Crime Victims in Cross Fire: Alternate Intervention Strategies in a Criminal Trial

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I. INTRODUCTION

The world that we see today evolved from a time when it was all flesh & teeth. As men marched into civilization, they began to attach sentient values to some of their folkways and customs, which in reality were nothing more than their wonted ways of doing things. The inception of religion, conceivably around 25,000 BC, resulted from intelligent men's reluctance to accept themselves as the supreme planner and controller of the world. Thereafter, any act which breached religion or any customary practice was considered to be a 'crime'. Hence, the history of crime is as old as mankind itself. This evil has existed since the dawn of civilization.

In the civilized world today, the criminal law has been maintained and mandated by different instrumentalities of the state. In different times and at different places, the person committing the crime and the victim thereof had been treated differently. In ancient India, a traveler in scarcity of food could, without permission of the owner, take 2 sugarcanes, 2 cucumbers, 5 mangoes and a handful of dates/corn/wheat/rice without being liable to any punishment.[1] However, England wherefrom we substantially borrow our legal system, had formerly an extremely harsh collation of criminal law operating against the accused. As Fitzjames Stephens tells us "in his time, there were 160 Capital offences without benefit of clergy for actions which men were daily liable to commit"[2]. During 10 years of the reign of James I (1609-1618) nearly 1500 persons were hanged in the city of London alone.[3] However, as the time passed, the common law system slackened the apparent bias against accused through manifold legal and constitutional maxims, rules of procedure and practical adjustments of one sort or the other.

Be that as it may be, one thing which had conspicuously been absent throughout was the institutional concern for the victim[4] of the crime, and this has been true both for the ancient Indian Legal System[5] as well as the Common Law System[6], which we scrupulously followed while setting-up our contemporary legal system.

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[1] Manusmriti, VIII- 341; Verses given by sage Manu on how to lead the life according to vedic sanatan dharma, in the vedic state of Brahmavarta, which were later compiled in the form of Manusmriti.

[2] FitzJames Stephens, *Juridical Society Paper*, Vol. I, 468

[3] *Jeafferson Middlesex County Records*, Vol. II, 16- 21

[4] For the sake of simplification, let us assume that victim here includes only the person directly affected by the crime and his family consisting of his relatives.

[5] *supra* note 1 at IX-249 says that a King should never punish an innocent and should never allow guilty to go unpunished; and at XI 228, it says that if a man confesses to commit a sin, he castes it off as a snake castes off his slough.

[6] As observed by George P.Hetcher, *The Place of Victims in the Theory of Retribution*, 3 Buffalo Criminal Law Review 51 (1999-2000), "Remarkably, the theory of criminal law has developed without paying much attention to the place of victims in the analysis of the responsibility or in the rational for punishment".

In earlier societies, the random relationship between the offender and the victim *au fond* reflected a perennial raw struggle both for survival and ascendancy. With the occurrence of barter economy, the money and goods were accepted as symbolic compensation and restitution of crime in place of the erstwhile corporeal punishment; however, failing that for myriad reasons, the victim had always been almost a 'forgotten' player in the Criminal Justice Administration System (hereinafter referred to as CJAS). It has been the universal observation that when the state instrumentalities take-over the responsibility for enforcement of law and order and there have been more than one theories behind it viz. crime considered as a wrong against the whole society, cost of crime ultimately born by the state's *welfare-avataar* etc., the victim becomes merely an 'accuser' and the punishment purports to profit none except the law-enforcing state. It is more so because the intrinsic purpose of the state in this plenary mission appears to be confined to maintain public confidence in CJAS and preserve its legitimacy, hence it does not hover beyond the 'proof' or 'no proof' of the guilt of the accused.

This lineament of state instrumentalities inevitably and unfailingly marginalizes the role of the victim and effectively relegates him to a mere witness status. Today, as the drama of criminal trial unfolds before the exasperated eyes of victim, he discovers that he is rather treated as an appendage of a system 'appallingly out of balance'. He seems to learn the hard way that somewhere along the line, the system itself has lost the track of the simple truth that law- both substantive and procedural- is supposed to be fair, protecting those who obey it while punishing those who disobey it. The tremendous consequences accorded to the accused in our CJAS must be rendered even with the victim's rights- so as to give the bereaved victim a chance to grieve as he struggles to overcome insuperable inner torment. This crucial balance shall in the ultimately analysis proffer a manifold mechanism for our society to heal itself through its strongest resource- the people.

