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LAW OPINION

To explore statement of witness effectively

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THE detection of crime and collection of evidence are one of the major duties of our police force. The prime object of investigation is to detect the accused persons who are involved in commission the offence. However, in many instances the investigating officers are found to be inefficient, negligent and biased in discharging their duties. The delayed, defective and biased investigation of crimes is one of the major stumbling blocks that haunt our criminal justice system for long.

It goes without saying that very low conviction rate in criminal cases is reflective of our stagnant criminal justice regime. It also appears in many cases that accused persons are acquitted in view of sheer discrepancies in the statements of witnesses before and during trial.

While investigating a police case (GR case), the investigating officer (IO) may require the attendance of any person who is supposed to be acquainted with facts and circumstances of the occurrence (Section 160, Code of Criminal Procedure 1898). IO may examine orally such persons who are legally bound to answer his/ her queries in connection with the occurrence, except those which may expose their criminal implications thereby. Oral examination of the witnesses as such requires to be reduced into writing. This is known as statements of witnesses recorded under section 161. Such statements of witnesses made before the police do not require to be signed by the persons making them.

One of the compelling reasons behind examining the witnesses as such is to ascertain the truthfulness or falsehood of the accusation as spelt out in the First Information Report (*Ejahar*). Another philosophy behind the recording of such statements is that accused side should be given the opportunity to compare the statements made during investigation and during trial as defence should not be taken by surprise during trial.

If the defence side can show the inconsistencies and vagueness of such statements of the witnesses to the effect that charge is absolutely groundless, the presiding judge is to discharge the accused. On the other hand, at the charge- hearing prosecution side brings notice of such statements to show that there is prima facie ground for presuming that such accused person has committed the offence.

It is a settled principle of criminal jurisprudence that no statement made to a police is admissible as substantive evidence unless something definite is recovered or collected in connection with the previous statements (For details see Ss. 25, 27, Evidence Act 1872). It is a common knowledge that such statements are made before the police in absence of the accused and are not signed by the maker. The maker does not take any oath before making such statements. It cannot be used by the prosecution to corroborate or contradict the statements of its own.

In other words, 'the statements of witnesses thus recorded cannot be used by the prosecution, but can be used by the defence alone under section 162 of Code of Criminal Procedure 1898 to contradict the prosecution witnesses in the manner provided by section 145 of the Evidence Act 1872'.

In practice, IOs are not in the habit of recording the statements of witnesses while examining them, but subsequently make a summary of what the witnesses said at the time of such examination. With the help of private scribe (munshi), they prepare the record of those statements at their 'free time'. As a result, many vital points are found to be missing in the statements of the witnesses. It is not expected that IOs are required to record the statement of witnesses in minute details. It is also now decided that minor omissions in the statements of witnesses do not materially affect the merit of the prosecution case.

It is also settled by the precedents that recording of witnesses' statements in some boiled form is quite irregular. If these causes substantially prejudice to the accused, the trial may be vitiated. Likewise, recording of joint statements of several persons is not proper in the eye of law. In delving into delicate right of accused, occasionally our apex Court skewed the evidence of witnesses out of consideration because they were examined by the investigating officer after long time.

Recording of statement of witnesses after a long lapse of time positively cast serious doubt if no explanation is given for such inordinate delay. There is also chance of concoction and embellishment of prosecution story if IOs are not vigilant enough to record the statements of the witnesses on time.

The prosecution witnesses also have no idea as to what have been written as their statements because such statements are never read over to them. Many informants have complained in protest petition (naraji) that IOs have not recorded the statements of the witnesses exactly as to what they have said to IOs during investigation. It appears that IOs have either very little idea or somehow oblivious to the importance of statements made under section 161.

It is also apparent that there is no effective pre-trial meeting between the prosecutor and the prosecution witnesses which put the witnesses at bay during trial. Apart from myriad of loopholes apparent in the investigation, lackadaisical and delayed recording of statements of the witnesses during investigation is a sure recipe to acquit the accused while discernable inconsistencies creep in between the statements of witnesses during investigation (before trial) and during trial.

Following suggestions are forwarded to explore such statements effectively:

a) Concerned Judicial Magistrate should maintain effective supervision over the activities of the IOs.
b) Judicial Magistrate should call for the case diary from time to time to review the pen picture of the development of the investigation.
c) IOs should be compelled to write down the versions of the witness by their own hands.
d) Sound recording of the speech of the witnesses in some compact disc form etc. should be introduced. This sound recording will form part of the police report.
e) In case of investigation of heinous crimes, IOs may place the star witnesses before the concerned Magistrate to have their statements recorded.
f) Suggestion for appending the signatures of the witnesses in the recorded statements may be under consideration. Accordingly, relevant provisions of laws may be amended.
g) Effective pre- trial conference of public prosecutor and prosecution witnesses is a must so that witnesses are supervised as to what they will depose during trial.
h) Victims' rights should be high in the agenda of criminal justice reform. Informant/ victim should be sensitised about their rights and duties.
i) National dialogue should be initiated for establishing separate investigating agency under the direct supervision of judicial magistracy.
j) Regular Police- Judicial Magistracy conference as contemplated in Criminal Rules & Orders, 2009 is a must.
k) Permanent prosecution office will ensure the professionalism and quality of justice.
l) Development of infrastructure of criminal courts with the innovative exploration of modern technology is indispensable for proper administration of criminal justice.
m) Delinquent investigating officers should be admonished while efficient officers should be rewarded.
n) Judges, investigators, prosecutors should be trained up at home and abroad.

