Chapter–II

PRE-TRIAL

The prosecutor is the chief practitioner of the criminal law. He represents the interest of the State and thereby the interest of the public in creating and maintaining a lawful and orderly society. Investigation of a crime is what precedes trial. The role of the Public Prosecutor during this phase and the extent of his discretion in ‘No prosecution’ & ‘prosecution’ decisions and in charge selections and the extent of co-ordination between police and the prosecutor and the Public Prosecutor’s domain to expedite investigations and get prepared an effective prosecution case file and about the need to expand the role of Public Prosecutor by assigning a few more functions to him which are hitherto exercised by the Magistrate with a view to quicken the case disposals form part of this chapter. The bed-rock of the chapter consists of the principles: Prosecutions shall be initiated only when there is adequate evidence; the decision to charge or not to charge is a prosecutorial decision and not an adjudicative function of the court.

Stages of a Criminal Case before Trial

On receiving information about a cognisable offence police register FIR and commence investigation. They collect evidence, arrest the accused and produce him before Magistrate and secure orders for police custody or judicial remand. On completion of investigation, if the police feel that no prima facie case is made out final report will be filled before court. If the investigating agency feels that a prima facie case is made out, it will file a charge sheet before court. The Magistrate has to pass necessary orders on final
reports and charge sheets. Depending on the order of Magistrate the case will be either dropped or put forwarded for charges and trial.

**Investigation and the Public Prosecutor**

Police is the Chief Investigative agency of the State. Police are governed by various State and Central laws. Administratively police is independent from Directorate of prosecution and the judiciary. As a principle, it is said that the court does not possess any supervisory jurisdiction over police and their investigation\(^4\). There is clear cut and well demarcated sphere of activity for the police in crime detection and that is the Executive power of the State\(^5\).

During investigative phase evidence is collected. Police examine witnesses and record their statements, collect material objects, conduct searches and seizures, arrest the accused, record their statements and confessions, arrange for test identification parades, obtain scientific reports and opinions from experts and prepare a case diary of all of it for each of the cases investigated. In the context of human rights and constitutional safeguards and presumption of innocence available for accused, there are sincere concerns about the threat of infringement of various freedoms available for people in the hands of investigating police. On the other hand, police have to look after the safety and security of the public from the criminals. Therefore, there is need for fine balancing of these competing values. A system of checks and balances is the means available for this task. Who should check the police and balance the rule of law led different countries adopting different legal postures? While it is the police who shall investigate, the leash over police was given to Magistrates in France, Germany, Belgium but it was given to


prosecuting attorneys in Scotland. There are hybrids with several variations available across the globe. In India, in a way, it is with Judicial Magistrates. An overview of working of this system in India discloses a pathetic failure of it and thereby necessitating a review and rethinking on this vital aspect.

**Arrest**

Gathering and collecting evidence may span a number of days or weeks, yet law requires the accused to be brought before a court within 24 hours of arrest\(^6\). The power to arrest and the discretion whether to arrest or not is always vested with the police\(^7\). The police arrest on the basis of probable cause to believe that an individual has broken the law. When the police feel there are grounds for believing that the accusation is well founded they transmit the accused and case diary to the Magistrate for remand orders\(^8\). Until this stage, Public Prosecutor is not notified about these events. Even at the time of remand decision on part of Magistrate, there is no power or duty for the Public Prosecutor to state about the case to court. It is the court’s responsibility and power whether the accused is to be remanded to further Custody or granted bail or released altogether. It is the Magistrate who has ultimate control over police investigation\(^9\). Thus, the arrest decisions of police are not supervised by prosecutors and the courts alone are empowered to review arrest decisions of police. This approach of Criminal law proved to be a failure. It is a matter of record that 60% of all arrests by police in the country are unnecessary and unjustifiable and 43% of the total jail expenditure in the country is

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\(^6\) Section 57 Cr.P.C.

\(^7\) Section 41 41 A Cr.P.C.

\(^8\) Section 167(1) Cr.P.C.

\(^9\) *Ramesh Kumar Ravi alias Ram Prasad v. State of Bihar* 1987 Cri.L.J. 1489 (Patna)
wasted due to such arrests\textsuperscript{10}. Prof. Afzal Qadri reports in his survey that 85.7% of police officers agreed that arrests are made on extra legal consideration\textsuperscript{11}. As a result of these types of arrests, the arrested persons have to spend time in pre trial custody, pay substantial fee for lawyers, and raise money for bails. There is enormous human agony and huge monetary loss for the citizens and the State besides wastage of precious judicial man-hours spent on such files.