Here, we shall examine a system that bends over backwards to protect those who 'may' be innocent, while ignoring 'the innocent' victims. For the sake of convenience, we divide our discussion into 3 parts i.e. pre-trial position of victim, during-trial position of victim and finally, what the conclusion of trial brings to the victim, including the measures which can be taken to address his predicament at the appropriate places.

II. POSITION OF THE VICTIM BEFORE THE TRIAL STARTS

The general assumption about crime is that it begins and ends with an act causing harm. This is rather a liberal approach to criminal liability. There is another way to cogitate about crime. Crime establishes a particularly relationship between the criminal and the victim. The criminal thereby gains a kind of dominance over the victim, which continues after the crime is committed. The victim often fears his return and feels insecure even in his own homestead. The process of arrest and investigation prima-facie relieves this dominance of the offender over the victim.

Law provides two channels to a victim for putting the CJAS into motion- an FIR (First Information Report) to the police under section 154 of the Criminal Procedure Code, 1973 (hereinafter referred to as CrPC) or a complaint under section 200 CrPC before the court of law. Theoretically, the victim is to be encouraged to report his grievance, which raises a legitimate expectation that he will be treated sympathetically and with a lot of concerns by the concerned state-agencies. Perhaps the most troubling issue that confronts a victim is the gulf that often emerges between this idealistic expectation and the grim reality. Making complaint to the court of law under section 200 CrPC first brings financial constraints in engaging an advocate for his representation in the court of law as the common man of this country still feels the lack of both knowledge and courage to come to the court on his own and make such complaint which though as prescribed by section 2(d) of CrPC can even be made through oral allegations before a magistrate with a view to his taking action under the CrPC. People generally do not carry a positive image of the judiciary especially that functioning at the district level. Among many others, one of the complaints against the magistrates is that they are not competent enough and also that they come from upper and upper-middle class families and therefore, do not do justice to the commonality.[7] After that, it poses procedural restraints to him in producing evidence (which may sometimes include/require scientific evidence) and witness/es in the court on his own so as to make the court satisfied to issue process against the accused under section 204 CrPC.[8]

Hence right from the British times, the course ordinarily known to the common man of this country is to go to a police-station and tell about his affliction at the hands of the offender, and thereby set the evidence-collecting-mechanism of the state in motion for his cause. Unfortunately, police also has miserably failed to inspire confidence in the rank and file of the society. It is a common perception with the populace that upon the information of the incident by the victim or by any other person, the registration of FIR (the First Information Report) under section 154 CrPC is done in a preferential, weighted and selective manner by the police, may be because the police is over-burdened with multiformity of roles to perform or because of the rampart corruption and political interference in its day-to-day working. Commenting upon this dreadful state of affairs, the Supreme Court observed that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on

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[7] K. L. Sharma, *Legal Profession and Society: A Study of Lawyers and their Clients* in Indra Deva (eds) *Sociology of Law*, Oxford University Press, 2005

[8] Though there is another way open to the Magistrate which is to order investigation by police under section 156(3) Criminal Procedure Code, 1973 without taking cognizance of the complaint; discussed later.

the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society. According to the Statement of Objects and Reasons (of the CrPC), protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.[9]

Non-registration of FIR becomes a further compounded and multifarious issue when the person against whom the allegations are made happens to be rolling in riches or commanding cogency in the society. Article 14 of the Constitution of India guarantees to all persons 'equality before the law' and 'equal protection of law' within the territory of India. Police officer must register an FIR immediately on receiving credible information about the commission of a cognizable offence. The Apex Court observed in this respect that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Section 154(1) of the Criminal Procedure Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. In fact, the police officer has to draw his satisfaction about the credibility of the information only on the material placed before him at this stage. The core of the Sections 156, 157 and 159 of the Code of Criminal Procedure is that if a police officer has reason to suspect the commission of a cognizable offence, he must either proceed with the investigation or cause an investigation to be proceeded with by his subordinate.[10] The constitutional bench of the Supreme Court also observed that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the CrPC, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate. Be it noted that in Section 154(1) of the CrPC, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the CrPC wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non- qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the CrPC may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a

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[9] *Lalita Kumari* v. *Government of Uttar Pradesh & Ors*. (2008) 7 SCC 164
[10] *State of Haryana* v. *Bhajan Lal,* AIR 1992 SC 604

case. An overall reading of all the provisions makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.[11] However, what happens every day at the *terra firma of the local thana* is anybody's guess. The predicament of the victim becomes all the more grave when just to keep the statistics 'proper', people, a major percentage of whom belongs to the deprived section of the population, are turned away and denied access to the very first phase of the CJAS i.e. the 'registration' of their grievances as FIRs under section 154 CrPC, and triggering of criminal investigation machinery thereupon.

