

AN APPRAISAL OF SENTENCING IN BANGLADESH: BETWEEN CONVICTION AND PUNISHMENT

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ABSTRACT

Criminal justice system of Bangladesh neither allows any separate sentence hearing nor does it invite any pre-sentence report on the background of the accused when the trial court pronounces its judgments. Our criminal laws provide for numerical sentencing structure without mentioning any stratification of offence level. There is neither specific statutory sentencing policy nor is there any separate sentencing statute. In absence of sentencing guidelines as well as distinctive sentence hearing, the judges often award the sentences mechanically in the exercise of their individual sense of unbridled discretion. Consequently, diversity of sentencing decisions arises for similar category of offences. In practice, a wide-range of mitigating and aggravating factors stemming from the case -laws essentially dominate the sentencing practice in Bangladesh. Non- custodial sentences including verbal sanction, conditional discharge, probation order, community service order, victim compensation order also remain largely unutilised while long custodial sentence and death penalty are frequently imposed in Bangladesh. It is also evident that the huge mass of sentencing factors as reflected in series of precedents, has rather developed in an inchoate manner. Nevertheless, it is possible to condense such sporadic sentencing factors into well- fashioned sentencing guidelines at behest of our apex Court. This article further argues that the accused should be given a separate sentence hearing opportunity so that award of punishment would become more meaningful exercise.

I. INTRODUCTION

Though determination of guilt of the accused is fundamentally distinct from the issue of sentencing, in Bangladesh a judgment for both conviction and sentence is delivered simultaneously in a maiden sitting. Our criminal justice system neither allows any separate sentence hearing nor does it invite any pre-sentence report on the background of the accused when the trial court pronounces its judgments¹. The victims of crimes are also typically excluded from taking part any participatory role in the criminal proceedings. Our criminal laws provide for numerical sentencing structure without mentioning any stratification of offence level.²

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¹ In Bangladesh there is no provision for any such pre-sentence report; however under Children Act 2013, s. 33, a Children Court is legally required to consider 'social inquiry report' on the background of the child while passing the sentence.

² In murder cases, sentencing option is either death or life imprisonment; however in almost all other offences sentencing options are far wider not only in terms of forms of

In absence of sentencing guidelines as well as sentence hearing, the judges often award the sentences mechanically in the exercise of their individual sense of yawning discretion. Consequently, diversity of sentencing decisions arises for similar category of offences. In practice, a wide range of mitigating and aggravating factors stemming from the case -laws, though not developed in a coherent fashion, essentially dominate the our sentencing practice.

It may be mentioned that Penal Code 1860 laid the substratum upon which our sentencing is based. Though Probation of Offenders Ordinance 1960 was promulgated with a view to having therapeutic approach to the offenders convicted of minor offences, provisions for such suspended sentences remain largely unexplored. Imposition of recurrent death penalty and long custodial sentence for serious crimes is a discernable hallmark of our sentencing practice which originated from the colonial codification of penal laws during early 19th century.

This article basically embarks on sentencing practice in criminal litigation of Bangladesh. It explores both primary sources including legislations, rules, regulations, and interviews with practitioners; and secondary sources including books, journals, periodicals and other resources from internet. Accordingly, an attempt has been made to explore the developments, trends and other pertinent issues on criminal sentencing in Bangladesh. A brief account has also been made on comparative sentencing reforms in the USA, the UK, Canada, Australia and India. In particular, current challenges in the practice of sentencing in Bangladesh are assessed with reference to mitigating and aggravating factors. A host of suggestions are also offered to meet the challenges in our sentencing practice. Finally, the article wraps up with a brief concluding reflection.

II. DEVELOPMENT OF SENTENCING IN BANGLADESH

In Bangladesh sentencing practice is basically regulated in accordance with the provisions as contained in Penal Code 1860 and other special criminal laws enacted from time to time. It may be noted that during 1790s to 1820s most norms of criminal laws of undivided India were changed that were later modified, enlarged, systemised and enacted as Penal Code.³ The Code of Criminal Procedure 1898 is the first legislative step to provide for probation scheme.⁴ In 2003 section 35A of Code of Criminal Procedure was inserted for

sentence, but also regarding quantum of punishment. However, Narcotics Control Act 1990 alone provides for some scaling of offence levels according to quantum of the narcotics items.

³ Malik, S., "Perceiving crimes and criminals: Law making in the early 19th century Bengal", 6 (2002) *Bangladesh Journal of Law*, at p. 59.

⁴ Code of Criminal Procedure 1898, s 562. Such provision was repealed by the Probation of Offenders Ordinance 1960, s 16.

deducting the period of custody from total period of sentence handed down to the accused.⁵ Probation of Offenders Ordinance 1960 provided for provisions on probation, admonition and discharge of the accused guilty of minor offences. Children Act 1974 also dealt with therapeutic approach as to how a juvenile delinquent will be treated in a sentencing court. In 1980s a plethora of special laws provided for reluctant victim - protection procedure as well as recurrent harsh punishments with a view to combating violence against women and children.⁶ The Code of Criminal Procedure 1898 empowers the courts for awarding compensation to be paid to the victims of crimes.⁷ However, such discretionary powers of the sentencing judges have never been widely exercised. Domestic Violence Act 2010 provides for the punishment in the form of 'community service order' in case of repeated delinquency on the part of the offender. Newly enacted Children Act 2013 provides for the comprehensive reformatory approach for betterment of the youthful offenders who are in conflict with laws. From time to time, judicial pronouncements endeavour to develop sporadic mitigating and aggravating factors in awarding the sentence. In absence of separate sentencing statute, the purpose and principles of criminal sentencing largely emanate from the case- laws.⁸

It may be specifically mentioned that in 1978 a provision for separate sentence hearing was inserted in sections 265K(2) of Code of Criminal Procedure 1898 for trial in Sessions Courts which provided that:

'If the accused is convicted, the Court shall unless it proceeds in accordance with the provisions of section 562, hear the accused on question of sentence, and then pass sentence on him according to law.'⁹

Another similar provision was also introduced for trial in Magistrate Courts.¹⁰ However, both the sentence hearing provisions were repealed in 1982.¹¹

⁵ Code of Criminal Procedure (Amendment) Act 2003, s 35A.

⁶ For instance, Dowry Prohibition Act 1980, Prevention of Repression of Women and Children Act 2000, Acid Crime Control Act 2002, Prevention of Human Trafficking Act 2012 are few of special laws enacted to combat violence against women.

⁷ Code of Criminal Procedure 1898, s 545.

⁸ Such precedents are typically referred to as 'guideline judgments'. However, no such 'guideline judgment' offering exhaustive guidelines is found available in our law reports.

⁹ Such provision was inserted by Law Reforms Ordinance (Ordinance XLIX of 1978).

¹⁰ Ordinance XLIX of 1978, s 250K(2) reads thus: *'Where in any case under this chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 349 or section 562, he shall after hearing the accused on the question of sentence, pass sentence upon him according to law.'*

¹¹ Ordinance XXIV of 1982.