UNIT 14 PROSECUTION PROCESS AND DEFENCE ADVOCACY

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14.1 INTRODUCTION

Criminal Justice System in India is adversary in nature and follows the common law system. The system is based on a strong presumption that every one is presumed to be innocent unless proved otherwise. In other words, as soon as a person is accused of having committed a crime, the prosecution has to prove, of course beyond reasonable doubt, that the accused is guilty of the alleged crime and the accused person at liberty to question and cross-question the allegations raised by the prosecution. Sankar Sen (2002) is of the opinion that the adversary Criminal Justice System gives advantage to the accused and makes conviction very difficult. The rationale underlying the adversary criminal justice system is that both the adversary parties are more or less equal and that require them to confront each other as per pre-determined rules is likely to deduct the possibilities of miscarriage of justice to a bare minimum.

The Judiciary in order to arrive at the right conclusions depends, to a great extent, upon the arguments advanced by the Prosecution and the defense counsel. The prosecution develops his case on the basis of the investigation conducted by the investigating agency which is by the large under the control of the police and the defense counsel prepares his brief on the basis of the facts given by their client (accused person). There is every possibility of exaggeration of the facts at both the levels i.e. the investigating agency as well as the accused person. The chances of over-play or under-play on both the sides, by way of suppression of the facts, cooking up of the facts, exaggeration of the facts, manipulation of the facts, harassment of the witnesses, influencing the witnesses, engagement of the pocket witnesses, un-necessary adjournments and what not, are always there. Hence, the presumption of innocence, in the adversary system of criminal justice process, is in the best interest of justice. However, there are certain exceptions to this principle and onus to prove innocence in such cases lies on the accused. The examples in this respect are the cases of rape and bride burning, where the
Presumption of innocence does not apply. In this adversary system of criminal justice system, prosecution and defense counsel occupy very important strategic position in the entire system and it is mainly with their assistance that the judge can arrive at the right conclusion of the case in question.

The issues regarding concept of prosecution, role of the prosecutor, duties of the prosecutor, defense mechanism, role and status of the defense counsel, obligations of the defense counsel, concept of presumption of innocence along with the role of the criminal court in the entire criminal proceedings have been discussed.

14.2 OBJECTIVES

After reading this unit, you should be able to:

• explain the concept of adversary pattern of the Criminal Justice System in India;
• explain the concept of ‘Prosecution’;
• know about status and role of the prosecutor in the Criminal Justice System;
• know about the duties of the prosecutor;
• explain the concept of defense mechanism in the Criminal Justice Process;
• know about the obligations of the Defense Counsel;
• describe the concept and importance of ‘presumption of innocence’; and
• describe role of the Criminal Court.

14.3 PROSECUTION AND THE PROSECUTOR

The prosecution is very vital stage in the criminal trial. The evidence collected by the Investigating agency is passed on to the prosecutor for the purpose of prosecution of the accused. The entire prosecution revolves around the prosecutor who represents the State in the Court of law and enjoys wide powers regarding the presentation of the case. The prosecutor possesses the broad discretionary powers to dismiss the charge or to reduce them to lesser offences for which the offender will defend his case.

The prosecutor is the key law enforcement in his jurisdiction. His potentialities are displayed by his intelligence, skill and legal capacity. He is a sort of quasi-judicial officer, who determines from his own investigation based on the facts and evidence submitted to him by the Investigating Agency or others regarding the alleged. The public interest demands, the prosecutor to plead the case on behalf of the state fairly, freely and fearlessly and convince the court regarding all the dimensions of the case. The interest of the State is almost entirely in his hands. The onus to prove every ingredient of the offence against the accused rests with the prosecution. It is only when all the ingredients of the offence in question are established that the court is entitled to examine the defense.