Common man of this country requires to be educated that the SHOs (the Station House Officers or the *Thanedars* as known in vernacular) of their local police station is not all what they got to launch the criminal proceedings; that they can approach the District Superintendent of Police for getting their grievances registered or make a complaint before the magistrate for getting a 156(3) CrPC order which obligates upon the police to register the FIR and start the investigation thereon. It is pertinent here to note that if the magistrate declines to make 156(3) CrPC order, he has to record reasons for the same, which shall be further open to revision as provided under CrPC.[12] The Punjab and Haryana High Court observed that the Magistrates/Judges should not shirk their legal responsibility to pass an order for registration of the FIR and its investigation by the police on the applications under section 156 (3) CrPC in the cases where on the basis of the allegations made therein and the material, if any, brought on record in support thereof, prima facie cognizable offence of serious nature requiring police investigation is made out. In such cases the complainant should not be compelled to collect and produce the evidence at his cost to bring home the charges against the accused, thereby forcing the complainant to proceed in the manner provided by chapter XV CrPC (i.e. by making a complaint under section 200 CrPC before the court of law, as discussed above).[13]

Once the victim achieves this exiguous feet of getting his grievance registered as an FIR under section 154 CrPC, his statement is recorded and he is sent for medical examination, if need be; and thereafter the only stage at which he comes into picture is that of the evidence, when he is called upon as one of the prosecution witnesses. Under the existing legal setup, the victim is neither reckoned as a guiding light in the investigation nor has he been conferred with any statutory right to ensure that the crime is properly and effectively investigated by police. The Madras High Court in one such case while transferring the investigation to the CBI observed that taking note of the fact that after registration of the case, the police could not even knock at the doors of the main accused, one can conclude that the main accused is still controlling the affairs through his relatives and patrons who are in power. In view of the compelling circumstance, this

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[11] *Supra* note 9
[12] *Shiv Singh* v. *State of M.P.*, 2009 CrLJ 4217
[13] *State of Haryana* v. *Chander Lal*, Punjab and Haryana High court CRM M-40078 of 2012 decided on 09-01-2013

Court directs the first respondent to forthwith transmit the papers/records, if any, pending with him or CCB, to the Joint director, CBI. The CBI should take into account the serious allegations made against the controversial police officers of the State and proceed strictly in a proper perspective, for, none is above law and if the theory of influence is allowed to rule over the police administration, then injustice would be rampant defeating the rule of law, sometimes even resulting in deprivation of judicial remedies to the victimized persons.[14]

Here it shall be pertinent to note that in case the SHO of a police station considers that the offence does not appear to be serious or there is otherwise no sufficient ground for starting an investigation, he may not investigate the case but then he has to send a report to the Magistrate who can direct the police to investigate or if the Magistrate thinks fit, hold an inquiry himself.[15] Also, section 157 CrPC contemplates the requirement of giving reasons and notifying respectively the court and the informant who is the victim himself most of the times. But the veritable object thereof is not to keep the victim in loop, it is rather to inform the victim that the concerned SHO thinks that there are no sufficient grounds for entering upon the investigation in his case. Here, Police must understand and recognize the fact that the criminal process itself causes humiliation and strain to the victim in more than one ways especially when he is left groping in the dark and know nothing about what is happening around him. Such abasement and ignominy can very well be equated to the degree of dolour caused to him by the offence itself, and hence it has been termed as 'Secondary Victimization' of variable degrees depending upon the particular vulnerability of a victim when confronted with these unpleasant features of the process.[16]

To revivify the sense of self-esteem in the person of victim, it seems pressing that he must have an impression that the society has not left him in lurch and that the state is standing behind him with full vigor and attention. Here, it is suggested that the Right to Information may prove to be a proficient device. A duty should be cast upon the police to apprise the victim of the development, direction and progress in the investigation when duly asked for by the victim, which shall include the steps taken hitherto unless of course, this information by any objective standard is likely to trammel the investigation itself, which conclusion should be made contestable by the victim before a police officer of the rank of Deputy Superintendent of Police or above of the concerned territorial jurisdiction. This way the remedy, in cases of alleged manipulation of investigation, shall come from within the investigation agency, and the trust deficit for the police shall be taken good

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[14] *G.Kutty Alias Ramesh* v. *The Superintendent Of Police,* Madras High Court Criminal Original Petition (MD) No.8151 Of 2010, decided on 03-09-2010

[15] *Abdul Mukid* v. *State of U.P.*, 2007 CrLJ (NOC) 407

[16] Helen Fenwick, *Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?*, The Modern Law Review, Vol. 60, 1997 (3)

care of, as we see that both the Parliament and the Supreme Court had given much credence to the upper echelon of the police department.[17]