Although a police officer should have the authority to arrest a person without prior prosecutorial approval, the process should go no further than that without formal involvement of the Public Prosecutor’s office. The Public Prosecutor could act as a quality controller of the arrest proceedings and he should forward to court only deserving arrestees. Expanding the legal role of the Public Prosecutor in this sphere of activity could not evoke any protest from judiciary since there are no vested interests at stake there. It could not evoke protest from police since what the courts are expected to do would be done by the prosecutors. It could not evoke any protest from defense bar since it does not affect their functioning. Therefore, the law shall be suitably amended and a role for the Public Prosecutor shall be so evolved enabling him to process the arrest cases before a judicial review takes place so as to avoid infringement of rights of accused and avoid unnecessary pre-trial detentions which will cut the expenditure for the exchequer.

**Bail**

At the bail hearings before a court of law, if the case is not grave, there is no legal requirement for the court to hear the prosecutor and bail would be granted to accused


invariably\textsuperscript{12}. In such cases, the Public Prosecutor does not get to know about the case until the police complete the investigation and file a final report or charge sheet before the court.

If the offence is serious, the Public Prosecutor would be notified by the court about bail hearing\textsuperscript{13}. This is the first occasion, in the present scheme of law, for the Public Prosecutor to become aware of the existence of a case. An efficient and effective process is one where all relevant information about the criminal and the case diary is automatically transmitted to the prosecutor by the police. It is very important to determine the strength of the evidence and the legality of the arrest at this process point. However, in law there is no provision for it and in practice there is no such prompt and automatic transmission of files from police to prosecutor. It is a common phenomenon that at bail hearings before Sessions Courts prosecutors would seek adjournments for more than a week days solely for the reason that they have no case record with them.

Though police and prosecutors are on the same side in pursuing criminal prosecutions, lack of co-ordination between them is a disappointing feature in the present set up. All this works against the swift disposal norms in the Criminal Justice System. Therefore, law should suitably be amended for prompt transmission of case files by police to Public Prosecutors.

**Witness Examination**

During the course of investigation police examine witnesses and record their statements. It is assumed that being public servants they do it honestly and accurately. However, the stark reality is otherwise and the police themselves acknowledge it. They

\textsuperscript{12} Section 436 and the First Schedule of Cr.P.C.

\textsuperscript{13} Section 437, 438, 439 and the First Schedule of Cr.P.C.
make perverse enquiries, the investigation is either delayed or poor in quality, and they do biased investigation, behave rudely, discourteously with victims and witnesses and sometimes minimise the gravity of offence by manipulation\textsuperscript{14}. Court and Magistrate have no connection with this part of investigation of police. Thus, there is no check on the abuse of power by police. It is a common experience in trial courts that many witnesses depose facts which are against the statements of those witnesses prepared by police. Many of those witnesses swear and say that police did not really record their statements during investigation. Thus, it is deducible that the police prepared statements in the name of some witnesses without really questioning them. As the mandate of law\textsuperscript{15} is that police shall not take the signatures of witnesses recorded during investigation, the misdeeds flourish. There is no attempt at law yet in India in evolving a prosecutor’s independent status to control abuse of police practices. There shall be a legal mandate that the police diaries shall be scrutinised by the Public Prosecutor and he shall be empowered to call a witness during investigation and examine him to find out whether his statement was honestly and accurately recorded by police or not. An amendment to the law to that effect will bring discipline in police investigation and that will lead to accurate investigation resulting in truthful and effective prosecution case building.

**DECISION NOT TO PROSECUTE**

On the police work of investigation the final decision can be for prosecution of case before court or dropping of the case. It seems that these discretionary powers are with police, though reviewable by court. The scheme of law suggests that it is laid down


\textsuperscript{15} Section. 162(1) Cr.P.C.
on ‘legality principle’. There appears to focus on the ‘expediency principle’. There is huge space for alternatives besides no prosecution and prosecution decisions. In legal theory, the decision not to prosecute is an executive function and the appropriate authority ought to be the Public Prosecutor. He could be an effective agency to unburden the courts in this sphere of activity.

