REVISITING THE JUDICIAL CONUNDRUMS OF DISCHARGE IN CRIMINAL PROCEEDINGS: TRACING THE ALTERNATIVES FOR TRADITIONAL APPROACHES

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Abstract

The pendency of cases in Indian Judiciary has been a recurring concern. According to the government sources, there are 4.9 crore pending cases in subordinate courts while 58,000 in High Courts. The clearance rate was at its lowest at 0.79% by the end of 2021. Backlog and high pendency has wide-scale ramifications, the most fundamental of which is denial of the basic right to justice to undertrial prisoners who keep languishing in jail for long periods. Structural barriers denying fundamental safeguards to the accused for his need of speedy justice negates the cardinal principles of Indian criminal justice system which is primarily based on the due process model. Interestingly, in a system where the presumption of innocence holds paramount importance and apart from many other provisions which is even reflected in the scheme of trial procedure, the attitude of courts towards the procedure of discharge poses varied anomalies.

The present research paper in the backdrop of the aforesaid facts attempts to-firstly, as certain the extent to which judicial mind is permissibly applied at the stage of discharge. Secondly, this study in the backdrop of NCRB data and select elopement cases of adolescent girls and subsequent criminalization, aim stobringout the elements of one of the most important yet occasionally used provision of discharge as one of the measures to combat pendency. It explores the possibility of altered approach towards discharge asamed ium to reduce the length of a criminal case and the pendency of criminal cases.

Key Words: *Discharge, Due Process, Pendency, Speedy Justice & Presumption of Innocence.*

1.Introduction: Understanding presumption of innocence in due process model

The Indian criminal justice system has a colonial legacy and is largely adversarial in nature.[1] It finds its roots in the "Due Process Model", consequentially "presumption of innocence" plays a very prominent role in criminal trials whereby the judiciary decides on the guilt of the accused by applying the ancillary principles namely, "proving beyond reasonable doubt" and giving the benefit of doubt to the accusedif the guilt is not proved[2]

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[1]The Code of Criminal Procedure 1973,Section 313, No. 2, Acts of Parliament, 1973 (India).
[2]1 MINISTRYOF HOME AFFAIRS, COMMITTEEON REFORMSOF CRIMINAL JUSTICE SYSTEM(Government of India 2003).

The over-crowded prisons, incidence of recidivism and high acquittal rates points towards something amiss about the system. Cases are dragged into a quagmire of technical details for years and even decades, while the victims of injustice continue to suffer. Their suffering is aggravated by the severe rigours of pursuing complicated and expensive legal procedures. There is very little attempt to arrive at an amicable settlement.

The criminal justice machinery in India is driven by due process that is shouldered by the adversarial adjudicatory process. The system is applauded not just for the protections it gives to the accused but also the extensive presentation of evidence and arguments to arrive at an accurate outcome. The judiciary discourages the role of thejudge as a mere spectator and advocates for a participative role.[3] Due process model acknowledges the state inflicted drastic deprivation of dignity and liberty upon initiation of criminal process against an offender.[4] In contrast to the crime control model, there is a presumption of innocence and full opportunity is given to an accused to discredit the case of investigative and prosecutorial agencies before an impartial authority. The Code embodies the principles underlying Articles 14, 19 and 21.[5] The constitutional spirit of justice, reasonableness, fairness and equality not only give access to justice to the victims of crime but also give body to the rights of an accused who is in fact the person on trial.

The Presumption of innocence follows the accused throughout the trial[6] until his guilt is proved beyond reasonable doubt.[7] This principle is embedded at every pre-trial as well as trial stage, including the under-utilised provision of discharge in the Code of Criminal Procedure.[8]

A preliminary hearing called 'hearing on discharge' assists the Court in identification of the specific issues and the number and need of witnesses. It also helps determine the prospective length of the trial, if the hearing points to the fact that the accused committed the offence. This stage is crucial for the most significant reason, that is, to explore alternatives of reducing the length of trial and adopting means that would serve the ends of justice without a protracted trial. When it is abundantly clear by way of lack of evidence, weak allegations and no material on record to explain the accusations against the accused, the Court has power to cut short the criminal process and let the accused be discharged. This stage, if approached with caution, curiosity and conviction, can help reduce the number of under-trials locked up in the prisons.

The under-trial population in prisons have prompted the Supreme Court to issue several directions[9] for release/discharge of accused in case of minor offences and offences punishable up to seven years except the economic offences. Burgeoning pendency of cases is also symptomatic of a diseased criminal justice system- the very system operating as an engine of oppression.[10]

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[3]Ram Chander v. State of Haryana, (1981) 3 SCC 191.

[4]HerbertL.Packer,Two Models of the Criminal Process, 113UNIVERSITYofPENNSYLVANIAL.REVIEW1–68 (1964).

[5]INDIA CONST, art. 14, 19 & 21.

[6]Leonard Munker, Preserving the Presumption of Innocence 49(1) J. KANSAS BAR ASSOCIATION49-54 (1980).