In fact, realizing the need of keeping tabs on police during the investigation, which in practical terms shall have a direct bearing upon the confidence of the victim that something is being done by the state machinery to redress his sufferings and redeem his fealty, the Supreme Court in *Sakiri Basu* v. *State of U.P.*[18] observed that where the Magistrate finds that during investigation, nothing is done at all or it is not being done satisfactorily, he may issue directions under section 156(3) CrPC to carry out the investigation properly and can monitor the same to ensure that it is so done. It follows from this judgment that though investigation is an area falling within the exclusive domains of the police and the courts cannot interfere in it by directing as to in what manner it is to be done or what conclusion to be reached-at by what evidence, however under the Doctrine of Implied Powers, the judicial courts have 'monitoring powers' to ensure that the investigation is being carried out 'properly'. Judicial pronouncements of such kind from the highest court shall eventually germinate confidence in the victim. He can see to it through the medium of courts that investigation by police does not fall to the ground or proceed haywire. Further, the Supreme Court through Bhagwant Singh v. Commissioner of Police[19] has read into the wordings of Section 173 CrPC that no Closure Report, wherein the police draws to a close that the offender remained untraced or that the reported offence has not occurred et al, presented by the police in culmination of the investigation shall be so accepted by the court without notice to the de-facto complainant and providing him with an opportunity of being heard; the same requirement of notice applies squarely to the case when the Magistrate on consideration of the police report under section 173 CrPC decides not to take cognizance and proceeds to drop the case. Here, it is pertinent to note that the Magistrate can take cognizance (even) on the Closure Report and issue process against the accused[20] or without taking cognizance he may order further investigation into the case under section 156(3) CrPC[21].

The whole idea seems to converge on removing the possibilities of police thwarting the initiation of criminal process in a partisan manner and subverting the whole CJAS in its nethermost plinth. The courts must also keep in view that the complainant-to-court channel under section 200 CrPC read with section 2(d) CrPC should not be crippled on mere technicalities. A different approach would foster abuse and defeat the whole purpose of law which is to provide victims an alternative access to CJAS which is independent of police. In fact, it was observed by the Calcutta High Court that where the allegations in the complaint clearly make out the elements of offence, the non-

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[17] The Supreme Court in *Kartar Singh* v. *State of Punjab,* 1994 Cr L J 3139 upheld the validity of Section 15 TADA wherein confession before a Superintendent of Police was held admissible in the court of law, which was otherwise barred by virtue of section 24, 25 of the Indian Evidence Act, 1872.
[18] (2008) 2 SCC 410
[19] (1985) 2 SCC 537
[20] *Union of India* v. *Prakash P. Hinduja,* AIR 2003 SC 2612
[21] *State of Bihar* v. *J.A.C. Saldanah,* AIR 1980 SC 326

examination of the complainant and the witness/es from his side under section 200 CrPC would not vitiate the taking of the cognizance by the Magistrate provided the accused is not prejudiced thereby, because such omission to examine them may be treated as an error of procedure curable under section 464 CrPC.[22] Also pertinent to note here is that section 203 CrPC itself mandates the grant of hearing to the complainant before a complaint under section 200 CrPC is dismissed thereunder; and also that the Magistrate has to record the reasons for such dismissal of complaint. The Kerala High Court observed on this issue that even in case of piecemeal (partial) dismissal of a complaint, the Magistrate is bound to record reasons for the same otherwise it would be impossible for the High Court to consider whether the discretion had been properly exercised or not.[23] Hence, the courts of law especially the Magistrate Courts have an unparalleled and unrivaled role to play in ensuring that the victims derive an unfettered and unshackled access to the CJAS.

Now, we have reached at a stage where the Court can be considered to have seized of the matter and the criminal trial starts.

III. POSITION OF THE VICTIM DURING THE TRIAL

Now, that the Accused enters the realm of trial, it become a contest rather between the accused and the State which is represented by the public prosecutor in courts. Theoretically, the main reason that criminal offences are prosecuted by the State is that the criminal conduct is regarded as a threat against the whole society, and hence it requires a 'community response'. This justification is supplemented by the financial burden that the crime imposes on the State. Also, there breaths a cabalistic timidity that if the victims are supplied with a reticulated role in transacting the prosecution, they shall by all odds strive for more serious charges and stiffer penalties. Consequently, the primitive retributive elements would creep in the criminal trial. Also, in absence of the public-prosecutor[24] from the arena, the prosecution by a pleader for the private party may degenerate into a legalized means for wreaking private vengeance[25] and consequently, the provisions like newly introduced section 265 A to L of the CrPC[26], Section 320 of the CrPC[27] etc. would be rendered practically redundant. Any alternative arrangement will lead to more contested cases and a greater volume of trials, with an ineluctable offshoot that an already overburdened CJAS would cripple and collapse under an ever exponentially increasing amplitude of pendency in courts.