On completion of investigation, if it appears to the police that there is no sufficient evidence or reasonable ground of suspicion, he shall forward final report\textsuperscript{16} to the Magistrate indicating his conclusion of dropping the case\textsuperscript{17}. This police decision on ‘evidential insufficiency’ is then reviewable by magistrate. If the Magistrate believes that the evidence collected is sufficient, he could overturn the police decision and take cognisance and direct the case for prosecution in term of Section 190 Cr.P.C\textsuperscript{18}. If the Magistrate agrees with the police conclusions, he closes the case and drops prosecution. However, before doing so he notifies the \textit{defacto} complainant to hear his protest\textsuperscript{19}. If the Magistrate is satisfied with the protest he may permit private prosecution of the very same case\textsuperscript{20}.

In the anxiety to uphold rule of law the power to decide prosecutability of a case is granted to court. This apparently ensures equality of treatment and prevents danger of abuse of official power of police. However, in practice it produces strange results. On a non-prosecution case of police, if the court takes cognisance, the prosecutor would have to prosecute a case which according to his own client a case not fit for prosecution.

\begin{itemize}
\item \textsuperscript{16} This Final Report is also called B Memo in some parts of the country and is called as referred charge sheet in some parts of the country.
\item \textsuperscript{17} Section 169, 173(2) (i) (d) Cr.P.C.
\item \textsuperscript{18} \textit{Abhinandan Jha v. Dinesh Mishra} AIR 1968 SC 117.
\item \textsuperscript{19} \textit{Bhagwant Singh v. Commissioner of Police} 1985 Cri.L.J. 1521 SC.
\item \textsuperscript{20} \textit{H.S. Bains v. The State (Union Territory of Chandigarh)} AIR 1980 SC 1883.
\end{itemize}
Therefore he gets very little support from police and holds little enthusiasm during trial. The accused contends in defense that there is no case to answer for him. Thus it is a case, which both parties to the case condemn but they shall suffer the ordeal of a trial. It is not difficult to imagine as to what will happen to such cases. Finally they end up as damp squibs but only after consuming lot of time of the court. In jurisprudence determination of facts to find out whether there is sufficient evidence to launch prosecution is a prosecutorial decision and thus an executive function. The best authority of State in this regard is none other than the Public Prosecutor. While collection of evidence is the exclusive function of the police, the screening process to find out whether the case can be tabled for prosecution is obviously the function of Public Prosecutor. The discretion shall vest with him since it is he who has to prosecute the case before court. Therefore police shall place the case file with prosecutor and if the prosecutor is satisfied he should be empowered to endorse his no-prosecution decision on the ground of insufficiency of evidence. This does not offend any principle of law sine this power is already with him in a pending trial case. He is empowered to indicate the trial court about the insufficiency of evidence and absence of prospect of conviction and can with draw from prosecution in the interest of justice. There is no principle of law to try a sterile case. The law at present permits the prosecutor only to respond instead of permitting him to shape the case for prosecution. Given a role by law, the Public Prosecutor would be an adequate reviewer of police case on evidential sufficiency and if he finds that the police missed certain parts of investigation he could order for further investigation too. Law shall be suitably amended making the Public Prosecutor to gate keep the case flow into courts. Police forward ‘no-prosecution’ files to court on the ground that the case is

undetectable, civil in nature and therefore not a case fit for criminal prosecution or false. An undetectable case is one where the offender is not known. For instance, along the lengthy National High Way, in a dark night when a reckless motorist causes death of persons in a motor vehicle accident and drives away, the investigating officer may gather enough evidence to prove the punishable rash act of the offending motorist but could not detect the culprit despite his best effort. Rule of law demands that the cases in which the offender has not been identified cannot be treated differently than ones in which there are known offenders. The search for the offender is a matter of evidence. The principle of law is that the Magistrate is bound to take cognisance of every offence brought to his notice. On such cognisance being taken it is the duty of the Magistrate to find out who the real offender is. However, not much happens in practice. It is really inconceivable to assume that a Magistrate would be able to find out the perpetrator of crime who the police and witness could not find. Such cases steal a lot of time of the court and finally terminate without useful result. Prudence demands that these types of cases shall be handled according to administrative discretion rather than on strictly legal requirements. Therefore, it shall be left to the discretionary power of Public Prosecutor to take a decision in such cases.

