

CHAPTER SEVEN_ THE TRIAL

Art [(94- 98)(123-149)]

- 1) Fair Trial Rights and Trial Proceedings**
- 2) Preliminary Objections and Their Consequences.**
- 3) Plea of accused**
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Fair Trial Rights and Trial Proceedings

- Trial in general and criminal trial proceeding in particular should be fair. To this effect, parties to the proceeding have certain rights which we call **fair trial rights**. Almost in all legal systems an accused enjoys rights, often granted by law or customarily
- The idea of fairness during a trial has something to do with **equality of arms of the parties**. Fair trial is thus an effort to reduce this unbridgeable **gap of power, legal skill and resources** between the two parties and in some way leveling the ground so that there could be a fair hearing. These mechanisms are mainly by “granting” certain rights to the accused such as the right to remain silent, due process of law the right to pre-trial access to evidence, open court trial and presumption of innocence and by imposing certain burdens and obligations on the public prosecutor, such as, the constitutional obligation to respect and have respected the rights and privileges of the accused, the obligation to prove the charge and to prove it beyond reasonable doubt degree.

Often the following are mentioned as rights of the accused:

- ☐ Right to speedy trial
- ☐ Right to public trial
- ☐ Right to counsel or legal assistance
- ☐ Right to obtain a copy of the charge
- ☐ Right to be presumed innocent
- ☐ Prohibition of self incrimination

Right to counsel or legal assistance

- Article 20/5/ of FDRE Constitution in realizing this right reads:

Accused persons have the right to be represented by legal counsel of their choice ,and ***if they do not have sufficient means to pay for it*** and ***miscarriage of justice*** would result, to be provided with legal representation at state expense.

- In principle Art 20(5) of FDRE Constitution is extended to every accused in that it grants the right to be represented by legal counsel of their choice at their own expenses. However, a state should provide defense legal counsel only to those ***who are not able to pay for it***, even though, only if miscarriage of justice is believed to have resulted had defense counsel not been provided. In all others cases, no legal counsel be provided to the accused at the expense of the state.

Right to obtain a copy of the charge

- Under Art 20(2) of FDRE Constitution, the fact that an accused person has the right to be informed with sufficient particulars of the charge brought against him and to be given the charge in writing has been stated.
- Hence, the institution of a charge in written form and obtaining the same is a constitutional right of any acc used.
- The CPC under Art 109/4/ stated that a copy of every charge shall be given to the accused free of cost which at the same time indicates that a charge be in writing.

The right to a public trial, FDRE const, Art 20/1, proc 25/96 Art 26, and Art 176 cpc

Article 20 /1/ provides:

Accused persons have the right to a **public trial** by an **ordinary court of law** within a **reasonable time** after having been charged. The court may hear cases in a closed session **only** with a view to protecting the **right to privacy** of the parties concerned, **public morals** and **national security**.

- Thus, the FDRE Constitution makes trial to be “public”, i.e. in an open court before ordinary court in principle. *Ordinary court should be understood to mean a court having both judicial, material and local jurisdiction* to adjudicate the case based on the grounds discussed under the preceding chapter. No special tribunal be assigned for a particular case.
- Article 20/1/, however, is not limited to the accused’s right to public trial. It also guaranteed that trial be undertaken speedily – speedy trial. **Speedy trial is to mean trial which avoids unnecessary and unreasonable delay**, i.e. decision rendered within the possible reasonable period of time

Yet, both the Constitution under Art 20 and the Courts Proclamation under Art 26 put **exceptions** to this right. The Constitution provides that a court could hear cases in a **closed session** only with a view of protecting

- i. the rights to privacy of the concerned parties,
- ii. public morals and national security.

Sub Art 2 of article 26 of Proclamation No. 25/96 lists two grounds for a court to hear cases in a closed session –“in camera” these are:

- i. Public and state safety, and ii. Public morality and decency.

Under Art 176 of the CPC:

- In all cases, therefore, the accused has the right to open court – public trial **as a rule** and that trial be in closed session i.e. in camera, is possible only under some **exceptional** situations provided by law.

The Presumption of Innocence.