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[22] *Deepak Ghosh Dastidar* v. *Sant kumar Mukherjee*, 2003 (1) Crimes 297 (302) Cal
[23] *Prakashan Vijay Niwas* v. *State of Kerala*, 2008 Cr.LJ 1272
[24] The Public Prosecutor is not a protagonist of any party though in theory, he stands for the state in whose name all prosecutions are conducted. He is to aid the court by examining all witnesses who had knowledge of all the relevant facts. Ratanlal and Dhirajlal, *The Code of Criminal Procedure*, p. 68, 19th Enlarged Edition 2013, Lexis Nexis
[25] *Shiv Kumar* v. *Hukam chand*, (1999) 7 SCC 467
[26] Provisions for plea bargaining, vide Amendment 2006 in the Criminal Procedure Code, 1973
[27] Provisions for compounding of certain offences

However, demands are often raised by the victims to let their counsels carry-out the prosecution. The role of the public prosecutor has now become an enormous issue after the Supreme Court proscribed the role of prosecutor in *Zahira Habibullah H. Sheikh* v. *State of Gujarat*[28] wherein it was observed that though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainants party, would be appropriate. Frequent recurrence of such instances at all levels where state-run-prosecution evinced vested interests in the accused has consistently corroborated the public distrust.

If we read Section 225, 301, 302 CrPC together, we reach at a conclusion that in a criminal trial before the Magistrate, prosecution can be conducted by any person not necessarily a public prosecutor, if the Magistrate so permits; but it cannot so happen in the Court of Session which in fact is a contrariety to fairness towards the victim since almost all the heinous offences are Sessions triable. With abysmally low rate of conviction, deterrence as one of the major aims of CJAS is gradually becoming inanity. Inefficient rather dubious handling of prosecution has now become a norm instead of oddity. In this state of affairs, victims should be allowed to 'participate', and there should be laid down a charter of rights through which he can have practically meaningful interventions in the trial. To achieve this purpose, the victim must have a right, in all trials including Sessions Trial, to get his counsel stand parallel and in synchronization with the public prosecutor. The apprehension that such interventions of the victim may open a flood gate for vengeful traits of the victim, can be allayed by keeping a balanced approach and allowing him limited interventions at selective points in the trial so as to ensure fairness to all the stakeholders therein.

In this context, descending to the component level of a criminal trial, we see the victim remains a non-participant at all but one stage, and that is the stage of prosecution evidence at which he appears as one of the prosecution witnesses. Apart from that, at all the climacteric junctures of all the crucial stages of the trial till the last stage of final arguments on the case, be it the bail stage, the charge framing stage, the prosecution evidence stage etc. the victim finds himself totally alienated and estranged.

In fact, at the crucial stage of prosecution evidence, everything appears to be in complete chaos and disarray. Investigating Officer and other formal witnesses from the police department usually do not turn up for giving evidence on the scheduled dates without successive coercive process issued against them. There seems to be a complete deficiency of cohesion and co-ordination among the concerned court/state agencies so far as the production and examination of prosecution evidence is concerned. It is of the common experience in the courts that a raft of successive 'dates' spanning over years and years together for calling prosecution witnesses fetch no results. In one such situation, the

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[28] (2004) 4 SCC 158

Apex Court observed that it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the Public Prosecutor have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.[29] As if it is not enough, the hostility of the prosecution witnesses particularly when the accused happens to be an influential entity, brings another enigma to the victim. Here, it is pertinent to note that the 'Witness Protection Scheme', has remained a cipher in India, which is squarely to be blamed for the stifling and ultimately the unnatural death of a vast majority of criminal trials in India.