The prosecutor is very important in the judicial process and has a very vital role in bringing the facts to the knowledge of the court. The Supreme Court in a
famous case of Kali Ram (1973), while highlighting the role the prosecutor observed as under:

“Apart the cases of the statutory presumptions, the onus is upon the Prosecutor to prove the different ingredients of the offence and unless it discharges that onus, the prosecutor can not succeed. The court may of course presume as mentioned under Section 114 of the Evidence Act, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct other presumptions of similar kind in the similar circumstances can be made under the provisions of the section in itself. Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of the case, as no hard and first rule can be laid down.”

The prosecution has to stand on its own strength, because the primary burden of proving crime as on the prosecution. The apex Court in the Tika’s case (1974) laid down that the case of prosecution is to be established independent of the defense version and in a case which depends for its proof on direct testimony, falsity of defense will not help the prosecutor to establish its case.

Self Assessment Question
1) Discuss role of the prosecutor in the criminal justice process.

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14.4 DUTIES OF THE PROSECUTOR

The prosecutor has a duty towards the society at large and is expected to uphold the rule of law to ensure justice to both the victim as well as to the accused. The specific functions of the Prosecutor are as under:

a) To serve as an independent executive agency that is committed to upgrading the rule of law is the process of investigation as well as trial of criminal cases.

b) To critically examine the Police charges heat with a view to establishing the alleged accusation on the basis of evidence record and the possible witnesses that will support the prosecution case.

c) To perform the dual role of the administrator of justice that will help the court in framing the charges and provide the list of prosecution witnesses and adduce prosecution advocacy in the case. He as a prosecutor is expected to skillfully perform his prosecutorial role.

d) To seek justice, not merely convictions for the accused.

e) To know and to be guided by the standards of professional conduct as defined in the professional codes and legal canons.
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The prosecutor is under moral and legal obligation to ensure that justice is done to all the concerned, in the cases, he prosecutes and that the innocent persons are not convicted. The Supreme Court in the Chaudhary’s case (1974) observed that the duty of the prosecutor is not only to bolster up a prosecution case, which may as such enable the court to record conviction, but also to bring out the unvarnished the truth.

It has been found that the prosecutors usually are under tremendous pressure to seek convictions at whatsoever cost. Prosecutors are considered as the spokespersons of the police agency. Verma (1972) pointed out that the public prosecutor finds it difficult to work with out the extraneous considerations and influence. In most of the cases he is keen on fighting the battle for conviction rather for justice.

Self Assessment Question
2) Describe duties of the prosecutor.

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14.5 DEFENSE AND DEFENSE COUNSEL

The Defense Counsel is equally an important partner in the judicial process of the criminal justice system. He is no less important than the public prosecutor. He is occupying a pivotal position in the system and his obligations are multiple and complex. His obligation towards his client is that of a counselor and advocate, professional adversary towards the prosecutor and again counselor to the Court. It is a matter of fact that without the help of the defense counsel, it is very difficult for the court to apply its mind, to find out the truth and to reach to the conclusions to deliver the judgment.

Educated he may be can not pleas his case in the court of law without the proper assistance by the professional hand. The importance of the Defense Counsel has been highlighted by the Kerala High Court in the Kurien Case (1970) by quoting Lord Dennings observation. Lord Dennings has traced out the importance of the professional hand in the following words:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses on the other side. He may be tongue-tied or nervous or confused or wanting in intelligence. He cannot examine or re-examine witnesses. It is difficult for a person to speak on his behalf, even if asked by the court to speak. If justice is to be done, he ought to have the help of someone to speak on his behalf. And who better than a lower, who has been trained for the task”. 
He further, pointed out that when the reputation or liberty or livelihood of a person is at stake, he has a right not to speak only, but to speak through a counsel. The Supreme Court of the United States in Power’s case (1932) described the importance of the Defense Counsel in adversary Criminal Justice System in the following terminology:

“Even the intelligent and educated layman has a small and some times no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself, whether the indictment is good or bad. He is unfamiliar with the rules of evidence without the counsel, he may be put on trial without a proper charge and convinced on the basis of irrelevant or inadmissable evidence. He lacks both the skill and knowledge adequately required to prepare the defense, even if he has a perfect one. He requires the guiding hand of the defense counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction, because he does not know, how to establish his innocence”.

