Constitutional Safeguards to Convicted Persons

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Right to Freedoms under the Constutution

- Articles 19 to 22
- Need and justification
- Availability to Accused and Convicted Persons
- Human Rights of Convicted Persons
- Protection against Ex-post Facto Law – Art.20(1)
- Protection against Double Jeopardy – Art.20(2)
- Protection against Self Incrimination– Art.20(3)

Protection against Ex-Post Facto Law

Art.20(1)

- *Ex post facto law* - which imposes penalties retrospectively or which increases penalty for past acts
- Exception: Beneficial legislation reducing punishment for an offence Rattan Lal v.State of Punjab [AIR 1965 SC 444]

Guarantee against Double Jeopardy
[Art.20(2)]

- *Nemo debet bis vexari*
- *No person shall be prosecuted and punished for the same offence more than once*
- *Enunciates principle of autrefois convict but not that of autrefois acquit*
- *In England and USA both the principles –made applicable*

Protection against double jeopardy

- ***Nemo debet bis vexari***
- Position under CPC - S.11 **Resjudicata**
- Position under the IEA 1872-S.115 **Estoppel**
- Position under the Constitution - Art.20(2)
- Position under US Constitution - V Amendment
- Position under General Clauses Act 1897-S.26
- Principle of *Autrefois Acquit* & *Autrefois Convict*

Double Jeopardy

- **Article 20 (2_)** of the Constitution - no person shall be prosecuted and punished for the same offence more than once.
- Similar guarantee - found in almost all civilised societies governed by rule of law
- The well known maxim ***`nemo debet bis vexari pro eadem causa'*** embodies the well established common law rule that no one should be put on peril twice for the same offence

Justification & Historical aspects

- **The fundamental right u/A 20 (2) - has its roots in common law maxim nemo debet bis vexari - a man shall not be brought into danger for one and the same offence more than once**
- **If a person is charged again for the same offence, he can plead, as a complete defence, his former conviction, or as it is technically expressed, take the plea of autrefois convict. This in essence is the common law principle.**
- **The corresponding provision in the American Constitution is enshrined in that part of the Fifth Amendment which declares that no person shall be subject for the same offence to be twice put in jeopardy of life or limb**
- **The principle has been recognised in the existing law in India and is enacted in Section 26 of the General Clauses Act, 1897 and Section 300 of the Criminal Procedure Code, 1973. This was the inspiration and background for incorporating sub- clause (2) into Article 20 of the Constitution.**
- **But the ambit and content of the guaranteed fundamental right are much narrower than those of the common law in England or the doctrine of `double jeopardy' in the American Constitution.**

Essential Conditions for invoking the protection of Article 20(2)

In **Maqbool Hussain vs. The State of Bombay** , the apex Court explained the scope of the right guaranteed under **Article 20 (2)** and as to what is incorporated in it as "within its scope the plea of *autrefois convict* as known to the British jurisprudence or the plea of double jeopardy as it known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence."

Essential Conditions for invoking the protection of Article 20 (2) to be invoked by a person

- **-there must have been a prosecution and as well as punishment in respect of the same offence before a court of law of competent jurisdiction or a tribunal, required by law to decide the matters in controversy judicially on evidence.**
- **-That the proceedings contemplated therein are in the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of the proceedings of a criminal nature in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.**
- **- Both the factors must co-exist in order that the operation of the clause may be attracted."**

This principle is reiterated in S.A. Venkataraman vs. The Union of India & Anr., wherein this Court observed that **the words "prosecuted or punished" are not to be taken distributively so as to mean prosecuted or punished.**

The General Clauses Act 1897

Sec 26. Provisions as to offences punishable under two or more enactments -

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, **but** shall not be liable to be punished twice for the same offence.

S.300. Person once convicted or acquitted not to be tried for same offence

- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force ,not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under subsection (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.
- (2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.
- (3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened, at the time when he was convicted.

- (4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.
- (5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.
- (6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.
- **Explanation—The dismissal of a complaint, or the discharge of the accused, is not an acquittal** for the purposes of this section

- **Illustrations**

(a) *A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the* acquittal remains in force, be charged with theft as a servant, or upon the same facts, with theft simply, or with criminal breach of trust.