There is real need to get rid of huge pendency in criminal courts. The discretion to rule on no prosecution decision shall be excluded from the judicial domain and the power be conferred on the Public Prosecutors. For instance in the year 2007, in the State of Andhra Pradesh in 19,525 Indian Penal Code offences police filed Final reports...

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23 A.C. Aggarwal, Sub-Division Magistrate, Delhi v. Mst. Ramkali AIR 1968 SC.1
indicating no prosecution decisions. In terms of total cases filed into court by police in that year it is 13.9%. All these cases occupy the court shelves for a considerable time as the court has to invite the defacto complainants and hear them and take decisions on these files. By shifting the power of decision from courts to prosecutors so much of such time is left for the courts to deal with live prosecutions and achieve the goals set by speedy trial norms.

There is a whole set of another category of cases which deserve no prosecution observance on the basis of expediency principle. For instance, the case involves a minor offence, a crime with a consenting victim, or an offence concerning which there may be ambivalence in the society regarding enforcement. For instance, crimes such as attempt to commit suicide due to poverty, incurable disease, broken love, failure in examinations, a minor girl eloping with her lover. In addition to it, there are cases where the circumstances surrounding the commission of offence might be such that they call for discretionary exercise of leniency. The accused might be aged and infirm or has committed the particular act under the pressure of an unusual situation unlikely to repeat itself. A crime may involve theft by an employee from his employer where the employee promises to make restitution and the employer does not wish to press the case. Similarly, in an intra-family situation, often involving an assault, if the parties reconcile or the complaining victim–witness does not wish to pursue the matter, the question of need to prosecute or not prosecute has to be gone into. In all these type of cases, though sufficient evidence is there that a crime has been committed, there are sound reasons and

25 Table 4.2 at page 346 CRIME IN INDIA 2007 (Part II), National Crime Records Bureau, Ministry of Home Affairs.
26 Ibid, Table 4.3 at page 347.
circumstances for taking a decision not to prosecute. However, because of legality doctrine that every crime has to be prosecuted before a court of law, the police circumvent it and manipulate the records to the knowledge of their peers and superiors and prepare a case diary showing that the reported crime is a mistake of fact or that there is absolutely no evidence available to support the case. Police take these decisions of not to prosecute on every day in several crimes but they are invisible since they prepare the record to suit their decision so as to see it fits within legal parameters. Manipulation of record is a matter of great concern and it breeds corrupt practices and inefficiency. The primary cause of this illegal practice is, not resting the decision ‘not to prosecute’ with an impartial and independent authority.

No system of Justice in a modern nation can possibly prosecute all crimes that come to its attention. There is need for discretion. Expediency principle allows discretion whether to bring cases to court or not. It gives flexibility to the system and avoids courts being overburdened with trivial cases and those where the public interest is best served by an alternative course of action. Waiver of prosecution on grounds other than the insufficiency of evidence has become widespread in Europe. In Scotland, the prosecutor Fiscal has a range of options including giving the accused a personal warning. He can also impose a fixed rate of fine with the offender’s agreement. In Germany, prosecutors have broad powers to dismiss cases and impose sanctions such as community work. In Belgium, the prosecutor with the consent of the offender can order a programme of reparation, medical treatment to the victim. To eliminate errors, the

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safeguards must reside within the legal rules and the internal working cultures fostered by training and management within the institutions. Courts shall function to clarify doubts and address grievances.

Criminal Proceedings are the process by which the various agencies of the Government implement the prohibitions contained in the criminal law. Criminal procedures function as a people processing system. The system operates as a funnel, from which significant number of those involved in the process is discharged as investigations at each stage fail to turn up sufficient evidence and charges are dropped, or as accused are found not guilty. The prosecutor, as the representative of the State ought to be a principle player in this process. Given a legal base prosecutor could become adequate reviewer of evidential sufficiency of a case and also public interest aspects in no-prosecution decisions. The powers of the court in reviewing non-prosecution decisions shall be restricted to correct grossly unfair decisions.

