontinuance with the consultation of investigating agency.

Same powers are available to the prosecutors of following countries;

Canada, Hong Kong, Northern Ireland, Ireland, Kenya, South Africa, but the situation is different in

INDIA and PAKISTAN

INDIA has no independent prosecution agency rather the powers of prosecutors are regulated under Indian Criminal Procedure code, 1973; however the prosecutors can withdraw from prosecution but that is still subject to leave of the court. The Prosecutors in India are not independent and there is no concept of Case Review in India.

*Pakistan has four provinces and each province has its own prosecution Act; the Move to establish an independent prosecution Services was made in year 2005 when prosecution Act of KPK Province was promulgated. The Punjab Criminal Prosecution Service (Constitution, functions and powers) Act, 2006 paved a way to establish an independent Prosecution Agency in the Province of the Punjab. The Act for the first time introduced powers and duties of prosecutors and introduced a provision with the name of “**Result of Scrutiny**” that is some what similar to case review but the prosecutors in Punjab has **no power to stop or drop the cases***

Criteria of crown prosecutors for case review

- Step-1** REVIEW ALL AVAILABLE MATERIAL
- Step-2** CONSIDER APPLICABLE LAWS AND OFFENCES
- Step-3** CONSIDER EVIDENCE IN DETAIL
- Step-4** IDENTIFY ELEMENTS OF EACH OFFENCE
- Step-5** APPLY THE EVIDENCE TO THE OFFENCES
- Step-6** CONSIDER THE DEFENCE CASE
- Step-7** CONSIDER AND REQUEST FURTHER EVIDENCE
- Step-8** MAKE A DECISION

Step-9 INFORM POLICE

Step-10 DRAFT CHALLAN

KPK and Baluchistan Provinces of Pakistan

In respect of prosecutorial decision making and withholding of police reports due to deficient evidence, the prosecution Acts of KPK and Baluchistan are more liberal and comprehensive;

The Public Prosecutor being competent in respect of a particular case or class of cases shall on receipt of the final report: -

Send the same before the competent court for trial: or

Withhold the same for want of proper evidence and return it to the investigation officer with written direction to resubmit the report after removal of the deficiencies so identified by him.

In respect of compoundable offences other than those which are punishable by death or life imprisonment, the Prosecutor General and in respect of compoundable offences punishable with imprisonment for seven years or less, the District Public Prosecutor, may withhold prosecution if reasonable grounds exist for the Public Prosecutor to believe that the same shall be compounded.

Provided that if the offence is not compounded within a period of one month, he shall send the report in the competent court for prosecution and trial.

*In respect of offences other than those which are punishable by death or life imprisonment, the Prosecutor General and, in respect of offences punishable with imprisonment for seven years or less, the District Public Prosecutor, may apply supported with reasons, to the court of competent jurisdiction for the **discharge of case** if the institution of the case has been found to be malafide, wrongful or weak from evidentiary view point.*

In Punjab no such provisions are available; neither the prosecutor drop or stop the case nor it can withhold the same. Until the legislator gives such powers, writing of case review/result of scrutiny would be helpful in filtering the criminal cases. This concept if exercised can have some merits or demerits that can be listed as under;

Demerits of Case Review

1. Prosecutors are not accustomed to such powers which can be misused in the beginning.

2. *Role of Prosecutor is not yet recognized by the stake holders of Criminal justice system therefore, strong opposition is expected.*
3. *Prosecutors lack basic facilities and are exposed to society whose protection is at stake as well, so they can be under some influence.*
4. *Exercise of Case review needs a strong legal acumen, knowledge, practice and training; until it is achieved, power can not be properly exercised.*
5. *Non-Familiarization of police and Judiciary with exercise of case review which would open a new debate on the powers of prosecutors and may not be accepted by them.*
6. *The hierarchy of prosecutors has not yet been defined through Rules which would create an imbalance approach among senior prosecutors in respect of case review when they might examine it.*
7. *Prosecutors are also not willing to exercise this power due to fear of their explanations by the superior hierarchy.*