(b) *A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may*be tried again for culpable homicide.

(c) *A is charged before the Court of Session and convicted of* ***the culpable homicide*** *of B. A may* not afterwards be tried on the same facts for **the murder** of *B.*

(d) *A is charged by a Magistrate of the first class with, and convicted by him of* ***voluntarily*** **causing hurt** to *B. A* ***may not afterwards be tried for voluntarily causing grievous hurt to B on the*** **same facts**, unless the case comes within sub-section (3) of this section.

(e) *A is charged by a Magistrate of the second class with, and convicted by him of,* ***theft of*** **property** from the person of *B. A* ***may subsequently be charged with, and tried for, robbery on the*** **same facts.**

(f) *A, B and C are charged by a magistrate of the first class with, and convicted by him of,* **robbing** *D. A, B and C may afterwards be charged with, and tried for****, dacoity on the same facts.***

Position in USA

- The **Fifth Amendment of the American Constitution** enunciated this principle in the manner following:-

- "..... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself.....
- Under the United States rule, to be put in jeopardy there must be a **valid indictment** or information duty presented to a court of competent jurisdiction, there must be an arraignment and plea, and a lawful jury must be impanelled and sworn. It is not necessary to have a verdict.
- The protection is not against a second punishment but against the peril in which he is placed by the jeopardy mentioned."

Leading cases on Double Jeopardy

1. **MAQBOOL HUSSAIN V. THE STATE OF BOMBAY**

   [AIR 1953 SC 325 (17 April 1953)]

- **Held-** that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.
- It therefore follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs Authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs Authorities to have been "Prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay, in the complaint which was filed against him under section 23 of the Foreign Exchange Regulation Act.

2. KOLLA VEERA RAGHAV RAO v. GORANTLA VENKATESWARA RAO AND ANR.

[2011] INSC 87 (1 February 2011)

-the appellant was already convicted under Section 138 of the Negotiable Instruments Act, 1881 and hence he could not be again tried or punished on the same facts under Section 420 or any other provision of IPC or any other statute.

-Held- In the present case, although the offences are different but the facts are the same. Hence, Section 300(1) of Cr.P.C. applies. Consequently, the prosecution under Section 420, IPC was barred by Section 300(1) of Cr.P.C.

3. V.K. AGARWAL, ASSISTANT COLLECTOR OF CUSTOMS *V. VASANTRAJ BHAGWANJI* BHATIA & ORS

[AIR 1988 SC 1106: 1988 (3) SCC 467]

- Respondents 1 to 3 were prosecuted for an offence punishable under section 111 read with section 135 of the Customs Act, 1969, on the basis of recovery of primary gold from their house.
- Respondent No. 3 was convicted and respondents Nos. 1 & 2 were acquitted.
- Later, the same persons were sought to be prosecuted under section 85 of the Gold (Control) Act, 1968 relying on the find of the primary gold from the very same premises at the time and on the occasion of the same raid at the house of the said respondents, which had given rise to the prosecution under the Customs Act, as stated above.
- The respondents 1 to 3 contended that the new trial was barred. The trial Magistrate accepted this plea and ordered the prosecution to be dropped. The Sessions Judge confirmed the order of the trial court. The High Court affirmed the decision of the Courts below, holding that the trial was barred by virtue of section 403 (1) of the Code of Criminal Procedure, 1898 (Cr. P.C.).
- The State then approached Supreme Court by way of appeal.
- Allowing the appeal in part, the Court HELD: The ingredients required to be established in respect of an offence under the Customs Act are altogether different from the ones required to be established for an offence under the Gold (Control) Act. In respect of the former, the prosecution has to establish that there was a prohibition against the import into Indian sea waters of goods which were found to be in the possession of the offender. In respect of the offence under the Gold (Control) Act, it is required to be established that the offender was in possession of primary gold. In regard to the latter offence, it is not necessary to establish that there is any prohibition against the import of gold. Mere possession of gold of purity not less than 9 carats in any unfinished or semi-finished form would be an offence under the Gold Control Act.