DECISION TO PROSECUTE

In its present form the law is that the decision to prosecute exclusively belongs to police. The Public Prosecutor has no power to step into and take a decision contrary to the opinion of the police. Guiding rule that governs the police in this function is: Whether there is sufficient evidence or reasonable ground of suspicion to justify prosecution of the accused before court. Even if the court believes that there is sufficient evidence in a case it cannot order the police to file charge sheet. However once police file charge sheet before the court, the power to review the police decision is

29 M.C. Mehta v. Union of India, AIR 2007 SC 1087.
30 Section 170(1) Cr.P.C.
31 M.C. Abraham v. State of Maharashtra 2003(2) SRJ 135 at 143.
with the Magistrate. He can direct further investigation, refuse to take cognisance and drop the case or can take cognisance, if he finds prima facie case. This scheme of law vesting the decision to prosecute with police reviewable by court without any intervention of Public Prosecutor seems to be a failure. For instance, in the year 2007, in the State of Andhra Pradesh in 57,811 cases the accused were either discharged or acquitted\textsuperscript{32}. This is alarming by any standard. Training the prosecutors and training the Judges, would not improve the situation since the outcome of judicial process is directly dependant on the quality of the case sent up for prosecution. Initial determination of quality of a case shall be a prosecutorial decision and it shall never be left either to police or to court and the discretion to decide the prosecutability of a case shall be within the domain of the prosecutor. A survey on major cases of failure of criminal cases reports the investigative lapses and lists them: non-examination of material witnesses in time by police, inconsistency in the statements of witnesses recorded during investigation, inconsistency between observations in inquest report and the version of witnesses, improper recoveries at the instance of accused and careless conducting of reports for recoveries and scene of offence, departure from the prescribed procedure and inordinate delay in filing charge sheets without proper scrutiny\textsuperscript{33}. This reality of facts forms the basis to raise a policy question as to who shall decide the prosecutability of a case for prosecution.

In theory, police and Public Prosecutor share the same interest in Criminal Justice. However, their responsibilities and pursuits are different. Police must keep peace and

\textsuperscript{32} Table 4.10 Crime in India 2007 (Part II) Page 358, National Crime Records Bureau, Ministry of Home Affairs.

\textsuperscript{33} Mohammad Abdul Khadeer, \textit{A Role of Public Prosecutor in Administration of Criminal Justice} 1986 Cri.L.J 11 (Journal Section).
arrest the lawbreakers; the prosecutor must bring the case of the State in a court of law. Police book the cases and arrest the suspect on the basis of probable cause but the prosecutor must produce a higher quality of evidence and prove the guilt beyond reasonable doubt in the court to seek conviction\(^{34}\). Clearance of as many numbers of cases as possible being the work ethic and institutional norm for the police, they make a rapid examination of the case file and forward it to court since in their opinion there is reasonable suspicion that the accused had broken the law. Police are not law graduates and are not well versed with trial standards of evidence followed by courts. Since it is acknowledged that Public Prosecutors are gate keepers to the criminal justice process\(^{35}\) and they are considered to be officers of the court\(^ {36}\) and they are also described as Ministers of Justice whose job is none other than assisting the State in the administration of Justice\(^ {37}\) the discretionary power to decide the prosecutability of a case shall rest with the Public Prosecutor. His position in law shall be strengthened and it must be up to him to decide whether there is trial sufficiency for the case or not. It is his filtration that will reduce the case flow into courts and reduce the pendency in courts and increases the quality of cases sent up for trial. The dictum is that ‘the process is the punishment’. Therefore morally it is wrong to prosecute if the evidence is insufficient. For economical reasons also it is desirable not to prosecute weak cases in courts. For these many reasons law shall be reformed and charging standard shall be modified. There shall be no prosecution unless there is realistic prospect of conviction.


In many countries in the world, charging decisions are with the Public Prosecutors. In the United States of America, the decision to charge or not to charge, a suspect with a crime remains the central aspect of the prosecutor’s function. In Bulgaria, it is the prosecutor’s power to bring charges against criminals and sustain the charges. In Georgia, the Police forward the case diary to the prosecutor for his approval and further submission to the court. In Czech Republic, the Prosecutor could give instructions to police and cancel their wrong decisions. The Criminal proceedings are initiated by the Public Prosecutor only. In Italy, the Prosecutor is the Charging Officer. In Kyrgyzstan, it is the Prosecutor who approves the case and files into court for prosecution. Thus in many jurisdictions, both adversarial and inquisitorial, the prosecutor holds the charging decision.

