ISSUE ESTOPPEL IN CRIMINAL CASES

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INTRODUCTION

'A' is charged with blasphemy and is put on trial for the same. The defence wishes to enter the plea of unsoundness of mind which is a general exception in the Indian Penal Code, 1860 (IPC). Meanwhile in another case where the same person 'A' was accused of disturbance of public tranquillity, he is acquitted where the court finds him a person of unsound mind. The question which arises here is *that should there be again litigation on the issue that 'A' is a person of unsound mind? What is the finality of an issue in the criminal justice system even if it is decided by a competent court? Should the prosecution in this case be estopped from giving any evidence on the same issue which is reasonably connected to the impugned trial in question?* It is with these basic questions the author wishes to start the paper. Over the course of the paper these questions will be analysed in the light of the concept of the Issue Estoppel. The approach of the Indian courts and other common law countries will be looked at.

One of the fundamental basic pillars of criminal law Jurisprudence is the shielding of the accused from an unwanted and perpetual harassment[1]. Keeping in mind this underlining philosophy of law, the criminal law statutes should be designed in such a manner so as to not subject the accused to an unnecessary and grotesque path of mental agony. However the doctrine of Issue Estoppel is nowhere mentioned in the Code of Criminal Procedure, 1973 (Cr.P.C, hereinafter the code) but the situation mentioned above raises many important concerns which will be analysed after a leaf by leaf analysis of the multiple facets of the principle of Issue Estoppel.

APPROACH OF THE COURTS AND ISSUE ESTOPPEL

[1] Aparna Chandra & Mrinal Satish, *Criminal Law & the Constitution* In Sujith Choudhury *et al* (ed.) The Oxford Handbook on Indian Constitution, OUP: London (2016).

Primarily the concept of Issue Estoppel is a modified derivative of the doctrine of Res Judicata which is applicable in civil cases.[2] Its use in the criminal cases is relatively newer in the origin but it has derived its roots from the age old doctrines of criminal law jurisprudence such as that of Double Jeopardy[3]. There is a significant difference between the two concepts but the built up of Issue Estoppel in the essence is inspired from the rule of Double jeopardy and the other shades related to it such as the principle of Autrefois Acquit and Convict.

Section 300 of the code exhaustively details the provisions regarding the same but as noted in the introduction it does not mention about Issue Estoppel. Other provisions of the code also do not mention the same but the Supreme Court of India in its various judgements has recognised the concept.[4] In other common law countries like USA this is known as *'Collateral estoppel'* and is recognized from as early as 1916.[5] This is also recognized by the courts in Australia[6]. Through the Fifth Amendment in United States this is believed to have been constitutionalized but the explicit mention and settled practice is still not found.[7] The courts have been confused among themselves when it comes to the application of the rule. In one case the application looks perfectly fine but in a different case as the facts change the judges have started questioning the rational of their previous judges. This trend can be seen very evidently if one closely studies the trajectory of the decisions of the United States courts concerning this issue.[8]

What exactly is Issue Estoppel?

When a given fact in a case has been sufficiently litigated and a finding has been reached by a competent court in favour of the accused then the issue is deemed to be settled.[9] It is accepted as final and the prosecution is estopped from litigating the issue again or even presentation of evidence in that matter.[10] However, it is to be noted that it does not bar the trial but is merely

[2] *The Due Process Roots of Criminal Collateral Estoppel*, Harvard Law Review, Vol. 109, No. 7 (May 1996) pp. 1726-1746.

[3] *Id*, 2.

[4] See *Masud Khan vs. State of U.P.*, (1974) 3 SCC 469; *Ramesh Chandra Biswas vs. State*, 1994 Cri LJ 1134 (Cal); *Lalta vs. State of U.P.*, 1970 Cri LJ 1270.

[5] *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916).

[6] *Supra.*, 2

[7] *Supra*, 2.

[8] *Supra*, 2.

[9] *Manipur Administartion vs. Thokchom Bira Singh*, (1965) I Cri LJ 120.

