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Doctrine of Double Jeopardy under the Constitution of India and the Code of Criminal Procedure, 1973: A Comparative Analysis

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ABSTRACT

Art. 20 clause (2) of the Constitution of India incorporates the principle which is known as the doctrine of 'double jeopardy' in Anglo-American jurisprudence. Fifth Amendment to the American Constitution provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Before the present Constitution in India there was no such provision in Government of India Act, 1935. The principle was however incorporated in Section 26 of the General Clauses Acts, 1897 and Section 403 of the Old Criminal Procedure Code, 1898 which now finds mention under Article 20, clause of the Constitution of India and Section 300 of the Criminal Procedure Code of 1973.

Keywords: *offence, court, prosecution, conviction, punishment, acquittal, double jeopardy.*

I. INTRODUCTION

Under English and American laws as well as under Section 300 of the Code of Criminal Procedure, 1973 the principle is that, once a person is tried for an offence, he cannot be tried again for the same offence. It is immaterial whether in the first trial he was acquitted or convicted. He can plead *'autre fois acquit'* or *'autre fois convict.'* However, under Article 20 clause (2), only the principle *'autre fois convict'* has been incorporated. As under Article 20(2) we find the words *'prosecuted'* and *'punished'* with the conjunction *'and'* that is to say, the protection of double jeopardy is given only when the accused has not only been prosecuted but has also been punished. Both prosecution and punishment should co-exist in order to make Article 20(2) operative. A prosecution without punishment would not bring the case within Article 20(2). Thus, under Art. 20(2) of the Constitution, the bar is against a person being subjected to punishment twice for the same offence. It, therefore, follows that if at the previous trial, a person was acquitted, there will be no bar to his being tried for the same offence under this Article. A person accused of committing murder was tried and acquitted. The State preferred an appeal against the acquittal. The accused could not no plead Article 20(2) against

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the State preferring the appeal against acquittal. Article 20(2) would not apply as there was no punishment for the offence at the earlier prosecution; and an appeal against the acquittal was in substance a continuation of the prosecution.[2]

II. BASIS

The doctrine of double jeopardy is based on certain famous principles:

a) *nemo debet bis vexari pro una eat eadem causa*- no person shall be vexed twice for the same cause;

b) *nemo debet bis puniri pro uno delicto*- no one should be punished twice for one fault.

III. SCOPE OF ARTICLE 20(2) OF THE CONSTITUTION AND SECTION 300(1) OF CR. PC, 1973

- Article 20(2) says, no person shall be prosecuted and punished for the same offence more than once.
- Section 300 (1): **Person once convicted or acquitted not to be tried for same offence:** 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 sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof.

IV. CONDITIONS

For the application of Article 20 clause (2), the following conditions must be satisfied: -

(A) There must be a person accused of an 'offence'

'Offence' means any act or omission made punishable by any law for the time being in force (Section 3, Clause 38, General Clauses Act, 1897). As per Section 40 of the Indian Penal Code, 1860: the word "offence" denotes a thing punishable under this Code, or under any special or local law

(B) There must have been prosecution as well as punishment-

The word 'prosecution', according to *Wharton's Law Lexicon*,[3] means a proceeding either by

[2] *Kalawati v. State of Himachal Pradesh,* AIR 1953 SC 131
[3] 14th Edn. p.810

way of indictment or information in the criminal court in order to put an offender upon his trial. The Supreme Court in *Thomas Dana v. State of Punjab,*[4] held that, for application of Article 20(2), it is necessary that the accused must have been prosecuted and also punished. If an accused is prosecuted and acquitted, he cannot plead double jeopardy under Article 20(2).

(C) The prosecution and punishment must have been before a court of law or judicial tribunal of competent jurisdiction

Though the words 'before a court or judicial tribunal' are not found in Article 20(2) but having regard to the background under which the provision was enacted, the protection of Article 20(2) can be invoked only where there has been prosecution and punishment in respect of the same offence before a court or judicial tribunal. The former prosecution must be before a court or judicial tribunal of competent jurisdiction.[5] The action taken by administrative authorities or quasi-judicial body does not prohibit a later prosecution before a court of law or judicial tribunal.

In *Maqbool Hussain v. State of Bombay,*[6] the appellant, who was an Indian citizen, arrived at the Santa Cruz airport from a foreign country, on landing he did not declare that he had brought in gold with him, but on search it was found that he had brought 107.2 tolas of gold in contravention of notification of the Government of India. The customs authorities took action under Section 167 (8) of the Sea Customs Act, 1878 and confiscated the gold. The owner of the gold was, however, given an option of paying within four months time Rs. 12,000.00 in lieu of confiscation but nobody came forward to redeem the gold. In the meantime, a complaint was filed in the Court of the Chief Presidency Magistrate under Section 8 of the Foreign Exchange Regulation Act, 1947. The appellant contended that his prosecution in the Court of Chief Presidency Magistrate was in violation of Article 20 (2) of the Constitution because he has already been prosecuted and punished by Sea Customs Authorities inasmuch as his gold was confiscated. The Supreme Court held:

"We are of the opinion 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 the plea of double jeopardy."