The model that is proposed is that on completing investigation police file the Referred charge sheets before the Public Prosecutor who shall scrutinise and can take a decision for further investigation with a direction to police to improve the case or he may agree with conclusion of police file and decide that there is no case to prosecute. When the decision is not to prosecute, he must serve a notice to the victim–complainant and hear his objections and pass an order supported by mentioning his reasons. Then treat, it as an administrative order and permit the victim–complainant to challenge it before the Director of prosecutions. The Director of prosecution would hear the protest and verify

40 Ibid. p. 175
41 Ibid. pp. 114, 115.
42 Ibid., p.238
43 Ibid. p.262
the order of the prosecutor and the record and will pass the final order on administrative side. If he overrules the prosecutor’s decision he will order for prosecution of case and assign it to another prosecutor to handle the case and that ensures fair treatment to the case and avoids embarrassment to the Public Prosecutor who earlier decided not to prosecute the case. If his order affirms the order of prosecutor it emerges that the State does not wish to prosecute that case. The aggrieved victim–complainant could be allowed to challenge this order before a court of law and if his succeeds in convincing the court he would be permitted to prosecute the case privately. If by his order prosecutor decides to prosecute, he could file charge sheet into court. This model obviates reluctant prosecutions on part of State, reduces workload in the court and takes care of victim’s ambitions in deserving cases.

**Charge Selection**

One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the accusation against him. This is important to the accused in the preparation of his defence. Evidence is to be tendered with respect to matters put in the charge and not the other matters. Therefore, the accusations are to be formulated and written with great precession and clarity. Importance of prosecution version in a trial was stated by the Supreme Court of India\(^44\). “The prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence set up by the accused. Nor can the court, on its own make out a new case for the prosecution and convict the accused on that basis”. Thus, the value of appropriately charging the accused on the basis of the

\(^{44}\) *Bhagirath v. State of M.P.*., AIR 1976 SC 975.
facts available needs no more emphasis. In fact Section 226 Cr.P.C., for trial before a court of Sessions mandates the prosecutor to open the case by describing the charge brought against the accused telling the court about the evidence, he proposes to produce to prove the truth of the charge. The prosecutor has got the onerous duty to prove the charges beyond reasonable doubt.

Penal Codes usually contain many overlapping offence categories. Because legal draftsmen and legislators abhor a situation where there might be a gap in the criminal law that would leave undesirable conduct not subject to punishment, they compensate by formulating the criminal law in an over inclusive manner. A consequence is that much criminal conduct is susceptible to being charged under more than one offence category, legally comprises more than one offence, or involves related acts, each of which may constitute a separate offence. Similarly, many acts constituting a serious crime may be charged at the level of the most serious offence or at the level of some lesser included offence.

As on today, the law is that the police mention the penal provisions of statutes in their charge sheet disclosing its interest to prosecute the accused before the court on those charges only. The charge-sheet is filed directly before the Magistrate. Based on the Case Diary, the Judicial Magistrate selects the charges and frames the charges and reads them out to the accused. If the accused pleads ‘Not guilty’, the prosecutor would be called upon to produce evidence to sustain the charges. Thus, the Magistrate is not bound by state’s desire to prosecute the accused for the offences mentioned in the charge sheet. One of the reasons behind the policy of entrusting the power of selection of charges with the court is that the police are incapable of classifying the criminal conduct of accused
under precise penal provisions. Therefore, the court has to select charges appropriate to the facts made available by the police. But on the other hand if the court fails to frame a charge or frames a defective charge, the prosecutor has no power to apply to the court for rectification of charges.\(^{45}\)

**Drawbacks in this Phase**

Each legal authority has its own orientations, aptitude, and dimension. Between the court and the police, cultures are vastly different. One vital drawback in Magistrate’s charge selection is that it is resulting in strain on the trial leading to unnecessary adjudications. For instance, in a crime an accused criminally trespassed into the house of a victim and criminally intimidates him and after wrongfully restraining him causes grievous hurt to him and also breaks away his furniture in the house and carries away his valuables. In this instance, he has committed six offences. During the investigative phase police collected evidence and found sufficient evidence to charge the accused for four of the offences and found only a little evidence or contradictory evidence concerning the remaining two offences. On concluding investigation, police formed an opinion on assessment of evidence and decide to file charge sheet only for the four offences as the record fully supports only them and not the other two offences. However, the court, mostly with a view to tread safe path, may opt to charge the accused not only for the four offences cited by Police but also for the two offences which they omitted to mention in the charge-sheet. As a result, the court frames six charges and the accused has to prepare his defence for all the six charges. During the trial phase, prosecution adduces its evidence which supports only four charges since the case is made up by police only for