[7]Joseph Sorrentino, Demystifying the Presumption of Innocence 15 GLENDALE L. REVIEW16-26 (1996).

[8]The Code of Criminal Procedure 1973,Section 227, 239, 245, No. 2, Acts of Parliament, 1973 (India).

[9]Common Cause v. Union of India AIR 1996 SC 1619.

[10]177 LAW COMMISSION OF INDIA, REPORT ON LAW RELATING TO ARREST 65 (Ministry of Home Affairs 2001).

This grave situation can be remedied by identifying the specific causes of pendency at each stage and targeting them. The high acquittals signify that in most of the cases trial wasn't necessary if there had been application of mind at the pre-trial stage of discharge/framing of charges in order to weed-out cases which were groundless or malicious, with no chances of securing conviction.[11]

Figure 1: Nature Wise disposal of Criminal Cases 2022 (Source: National Judicial Datagrid, available at: https://njdg.ecourts.gov.in/njdgnew/?p=alert_dashboard/index)

2. Pre-Trial Discharge in Due process model: A Safety valve

The Due process model of Herbert Packer which aims at providing due process or fundamental fairness by way of procedural safeguards focuses more on accused's rights. The prime focus on protecting the rights of accused stems from the fact that firstly, the accused is presumed to be innocent until proven guilty and secondly, he is pitted against the mighty state. The criminal process in a due process model sets legitimate obstacles to the State which must be negotiated to secure a conviction. Apart from various such obstacles posed in the course of arrest, detention, there are many such safeguards in the pre-trial as well as during the trial stage. One such safeguard is the provision of discharge of the accused. Pre-trial discharge is a filter which is used to weed out cases instituted on no firm ground, with or without malicious intent. This stage acts as a safety valve and is used to protect the accused from wrongful prosecution and the ensuing harassment.

2.1 Discharge in Warrant and Sessions Case

The discharge under the Code of Criminal Procedure has multi-faceted reasons. Courts discharge an accused when there is no sufficient ground for proceeding[12] (Figure 1) or when on the day fixed for the hearing, the complainant is absent and the offence is such which can be lawfully compounded or is non-cognizable. The discharge in both the above stated case happens prior to framing of charges. The Code of Criminal Procedure provides for pre-trial discharge in cases of Trial of warrants case by Magistrate (case instituted on Police report/Otherwise than on police report) and Trial before a Court of Session (figure 1). It doesn't make such provision in Summons cases tried by Magistrate or the Summary trials.

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[11]245 LAW COMMISSION OF INDIA, REPORT ON ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MAN POWER 6(Ministry of Home Affairs 2014).

[12]The Code of Criminal Procedure 1973,Section 227, 239, 245, No. 2, Acts of Parliament, 1973 (India).

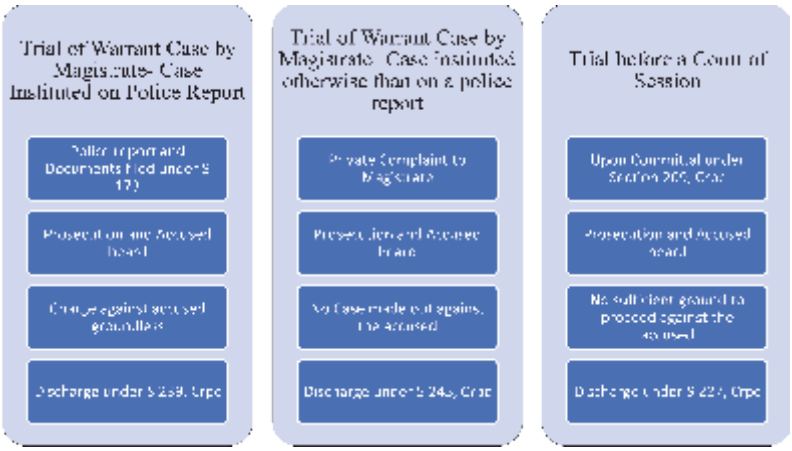

Figure 2:Discharge in different kind of cases at Pre-trial Stage

This is the stage where the court has an opportunity to weed out merit less cases at the very inception. Lack of establishment of prima facie case against the accused is likely to result in the discharge of the accused. This stage is also an opportune time to nip the issue of pendency of cases in the bud, by removing frivolous or un-merited cases which end up taking the crucial and precious time of the court. However, courts in India are apprehensive of discharging the accused because they are required to give a reasoned order for the same, in contrast to the other alternative i.e. framing of charges[13] which doesn't require any reasoning whatsoever. The precautionary approach of the court in matters of discharge is also mirrored in the National crime Records Bureau Data which shows a mere 7% of accused persons being discharged, while 51% of being convicted and 42% acquitted for the offences under Indian Penal Code (Figure 3).