Merits of Case Review

1. *Prosecutor would know the case at the early stage before the trial.*
2. *Prosecutor would be helpful in coaching the witnesses.*
3. *Prosecutor would be able to devise a case strategy.*
4. *Prosecutor can assist the court in building opinion about the fate of the case.*
5. *Case review document can be used by the prosecutor for their opening speech.*
6. *Prosecutor can help the court to choose the case for trial on priority basis.*
7. *Prosecutor can help the court to frame proper charge against the accused.*
8. *Prosecutor can evaluate the available evidence at any stage of the case about its efficacy in line with the case review exercise.*
9. *Prosecutor can ask the government to withdraw from prosecution if the case is not trial worthy.*
10. *Prosecutor can help to decrease the burden of the courts if he proposed that the case is not fit for trial.*
11. *Prosecutor can help the court to summon those pieces of evidence which has been skipped or missed by the police during investigation.*

12. In the Public Interest, he can also propose pre-mature termination of trial.
13. Through this exercise precious time of the court can be saved.
14. The cost involved in prosecution of cases would also be decreased.

As there is no set format for writing result of Scrutiny/Case Review in the Punjab, therefore keeping in view the experience of foreign prosecutors and special circumstance in our country, it is proposed that report should be in narrative form but it must contain the following particulars so that a true picture of case could be highlighted.

Report Under Section 9(7) of Criminal Prosecution Service (constitution, functions and powers) Act, 2006

FIR: _____ Dated _____ U/S _____

Police Station: _____ District: _____

Date of Receiving of Report U/S 173 Cr.P.C. _____ Date of case review: _____

<i>Complainant #</i>	<i>Deceased #</i>
<i>Injured #</i>	<i>Date of Occurrence #</i>
<i>Time of Occurrence #</i>	<i>Place of Occurrence #</i>

Proposed Charges

e.g. Terrorism, Murder, use of explosive,

Application of Penal Statutes

e.g. PPC, ATA, Explosive Substance ACT

Brief Facts of the case

Names and Role of offenders

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____

Available Evidence

- 1. **Oral Evidence:** Ocular (Direct, hearsay) , Relevance (Resgestae/ circumstantial), Privileged

<p>i) Name of witnesses in report U/S 173 Cr.P.C.ii) Name of other witnesses & Nature of evidence</p>	<p>Name of other witnesses & Nature of evidence</p>
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- 2. **Documentary Evidence:** Primary or Secondary (FIR, Memos etc)
- 3. **Physical/Real evidence:** case property
- 4. **Forensic Evidence** Finger Prints, DNA, Ballistics, chemical
- 5. **Other Evidence:** Surveillance, telephone interception, electronic evidence, call data

Applicable offences

e.g. Section-7 of ATA, 302 PPC, 3/4 of Explosive substance Act with little description of offences

Evidential Test

Discuss the entire evidence available against different accused persons with submissions that there is real prospect of conviction. Like as follows;

Nature of Evidence available against following offenders

1. **XXX** (Confession, ocular , recovery, Conspiracy, Motive etc
2. **YYY** (Resgestae, recovery, conspiracy, Phone Data, DNA etc

Value of evidence

1. **XXX** Substantive, supportive, corroborative
2. **YYY** Substantive, Circumstantial, supportive, hearsay, Corroborative

Insufficient Evidence against following offenders

1. **ZZZ** confessions before police , No evidence of common intention
2. **SSS** Joint extra judicial confession, joint recovery, No phone data

Public Interest Test

Discuss public interest test for prosecution of offenders or otherwise

e.g. This is a serious offence which involves terrorism that has become menace for the security of Pakistan; offence has been committed on the behest of proscribed organization which has resulted in great loss to human lives and culminated into producing hatred, fear and insecurity in a community; Prosecution of offences and Passing of sentence in this case would help prevent the terrorist activities in the country and would have a deterrent effect in order to maintain community confidence.

Conclusion

Discuss in general about sufficiency or insufficiency of evidence against the accused persons; recommendation for trial or otherwise of each accused and request for framing of charges against them in different heads under penal statutes mentioned above

Public Prosecutor

Note: Report U/S 173 Cr.P.C along with documents consisting of ____pages is attached with this report

For reference a model case review is reflected below

Office of the District Public Prosecutor, Lahore

Case Review/Result of Scrutiny U/S 9(7) of Criminal Prosecution Service (Constitution, functions and powers) Act, 2006

FIR No. ... Dated..... U/S 7 ATA, 302/324/353/186/148/149/120-B/121 PPC, 3/4 Explosive Substance Act