Finally, when the victim himself steps up in the witness box, he normally picks-up the perception that by contrast, the accused is subjected to far less compulsion and harassment. While the victim is required to make comprehensive formal statements, disclose intimate details and endure allegations which would be defamatory in other context; the accused on the other hand, can conveniently choose not to step in the witness-box and to remain silent on his sweet will.[30] Law of Evidence is seen by many a victims as being unduly favorable to the accused. Particularly in sexual offence trials, the fate of the case usually turns on the credibility of the victim, who is then placed under intense scrutiny for horrifying factual details of the crime.[31]

In these circumstances, an urgent need stands for an effective participation of the victim leastways at some selected points in the criminal trial. As also noted by the Malimath Committee, 2003 the victim must be heard by the court at the Bail Stage and the Charge Framing Stage. Not only this, the victim must also be given an opportunity to supplement the evidence both oral and documentary if he feels that something material has been left or dropped by the prosecution. Also, he must have opportunity to examine the witnesses produced both by the prosecution and the defence side, may be through a supplementary examination on his own or through the court under section 165 of the Indian Evidence Act, 1872 (hereinafter referred to as IEA) or under section 311 CrPC, if he feels that justice has not been done to his cause. Here, it would not be out of place to realize that even the courts frequently indulge in dereliction of the duty cast upon them under section 165 IEA or under section 311 CrPC, sometimes to avoid the impression that the 'Chair' is acting partisan by trying to fill the gaps and lacunas of the prosecution

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[29] *Shailendra Kumar* v. *State of Bihar and Ors.* (2001) 8 SCC 13

[30] Article 20(3) of the Constitution of India

[31] *State of Punjab* v. *Gurmeet Singh,* (1996) 2 SCC 384. Here the Supreme Court noted that "the courts should not sit as a silent spectator. It must ensure that the cross-examination is not made a means of harassment and humiliation to the victim of the crime of rape".

version of facts and events, and at other times due to sheer indifference or the exasperating work pressure in the trial courts.[32]

Moving further, the Amendment Act, 2006 (2 of 2006) w.e.f. 05-07-2006 in the CrPC is a welcome step introducing the concept of 'Plea Bargaining' in the Indian CJAS, wherein the victim 'participates' in arriving at a 'Mutually Satisfactory Disposition' in cases which qualify under section 265A CrPC to be considered for this settlement-mechanism. In the same vein, the victim must also participate and be heard by the Court when public prosecutor seeks to withdraw the prosecution under section 321 CrPC. The court before judiciously exercising its discretion in granting or with-holding its consent, which is a statutory requirement section 321 CrPC, must also take into account the averments of the victim.

Also, the victim must be given an opportunity to address concise oral arguments and submit a memorandum of written arguments supplementing that of the public prosecutor after the close of the Prosecution Evidence. An amendment to this effect is much needed in section 314 CrPC.

IV. POSITION OF VICTIM AT THE CONCLUSION OF THE TRIAL

Now, the case enters the last spell of the criminal trial where in case the accused is found guilty, the court is to choose from various options available for punishment, which include the ones with reformative overtones viz. section 360 CrPC and various provisions in the Probation of Offenders Act, 1958, Juvenile Justice Act, 2000 etc. Here the courts are not only to explore the possibilities of the reformation of accused but also, it is to be seen that both the victim and the society must carry home the impression that ultimately after the ordeal of criminal trial, justice has been done to their cause.

The criminal trials which culminate in conviction signify a fact that the victim and the prosecution witnesses, who may be family members or otherwise related to the victim or may be totally unrelated to him, have put in persistent efforts in carrying out the prosecution this far by keeping at bay all kinds of fear and influence, and playing truant to all considerations- cash or kind. In such wise, if the accused is let-off the hook with a relatively minor punishment (here let us take 'punishment' in pure corporeal sense, as we shall consider the relevancy of monetary compensation as part of the punishment/sentence later in our discussion), the victim feels derided, swindled and persecuted, which can be considered as 'Tertiary Victimization'[33] and hence, in many countries viz. Australia, England, Canada and USA, particularly after the U.N. Declaration, 1985[34], the victims at the stage of sentencing have been provided with an opportunity to address and inform the

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[32] As observed by the Supreme Court in *Zahira Habibullah H. Sheikh* v. *State of Gujarat, supra* note 28 at 165

[33] Primary Victimization: when the crime against the victim was committed. For Secondary Victimization, see *supra* note 16