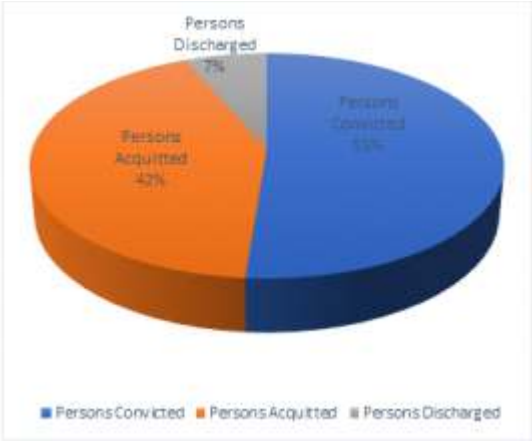

Figure 3: Disposal of Persons accused of crime under IPC (Source: 'Crime in India 2021', National Crime Record Bureau)

[13] Id., Sections 228, 240, 246.

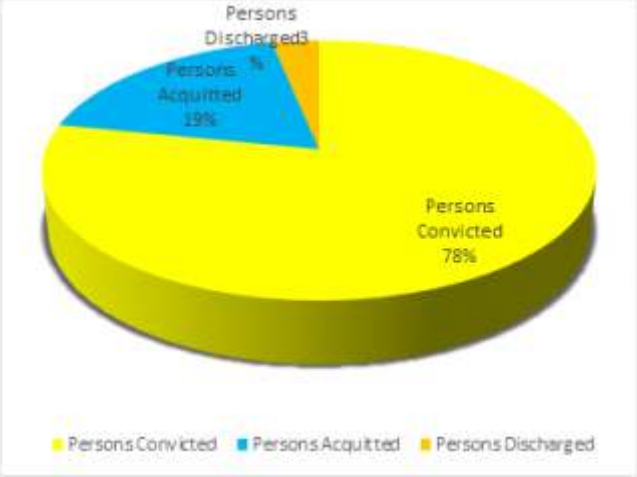

Figure 4: Disposal of Persons accused of crime under Special and Local Laws (Source: 'Crime in India 2021', National Crime Record Bureau).

The long periods of pre-trial detentions not just hits the presumption of innocence of the accused but also denies their fundamental right to speedy justice and their right to life and liberty guaranteed by Article 21.[14] As per Prison Statistics of India, there were 3,71, 848 undertrial prisoners and 1,12,589 convicts out of the total 4,88,511 prisoners in the year 2020. The number of undertrials in Indian prisons has seen an increase from the previous two years (2018, 2019). The languishing undertrials which has always been a matter of concern in terms of burgeoning prison population also has an economic downside. Long trials has always been an expensive affair, for instance the trial of Nitish Katara case went for 12 years and cost 5.8 crores to the exchequer.[15] It is also evidenced by the prison expenditure of 5814 crore (86.3%) out of the total sanctioned budget for the financial year 2020-21 Rs. 6740 Crore.[16] The brunt of the procedural lapses and the misplaced systemic practices is borne by the State exchequer which has to spend humongous money in maintaining undertrial prisoners.

Pre-trial diversions such as compounding,[17] plea-bargaining[18] and quashing[19] are another good alternative to cut short the period of trial and expeditiously dispose off the matter. While the order of compounding and plea-bargaining are of acquittal and conviction, respectively, the order of quashing results in discharge of the accused.

2.2 Discharge in Summons Case

[14] Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979 SC 1369.
[15] THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/nitish-katara-murder-case-cost-rs-5-8-crore-to-exchequer/articleshow/46148033.cms?from=mdr (last visited Sept. 8, 2022)
[16] NATIONAL CRIME RECORDS BUREAU, PRISON STATISTICS OF INDIA, 263 (Ministry of Home Affairs, 2020).
[17] The Code of Criminal Procedure 1973,Section 320, No. 2, Acts of Parliament, 1973 (India).
[18] Id., Section 265A-L.
[19] Id., Section 482.

The Code of Criminal Procedure doesn't make a provision of discharge in summons cases like those in warrant and session cases. However, the judicial pronouncements over the period had unsettled the law by allowing discharge in summons case.[20] There are counter decisions in congruence with the legislative scheme as well.[21] The course set by these catena of decisions reading the provision of discharge in summons case has been corrected in the case of *Amit Sibal v. Arvind Kejriwal*[22] which is in harmony with the legislative scheme. This sentiment has also echoed by the Delhi High Court in a recent decision.[23]

The rationale for not having discharge provision in summons case is reflected in the legislative intent[24] which did not envisage summons case to be as protracted as a warrants case, thus elaborate hearing at the time of framing of charges was deliberately avoided. However it is pertinent to note that trial of summons cases these days are as long drawn as a warrants case, thus there is no plausible reason to make the accused face a protracted trial and deny the right to argue for discharge.

