Plea Bargaining and Criminal Work-load

Kazi Ebadul Hoque*

From the Annual Report on the Administration of Criminal Justice published by the Calcutta High Court it appears that in undivided Bengal in 1946 there were 22 Sessions Judges, 12 Additional Sessions Judges and 44 Assistant Sessions Judges in total 78 Judges holding session trials with the aid of jury or assessors. Those Courts of Session disposed of in that year 1,810 session cases and those Courts disposed of those cases within on an average 74:5 days of commitment to the Court of Session. In those days session trials were held with utmost expedition within a week from framing of charge against the accused. The author during early days of his practice found that session trials were continuous from day to day without any adjournment and collapse of a session trial for the failure of attendance of any accused or witness to the trial was viewed seriously and the public prosecutor and the concerned police officer had to explain such failure. From the compilation of annual returns submitted by 60 out of 61 District and Sessions Judges to the Supreme Court of Bangladesh it appears that in 1998 there were 381 Judges in the Courts of Session and session level Courts in those districts and out of 1,27,924 pending criminal cases those Courts disposed 61,201 cases leaving 66,723 cases pending. Though jury trial was abolished in 1959 and trial by assessors in 1979 and the trial Judge alone determines the question of fact as well as law, average time required for completing a trial from the time of framing of charge against the accused take from several months to more than a year and the practice of continuing the trial from day to day without any adjournment has long been abandoned causing much hardship to the parties and witnesses discouraging many from becoming a witness. It appears from a report published in the Sangbad on September 15, 2004 that Modan Gopal Goswami was murdered on the night following 28th April, 2002 and charge sheet was submitted by the police on October 10, 2003 and after transfer to the Speedy Trial Tribunal charge was framed on March 29, 2004 and trial commenced on April 12, 2004 and 22 witnesses were examined in 43 working days and judgment was delivered on September 14, 2004. When Speedy Trial Tribunal took

* Justice Kazi Ebadul Hoque, Former Judge, Supreme Court of Bangladesh.

about six months to complete a trial delay in completing a trial in other court could easily be understood.

From the Annual Report on the Administration of Criminal Justice published by the Calcutta High Court it also appears that in undivided Bengal in the year 1946 there were 605 Magistrates dealing with criminal cases. In that year cognizance was taken by those Magistrates in 2,77,507 criminal cases out of 3,75,610 complaints lodged with the Police Stations and Magistrates. Those Magistrates disposed of 1, 74:837 cases including the cases committed to the Courts of Sessions after preliminary enquiry, under the now repealed Chapter XVIII of the Code of Criminal Procedure, abolished in 1979 by the Law Reforms Ordinance 1978. From information supplied by the Cabinet Division it appears that in 1999 there were 3,510 Magistrates in the country and out of 7,01,783 criminal cases they had disposed of 3,95,908 cases in that year including the cases sent to the Courts of Session and Session levels Courts and Tribunals leaving 3,05,875 cases pending.

It appears from a report published in the Daily Star on June 29, 2003 that the Hon'ble Law Minister disclosed in the Parliament on the previous day that after 30th April, 2003 5,69,017 criminal cases were pending in the Session, Session level Courts and Courts of Magistrates.

Pendency of huge number of criminal cases in the Sessions and Sessions level Courts and Courts of Magistrates is a matter of great concern to the administration as well as to the affected persons. If the accused is not released on bail he rots in the jail custody increasing the already over crowded jails which have been accommodating triple the number of its capacity of inmates. Delay in disposal of a criminal cases increased the cost of prosecution as well as the defence. It tells upon the efficiency of the system. What is the way out of this quagmire? Though the number of Judges in the Court of Sessions and Sessions level Courts in 1998 increased to 381 from 199 and number of Magistrates increased to 3,510 in 1999 from 875 in 1994 increasing number of work-load in those Courts could not be prevented. Thus increase in the number of Judges and Magistrates is not the answer to the problem. We are to seriously consider about adopting some other methods to cope with this critical situation. The tool of plea-bargaining may be considered as an answer to the problem.