\(^{45}\) *Krishnammal v. Revenue Divisional Officer* 2009 (1) ALT (Crl) 39 (Mad).
those charges. Ultimately court finds no sufficient evidence for the two charges opted by it. Therefore, for those two extra charges it has to record acquittal judgement with a finding that the prosecution failed to produce enough evidence. The out fall of this exercise is both on prosecution and the accused. The prosecution suffers judicial comment on the failur
[214x684]e of prosecution to sustain those two charges which in truth it never intended to prosecute. The accused was forced to defend himself for those two charges which had no merit to be framed even according its adversary. All this fruitless exercise invariably evaporates valuable public time of court too.

**Contesting the norm**

In the essentially adversarial system of Criminal Justice System available in India it is a grave discrepancy that the prosecutor has to prove charges framed by the court and not the charges preferred by himself or his client. Thus joints in the system are loose and they have to be fixed up. It is justifiable to contend that the function of selection of charges must be left to the prosecutor. There can be several reasons in support of this proposal. In the context of the nature of criminal law, it is the prosecutor who is really an appropriate functionary to take a decision to charge fully or at a reduced level, whether single or multiple charges. The choice by the prosecutor of what to charge in the first instance will usually take account of the sufficiency of evidence available and the likelihood of a successful prosecution. In deciding which charges to file, the Prosecutor will take into account the kind of case and the ‘accused–specific’ factors. For example, a person with long criminal record, particularly one involving crimes of the same type under consideration and particularly where the person has escaped serious punishment in the past, he could charge maximally both with respect to the type and the number of
offences. Prosecutor may also think in strategic terms regarding the possibility of plea bargaining and prepare multiple charges so as to gain leverage in the event the accused is inclined to negotiate on charges. All these factors and strategies are not within the comprehension of court. Therefore charge selection has to be the forte of the prosecutor. The day-to-day occurrence of unnecessary charge selections and its bad consequences can be solved by empowering the prosecutor to decide the charges.

The policy behind the power of the court to decide what charges are to be framed being based on police incompetency in finding accurate law provisions, such reason loses its force once the prosecutor is empowered to make charge selection since he is legally well versed in those aspects of law. Looking at the legal hold given to the Prosecutor by the Criminal Procedure Code, it is more appropriate to allow the prosecutor to make charge selection. Section 224 Cr.P.C. provides that when a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the prosecutor is entitled to withdraw the remaining charge or charges with the consent of the court and such withdrawal results in acquittal of the accused. Besides this, under Sections 321 Cr.P.C., the prosecutor is entitled to withdraw from prosecution of any of the charges or the entire case, with the consent of the court and that result in acquittal of the accused. Supreme Court of India stated that it is the Public Prosecutor alone and not any other executive authority that decides withdrawal of prosecution. Court performs only a supervisory function and not an adjudicatory function in the legal sense of the term\textsuperscript{46}.

\textsuperscript{46} Sheonandan Paswan v. State of Bihar 1987 CriLJ 793 at 830 (SC).
Thus, when it comes to withdrawal of some or all charges the primary functionary is prosecutor. However, for charge selection he is made a non–functionary. It is a strange legal phenomenon in the Indian Criminal Jurisprudence that the prosecutor has no authority to formulate charges but he is the sole authority to withdraw the entire prosecution. Law reposed immense confidence in the prosecutor and courts hailed him as Minister of Justice. The power to withdraw charges implicitly contains the discretionary choice of selection of charges. Therefore, the submission of the researcher is to confer explicit power of charge selection for the prosecutor which is implicitly found with him only at an advanced stage of the case.

In practice, in serious cases, the CBI in India while filing charge sheets into court also file a ‘draft of charges’ in conformity with law of charges prescribed in Chapter XVII Cr.P.C., and courts usually adopt them.