4) A.A. Mulla & Ors Vs. State of Maharashtra & Anr

AIR 1997 SC 1441

- The appellants were charged u/S 409 IPC and S.5 of the Prevention of Corruption Act for making false panchnama disclosing recovery of 90 gold biscuits although according to prosecution case the appellants had recovered 99 gold biscuits.
- Two of the appellants were acquitted trial Judge and the remaining two appellants were acquitted by the High Court inter alia on the finding that the prosecution had failed to prove misappropriation.
- They were once again tried under the Customs Act & FERA
- They contended that second trial amounts to double jeopardy
- Held by SC that:- Art.20(2) would not be attracted to the instant case in view of the distinct facts of both the offences

5. JITENDRA PANCHAL v. INTELLIGENCE OFFICER, NCB & ANR.
[2009] INSC 202 (3 February 2009)

- The High Court came to the conclusion that merely because the same set of facts gives rise to different offences in India under the NDPS Act and in the USA under its drug laws, the different circumstances and the law applicable would not debar the Special Judge, Mumbai, from dealing with matters which attracted the provisions of the local laws and hence the application of the principle of double jeopardy was not available in the facts of the present case.
- Against the rejection of such plea of double jeopardy by the High Court that the present appeal has been filed before the SC

- **Held** that:- In our view, the offence for which the appellant was convicted in the USA is quite distinct and separate from the offence for which he is being tried in India. As was pointed out by Mr. Naphade, the offence for which the appellant was tried in the USA was in respect of a charge of conspiracy to possess a controlled substance with the intention of distributing the same, whereas the appellant is being tried in India for offences relating to the importation of the contraband article from Nepal into India and exporting the same for sale in the USA. While the first part of the charges would attract the provisions of Section 846 read with Section 841 of Title 21 USC Controlled Substances Act, the latter part, being offences under the NDPS Act, 1985, would be triable and punishable in India, having particular regard to the provisions of Sections 3 and 4 of the Indian Penal Code read with Section 3(38) of the General Clauses Act, which has been made applicable in similar cases by virtue of Article 367 of the Constitution. The offences for which the appellant was tried and convicted in the USA and for which he is now being tried in India, are distinct and separate and do not, therefore, attract either the provisions of Section 300(1) of the Code or **Article 20(2**) of the Constitution. [Para 26]

6. MONICA BEDI v. STATE OF A.P.

[2010] INSC 939 (9 November 2010)

- The learned senior counsel Shri K.T.S. Tulsi appearing on behalf of the appellant - Monica Bedi (A-3) submitted that the appellant has been tried and convicted by a competent court of jurisdiction at Lisbon for being in possession of fake passport and, therefore, her trial and conviction for possessing the same passport before the C.B.I. Court at Hyderabad amounts to double jeopardy and in violation of **Article 20(2)** of the Constitution of India and as well under Section 300 Cr.P.C.
- The simple case of the prosecution is that all the appellants entered into a conspiracy in order to secure a passport in the assumed name of Sana Malik Kamal, for the benefit of Monica Bedi so as to enable her to utilize the same to leave the country and travel abroad. There is no controversy whatsoever that Monica Bedi travelled abroad on the strength of the passport secured by her in the assumed name. She entered Portugal with the aid of passport standing in the name of Sana Malik Kamal for which she has to face the prosecution and suffer conviction and sentence in Portugal. (Para 28)
- It is evident from the record that the involvement of the appellants is at two stages. Stage one is where Monica Bedi (A-3) and Mohd. Yunis (A-7) are involved in the pre- 36 passport application at the threshold and even before the preparation of application seeking the passport in the assumed name. Stage two is the involvement of Monica Bedi (A-3), Shaik Abdul Sattar (A-5) and D. Gokari Saheb (A-8) after the submission of passport application before the authorities.(Para 29)

- So far as the appellant - Monica Bedi is concerned she is involved in the conspiracy as proved at both stages i.e. pre-passport application stage and post-passport application stage. The conspiracy itself has been hatched only with a view to secure a passport for Monica Bedi in the assumed name of Sana Malik Kamal. We do not find any merit in the submission of Shri Tulsi, learned senior counsel that there is no evidence whatsoever against Monica Bedi to prove her involvement for the offence punishable under Sections 120B, 419 and 420 IPC. The sequence of events as unfolded by the evidence, which we do not want to recapitulate once again as we have noticed the same in detail in the preceding paragraphs, clearly prove the charges levelled against Monica Bedi. It is for her benefit that the entire conspiracy has been hatched involving more than one individual in order to secure a passport for her benefit enabling her to travel abroad in the assumed name of Sana Malik Kamal.[Para 33]
- **Held that**:-There is no material based on which this Court is to differ with the findings and conclusions concurrently arrived at by the courts below.
- Consequently her plea for protection under Art.20(2) - was rejected