Before entering into a discussion about the utility of resorting to plea bargaining as a tool of quick and speedy disposal of criminal cases to

cope with the increasing burden of criminal workload and also as a means of minimising the cost both of the prosecution and defence, let us try to understand what is meant by plea bargaining. A criminal trial begins with the framing of charge against the accused by the Magistrate or the Judge before whom he is brought or appears. The charge framed against the accused is read over and explained to him by the Magistrate or the Judge and he is asked as to whether he pleads guilty or not to the charge. If the accused pleads guilty he may be convicted and sentenced by the Magistrate or Judge. Instead of pleading guilty the accused may deny the charge and claim to be tried. In that case, the prosecution has to prove the charge against the accused by adducing evidence against him. As already noted above some time trial of a criminal case continues little over a year. Whether an accused shall enter a plea of guilt or innocence after framing of charge against him is absolutely within the discretion of the accused and his lawyer. When a lawyer is engaged to defend an accused he acts according to the instruction of his client (the accused) but the accused also very much depends on the advice of the lawyer. Defence strategy is decided after mutual discussion between the lawyer and the accused party and study of the prosecution materials by the lawyer. An experienced lawyer knows well from the study of the prosecution materials and discussion with his client what is the chance of success in the trial. If the lawyer finds that chance of success is not a bright one he may advise his client accordingly and with the consent of the client may enter into negotiation with the prosecutor and if both the prosecutor and defence lawyer agree to some measure both of them may jointly approach the trial Magistrate or Judge for his concurrence to such a measure. If the Magistrate or Judge even tacitly consents to such agreed measure the deal is struck and the accused pleads accordingly. The entire process beginning from negotiation by the defence lawyer (with the consent of his client) with the prosecutor and the measure to be taken agreed between them and tacit consent of the Magistrate or Judge to the same is called ‘plea bargaining’ because through this process is decided what plea would be entered before the Court by the defence. By the process of negotiation between the prosecutor and defence lawyer it is decided whether the accused would plead guilty to the prosecution accusation of the offence or to a lesser offence, if there is scope to do so, or whether he would plead guilty to the prosecution accusation of the offence, on an assurance of lesser sentence to be awarded for which tacit concurrence of the Magistrate or Judge is necessary. Entering a guilty plea by the accused saves the prosecutor trouble of time consuming

process of proving the case against the accused by bringing the witnesses to the Court and also cost of such trial. Similarly the Court is spared the trouble of examining witnesses consuming much judicial time and achieving quick disposal of a case lessening his fattening work-load. The defence is saved from the anxiety of uncertainty of the result of the trial and the cost of defending the case on the assurance of cellain known sentence to be suffered by him.

It is now clear that the tool of plea bargaining is more useful to the prosecutor and the Magistrate or Judge in disposing of criminal cases speedily saving much time and avoiding uncertainty of the result of a contested trial. Moreover the Magistrate or Judge is saved from the embarrassment of reversal of his judgment on appeal. Similarly the accused also can avoid uncertainty of the result of trial to be undertaken for which much expenses are necessary to engage an experienced lawyer and he knows in advance what sentence he is going to suffer through plea bargaining. Moreover under such a deal the accused may get a suspended sentence or probation if allowed under the law or merely a sentence of fine where the offence is punishable either with imprisonment or fine.

A study about the rise of plea bargaining in the United States of America shows that from the early nineteenth century the prosecutors resorted to plea bargaining to cope with the increasing work-load in the criminal Courts. Where the prosecutors had the power to negotiate pleas without any participation of the Judge he would do so and persuaded the accused to plead to one or more of the several charges in exchange for his dropping the remaining charges or (in the case of murder) reduced the charge to a lesser offence of manslaughter or grave injury. This type of plea of bargaining is better known as 'charge bargaining; thereby assuring the- accused reduced sentence. This type of bargaining required the concurrence of the prosecutor and the accused and the Judge was an stranger to such a deal. The study fu11her found that in the later nineteenth century Judges played dominant role in plea bargaining by conceding to prosecutor's request of awarding reduced sentence. This type of plea bargaining is better known as 'sentence bargaining'. Though Judges initially refused to participate in plea bargaining process were compelled to do so due to crushing work-load of criminal cases when by legislation prosecutor's power of charge bargaining was curtailed.