The defense counsel has a very important role in justice delivery system. He can help the court in dispensation of justice by guiding on facts and relevant legal position on the issues in question.

**Self Assessment Question**

3) Explain importance of Defense Counsel in the Criminal Justice Process.

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**14.6 OBLIGATIONS OF THE DEFENSE COUNSEL**

There is no doubt about the fact that the Defense Counsel has a very important position and role to protect the rights of the accused person. He represents the accused person during the trial process and is under professional obligation to safeguard the legal and constitutional rights of the accused person during the trial and to protect him against arbitrary action of the executive. Some of the statutory obligations of the Defense Counsel are as under:

a) To support and uphold the Constitution and laws of the country;

b) To maintain the respect due to the courts of justice and judicial officers;

c) To give proper counseling to his clients and not to mislead them on any issue;

d) To maintain such actions or proceedings or defenses, which appear to him legal or just;

e) To use only such means as are consistent with the truth;

f) To use only such means which are legal;
g) To ensure that no attempt is made to mislead the judge or any judicial officer by an artifice or false statement of law or fact;

h) To gain and maintain the confidence of the clients and judiciary;

i) To preserve the secrets of his client whatsoever, at every peril to himself;

j) To abstain from all offensive language and offensive personality;

k) To abstain from advancing any fact, pre-judicial to honour or reputation of a party or witness, unless required by the ‘cause of justice’ with which he is charged;

l) Not to encourage, either the commencement or the continuance of an action or proceeding from any corrupt motive or passion or interest;

m) Never to reject, for any consideration personal to himself the cause of defenseless or oppressed.

Self Assessment Question
4) Describe important obligations of the Defense Counsel.

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14.7 PRESUMPTION OF INNOCENCE

The basic foundation of the Criminal Justice System is that every one is presumed to be innocent unless proved otherwise. It is said that ‘let hundred criminals be let off, least one innocent person be not punished’. This principle is based on the premise that even if a single innocent individual is convicted, it will result in the miscarriage of justice. The principle is questioned by many jurists. Gavin Drewary has questioned the efficacy of the principle of letting hundred accused persons off and thereby reducing the efficiency of the Criminal Justice System as such. Warren E. Burger, Chief Justice while commenting on this principle observed that this principle has resulted in the development of the system of the Criminal justice in which it is often difficult to convict even those who are plainly guilty. He further pointed out that miscarriage may arise from the acquittal of the guilty no less than from the conviction of the innocent.

In a criminal case before the court of law, while considering the evidence advanced by the parties concerned, if two views are possible, one leading to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. It is an established principle and this principle has special relevance in the cases, where the guilt of the accused is sought to be established by the circumstantial evidence. If the trial court, while dealing with
the evidence, entertains any doubt regarding the guilt of the accused person, the benefit of such doubt has to be given to him. The nature of the doubt regarding guilt of the accused, must be of courts reasonable. It is not merely the doubt of mind, which is either so vacillating that it is incapable of reaching a firm conclusion, or so timid that it is hesitant and risky to take things to the natural consequences. Further, the rule regarding the benefit of doubt also does not warrant acquittal of the accused by resorting to surmises, conjectures or fanciful considerations. The Supreme Court in Shivaji’s case (1973), while highlighting the importance of the principle, has struck a note of caution in the following terminology:

“The cherished principles or golden thread of proof are beyond reasonable doubt, which runs through the web of our law, should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men go out, but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubt belongs to the accused.”

It is true that wrongful acquittals or convictions shake confidence of the people in the judicial system and therefore, undesirable in the judicial system. The wrongful conviction of innocent persons, however is the worst as the repercussions of wrong conviction of an innocent person are quite serious and its implications can be felt in the society. Moreover, it is impossible to re-socialise such persons who have been wrongly convicted. It a innocent person charged for the offence of murder is found guilty for murder, sentenced to death and the sentence is executed. In such circumstances, nothing can rectify the implications of the wrong conviction.