On summation, it is seen that the court has no power to direct the police to file a charge sheet in a case in which police found no case to prosecute but the selection of charges is the court power and that resulted in framing of charges for which the prosecution never collected proper evidence to prove thereby causing strain to both parties to the case and strain on court. To avoid this in congruity it is found eminently desirable that in the adversarial system of Criminal Justice the Public Prosecutor is the right functionary to have the power of selection of charges since it is he who has to prove the charges as an independent functionary of the state.

On vesting powers with the Public Prosecutor to take decision to prosecute as well as to select charges, two value additions can be thought of. They are:

(1) Dispensing with committal proceedings provided in Section.209 Cr.P.C.
(2) Timing of filing charge sheet into court.

Police cannot file cases directly before court of Sessions because of bar contained in Section.193. Therefore, they file all cases before Magistrate. Out of them, the Magistrate has to find out cases triable by Sessions Court and commit those cases to the court of Sessions as per Section.209 Cr.P.C. This procedure is followed for the offences mentioned in the Indian Penal Code, 1860 as well as offences under any other penal statute. During this committal phase, Magistrate has to normally accept the State’s desire to have it committed to Court of Sessions47. Magistrate is forbidden to apply his mind to the merit of the matter and he works only as a facilitator for forwarding the case to the Sessions Court. The only effective function on his part is to see that the copy of the case of prosecution is supplied to the accused.

In the event of charge selection being made by the Public Prosecutor, law can be amended permitting him to file the case directly before the Sessions Court48. If committal proceedings are dispensed with Half-Year delay of the case in the Magistrate’s Court can be avoided. In fact much modern legislation is containing provisions to bypass Section.209 Cr.P.C., committal proceedings. For instance Section.36-A(1)(d) of the Narcotic Drugs and Psychotropic Substances Act, 1985 mandates filing of cases under that Act directly before the Special Court which is Court of Session. This method reduces case pendency in the lower courts and do not add any additional burden to the Court of Session.

Timing of filing charge-sheet

That the police have a free hand and the decision as to when to prosecute the accused can be postponed for years. It may be true that incriminating material may not quickly come to light and therefore public interest require that lapse of time should not generally bar a prosecution. This is of course subject to principles of limitation provided in Section 467 to 473 Cr.P.C. meant for offences punishable with less than three years imprisonment. For the graver offences there are no time limitations. But the delay in the decision to prosecute has a fall out. The risks associated with are: death of witnesses, faded memory of witnesses, loss or destruction of vital pieces of evidence. These factors however weigh heavily at the trial and the Public Prosecutor gets only a jaded case to prosecute and ultimately, if the case fails for the reasons referred above it is the public interest that suffers. The problem of balancing public interest with private rights though underlies the whole of criminal law, the unfettered discretion of police about choosing the timing to file police report for prosecution shall be curbed. Law should make a provision enabling the Public Prosecutor to hurry up the matter and get the case filed before him as early as possible. This would work as some protection against abuse of discretion by Police.

To sum up, pre-trial phase is the intake process of prosecution. It is dominated by two issues: the ability to review and approve or disapprove the case files before they are filed in court and the extent to which the evidence is available for charging. The dominant role of police in this phase resulted in excess arrests, manipulation of evidence, in sufficient case build up. The discretionary power to file charge sheets and final reports before courts is exclusively held by police. The Magistrate is seen empowered to review
non-prosecution as well as prosecution decision of police. The office of Public Prosecutor is so downgraded that there is no effective co-ordination between police and Public Prosecutor and there is no legal provision for transmission of case files to Public Prosecutor. Absence of prosecutorial review of prosecutability of a case in this phase is the cause of erosion in quality of cases leading to failed prosecution in majority of cases. Legal scheme shall be modified subjecting the police work to the supervision of Public Prosecutor from the time of arrest till the case file is fully prepared empowering the Public Prosecutor to review arrest decision, verifying the investigation diary by interviewing the victims and witnesses with power to order further investigation when needed. Power to decide whether a case shall be dropped or be prosecuted shall vest with the Public Prosecutor and it shall be within his domain to select charges for prosecution and choose the timing for filing the case before court. To this extent, the powers of police and Magistrate be delimited and these legitimate prosecutorial function is vested with the Public Prosecutor subject to the control of directorate of prosecution. This proposed scheme will enliven the office of Public Prosecutor and it will obviate the quality and quantity concerns of cases to be processed through court fructifying the fair and quick disposal norms of criminal cases.

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