Victims' rights should be high in the agenda of criminal justice reform. Informant/ victim should be sensitised about their rights and duties.

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RIGHTS WATCH

Not to gag the Media

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THE initiative taken by the government to amend Press Council Act, 1974 is to tighten its grip to establish more control over the press by inclusion of penal provision for newspaper for publishing false, instigating, slanderous and anti state reports. Can governmental control prejudice press freedoms? Yes, undue legal restrictions are created or misused with the clear intention of eliminating independent reporting and opinion might be oppressive for the press.

The main task of our press council is to deal with complaints about the work of the media, through collective decision-making. A long time has elapsed as our Act is enacted in 1974. There has been sea change in functioning by media. Therefore, it has been felt by government , social activists and others that the Act requires suitable amendments for incorporating provisions to achieve more effective regulation of the press in Bangladesh without interfering with the desired freedom of the press.

In present world, while promoting the freedom of expression many countries are moving forward to self-regulation. Self-regulation is not censorship and not even self-censorship. It is about establishing minimum principles on ethics, accuracy, personal rights and so on, while fully preserving editorial freedom on what to report and what opinions to express. Self regulation ensuring freedom of expression means, in the words of the European Court of Human Rights (ECHR), "The right to shock, disturbs, and offends". The media have a strong interest in making that freedom not only tolerable but also enjoyable.

In UK, the print media is essentially self-regulating. There is no statutory Press Council, no statutory complaints body and no requirement that journalists be registered or belong to any particular association. There is, however, a body established by newspaper bodies themselves, the Press Complaints Commission. So, making the press council as a self regulatory body rather than statutory one will be more responsible.

Most self-regulatory bodies impose a deadline within which complaints must be lodged. Complaints can be investigated most effectively while circumstances remain fresh in the minds of those involved and while the subject matter of the article remains relevant. Supporting evidence such as reporters' notes is less likely to be available when it relates to something that happened a long time before a complaint is lodged. Furthermore, remedies for instance apologies, corrections or critical adjudications, are more meaningful when they appear promptly. So, the duration of filing complaint should be specific.

The proposed amendment suggests financial punishment up to 10 lakh. There is evidence that financial penalties are not an effective punishment for newspapers because the increased sales from an intrusive story can outweigh the subsequent fine. Moreover, the impact of fines will vary widely and unfairly, depending on the wealth of the newspaper involved. So, preventing the flow of information from the media to the public offends against the general principle of press freedom.

The current Press Council has been vested with the authority to draw up the methodology of its inquiry and for adjudicating the complaint cases by framing rules and regulation within the ambit of the Act but Press Council of Bangladesh is silent about it. So, the regulation should be enacted quickly.

In Denmark, Press Council is established pursuant to the Danish Media Liability Act of 1 January 1992, to deal with complaints about the Danish mass media. The Press Council cannot impose a sentence on the mass media or assure the complainant financial compensation. In cases concerning sound press ethics the Press Council can express its criticism. In cases about reply the Council may direct the editor of the mass media in question to publish a reply. In both types of cases the Council may direct the editor to publish the decision of the Council to an extent specified by the Council.

Our existing provision denotes that the Council has the power to direct a newspaper to publish the particulars of its inquiry/or adjudication. If the publication fails to abide by the directions given by the Council, the statute is absent on the mechanism to enforce such direction. So, only in that case, there should be explicit provision for publishing the adjudication in the newspaper failing which suitable penal measures like stopping of giving advertisements by government or public sector undertakings for a specified period, withholding of accreditation or deregistering the paper for a specified period may be imposed on the erring newspaper according to gravity of malpractice only when such steps appear unavoidable.

In South Africa, the adjudicating structures shall consist of The South African Press Ombudsman ("SAPOM") and, The South African Press Appeals Panel ("SAPAP"). The complaint shall be made to the Ombudsman. If the complaint is not settled, any one of the parties may apply to the South African Press Appeal Panels (SAPAP). SAPAP may make caution or reprimand a respondent, direct that a correction, retraction or explanation and, where appropriate, an apology. So, the thought of press ombudsman can be included.