2.3 Revision by Sessions Court and the High Court

The discharge provisions require the Judge to "record his reasons" for discharging the accused. Moreover, Magistrate cannot pass an order of discharge until he examines all prosecution witnesses.52 It will be illegal to pass an order only upon examination of complainant.[25] A reasoned order is needed because the same is subject to revision by a higher court i.e. the Sessions Court or the High Court as the case maybe.[26]

If the discharge application of the accused is rejected then he may approach the High Courts challenging the same or even pray the quashing of proceedings against him. This order is, thus, not an interlocutory one and revision is maintainable under S. 397 of the Code[27]

The Law Commission of India suggested conferring the Magistrate with the power to restore the case on good and sufficient cause and re-summon the accused to face the trial on merits in cases where the accused had been discharged previously. This will not only ease the inconvenience caused to the aggrieved party who is asked to knock the doors of High Court in such event but also ease the burden of the High Court, which will have to rehear the entire matter by virtue of its inherent power under s 482.

2.4 Discharge in Foreign Jurisdiction

2.4.1. The United States of America

In the United States, the Federal Rules[28] comprise of the procedure for a preliminary hearing.[29] It is mandatory for the Magistrate to hold such hearing in 14 days of his initial

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[20]Arvind Kejriwal &Anr. v. Amit Sibal & Anr., (2014) HCC (Del) 719; Bhushan Kumar v. State (NCT of Delhi) (2012) 5 SCC 424.

[21] Subramanium Sethuraman v. State of Maharashtra &Anr., (2004) 13 SCC 324.

[22]2016 SCC OnLine SC 1516.

[23]R.K Aggarwal v. Brig. Madan Lal Nassa & Anr., 2016 SCCOnline Del 3720.

[24]41 LAW COMMISSION OF INDIA, REPORT ON THE CODE OF CRIMINAL PROCEDURE 1898, 178(Ministry of Home Affairs 2001).

[25]Yashodabai Keshav Thakur Desai v. Bhaskar Moreshwar kamat, 1972 SCC OnLine Bom 52.

[26]R.S Nayak v. A.R Antulay, (1984) 2 SCC 500.

[27]MCD v. Girdharilal Sapuru & Ors., 1981 (2) SCC 758.

[28]US Federal Rules of Criminal Procedure, 2020.

[29]Id., Rule 5.1.

appearance and if he is not in custody, then within 21 days or any other time upon satisfaction of extraordinary circumstances.[30]

Unlike Indian process, at the hearing, the US rules allow the accused to produce evidences and even cross-examine witnesses but cannot challenge the legality of process adopted by the Prosecution in obtaining the evidence.

The hearing helps the Court ascertain the commission of impugned offences by the accused before it. And if the outcome is affirmative, accused is promptly required to appear for trial.67 If the Magistrate is convinced that the accused did not commit the offence, he must dismiss the complaint and discharge the accused.68 The discharge does not preclude prosecution for the same offence.

There is also a stark contrast in procedure adopted in the U.S. and in India. While the rules in U.S. allow the accused to present evidence, the Code in India restricts the involvement of accused to raising objections orally in a hearing. Merely permitting oral submissions without the provision to produce evidences to substantiate the arguments would be a futile exercise. Only with an open-mind and a rights-based approach can the Court really assess the strength of the case made out against the accused at the preliminary stage itself.

2.4.2 Singapore

The concept of a pre-trial hearing is prevalent in another common law country that is Singapore. A pre-trial conference like this happens after the stage of plea of guilt however the objective behind it is to disclose the case to the Court as well as the accused. For this reason the provision for the same is called 'criminal case disclosure conference' and is laid down in S. 160 of the Criminal Procedure Code, 2010. It is a formal process that facilitates the trial by help of parties who outline their cases and evidences for the Court to determine if a case is made out against the accused person or not.

2.4.3 New Zealand

To assess the pre-trial delay and ensure there is sufficient support to take the matter to trial, the Court requires the prosecuting agencies to establish a preliminary case before it. The Criminal Procedure Act, 2011 of New Zealand provides for a 'pre-trial admissibility hearing' under Section 78. This hearing plays a significant role where the Court is convinced to deal with issues, the adjudication of which does not require the commencement of trial as a pre-condition. Moreover, if the Court believes the evidence is such that if the admissibility is not decided at a pre-trial stage, it may affect the overall proceedings. And finally, this hearing helps clearly ascertain whether the need for a trial is precluded.

2.4.4 Realm of International Law

Discharge finds its relevance in principles of international law where pre-trial release is encouraged in matters where charge is unfounded upon an impartial investigation[31] According to it, the prosecutors are under the duty not to continue prosecution or make effort to have the proceedings stayed. Other agencies like investigators and the police

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[30]Ibid..

[31]Tokyo Rules, Rule 5.1; UN Guidelines in the role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27th August to 7th September 1990, at paras 14 and 18.

should be permitted to discharge the accused if it is found that proceeding with the course of law is unnecessary for a particular matter.[32]

The International Criminal Court (hereinafter 'ICC') follows a hybrid of adversarial and inquisitorial system.[33] Its procedure is governed by the Rome Statute[34] and comprises of a stage of confirmation of charge before the trial actually begins. As per A. 61 the Court is required to hold a pre-trial hearing to approve the charges proposed by the Prosecution in presence of both parties and their counsels. The charges are substantiated by the Prosecution with documentary or summary evidence and the accused may object to charges, challenge the evidence and even present evidence.[35] Upon such hearing, the charges may be confirmed by the Pre-Trial Chamber or declined in light of insufficient evidence or an adjournment may be granted.[36]

When a charge has not been confirmed by the Pre-Trial Chamber of the ICC, the same acts as a blockade for unscrupulous and unnecessary proceedings against the accused. As a consequence all the restrictions upon the accused are also lifted and have the effect of discharge.