[10] *Id.*

a res judicata on that particular issue.[11] For the application of this principle, the parties must be same and there shall be a reasonable nexus in the application of issue estoppel based on the same fact if it is contested again.[12]

Therefore, in an ideal circumstance if the situation given in the introduction comes to the knowledge of the courts, they must invoke Issue Estoppel. The real practice may differ and we shall discuss the same as we go ahead in our analysis of this doctrine. The Supreme Court in the case of Pritam Singh vs. State of Punjab first invoked Issue Estoppel as a principle in criminal law practise of India.[13] It was held that the legal maxim '*res judicata pro varitate accipitur'* also applies to the criminal proceedings as much as it is applied in civil cases.[14] After this there have been multiple decisions of the Supreme Court where the court has given the benefit to the accused and relied upon the same. In the case of ***Manipur Administration vs. Thokchom Bira Singh*** the Supreme Court has discussed Issue Estoppel in much detail.[15] The judgement places reliance on the decision of the Privy Council in the case of ***Sambasivam vs. Federation of Malaya***.[16] The interesting point in the judgement is that the court also delves into the analysis of the conflicting opinions expressed in the case of ***R vs. Conelly.***[17] An important observation that the court made here is that, *whether issue estoppel can be applied to the prosecution also?* In a civil proceeding, *Res Judicata* is available to both the parties so can it be not done in the criminal cases? The court did raise this question but did not provide any answer to the same as it was not related to the case at hand. In a recent case of 2013, the Supreme Court has again recognized the application of Issue estoppel in criminal cases and recognized the rights of the accused be protected against vexatious prosecutions lodged with malicious intent.[18] Despite this, the author feels that we have to cover a long way in order to build a standard procedure in these types of cases so as to rule out the ambiguity. The law commission has also not contributed much to the discussion but

[11] *Supra*, 4.

[12] *Ravinder Singh vs. State of Haryana*, (1975) 3 SCC 742.

[13] AIR 1956 SC 415.

[14] *Id.*

[15] *Supra*, 9.

[16] 1950 AC 458 (PC).

[17] *R vs. Conelly* (1963) 3 AER 510.

[18] *Ravinder Singh vs. Sukhbir Singh and Others*, (2013) 9 SCC 245.

only has commented that in the absence of complete opportunity with the courts any legislation in a hurry would be undesirable.[19]

DUE PROCESSS AND ISSUE ESTOPPEL

It is well evident that the constituent assembly chose the phrase 'Procedure established by law' in the place of 'Due Process of law'[20] in order to not get caught in the web made by itself as in the case of *Lochner vs New York.*[21] However there is a literal exclusion of the phrase 'Due Process' in the text of the Constitution but the Criminal Justice system should impart a certain degree of the values which are inherent to it so that it does not get affected by the legislative arbitrariness. This is relevant here as Issue Estoppel is a characteristic of the trial process in the criminal justice system. It should be understood that there are certain safeguards to the accused, which are essential in order to impart a fair process of justice. Unfortunately, the Supreme Court has not taken the desired approach when it comes to securing justice. The honourable court has been very apt when it comes to rhetoric but it has not delivered the concreteness, which is desired. The Judges have been populist in their approach towards the law and the focus has been shifted to meeting certain public order goals and to ensure the guilt is discovered. The problem with the court's approach to the factually finding of the guilt is that the courts are ready to go the extent that they will narrowly construct the procedural safeguards in order to facilitate the truth discovery mission.[22] The author here wishes to give an example in order to elaborate more on the proposition.

Suppose 'A' is a prime accused in a sensational gang rape case along with 3 others, and the case gets a tremendous media attention. At the trial he pleads *Alibi* and the court accepts the fact that he was not present at the time of the offence. Sometime later, while the trial still continues against the other three accused, the government decides to change the prosecution lawyers under the public coercion and the reason for the same being their incompetence. The new prosecution lawyer wishes to bring in the plea that the previous prosecution was incompetent and the issue was litigated in a manifestly poor manner. So for the complete justice to be served the court must allow the prosecution to adduce fresh evidence as against accused 'A' and the finding of the court on his plea of *Alibi* must be visited again.

[19] 41st. Report, p. 256, para. 30.6.

[20] *Supra*, 1.

[21] 198 US 45 (1905).

[22] *Supra*, 1.

Now this situation gives rise to the two important questions which are expedient and required to be looked at:

1. Since there is no clear cut statutory framework for the law relating to issue estoppel, what will happen if the court decides that the prosecution must not be estopped and the issue is to be litigated again?
2. What if the court applies the doctrine of issue estoppel as the finding was in favour of 'A' but in reality the prosecution was actually bad and the litigation of the issue was conducted in a really poor manner?

These two questions perplex us as we have two conflicting propositions before us i.e. one seeks procedural safeguards for the accused while the other seeks to give justice to the victim.