Re: **Attack on worship place**

Offenders: 1. Farhad Ahmad S/O ZakaUllah& 2. Muhammad Akhlaq S/O Faiz Ahmad

1. Proposed Charges

- Terrorism with Murder, use of Explosive

2. Introduction

A terrorist attack was launched by the offenders on the Mosque situated in Block-F, Johar Town within the limits of Police station Johar Town, Lahore in which 27 persons were died and 32 were injured. The offenders used hand grenade and Fire arm weapons during the occurrence besides a blast through motor bike of the offenders

3. The Evidence

On Friday, the 28th May 2010 at about 1/35 PM Col. Ferooz Khan (Complainant) was on duty outside the women gate of Ghausia Mosque situated in 27/B Johar Town Lahore, he heard reports of firing at Allah Ho Chowk Johar Town near House 25/B and saw two terrorist carrying bags reached on motor cycle and left the motor cycle there which blasted after ten minutes; they then moved to the main gate of Ghausia Mosque and stepped forwarded to women gate but paused because a person appointed there was firing at them. Complainant saw the hitting of bullet to his man who fell down, whereupon terrorist with little height tried to enter through women gate but failed; his co accused helped him to scale over the Gate, he finally entered inside the worship place and started indiscriminate firing; he thereafter came outside "Ghausia Mosque" fired at the guard and opened the main gate; his co-accused also entered inside the worship place. There were 1400 worshipers upon whom, the offenders made indiscriminate firing and used grenades as well which resulted into death of 26 people at the spot and many injured. The worshipers succeeded to apprehend the offenders along with suicide jacket and weapons at the spot; they were handed over to the police.

Accused Farhad Ahmad was arrested whereas Muhammad Akhlaq was injured; he was admitted in the hospital for treatment

Recovery from Muhammad Akhlaq Accused

1. One Rifle SMG
2. Eight Hand grenades with bandolier
3. Four Magazine containing 30 live bullets
4. One Suicide Jacket

Recovery from Farhad Accused

1. One Rifle SMG 2. Eight hand grenade along with bandolier 3. Four loaded magazine containing 30 live bullets 4. Suicide Jacket 5. One bifocal 6. Rs. 1260/-
Took into possession through two recovery memos

Spot Recovery

1. 176 Crime Empties recovered from different places of 87/C, Bait-ul-Noor
2. Burnt Motor Cycle CD-70 Red Colour used in the occurrence

Other evidence

- Complainant later made supplementary statement about names of all the deceased and injured persons and submitted list of their name before the Investigating Officer. (27 dead & 32 Injured)
- Site plan was prepared which reflects all the main points relating to the Crime episode.
- Inquest reports were prepared; post mortem was done, reports were received; MLRs of Injured were received.
- Statements U/S 161 Cr.P.C of eye witnesses and of injured witnesses were recorded.
- 88 witnesses are available to support the prosecution version
- Statement of Civil Defence officer, Bomb Disposal Squad in relation to spot recovery of grenades, Suicide jackets etc was recorded
- Forensic report of burnt Motor Cycle about its identity with respect to Engine No. and Chassis No. etc is available on record.
- Forensic Lab Matching report of crime empties with weapons recovered from both the accused is available.
- Chemical report of blood stained cotton of 27 deceased persons being positive is available on the record.

- Discharge slips of 22 injured from different hospitals are available.
- Antecedents of accused persons were obtained which are attached with Report U/S173 Cr.P.C

Both the accused during investigation disclosed the name of two accused persons who were with them during the occurrence; they were 1. Hafiz Muhammad Ilyas S/O Faiz-ul-Islam Caste Bhatti R/O Hafiz Street, Mughalpura, Lahore 2.Tanveer Butt S/O Ihtishaam Caste Rajpoot R/O WasanPura, Lahore. They could not be arrested; proceedings U/S 87 Cr.P.C. were completed and report U/S 173 to their extent was also submitted.