India has neither ratified nor signed the Rome Statute. But international practices and trends have often shaped the legislations especially in light of human rights jurisprudence. The opportunity to contradict the Prosecution evidence and to present own material can make the charge hearing a fruitful process rather than a mere formality before commencing a full-blown trial. Similarly, with respect to the procedure of a pre-trial hearing adopted in other jurisdictions does not absolutely match the Indian process for a hearing on discharge but the objective behind them is the same. For this reason, when this hearing is to be conducted is not the prime question. The importance of this hearing lies in the provisions for active involvement of the accused while weighing prosecution material to find out whether the Court requires an elaborate trial to convince itself of the accused's role in the crime.

3. Judicial approach towards "Discharge": Analysis of Role of Accused

The determination of the issue whether the trial court at the stage of discharge has the power to receive the material filed by the accused has recently drawn the attention and attempt has been made to evaluate the effect of providing the opportunity to the accused to adduce material at this pre-trial stage.

The Supreme Court in *Minakshi Bala v. Sudhir Kumar*[37] explained the scope and ambit of Section 239 and 240 of the Criminal Procedure Code, 1973- that the Magistrate after considering the police report[38] and the documents sent with it, can examine the accused, if required, and provide an opportunity of being heard to the prosecution as well as the accused. If upon such exercise, charge is found to be groundless then the Magistrate can discharge the accused in accordance with Section 239 CrPC; alternatively, if there is a ground for presuming the guilt of the accused, then the Magistrate has to frame the charge under Section 240 CrPC.

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[32]UN Guidelines on the Role of Prosecutors, Id. at para 18.

[33]Kress. Claus, The Procedural law of the International Criminal Court in outline: Anatomy of a unique compromise:, 1 J.INAT'LCRI. JUSTICE 603-17(2003).

[34]Rome Statute of the International Criminal Court, OHCHR 1998

[35]Id, Art. 16.

[36]Id, Art. 61.

[37](1994) 4 SCC 142.

[38]The Code of Criminal Procedure 1973,Section 173, No. 2, Acts of Parliament, 1973 (India).

Whether or not the accused can adduce material at the time of discharge was decided by the Supreme Court in *Satish Mehra case*[39]- If the accused succeeds in producing any reliable material of sterling and unassailable quality at that stage which might fundamentally affect the sustainability of the case, it would be unjust to discard such material by the court at that stage.

Thus, if the case ends there it saves a lot of time of the Court, efforts and cost. When the judge is reasonably certain that are less chances of conviction, the precious time of the Court should not be spent on holding a trial only for the purpose of completing the formality ergo it is advisable to snip the proceedings at the stage of Section 227 of the code itself.

The Supreme Court in State Anti-Corruption Bureau v. P. Suryaprakasan[40] went against its stand in Satish Mehra case that the court should not have rejected the application of discharge without applying its mind and considering the entire materials and explanation produced by the accused and held that the accused has at this stage has only the right of being heard and nothing beyond that.

The matter has been settled by the Supreme Court in *State of Orissa v. Debendra Nath Padhi*[41] where it was held that the accused has no right to produce any material/evidenceat the time of framing of charge and that the precedent set by Satish Mehrais per incurriam and against the mandate of the statutory scheme.

The Supreme Court has recently in *Nitya Dharmanand*[42] departed from the previous *Debendra Nath Padhi*[43] position by holding that the accused can present fresh material of "sterling quality" at the stage of framing of charges itself, if the material had been withheld by the prosecution. This reinforces the objective of framing of charges of filtering out wrongful prosecutions saving the accused to go through the ordeal of a full-

	Nature of Offence	Pending for	Reason
1.		More than 2 years	Noservice of summons to the accused or any other reason
2.	Traffic Offences Offence under IPC or any other law which iscompoundable with the permission of the court	More than 2 years	trial not commenced
3.	Offence under IPC or any other law- Non-cognizable & Bailable offence	More than 2 years	trial not commenced
4.	Offences under IPC or any other law which are punishable with fine only and are not of recurring nature	More than 1 years	trial not commenced
5.	Offences under IPC or any other law punishable upto	More than 1 years	trial not commenced
6.	Offences under IPC or any other law punishable upto	More than 2 years	trial not commenced

[39]Satish Mehra v. Delhi Administration, (1996) 9 SCC 766.
[40](1999) SCC (Cri) 373.
[41]AIR 2005 SC 359.
[42]Nitya Dharmananda v. Sri Gopal Sheelum Reddy Criminal Appeal No. 2114 of 2017.
[43]State of Orissa v. Debendra Nath Padhi, Appeal (crl.) 497 of 2001.

fledged trial.