- The presumption of innocence – **being innocent until proven guilty** – is a legal right that the accused in a criminal trial in many modern nations.
- Article 20/3/ of FDRE Constitution, in this connection states that during proceedings any accused person has the right *to be presumed innocent until proven guilty according to law*.
- Courts are, therefore, the only competent organs to declare that a person is guilty. Though it has been said that everybody is presumed to be innocent, it does not mean that, that particular person is in fact innocent. He could be in reality guilty but the law says “he shall be presumed innocent until proven guilty – until his guilt is declared by the court in accordance with law, which everyone should respect.

Privilege against Self Incrimination.

- The core of this protection in almost all systems is the desire to prevent investigation or adjudication procedures from ***coercing unreliable confession from the mouths of accused persons***. It is not the desire to prevent investigators from asking accused or suspected persons questions relating to the crime, not the desire to keep the person from answering them (although defendants are usually given the option of doing so), not the desire to keep people from drawing adverse inferences from an accused persons' refusal to answer question.
- In all the systems of the civilized world, a defendant has the right of silence in this narrow sense at least throughout the entirety of the criminal proceedings he or she has the right to refuse to answer question and may not be exposed to criminal sanctions for exercising this right much less to torture by order of the authorities.

- The use in evidence of statements obtained from the defendant in breach of his right to silence is an important aspect of the problem of **improperly obtained evidence**. The question most frequently discussed in this connection is whether a suspect's statement may be used in evidence where he made it without first being warned that he has a right not to talk. The question potentially raises the issue of evidence illegally obtained. In different systems the solution depends on whether there was a legal duty to warn the suspect of his right to silence in the case in question, the terms of this duty if it exists, and the attitude of the court to breach of this obligation and as might be expected, the courts where the inquisitional tradition is strongest are the least sympathetic to the defendant in this respect.

Art 19(5), FDRE Constitution in the some token provides that:

Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

Art 20(3) of the FDRE Constitution provides:

During proceeding accused persons have the right to be presumed innocent until proven guilty according to law and not to be compelled to testify against themselves.

- Consequently, one may say that privilege against self-incrimination is a constitutional right given to arrested as well as accused persons. The Constitution does not stop in guaranteeing this right. It also makes that any evidence obtained in violation of this right inadmissible, which could be considered as signal not to compel persons with the view of obtaining evidences for it would be useless.

II. Preliminary Objections and Their Consequences. 130-131

Under Art 130 of the CPC, the grounds of objections to a charge are listed.

1. That the case is *pending* before another court; or
2. That he has previously been *acquitted or convicted* on the same charge; or
3. That the charge against him has been barred by *limitation* or offence with which he has been charged made the subject of *pardon* or *amnesty*; or
4. That he will be embarrassed in his defense if he is not granted a separate trial, where he is tried with others; [Joinder of accused]or
5. That no *permission to prosecute* as required by law has been obtained; or
6. That the decision in the criminal case against him can not be given until *other proceedings have been completed*: or
7. That he is *not responsible* for his acts.

- Is the list exhaustive or enumerative ?
- ***Would it be possible for the accused to raise the issue of jurisdiction as a preliminary objection?***
- The right of the accused to raise such objections is not unlimited. Where no objection is raised after it has been required by court to state objections (if any) the accused is barred from raising any such objections at any latter stage in the trial. Yet if the objection is of a nature that could prevent valid judgment being given the accused could be allowed to raise such objections even out of time.
- ***Among the objections listed above, which do you think is better allowed to be raised even out of time?***
- ***Do you think is there any ground of objection that does not prevent valid judgment from being given?***

Plea of accused Art 132-135

- Once after a ***charge has been read out*** and explained by the presiding judge, the latter shall also ***ask the accused whether he pleads guilty or not guilty***, i.e. whether he admits or denies the charge. Where there are more than one charge, the judge shall read each charge one by one and ask, then record the plea of the accused in respect of each charge separately.
- It is the duty of the judge to ***record the plea of the accused without including or substituting any word of his own*** to what is stated by the accused. It should however be neither condensed nor extended. It should be clear enough in deciding that there is plea of guilt or not.