I may, conclude by stating that no regulatory body is expected to be full proof. Moreover, with lapse of time and in fast changing media scenario, adaptation to cope with changes is imperative. It will therefore, be judicious to interact with regulatory bodies of media operating at different parts of the world addressing different ground realities in the respective area of operation and to adopt the model best suited in Bangladesh.

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LAW LETTER

Smoking is injurious to 'Right to life'

Once famous American author Mark twin says 'giving up smoking is the easiest thing in the world I know because I have done it thousand times'. We never know whether he actually quit smoking. Smoking is one of the impending bad habits that are destroying our society. It not only unlock the door to different other unsocial and illegal activities but also leads our young generation to violate our social norms and customs.

GATS' (Global Adult Tobacco Survey) latest survey on Bangladesh on December 22, 2010 shows that 41.3 million adults are current tobacco users (43.3 percent of the total population). 7 in 10 current smokers plan to or are thinking about quitting and 47.3 percent made an attempt to quit in the last 12 months. 74 percent of current smokers thought about quitting because of warning labels. 11.5 million Workers (63 percent of workers) are exposed to tobacco smoke at the workplace. 45 percent of adults are exposed to tobacco smoke in public places.

Now, what should be done to control the use of tobacco? It would be wrong to say that the framing of strict laws would be the solution, since we already have sufficient laws regarding this, except few flaws on them. We have Railways Act, 1890 that prohibits any passenger from smoking in any compartment of a train. Then we had The Juvenile Smoking Act, 1919 before it was repealed by the latest Smoking and using of tobacco products (control) amendment Act 2013. Now The Smoking and Using of Tobacco Products (Control) Act, 2005 (Act No. XI of 2005) is the principal law governing tobacco control in Bangladesh. It has been amended recently in 2013 which tries to alleviate some loopholes of the original one.

Defining 'public place' under section 2(f) by recent amendment of 2013 is wide enough to include educational institution, government office, semi government office, private office, non-government office, library ,lift, indoor workplace, hospital, clinic area, court room, airport, shipyard, train station, bus terminal, cinema hall, demonstration palace, theater hall, shopping complex, restaurant, public toilet, child recreation park, fair, public transport ,line for standing of passengers of public transport, or any places specifically mentioned to be 'smoking free area' by concerned and appropriate authority.

At the same time section 4 prescribes the punishment 300 taka fine for smoking in public place which was 50 taka only before the amendment, not only this but also it prescribes double punishment for repetition of the same offence. Section 5 prohibits any advertisements, sponsorship in the name of corporate social responsibility, award, lottery, which is any way connected to tobacco or tobacco products patronization and promotion. Section 6 prohibits placing automatic vending machine for selling tobacco products. Selling tobacco or tobacco products to or appointing for selling such products by Person fewer than 18 years old is strictly prohibited under section 6(A); Besides these this Act also prescribes provision for demonstrating caution-notice like 'smoking is prohibited in this palace, it is punishable offence'. Besides theses The new law: Requires graphic warning labels covering 50 percent of the front and back of tobacco packaging. It Bans the use of misleading descriptors such as "light," "low tar," "mild" and "ultra light". It also strengthens enforcement mechanisms by prescribing the appropriate authority and their power and duty. Any magistrate can try offence under this Act and any offence under this Act shall be cognizable and bail able.

It is unfortunate to articulate that the said Act still indirectly permits smoking and even in the public place. Still section 7 and Rule 4 of the Rules of 2006 deal with smoking zone. Sub Rule 3 and 4 of Rules 4 permit smoking even in public places, which will definitely cause and will encourage second hand smoking and ultimately lead the people towards smoking passively.

This is like your are enacting a law for controlling tobacco on the other hand by prescribing smoking area you are abetting it. This double standard is destructive for the proper enforcement of the Act. As preamble says 'where as it is necessary to enact a law for controlling smoking and tobacco products as it is harmful for human health' but on the other hand under section 7 you keep something which will surely cause harm to human health which consequently kills the true spirit of the Act. Moreover this is Act remains silent about second hand smoking and rather encourages it. According to the US Environmental Protection Agency (EPA), the US National Toxicology Program, and the International Agency for Research on Cancer (IARC), a branch of the World Health Organisation, secondhand smoke is classified as a "known human carcinogen" (cancer-causing agent) that leads the nonsmoker to death.

These loopholes totally contravene the guidelines of 'Framework Convention on Tobacco Control' (FCTC) to which Bangladesh is a state party. The FCTC is a legally binding treaty that provides a broad framework of obligations and rights to Parties and promised to control tobacco and tobacco products to protect present and future generations.

Hence, smoking clearly violates citizens' right to life as guaranteed under the constitution. According to GATS statistics (16 Jan 2013) more than 57000 people is killed by tobacco in Bangladesh. Bangladesh is therefore has constitutional obligation to ensure smoking free society.

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