It is curious to note why the accused participated in the effort of the

prosecutor or the Judge to reduce their workload. Chances of acquittal in the trial was always uncertain and to undergo a trial required much expenses. It was very much difficult for an indigent accused to defend himself by engaging a lawyer spending huge amount of money. Moreover in petty offences like liquor offences or traffic offence sentence was only fine. The expenses of defending such a case was higher than the sentence of fine likely to be awarded. In case the Defence failed the Magistrate or Judge was likely to award higher amount of fine than in case of entering a guilty plea by the accused. A habitual offender is likely to be awarded higher sentence if he undergoes trial through pressing his previous conviction by the prosecutor than in case of entering a guilty plea when the prosecutor overlooks his previous conviction. In many cases first offenders are not sent to prison but to a deferred sentence and released on probation on furnishing bond by a citizen for his good conduct during the period of such probation failing which he is to suffer the sentence awarded. Probation encourages an accused to enter a guilty plea rather than not guilty plea risking a trial. If the accused pleads guilty than he is more likely to get a probation than to be sent to prison if he pleads not guilty.

George Fisher in his book 'Plea Bargaining's Triumph' (Stanford, California 2003) opined at page 16:

> "By (nineteenth) century's end, all three of Court room's actors - prosecutor, defendant (accused is called defendant in USA) and Judge had found reasons to favour the plea bargaining regime. For prosecutor and Judge, who together held most of the power, that mattered, the spread of plea-bargaining did not merely deliver marvelously efficient relief from a suffocating workload. It also spared the prosecutor risk of loss and the Judge the risk of reversal and thereby protected the professional reputation of each. In fact by erasing the possibility of either factual or legal error in the proceedings, plea bargains protected the reputation and hence legitimacy of the system as a whole."

The same author at page 222 of his book after evaluating the progress of plea bargaining in the twentieth century opined:

> "And yet since the creation of sentencing guidelines, (restricting Judges discretion of awarding reduced sentence) plea *bargaining* in American Federal Courts has advanced with striking speed. The guidelines official1y took effect .in November l987, but they did not begin to dictate the vast majority of federal sentences until after the Supreme Court declared them constitutional in 1989. In that year eighty four percent of

> adjudicated federal cases ended in guilty pleas (see Table 9.1). By 1991 the guilty plea rate had begun its relentless climb, reaching ninety four percent by century's end. During the last decade of the twentieth century, therefore, the rate of federal criminal trials fell from sixteen percent of adjudicated cases to only six percent, a drop of more than three-fifths."

The said author analyzed how the restriction on the Judge's discretion to award lesser sentence was circumvented by the prosecution and the Judge resorting to new methods of plea bargaining. These are according to the said author, 'fact bargaining', in which prosecutor and defence lawyer contrive to hide the defendant's unflattering relevant conduct from the Court, and 'range bargaining', in which defence lawyer and prosecutor agree to recommend that the Judge impose a sentence at the lower end *of* the guideline range. Other methods of plea bargaining, according to the said author are 'guideline factor bargaining' and 'substantial assistance bargaining'. In guideline-factor bargaining the Judge has the power to grant two or three level discount of sentence for acceptance of responsibility by the accused and the prosecutor agrees to recommend this discount in exchange for guilty plea by the accused. In substantial assistance bargaining Judge has the power to adjust sentence of the accused depending on the role he played in the crime. In such circumstances if the accused pleads guilty after disclosing that he pat1icipated in the crime duped by other members of the gang, the prosecutor recommends to the Judge to award reduced sentence for substantial assistance.

History of plea bargaining in the USA shows that it was initiated by the prosecutors to cope with the increasing workload at a time when they had the option to drop some of the charges in exchange for guilty plea by the accused to the other charges reducing the quantum of sentence and the Judges could also reduce the sentence in exchange for a guilty plea by the accused when they had the discretion to award any minimum sentence within the prescribed maximum sentence. In course of time by legislation such discretion of the prosecutor and the Judge has been curtailed. In spite of cut1ailment of such discretion both the prosecutor and the Judge devised new means to sustain plea bargaining with the active co-operation of the accused and his lawyer especially the public defender, an office created to assist the poor defendants who are unable to provide defence against criminal charge by engaging a lawyer. Plea bargaining in the criminal justice system is not an officially recognized tool of administration of justice in the USA. Yet this informal means has

succeeded in playing a dominant role in the criminal justice system with the active co-operation of the prosecutor, Judge and defence. Of late the system has found place in the English Criminal Justice System as a new entrant, of course unofficially.