In deciding whether to accept a plea of guilty, judges are required to personally address the accused and make inquiries to establish:

1. The accused knows of his/her right to a trial and that a guilty plea is a waiver of this right
2. The accused is pleading guilty voluntarily (i.e. was not forced or threatened into the plea)
3. The accused understands the nature of the charge.
4. The accused is aware of the possible maximum sentence that can be imposed if he pleads guilty.

Opening of Cases 136

Once after the identity of the accused is established and the information fit to what is already in the charge, the court has to read out and explain the charge to the accused. Then ask him if he understood what charge he has to answer and if he has got any objection to the charge.

- It is only then after that the issues of opening of cases comes in to being. Thus, the prosecutor in opening his case, shall state the charge(s) he proposes to prove and the nature of evidences he tenders in respect of each fact in doing so the public prosecutor is supposed to do in an impartial way as being provided under Art 136/1/ of our CPC.

Presentation of evidence 137-140

- As mentioned before, if the court recorded/entered the plea of not guilty or where the plea of guilty has been entered but the court orders the plea be corroborated with evidence, the court shall, call up on the prosecutor to produce his evidences. Thus, the public prosecutor shall give the registrar list of witnesses and experts, if he has any, who shall testify in respect of the charges, and the latter shall issue summons to them requiring to appear on such day and hour as fixed by the court. The public prosecutor also has the responsibility for ensuring that all exhibits are produced at the trial in the court the day fixed for hearing. ***If any documentary evidence they are annexed to the charge.***

- Evidences to be produced by the public prosecutor in support of his allegations are **oral, documentary, and exhibits**. As documentary evidences are normally annexed (not to the copy which is to be given to the accused in the earlier practice) to the charge, the court has the opportunity to examine it in time. Exhibits also as supported by witnesses who explain about the exhibit shall be produced for the examination of both the court and the accused during the trial when it is appropriate.
- However it should be noted that production of evidence is to be produced not by the public prosecutor only for the accused, too, can do the same in support of defense but only after the prosecutor proves his case to the satisfaction of the court beyond shadow of doubt normally ***proof beyond reasonable doubt***.
- The major types of evidences in criminal cases are oral evidence and the law provides for relatively detailed rules on examination of witnesses

Examination of Witnesses

- On the date fixed for hearing after the case has been opened and the court ordered the production of evidences, the public prosecutor who normally begins the case shall call up on all relevant witnesses so as to prove his case and explain about the issues to be proved by the witnesses or separately if the issues to be proved are different. Such witnesses then shall tender an oath or make an affirmation one by one, by a lay or expert witness before giving testimony. Witness shall be:
 - examined – in-chief by the public prosecutor
 - cross-examined by the accused or his advocate
 - re-examined by the public prosecutor
- This is applicable to witness called by the accused mutata mutandis.

- The public prosecutor conducts examination – in - chief to his witness to enable him tell the court whatever he knows about the offence. Thus, ***questions may be related to any fact that is directly or indirectly related to the offence that is to be proved***. During examination-in-chief, however, ***leading questions are prohibited***. This is because what the court wants to hear is the testimony of the witness and not that of the proponent.
- The CPC Art 137 provides the forms of questions to be put during examination-in-chief, it states that:
 - I. questions put in examination-in-chief shall only relate to facts which are relevant to the issues to be decided and such facts only of which the witness has direct or indirect knowledge .
 - II. No leading questions shall be put to a witness without the permission of the accused or his advocate or the public prosecutor, as the case may be.

- Hence, only questions shall relate to facts which are relevant and to the knowledge of the witness that are to be asked during examination-in-chief. Relevant facts having to do with what is stated in the charge or which are important to prove the allegation of the prosecutor/proponent. Thus, where the proponent puts a questions relating to a fact which is not important may raise the objection of relevancy.
- The other rule in examination-in-chief is that questions to be asked at this stage should relate to facts of which the witness has direct or indirect knowledge. Direct knowledge is acquired by that witness through personal observation. Depending on the nature of the fact, the witness should observe the fact in any of or any combination of the five sense organs. To say that a witness has direct knowledge, he must personally have sense, heard smelt touched/felt or tested the fact if it is perceivable in such away. It is believed that the witness can give reliable testimony in relation to such facts.