In another case, *Thomas Dana v. State of Punjab,*[7] Maqbool Hussain's case was followed. In

[4] AIR 1959 SC 375
[5] *Maqbool Hussain v. State of Bombay,* AIR 1953 SC 325; *Assistant Collector v. Malwani,* AIR 1970 SC 962
[6] AIR 1953 SC 325
[7] AIR 1959 SC 375

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this case, the first petitioner, Thomas Dana, was a Cuban citizen who came to India on a special passport by Government of Cuba. The second petitioner, Leo Roy Frey, was a citizen of the U.S.A. and held a passport issued by the Government of that country. Both the petitioners were in Paris in May, 1957, when the second petitioner purchased a motor car from an officer of the U.S. embassy and sold it to the first petitioner. Both came by the same steamer to Bombay and, therefrom, to Delhi. From Delhi they went by that car to Amritsar. After staying there they proceeded to Pakistan. On search by Customs Authorities certain articles and undeclared currencies and empty containers of gold bars were found from a secret chamber in the car and their baggages. The Collector Central Excise and Land Customs, New Delhi, ordered for confiscation of the car and all these things and also imposed a fine of Rs. 2,50,000.00 on each petitioner under Section 167 (8) of the Sea Customs Act.

After making further enquiries, the Assistant Collector of Customs and Central Excise, Amritsar filed a complaint against the petitioners under Section 8 of the Foreign Exchange Regulation Act, 1947 and Section 167 (8) of the Sea Customs Act, 1878.The Additional District Magistrate convicted the petitioners and sentenced each of them to two years rigorous imprisonment under Section 23-B of the Foreign Exchange Regulation Act, 1947, and six months rigorous imprisonment under Section 120-B (2) of the Indian Penal Code. The convictions were upheld by the Additional Session Judge and the High Court. The Supreme Court held that Article (2) was not applicable because the proceedings before Sea Customs Authorities under Section 167 (8) were not prosecution. An administrative tribunal may have to act judicially in the sense of having to consider evidence and hear arguments in an informal way but the Act does not contemplate that in so doing it is functioning as court.

The views expressed in Maqbool Hussain and Thomas Dana's cases were quoted with approval in *Hira H. Advani v. State of Maharashtra.*[8]

(D) There must be second prosecution and punishment

The right against double jeopardy is available only when the accused is prosecuted and punished for the second time. So long as the first prosecution continues, there is no question of Article 20(2). The question came up for consideration in *Kalawati v. State of H.P.*[9], Kalawati was charged with abetment of murder and she was acquitted by the Sessions Judge, the State preferred an appeal before the Judicial Commissioner who convicted her. On appeal before the Supreme Court, one of her contentions was that because of Article 20(2), State had no right to

[8] AIR 1971 SC 44
[9] AIR 1953 SC 131

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prefer an appeal against her acquittal. The SC held that since there was no punishment, Article 20(2) does not apply and that an appeal against acquittal, wherever it is permitted by the procedure, is in substance a continuation of the same proceeding.

(E) The second prosecution and punishment must be for the 'same offence'

For the applicability of Art.20 (2), there must be second prosecution and punishment for the same offence for which he has been already prosecuted and punished earlier. If the offences are not the same but different, the rule of double jeopardy incorporated under Art. 20(2) will not apply. The same act of a person may constitute two different offences, and in such a situation punishment for one offence does not bar the prosecution and punishment for the other offence. For example, the offences under Sec. 5(2) of the Prevention of Corruption Act, 1947 and Section 409 of the Indian Penal Code, 1860 are not identical in essence, import and context. In *State of M.P. v. Veereshwar Rao,*[10] the court held that acquittal on the charge under Section 5(2) of the Prevention of Corruption Act would not bar conviction of the accused under Section 409 of the Indian Penal Code.

In *Leo Roy Frey v. Suptd., District Jail,*[11] the question arose whether *a crime* and the offence of *conspiracy to commit the crime* are different offences. The petitioner in the instant case was found guilty of an offence under Sec. 107(8), Sea Customs Act, 1878, and was punished accordingly. Thereafter, prosecution for criminal conspiracy under Section 120-B, IPC was brought against him. The Supreme Court ruled that the second prosecution was not barred since it was not for the same offence. The Supreme Court held that, the offence of conspiracy to commit a crime is an offence separate from the crime itself which is the object of the conspiracy, because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or committed…The two are therefore quite separate offences. Accordingly, punishment for one offence does not bar punishment later for the other offence.