Regarding the issue of pendency in courts, the Supreme Court in *Common Cause v. Union of India*[44] issued directions encouraging courts to use the tool of discharge or acquittal and close the case in following enumerated matters:

Table 1: Cases fit for Acquittal/discharge and closure (Source: Common Cause, 1996)[45]

4. Evaluating the collaterals of mechanical framing of charges: A case study of elopement in romantic relationships

The primary objective of conducting a criminal trial is to ascertain the guilt of the accused by following a fair procedure and giving equal opportunity to both - the prosecutor and the accused. Trial generally commences after the conclusion of investigation (except in cases instituted otherwise than on police report) with the prosecution opening the case, which is followed by submissions of the defendant. The court at this stage has to sift through the material on record and ascertain if there is sufficient ground for proceeding against the accused (Figure 5) ergo either discharging the accused or proceeding with the framing of charges.

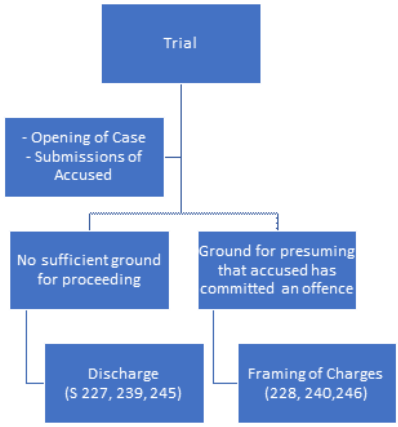

Figure 5: Process of Trial (Warrants and Sessions Case)

4.1 Framing of Charges

The court by applying its judicial mind[46] frames the charges only if there is a prima facie case and sufficient ground for proceeding against the accused. This judicial exercise of evaluation of the materials on record for framing of charges must be a reasoned order, to maintain sanctity of the accused's rights to know the grounds.

However, the Apex Court in *Bhawna Bai*[47] doing away the need for citing reasons in an order framing charges undermines the importance of this stage- reducing it to a mere formality- and thereby violating the crucial statutory right of an accused.

This decision is in complete disregard of the earlier decision *R.S Mishra v. Union of India*[48] where the Supreme Court held that the order framing charges should be clear and self-

[44]Satish Mehra v. Delhi Administration, (1996) 9 SCC 766.
[45]Common Cause v. Union of India, AIR 1996 SC 1619.
[46]Union of India v. Prafulla Kumar Samal, AIR 1979 SC 366.
[47]Bhawna Bai v. Ghanshyam, (2020) 2 SCC 217.
[48]R.S Mishra v. Union of India, Criminal Appeal No. 232 of 2005.

explanatory.This is in consonance with the legal right of revision available to an accused under Section 397 of the CrPC against an order framing charges. A revision can be preferred against an illegal or perverse order of framing charges, which post *Bhawna Bai* would be difficult to establish for it will be a non-reasoned order.

Bhawna Bai relying on *Kanti Bhadra Shah*[49] justified the need of giving reasons while framing of charges on the grounds of 'overburdening the already burdened trial courts with extra work'. This decision is in complete disregard of the constitutional and statutory rights of the accused, the principles of natural justice and the precedent set by *R.S Mishra* and *Prafulla Kumar Samal*.

Bhawna Bai, by endorsing *Kanti Bhadra Shah*, has opened the avenue for a perilous practice of trial courts to stop giving reasons in orders framing charges. This will supposedly pose serious repercussions to the accused, who will now have to withstand a possibly wrong, illegitimate and malafide prosecution till the end of trial. In fact, this will further increase the burden of the trial as well as High courts. It also runs against the cardinal principle of 'presumption of innocence'- where on one hand the discharge of the accused which upholds innocence of the accused requires reasons to be given, whereas the framing of charges pointing towards the guilt requires no reasons to be given.

4.2 A Case Study of Adolescent Sexuality

The law on age of consent[50] qualifies the consensual sexual relationship by an under 18 year-old as rape. This female under 18 years is assumed to have no sexual agency or sexual autonomy in the eyes of the law. This law on statutory rape, also called as the Romeo Juliet law in other jurisdiction has far reaching consequences. It is being excessively abused by the parents of the girl child to implicate her paramour for the offence of rape/penetrative sexual assault. Similarly, the instances of elopement of a girl child are labelled as kidnapping from lawful guardianship. This is so, because the offence of kidnapping from lawful guardianship doesn't consider the agency of the minor male or minor female, but gives credence only to the consent of the guardian.[51]

The legal framework on consensual adolescent sexuality is dragging minors into the criminal justice system. This over-criminalisation is leading to traumatic experience for minor and also over-burdening the State machinery. This is further complicated by the conflicting judicial discourse on interpretation and enforcement of the legal framework on sexuality. The age profile of the kidnapped/abducted female child victim and the purpose of kidnapping as given in NCRB Data corroborates the criminalization of underage sexuality. The share of female child victims in the age bracket 16-18 years kidnapped/abducted is 58% of the total child victims, while those in 12-16 years constitute 37% (Figure 6).