[34] United Nation's Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

court about their plight and predicament. Although apprehensions have been noted[35] that these statements at the sentencing stage may not have any therapeutic effect on the victim, rather harassment may be caused to him *et cetera* while he recapitulates the traumatic experience before the court. Be that as it may be, I am of the opinion that the balance lies in favor of such statements be allowed in the court at the sentencing stage as otherwise throughout the trial there occurs no specific occasion for the victim to communicate or for the court to fully appreciate the crisis undergone by the victim triggered by the crime, and the whole application of the criminal trial seems to have been narrowed down to the issue as to whether or not it could be proved beyond reasonable doubt that it was the accused who committed the offence under the scanner. Another reason is that such statements would help the criminal court to disembark upon a better understanding of the 'gravity' of the offence which in turn, shall be one of the many factors for the court to arrive at the 'appropriate' final order culminating the criminal proceedings. The same shall also hold true when the court exercises its discretion to release the offender on probation under section 360 CrPC or under the provisions of the Probation of Offenders Act, 1958. The victim must be given an opportunity to state whether he has any anxiety or concern about the release of offender on probation viz. the place/s to which the movement of the offender should be restricted or barred, or such other condition as may be applied to the offender while so releasing him. The court may incorporate these aspects into formulating its discretion as to whether and to what extent the legal provisions with liberal connotations and reformative undercurrents may be extended to the accused in a particular case.

Now moving on to the monetary compensation aspect in a criminal trial, it is understandable that many victims have a desire to see that the offenders are given harsh corporeal punishment, which only seems to assuage their gush of anger; however, monetary compensation has also sustained itself as a 'tool' for 'negotiation' in a wide variety of cases. In fact, the offences punishable upto 7 years of imprisonment[36] may now be placed under the plea bargaining regime under chapter 21A of the CrPC, wherein section 265B explicitly mentions that the 'Mutually Satisfactory Disposition' may include giving to the victim by the accused the compensation and other expenses. It being so, we more often come across a set language format in such dispositions which contains phrases for example "If I am paid this sum of Rs.__ lacs, I shall have no concern whether thereafter the accused is given any punishment of imprisonment or not at all". The same shall be true for offences which qualify to be compoundable under section 320 CrPC although the language of section 320 does not explicitly admit the consideration of monetary compensation. It would not be desultory here to note that even in the case involving heinous offences, which do not admit falling in either of the two categories, money does bring-down the curtains as the hostility of the prosecution witnesses in such

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[35] Geoffrey Flatman and Dr. Mirko Bagaric, *The Victim and the Prosecutor: The Relevance of Victim in Prosecutor Decision Making*, Deakin Law Review, Vol.16 No. 2, 2001

[36] For other qualifications, see section 265 A Criminal Procedure Code, 1973

like case is nothing but the manifestation of an 'out of court' settlement generally grounded in numismatic considerations.[37]

In other instances, the money moves not sequent upon a 'settlement' between the victim and the accused, but because the Judge exercised its discretion under section 357(1) CrPC. Evidently, under section 357(1) CrPC, if it is the court of Judicial Magistrate, the amount of compensation shall be circumscribed by his competency to levy fine as defined under section 29 CrPC.[38] However, this restraint is relieved by Section 357(3) CrPC, according to which a compensation simpliciter can be ordered without it being made a part of any fine.[39] This mechanism has a great potential vis-à-vis the victims because in the Indian society, irrespective of the economic and social strata to which one belongs to, it is rather despised and disdained that a crime be 'traded' with the offender. Hence, the money moving to the victims through judicial mechanism itself would be of really great help. However, again it has great limitations viz. it can be set rolling only at the stage of sentence and, it intrinsically depends upon the paying capacity of the accused. The Apex Court observed in this respect that although a provision has been made for compensation to victims Under Section 357 Code of Criminal Procedure, there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. This is perhaps why even on conviction this provision is rarely pressed into service by the Courts. Rate of conviction already being low inter-alia for incompetence of investigating agencies, apathy of witnesses and strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate for addressing the needs of victims.[40]

These limitations have been taken care of by the Amendment Act, 2009 (5 of 2009) w.e.f. 31-12-2009 which added section 357A to the CrPC which provided for compensation (even) in cases of Acquittal, Discharge or Untraced-Accused, mainly for restoration and rehabilitation purposes; and which also took away its dependency upon the paying capacity of the accused by mandating a State Victim Compensation Scheme to be prepared by every State Government in co-ordination with the Central Government of India. The Apex Court observed that the legal position that emerged till recent times was

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[37] Though perjury may follow the suit, but due to heavy pendency and an unwritten policy of courts, these instances are pretermitted.

[38] Under section 29 of Criminal Procedure Code, 1973, the Court of a Magistrate of first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees or both.

[39] *Hari Singh* v. *Sukbir Singh*, (1988) 4 SCC 551. The Supreme Court deplored the fact that courts in India rarely invoke the provisions contained in section 357 Criminal Procedure Code, 1973, and then recommended its judicious exercise by the courts especially by the sub-ordinate judiciary.