V. SECTION 300, CR.PC: GENERAL RULE AS TO DOUBLE JEOPARDY AND EXCEPTIONS TO THE GENERAL RULE

Section 300 of the Code of Criminal Procedure embodies the common law principle contained in the doctrine of *autre fois acquit* and *autre fois convict* which means that if a person is tried and acquitted or convicted of an offence he cannot be tried again for the same offence. Section 300 incorporates both the general rule as well as the exceptions. There are six sub-sections under Section 300, sub-section (1) contains the general rule and sub-sections (2), (3), (4) and (5) lay

[10] AIR 1957 SC 592
[11] AIR 1958 SC 119

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down the exceptions to the general rule.

(A) General Rule: Section 300 Sub-section (1)

Person once convicted or acquitted not to be tried for same offence: 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 sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof.

Object: In State of A.P. v. K. Meeraiah[12] the Supreme Court observed that the main object of Section 300(1) is to prevent re-litigation of the issue which has been determined in a criminal trial between the State and the accused. The effect of a verdict of acquittal pronounced by a competent court on a lawful charge after a lawful trial will be that this verdict will be binding and conclusive in all subsequent proceedings between the same parties to the adjudication on the same issue.

(B) Exceptions: Section 300 Sub-sections (2), (3), (4), (5) and (6)

Sec. 300 (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.

Sec. 300 (3): A person convicted of any offence constituted by any act causing consequences of 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.

Sec. 300 (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.

Sec. 300 (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.

Sec. 300 (6): Nothing in this section shall affect the provisions of Section 26 of the General

[12] AIR 1970 SC 771

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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.

VI. PRINCIPLE OF ISSUE-ESTOPPEL

In fact, the principle of issue-estoppel is not a sufficient ground which can bar a subsequent trial under Section 300 Cr.PC. It was in the case *Pritam Singh v. State of Punjab*[13] that certain observations were made by the Supreme Court relying upon the Privy Council's decision in *Samashivan v. Public Prosecutor Federation of Malaya,*[14] wherein *Lord Dermot* had observed that the maxim *res judicata pro veritate accipitur* is no less applicable to criminal proceedings than to civil proceedings.[15] The facts of Pritam Singh's case illustrate the role of issue-estoppel *vis-à-vis* Sec. 300, Cr.PC. Where the accused was charged under Section 19(F) of the Indian Arms Act for possessing a revolver without a licence and was acquitted as the prosecution could not prove that he was in possession of a revolver. In a subsequent trial of the accused for prove

[13] AIR 1956 SC 415
[14] 1950 AC 458 (PC)
[15] Quoted by Dr NV Paranjape, *The Code of Criminal Procedure,* (5th Edn. 2015), Central Law Agency, Allahabad, p. 389

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that he was in possession of a revolver. In a subsequent trial of the accused for murder, it was held that the possession of revolver cannot be proved against the accused as the prosecution was bound by earlier decision on the point and was estopped from giving evidence to prove the contrary.

The principle of issue-estoppel subsequently found support in a number of decisions[16] of the Supreme Court. The rule may be enunciated thus: Where an issue has been tried by a competent Court on a former occasion and the finding of fact has been reached in favour of the accused, such finding would constitute an estoppel or res judicata against the prosecution; not as a bar to the trial and conviction of the accused for different or distinct offences but as precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law." [i.e. Section 300(2) Cr.PC][17] It must, however, be stated that in order to invoke the rule of issue-estoppel it is necessary that the parties in the two trials must be the same and fact-in-issue proved or not in the earlier trial must also be identical with the one which is raised and agitated in the subsequent trial.[18]

(A) Distinction between issue-estoppel or res judicata and double jeopardy or *autre fois acquit:*

Pointing out the distinction between issue-estoppel and double jeopardy, the Apex Court has observed, that the principle of issue estoppel is different from the rule of double jeopardy or *autre fois acquit* as embodied in Section 300, Cr.P.C.. The principle of issue-estoppel is altogether a different principle where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of the accused. Such finding would operate as an estoppel or res judicata against the prosecution, not as a bar to the trial or conviction of the accused for a different or distinct offence, but as precluding of evidence to disturb the earlier finding when an accused is tried subsequently for a different offence which might be permissible by Section 300 (2) of the Code. For raising the plea of issue-estoppel there must be inevitably the same issue in the earlier proceedings between the same parties. Thus, any issue as between the State and one of the accused person in the same litigation cannot operate as binding upon the State with regard to another accused.[19]

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[16] Manipur Administration v. Thokchom Bira Singh, AIR 1965 SC 87; Piara Singh v. State of Punjab, AIR 1969 SC 961; State of A.P. v. Kokkiligada Meeraiah, AIR 1970 SC 771; Lalta v. State of U.P., AIR 1970 SC 1381
[17] Ramesh Chandra Biswas v. State, 1994 Cri LJ 1134 (Cal); Masud Khan v. State of U.P. (1974) 3 SCC 469
[18] Naresh Nonia v. State, 1997 Cri LJ 1181 (Pat); Ravinder Singh v. State of Haryana, AIR 1975 SC 856
[19] Punni Swami v. Venkatachalam, 1977 Cri LJ 431

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