In our country normally accused pleads guilty to minor offences like traffic offences, Metropolitan Police offences and some other petty offences which entail a sentence of fine only not as a result of any plea bargaining with the prosecutor but to avoid the harassment of lengthy trial and expenses in the Magistrates' Courts. Since major offences are tried by Courts of Session and Session level Courts there is hardly any guilty plea in those Courts which awards higher period of imprisonment and death sentence. In capital offences there is discretion of the Judge to award either death sentence or imprisonment for life. In murder cases there is scope to plead to a lesser offence of culpable homicide not amounting to murder (Section 304 of the Penal Code) and even to much lesser offence of grievous hurt (Section 326 of the Penal Code). In theft cases there is scope for pleading to lesser offence of receiving stolen property (Section 411 of the Penal Code) and in robbery or dacoity case there is also scope for pleading to a lesser offence of receiving propel1y stolen by robbery or dacoity (Section 412 of the Penal Code). In case of criminal breach of trust there is scope for pleading to a lesser offence of criminal misappropriation (Sections 403 and 404 of the Penal Code). There is also scope for pleading to lesser offences of cognate nature in various other cases under the penal laws. Moreover amended provision of section 35A of the Code of Criminal Procedure gives ample opportunity to employ plea-bargaining. If an accused deprived of the privilege of bail, especially indigent ones, spends long period in jail custody he may be persuaded to enter a guilty plea in exchange for his release from jail custody. This initiative can be taken by the prosecutor or the Magistrate or Judge in case the accused is undefended. If the accused is defended by a lawyer such initiative can be taken by the defence lawyer with the consent of his client when he finds little chance of success in a trial. When out of several accused in a case some are on bail and rest in custody for long time those on bail might be interested in a trial but it is in the interest of those in custody to enter in a guilty plea in exchange for an assurance of release from custody. In such a case those on bail might be tried after convicting and releasing those in custody on the basis of their guilty plea without waiting for completion of others' trial.

In our country there is great propensity to enter a not guilty plea and to claim trial without examining the prosecution materials and considering the chances of success in such defence. There is also propensity in our country to gain over prosecution witnesses and even to threaten them when attempt to gain over fails. There is also propensity of influencing the other operatives in the criminal justice system. Such evil methods are resorted to by the resourceful offenders and not by the ordinary indigent accused persons who form the bulk of the accused charged with criminal offences. Most of them are even unable to engage a competent lawyer to defend them for want of resources. Except in capital offences state defence is not available to the bulk of the indigent offenders defended mostly by inexperienced lawyers, if they could at all engage one with their limited resources. Of course there is provision, for legal aid for the poor litigants but neither fund is sufficient nor the system is workable. End result is most of the indigent offenders remains undefended. When such is the scenario accused persons and their engaged lawyers should seriously consider the chances of success in the trial of a criminal case. If the lawyer after examining the prosecution materials and consultation with the accused finds that the chance of success in the trial is very little rather it would entail harsher sentence he should persuade his client to agree to enter a guilty plea and then the defence lawyer should negotiate terms of such plea with the prosecution. It could be a guilty plea to a lesser offence than one contemplated by the prosecution or it could be a guilty plea to the offence contemplated by the prosecution on the assurance of the prosecutor to recommend for awarding a lesser sentence than normally awarded. In cases where conditional discharge or probation is available to the accused under sections 4 and 5 respectively of the Probation of Offenders Ordinance, 1960, the prosecutor should recommend for such conditional discharge or probation in exchange for a guilty plea by the accused. The prosecutor would gain more than the defence by obtaining a guilty plea thereby securing a conviction of the offender without going to trial saving time and cost as well as trouble of adducing evidence. The Magistrate or the Judge would also gain by conceding to the request of the prosecutor to reduce the charge or to award lesser sentence or conditional discharge or probation enabling him to reduce the crushing burden of work-load. Moreover there is risk of reversal of the decision of the Magistrate or Judge by the Appellate or Revisional Court if plea bargaining request by the prosecutor is not conceded to by him. When the prosecutor, defence as well as the Magistrate or the Judge is going to

gain from plea bargaining why not give a trial to the same. Of course, there is no legal sanction under the law to do so. But there is also no legal bar or prohibition to do so. Not only the prosecutor and Magistrate or Judge gains from plea bargaining by reducing the crushing work-load of criminal docket but the Government also gains from efficient management of the criminal cases and reducing the number of pending cases. It is said habits die hard and people are shy to adopt new methods and tools. If we desire to improve the system of criminal justice in the country the prosecutor, defence and Magistrate or Judge should act in unison to introduce plea bargaining in the system.