4. The Law

The type of offences are dealt under Anti-terrorism Act, 1997; Pakistan Penal Code; 1860 & Explosive Substance Act, 1908; Keeping in view the above facts, it is born out that following offences have been committed;

1. Terrorism as defined U/S 6 (1) of Anti-Terrorism Act, means the use or threat of action where (a) the action falls within the meaning of subsection(2)

According to section 6 (2) (a) involves the doing of anything that causes death; Section 6 (2) (b), involves grievous violence against a person or grievous bodily injury or harm to a person; Section 6 (2) (d) involves the doing of anything that is likely to cause death or endangers person's life: Section 6 (2) (ee) Involves use of explosive by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive; Section 6 (2) (h) involves firing on religious congregation, mosques, imambargahs, churches, temples and all other places of worship or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship; Section 6 (1) (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or **Community** or sect or create a sense of fear or insecurity in society; thus offenders are apparently guilty of act of terrorism as per section 6(6) of Anti-Terrorism Act, 1997; all the above offences are punishable U/S 7 (a), 7 (b), 7 (c), 7 (ff) & 7 (h) respectively

- 2. Murder;** as defined in section 300 of Pakistan Penal Code, 1860, punishable U/S 302 of Act ibid
- 3. Attempt to commit Murder** defined in section 324 of Pakistan Penal Code, 1860 and punishable under same section
- 4. Criminal Conspiracy:** as per section 120-B of PPC
- 5. Waging war against Pakistan** as per section 121 of PPC
- 6. Causing explosion** as per section 3 of Explosive Substance Act, 1908
- 7. Attempt to cause explosion** as per section 4 of Explosive Substance Act, 1908
- 8. Criminal trespass** of the nature as defined in Section 452 of PPC

Offences at Sr. No.6 & 7 require consent/ sanction of provincial government as per section 7 of Act ibid which is available

Section 34 of PPC is also applicable in respect of their joint liability for the offences committed during the occurrence

Section 148/149, 186, 353 PPC are not attracted in the circumstances because no element of unlawful assembly as defined in section 141 PPC is available; moreover, Colonel complainant was not on official duty, therefore sections 186 and 353 PPC are not made out.

5. Stance of Accused

Both the accused admitted the occurrence; stated whole story from their joining terrorist group (name the group), receiving trainings and facts up to this occurrence. They also admitted the recoveries belonging to them.

6. Evidential Test

The accused person made a premeditated attack on the worship place with intention to cause explosion for the purpose of terrorism and thereby waged war against Pakistan. They were trained enough to achieve their goal; they entered in the premises, made firing, cause explosion outside and committed murders of 27 persons, injured 33 persons; they could not succeed to blow up the jackets, they were apprehended at the spot,

The evidence against the accused is of **direct nature** in the form of ocular account, the prosecution also holds the supportive evidence in the form of injured as well as other eye witnesses;

There is conformity evidence in the form of Medical examinations of Deceased and injured persons.

The corroborative evidence in the form of recovered articles is available and supportive evidence of Civil Defence officer

Explanatory evidence in the form of spot recoveries with site plan is available

There is compelling evidence of matching report of weapon with crime empties is available.

The evidence of sharing common intention is also born out from the facts and circumstances of the case.

Motive in this case is also made out and is available which is, occurrence in the name of "Jihaad"

The accused have previous record of such like cases which is relevant evidence

I am satisfied that there is sufficient evidence against both the accused and there is realistic prospect of conviction for offences of Terrorism, conspiracy, Murder, criminal trespass, use of explosive, waging war against Pakistan

7. Public Interest Test

This is a serious offence which involves terrorism that has become menace for the security of Pakistan; offence has been committed on the behest of proscribed organization which has resulted in great loss to human lives and culminated into producing hatred, fear and insecurity in a community; Passing of sentence in this case would help prevent the terrorist activities in the country and would have a deterrent effect in order to maintain community confidence

I am satisfied that public interest test is made out

8. Conclusion

It is safely concluded for the assistance of Learned Court that availability of incriminating material against the accused Farhad Ahmad & Muhammad Akhlaq prima facie evaluated through evidential and public interest Test supra necessitates the issuance of process for commencement of trial against them on proposed charges because there is a realistic prospect of their conviction in the case; while no evidence is available against Hafiaz Muhammad Ilyas&Tanveer Butt accused at present which would only be collected as and when they are arrested or any liked clue is made available, process of summoning & proclamation to their extent is complete, their case may be separated;

Under the circumstances, Prosecution requests the Learned Court that at present accused Farhad Ahmad and Muhammad Akhlaq may be summoned to face trial on the suggested charges.

Public Prosecutor

Date_____