[40] *Suresh* v. *State of Haryana*, 2014 (4) Crimes 363 (SC)

that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/reparation by Courts administering criminal justice. (In India) The amendments to the Code of Criminal Procedure brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left section 357 unchanged, the Parliament introduced Section 357A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where the compensation awarded under section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or the District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively. The Apex Court further observed that the expanding scope of Article 21 is not limited to providing compensation when the state or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the state or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution, and accordingly, section 357A has been introduced in the CrPC.[41]

In this connection, the Supreme Court in *Ankush Shivaji Gaikwad* v. *State of Maharashtra*[42], with reference to the development in law (of awarding compensation to the victim) observed that the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. The Apex court further observed that the Harvard Law Review (1984) in an article on "Victim Restitution in Criminal Law Process: A Procedural Analysis" sums up the historical perspective of the concept of restitution as far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken.

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[41] *ibid*
[42] (2013) 6 SCC 770

Further, paving the way for the subordinate judiciary to follow, the Supreme Court pronounced some landmark judgments wherein it observed that regarding monetary compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357A of the CrPC must be applied[43]; that the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A (voluntarily causing grievous hurt by use of acid etc.) or Section 376D (gang rape) of the Indian Penal Code[44]; and stressing upon the need of uniformity in providing compensation under section 357A of the CrPC, the Apex Court observed that pursuant to this provision, 17 States and 7 Union Territories have prepared 'Victim Compensation Scheme' (for short "Scheme"). (However) As regards the victims of acid attacks the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs. 25,000/- in such scheme, the State of Rajasthan has provided for Rs. 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs. 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair. We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction[45].

As we have noted before, commencing from the ancient times when it was crudely done under a barter-system, there has been a concatenation when today the monetary compensation is accepted as a settlement or mutually satisfactory disposition within (and even outside[46]) the legal framework. However in cases where it does not happen, an obligation is cast upon the courts to ascertain at the stage of sentence as to which permutation and combination of corporeal punishment along with the monetary compensation shall best respond to the collocation of both the accused and the victim. This can be deduced by carefully looking at among other factors the gravity of offence,

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[43] *PUCL* v. *State of Maharashtra*, (2014)10SCC635
[44] *In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News*, Suo Motu Writ Petition (Criminal) No. 24 of 2014, (2014) 4 SCC 786
[45] *Laxmi v. Union of India and Ors*, (2014) 4 SCC 427

[46] read with *supra* note 37

the financial position of the accused[47] and the predicament of the victim and his family. Here, (even) at the cost of repetition it seems worth harping upon that the victim must be given a sensitive hearing at the stage of sentence, and the requisite amendment in CrPC must be brought into effect as soon as possible.

V. CONCLUSION

In India, the percentage of both crime-reporting and crime-detection remains low due to a wide variety of reasons. Even for the offences which somehow land-up in the courts, we have a low conviction rate[48] which seems to further plunge the percentage of 'crime-reporting'.

In criminal trials, the prevalent pre-occupation with the due process towards the accused must not eclipse the exigency to ensure that the victim's participation at all the stages of CJAS and his other interests be cogitated and considered as no subaltern to the quintessence of a fair trial. Participation in all forms of government, and that shall include prosecution in criminal trials, is the essence of a real democracy.[49] It will not be correct to say that it is only the accused that must be fairly dealt with in a criminal proceeding. This would be turning a Nelson's eye to the sentiments of society in general and the yearning of the victim in particular. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution.[50] It appears to be inevitable and unqualified that taking note of victim's interests at all stages of a criminal trial shall not only improve the conviction rate, but shall also inspire the 'crime-reporting'; and hence, all put together, it shall help check the rising graph of crime. Criminal Justice Administration Policy formulated and implemented after considering these dimensions shall pose effective deterrence to the potential criminals and shall re-ideate victim's rights as a trajectory towards the consummate, constructive and convincing social welfare ideology as distinct from the characteristics of a contracted, calamitous and convoluted conventional CJAS.

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[47] However, once section 357A Criminal Procedure Code, 1973 is actually implemented by all the State Governments, this factor would no longer be considered in this respect as far as the state victim compensation scheme is concerned.

[48] NCRB (National Crime Record Bureau) 2013: Total Violent Crimes- 300357, Conviction rate- 25.4%; Total Crimes Against women- 309546, Conviction Rate- 22.4%; Total Economic Crimes- 129306, Conviction Rate- 24.4%, http://ncrb.gov.in/CD-CII2013/figure%20at%20a%20glance.pdf

[49] Bill Clinton (Former President of the United States of America) noted while announcing his support for the Constitutional Amendment on Victims' Rights, 32 Weekly Compilation of Presidential Documents, U. S. Government Printing Office, 1134 (July, 1996)

[50] *supra* note 28