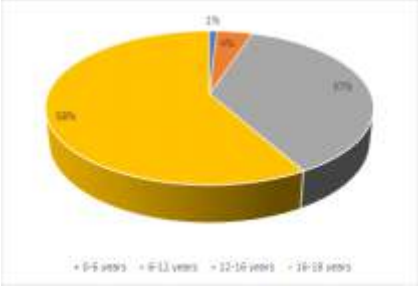

Figure6: Age-profile of Kidnapped/Abducted Female Child Victim (Source: Crime in India 2021, National Crime Record Bureau)

[49]Kanti Bhadra Shah &Anr. v. State of West Bengal, Appeal (Crl.) 5 of 2000.
[50]The Indian Penal Code 1860,Section 375, No. 45, Acts of Parliament, 1860 (India).
[51]Id, Section 361.

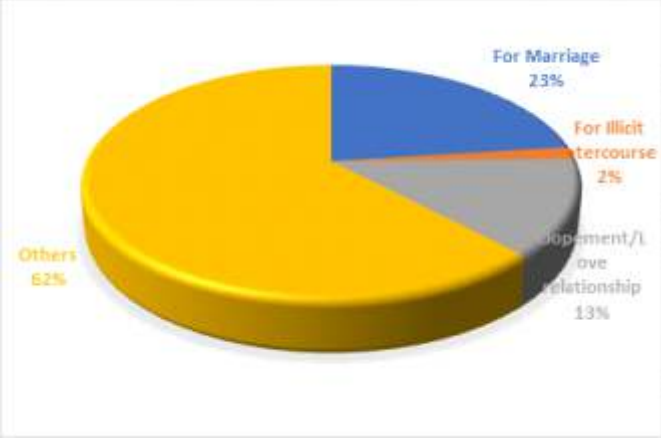

Figure7: Purpose of Kidnapping (Source: Crime in India 2021, National Crime Record Bureau)

Marriage (23%), elopement/love relationship (13%) and illicit intercourse (2%) account for 38% cases of kidnapping (figure 7). The consensual act criminalized by the law burdens the criminal justice system as a whole as evidenced by high acquittals, low convictions and recorded instances of compounding and quashing. This legal complexity can be ironed out by using the stage of discharge to weed out cases of marriage of underage girl, elopement out of romantic relationship and consensual intimacy.

Table 2: Court Disposal of Cases (Source: Crime in India 2021, National Crime Record Bureau)

Offence	Cases Convicted	Cases Discharged	Cases Acquitted	Cases Compounded	Cases Quashed
Kidnapping and Abduction of Women to compel her for Marriage (S 366, IPC)	259	46	982	70	6
Rape of Girls	694	160	1451	9	8
POCSO S 4 & 6 r/w 376	3270	297	6660	25	

Table 3: Disposal of persons arrested (Source: Crime in India 2021, National Crime Record Bureau)

Offence	Persons Convicted	Persons Discharged	Persons Acquitted
Kidnapping and Abduction of Women	685	246	1696
Kidnapping and Abduction of Women to compel her for Marriage	1248	133	3150
Kidnapping and Abduction of Women to compel her for Marriage	375	64	1256
Rape of Girls	869	211	1837
POCSO	3849	329	8183

4.2.1 Quashing

The courts in India have been allowing quashing of FIR in POCSO and aforesaid select provisions of IPC on the grounds that the that the parties had consented to the sexual relation and they were to be married[52], prosecutrix had forgiven the petitioner and both of them have consequentially married[53] and amicable settlement of dispute between the parties.

Court has also quashed the proceedings where the continuance of the same would jeopardize the welfare of the child born[54] out of the relation and the future of the prosecutrix (marital life[55]).[56] However, the Court has warned that this should not be taken as a precedent and quashing in rape cases on the grounds of parties entering into a compromise should be avoided at all cost, as it would go against the intention of the legislature[57]. Similar reasoning has echoed in another case, where the Court refused to quash the proceedings where a 17-year-old girl had entered into a marriage with the accused but drifted apart. The Karnataka High Court on the similar lines that the offence of rape is a grave crime against the society and thus no settlement between the parties either in the form of marriage or otherwise, can be a ground of quashing the proceedings.[58]

[52]Harish Kumar v. State (NCT) of Delhi, Crl. M.C 2377/2020.
[53]Ashish Gupta v. State (NCT) of Delhi, Crl. M.C 1003/2022.
[54]Mallesha @ Malla v. State of Karnataka, Criminal Petition No. 3481/2020/
[55]Mizanpur Rahman v. State of Assam & Anr, Crl. Pet. 159/2020.
[56]Vikash Kumar v. State (NCT) of Delhi & Anr, Crl. M.C 1015/2021.
[57]Dinesh Sharma & Ors. v. State (NCT) of Delhi, Crl. M.C 1002/2021.
[58]Soni Nihal Dinesh Bhai & Anr. V. Sri Sandeep Patel & Anr, Criminal Petition No. 9463 of 2016.