In the interest of justice, every step should be taken to ensure that only guilty parsons are convicted. The Supreme Court in Molu’s Case (1976) pointed out that in order to avoid the wrongful convictions, the court should make every effort to disengage the truth from falsehood and shift the grain from the chaff. The apex court in Prafulla Kumar’s Case (1979) laid down that the judiciary can not merely act as a post office or a mouth piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court and any basic infirmity appearing in the case. The court has to involve and evince an active interest by its active participation. The court has to extract truth and for this purpose ask questions to the witnesses and seek clarifications from the parties concerned.

It is an admitted fact that the human behaviour is so complex that a room must be left for a play in the joints, as it is not possible to formulate a cut and dried rules. Every criminal trial is a voyage of discovery in which the truth is the quest, rather the ultimate goal. It is the duty of every one associated with the judicial process, especially prosecutor and defense counsel, to explore the truth and promote the cause of justice. The Malimath Committee in their report has recommended for modification of the law regarding presumption of innocence. The Committee has been subjected to a lot of criticism on this account.
Self Assessment Questions
5) a) Describe briefly the concept of presumption of innocence.
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b) The benefit of doubt, if any goes in favour of whom?
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14.8 SUMMARY
• Indian Criminal Justice System is adversary in nature and depends upon the version of prosecution and the defense Counsel.
• Prosecution plays a very important role in the criminal justice process. The prosecutor represents the state in the court of law and frames the charges against the accused person.
• The prosecutor advances the facts of the case in the court of law and guides the court in respect of the legal position regarding the issues farmed in the case question.
• The prosecutor who is expected to be an expert in law and in the legal technicalities and experienced fellow in court procedure, on one hand has to jot down the facts given by the investigating agency and on the other hand, he has to face internal as well as external pressures regarding the disposal of the case.
• Defense of the charges leveled is equally important in the criminal process, as no one can be condemned un-heard. It is a fundamental principle of both the as well as criminal justice, that any one charged of an offence, must be given a chance of being heard.
• The defense counsel is an important component of the criminal justice system. The Defense Counsel who is supposed to be well versed in the judicial mechanism and legal technicalities has to give a proper advise to his client/accuse and render every possible assistance to the court of law to deliver justice.
• The defense counsel being an important link between the client/accused person has very vital role in justice delivery system. He is expected not to be cowed down by any consideration or any sort of influence or pressure. His assistance and guidance to the court on the issues farmed in the case in question, can enable the court to deliver justice to all.
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• The basic premise of the criminal justice process is that every one is presumed to be innocent in the eyes of law, unless proved otherwise in the court of law. However, there are certain exceptions to this rule.

• The court has a power to draw certain presumptions under certain circumstances.

• The benefit of doubt, if any in the evidence advanced by the prosecution, shall tilt in favour of the accused person. However, it is not benefit of every doubt which can be given to the accused person, but it is only the benefit of the reasonable doubt which can be claimed by the accused.

• The criminal court which is regarded as the fountain of the justice, has to analyse the case presented to it by the prosecution in the light of arguments and counter arguments by the defense counsel and the prosecutor, evidence adduced from the witnesses, facts deduced from the examination and cross-examination of the witnesses and other material evidence on record, and deliver the judgment on the merits of the case.

14.9 TERMINAL QUESTIONS

1) Describe the duty of the public prosecutor?

2) Discuss the status and role of the Defense Counsel in the Criminal Judicial Process.


4) Explain the concept of reasonable doubt?

14.10 ANSWERS AND HINTS

1) Refer to Section 14.3

2) Refer to Section 14.4

3) Refer to Section 14.5

4) Refer to Section 14.6

5) Refer to Section 14.7

6) Refer to Section 14.7

14.11 REFERENCES AND SUGGESTED READINGS

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