Privilege against Self-incrimination

Art.20(3)

- **5th Amendment to US Constitution -No person in any criminal case ,shall be compelled to be a witness against himself**
- **In India , the right –available to persons accused of an offence, against compulsion to be a witness, against himself**
- **S.73 ,IEA,1872 -authority of court trying a criminal case to direct accused person appearing before it, to give sample writing for comparison**
- **S.27 of IEA,1872- corpus delicti**

Privilege against Self-incrimination
Art.20(3) [contd..]

- **S.91,Cr.P.C-authority of a court/officer i/c of a P.S. to issue written order to the person having possession of the document to produce the same [See State of Gujarath v. syamlal Mohanlal Choksi AIR 1965 SC 1251 where the SC held that an accused person cannot be asked to produce documents in his possession]**
- **Narcoanalysis tests,S.115,IEA,S.11,CPC**
- **S. 161(2) ,CrPC provides similar protection to the accused.**
- **It provides that a person is bound to truly answer all questions while being examined by the police except those that "would have a tendency to expose him to a criminal charge or penalty…".**

Narcoanalysis or the ‘truth serum’ test

- **increasingly used by Indian police to gather evidence**
- **is a process by which a person is injected with barbiturates in order to induce a state of hypnosis and release repressed feelings, thoughts or memories. This semi-conscious state is said to facilitate interrogation.**
- **performed in hospital under supervision of psychoanalyst and anesthetist. Interrogation function of police is delegated to the psychoanalyst by providing detailed questionnaire.**
- **performed on suspects in a number of cases since 2000.**

Narcoanalysis or the 'truth serum' test

- criticised for its unreliability.
- Scientific studies demonstrate that it is not foolproof and even induces confessions from innocent persons.
- Research suggests that these tests are ineffective on individuals who are determined to lie, as they are usually still able to lie even when drugged.

Narcoanalysis or the ‘truth serum’ test

- **In *Ramchandra Ram Reddy v The State of Maharashtra*, the Bombay High Court ,In *Smt Selvi v. Karnataka* (2004(7) KarLJ 501), the Karnataka High Court ,and in *Rojo George v. Deputy Superintendent of Police,* the Kerala High Court disagreed and held that narcoanalysis test does not amount to deprivation of personal liberty or intrusion into privacy”**
- **The Indian Supreme Court addressed the issue in the *Smt.Selvi v.State of Karnataka (2010,SC)* case.**

Protection of Life and Personal Liberty

Art.21

- **Importance of Life and personal Liberty**
- **Analysis of Art.21- Person ,Life, Personal liberty, Procedure established by law, Due process**
- **Position after A.K.Gopalan, AIR 1950 SC 27 before Maneka Gandhi AIR 1978 SC 597**
- **Expansion of scope of Art.21**
- **Role of Judicial activism & doctrine of entrenchment**
- **Art.21 & Criminal justice -arrest, fair trial, speedy trial, bail, legal aid, long pre-trial confinement, hand-cuffing of under- trials, police torture, and prison administration etc**
- **Imposing unjust or harsh conditions, while granting bail, is violative of Art.21 - Babu Singh v.State of UP,AIR 1978 SC 527See also Gurbaksh Singh v.Punjab, AIR 1980 SC 1632**

Protection of Life and Personal Liberty
Art.21

- State of Maharashtra v. Dr.Praful B.Desai (2003)4 SCC 149 - Recording of evidence by video conferencing – satisfies requirements of S,273,Cr.P.C. and is in conformity with procedure U/A Art.21
- Sharada v.Dharampal (2003) 4 SCC 493 – In an application for divorce, court's direction to respondent to undergo medical examination-does not violate right to privacy u/a 21.

- Thank you