The court tends to quash the proceedings involving minor girl in order to protect the institution of marriage,[59] where the parties have entered into a compromise and have readily married[60] and a child begotten[61].In such cases, bleak chances of conviction and continuation of proceedings amounting to abuse of process of law was cited as a ground of quashing.[62]

Therefore, going by the legal framework criminalizing underage sexuality, the figures of NCRB and the decided case laws, it is evident that the situation can be salvaged if there is better application of judicial mind at the pre-trial stage (figure 8).

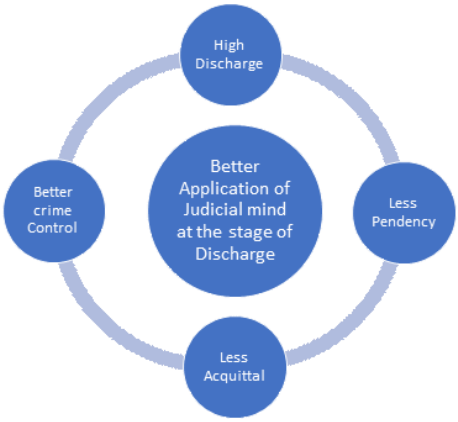

Figure 8: Schematic representation of Impact of better application of judicial mind at the stage of discharge

5. Conclusion: The Suggested approach

The Due Process model focuses on giving an equal space to the accused and enforcing his rights. However, as soon as the state machinery intervenes, the accused gets labelled and the evil gets dramatized[63]. Despite multiples safeguards, a criminal trial in itself is a status degradation process[64]. The role played by different stakeholders can turn out to be discriminatory when safeguards are ignored, process is abused and trial is approached mechanically. Overlooking the importance of the stage of discharge is one such crucial void that needs mending by a pragmatic attitude and a more detailed threshold hearing to weed out unscrupulous litigation and frivolous cases.

As regards the lack of statutory provision for active participation by accused at the stage of discharge, a judicial decision will be able to clear the air on the same. An amendment may be an appropriate way to bring a change where the desired result can be easily

[59]Jasmeer K P. v. State of Karnataka, Criminal Appeal No.336 OF 2021.

[60]Sivagnanapandian v. State of Tamil Nadu 2016 SCC OnLine Mad 18120; Thiyagarajan v. Union Territory of Puducherry & Anr, 2016 SCC OnLine Mad 17436.

[61]Ashok Kumar Singh v. State of M.P; A. Pannerselvam v. State & Anr, 2015 SCC OnLine Mad 4028; Prasanth v. State of Tamil Nadu, Crl. O.P. (MD). No. 3463 of 2020.

[62]Tejbhan Singh @ Jitu v. State of M.P., MCRC-10857-2015.

[63]FRANK TANNENBAUM, CRIME AND THE COMMUNITY (Columbia University Press,1938).

[64]Harold Garfinkel, Conditions of Successful Degradation Ceremonies 61AMERICAN J. SOCIOLOGY420–4(1956).

achieved without stretching the language of the section by way of interpretation.

While the intervention by the Apex Court or the legislature is awaited, the Courts have to be more circumspect and judicious in exercising discretion in the ongoing matters. It must take into consideration the facts and circumstances before rejecting the discharge application mechanically lest it would be a loophole that will unleash vendetta for harassment of others.

A pre-trial hearing is done at the stage of discharge but it can be a more collaborative and participative process on part of accused. His involvement, as a stakeholder, mustnot be limited to recipient of information and respondent to the prosecution material and allegations. In light of natural justice, an accused must also be equally contributing to the hearing that might ultimately be decided in his favour and a discharge be granted. Through purposive interpretation, this stage needs rethinking and redesigning. At the same time there has to be caution to not let the accused use discharge as a tool to desist prosecution and bring about abrupt end of a trial.

When the facts are inadequate and unintelligible, more so in absence of any evidencebefore Court which is faced with issues, legal or factual, of magnitude that cannot be known without sufficient material, prima facie decision should be avoided. Simultaneously, before the trial has commenced, the Court is not required to carry out meticulous analysis of whether a conviction or acquittal would result. However, the proceedings must be halted then and there if it appears that in the lieu of material presented in form of witnesses, statements, etc. the allegations are false, frivolous orvexatious and save the time of state machinery in arriving at the same conclusion at a later stage when resources have been invested in the process.

Though the discharge is not a highly used tool for the accused in the hands of defenceor the Court, if used vigilantly it will reduce the unnecessary filing of petitions and a consequent delay in proceedings. However, discharge order does not tantamount to acquittal. The outcome of a pre-trial hearing in regulating the possibility of cases tried is hard to be determined statistically. However, the impact is substantial if adopted more meticulously and can eliminate fictitious and unsubstantial claims.83 Not only does this permit a preliminary disposal of the matter, it advances the objective of the constitutional goal of speedy and effective justice.