In the answer to the first question one may say that this might be a pragmatic approach for the present day courts considering the trend as mentioned above. However, this trend of court violates certain right of the accused as he will be required to litigate the issue again. This will lead to a cycle of harassment because this time the prosecution will be better equipped. They will seek to demolish the previous claims and for that the witness and evidence this time could be better prepared or even sharper. On the other hand the defence will be helpless as they are left with no other choice than to present their same set of arguments. In all these cases which become high profile due to the media attention public opinion tend to shape the judicial outcomes also. The jury trials were abolished for the same but it must not be forgotten that judges are also humans and they may also be affected by public sentiments. In many of the cases there is a preconceived notion about the accused and even the society perceives someone as a criminal the moment he gets arrested. With the pathetic quality of policing in our country this judicial approach poses a threat to certain procedural safeguards of the accused. Litigation of the same issue again is nothing but an abuse of the powers vested with the judge. This according to some scholars is inconsistent with the concept of 'Fundamental fairness' as is enshrined in the phrase Due process.[23] As mentioned earlier India does not have the mention of the words 'Due Process' but does that not gives us the license to act in an arbitrary manner. In the absence of any carved out statutory guidelines regarding issue estoppel the powers vested with the judge have to be exercised with due care and caution.

[23] *Supra*, 2.

Moving on to the answer of the second question, the author feels that the concern highlighted in the question is itself a very valid one. There can be a prosecution case which was argued in a very weak manner. The prosecutor's incompetence might be the reason of the accused getting away as the ruling came in his favour. This might look weird when seen through the lens of a hypothetical but this was an issue in the case of *Buatte vs United States*.[24] In reality it becomes a problem because allowing the issue to be litigated again will lead to the slippery slope where one will never be able to draw the line. According to some of the scholars this is to be seen as a gradual dilution of the due process guidelines.[25] On the other hand we have the victim who demands justice. The quality of the case presented really depends on the quality of the prosecutor. *What if a situation arises where the prosecutor takes bribe from the accused and compromises with his ethics?* Now the situation becomes really dicey in this case. In this circumstance the truth will never come out if the issue is deemed to have been decided. *Would these types of cases fall in the exception category or some other approach has to be followed while dealing with this kind?* Sadly, the Indian courts have not had the opportunity to delve with these issues regarding the issue estoppel and the doctrine has merely been developed at a superficial level. In the case of *Bautte vs. United States* (supra) the plea of estoppel was rejected by the court but no comment as to the exception being carved out for these types of cases was made.[26] It is true that the offender should not go unpunished but at same time the criminal justice system itself should not start harassing the accused. This in the opinion of the author is also a form of injustice because the justice delivery system should be firm with a degree of finality in it as there is no use of digging the same pit again and again.

CONCLUSION

The author feels that a strict codification of the doctrine of Issue estoppel is necessary so as to cover the underlying grey areas surrounding the doctrine. This is true that the opportunity to analyse this principle inside out has not yet come to the Indian courts. Whatever little discussion the Supreme Court did was limited to the definitional aspect of the same and is far from discussing the real life practical considerations involved with it. As of now, we are not settled on many of the aspects and even the Supreme Court has left some of them open.

[24] 350 F.2d 389 (9th Cir. 1965); See also *An Exception to Collateral Estoppel in Criminal Cases because of Prosecutor's Incompetence*, University of Pennsylvenia Law Review, Vol. 115, No. 8 (Jun 1967) PP. 1346-57.

[25] *Id.*

[26] *Id.*

Therefore, unless the codification takes place and proper guidelines are laid out we will not be able to decide with clarity. Apart from India, the same problem to an extent is there in other common law countries as well. The absence of concrete guidelines and framework generates a lot of confusion and resulting in conflicting opinions among the courts themselves. This vagueness has to be tackled as injustice in any form, howsoever small be must be done away with. A mere recognition of the doctrine by the Supreme Court will not solve the purpose because it is of no use unless there is a roadmap. The Law Commission has said that there is no need for legislation in a hurry but the issue has not been taken up since then and neither there is any discussion on the same. A wait for the apt opportunity to decide on it is not a desirable thing to do. This is an essential component when it comes to the procedural safeguards and we should be progressive enough to develop it accordingly. It is a necessary step in order to secure the natural justice goals and therefore it will result in the overall growth of the criminal justice system.