- In principle leading questions are prohibited during examination-in-chief, however, there are exceptional circumstances where such questions could be asked at this stage if:
 - 1) the accused or his advocate gives his permission; or
 - 2) the question is related only to introductory matter such as the name, occupation and address of the witness and not the substance of the testimony; or
 - 3) the witness is a minor who does not have good command of language for the purpose of assisting him; or
 - 4) the witness does not know as to where to start, to refresh his memory; or
 - 5) the witness turns out to be hostile.

- Once the prosecutor is over with the examination-in-chief, the accused or his advocate **may**/emphasis added / conduct cross-examination. The **purpose of cross-examination** being to destroy what has already been established during the examination-in-chief by showing the testimony is not true; it is contradictory or not reliable, i.e. **destroying, falsifying or shading doubt** on what has been established during the examination -in -chief. Art 137/3/ of the CPC provides questions to be put by the adversary/opponent shall tend to show to the court what is erroneous, doubtful or untrue in the answer given during examination-in-chief.
- Leading questions are allowed to be put at this stage because as in most cases such witness is hostile to the adverse party seems very unlikely for such party to find a suggested answer from the witness.
- However, the fact that cross-examination is not conducted at all or no question has been put to the witness during cross-examination in respect of certain facts does not constitute an admission of the truth of the point (s) by the person who would have cross-examined the witness – the proponent .

- The third stage of examination of witness is that of re-examination. Re-examination is to be conducted by the party who conducted the examination-in-chief once after cross examination is over. The purpose of re-examination is to ***reestablish what has been demolished during the cross-examination or to clarify what has been confused during cross-examination.*** In view of its purpose, therefore, the facts that are to be raised during re-examination are limited to those, which were raised during the cross-examination. If there is no cross-examination at all, again there cannot be a re-examination as nothing has been destroyed by cross-examination from what has been established by the examination-in-chief.

- Art 136/4 / of the CPC provides that the court may put any relevant- questions which appear necessary for the just decision of the case, question to the witness any time. The testimony of the witness, therefore, should be recorded by the court accordingly. The record shall start with the name, address, occupation and age of the witness and there shall be an indication whether he has sworn or affirmed. The evidence of each witness shall be written down by the presiding judge. If he is unable to write for whatever reason, it may be recorded by another judge or clerk under his personal direction and superintendence. Because it is difficult to record every statement of the witness during the hearing the judge often writes the answers of the witness only in a form of narration and points which he thinks have to do with the questions asked. However, recently, a transcribing machine has been fixed in many federal and regional courts to record court proceedings.

- Witnesses are to be called by parties as there are **also court witnesses who are called by the court** on its own motion if it deems their presence vital for it would enable the court render just decision. Such witnesses could be called any time before judgment is given. In which case obviously it is going to be **the court that would conduct examination in - chief** and that **the party against whom these witnesses testify would conduct cross-examination**. The court may ask in place of the parties or disallow the question in its discretion.
- In principle, the public prosecutor shall state all the witnesses in his charge according to the practice. However, **Art 143** of the CPC widens the prosecutors right to call witnesses whose name does not appear in the list of witnesses mentioned in his charge provided the court is satisfied that the person is material witness and the prosecutor informs the accused in writing that the name of the witness he proposes to call and of the nature of the testimony he will give.

Post Evidence Procedure

- Evidences that could be produced before the court to prove the commission on an alleged crime by the accused could be documentary and/or oral. Documentary evidence could be the confession of the accused either before the investigating police officer as per Art 27/2/ or before a court by virtue of Art 35 or any other document, which may be material proof to the fact in issue. It may also be an exhibit, which has been used as a means for the commission of the crime like knife or gun, or a thing which is the fruit of an offence such as a stolen or robbed property or a document produced illegally or a thing against which the crime has been committed such as a document which has been forged, or an item from which its parts are looted.
- The court after going through all admissible evidences produced by the public prosecutor primarily and examining where relevance to the proof of the fact (s) in issues shall reach in to a decision, which is referred as “**Beyen**” in Amharic.

No Case Motion and Acquittal

- Art 141 of the CPC reads:

When the case for the prosecution is conducted, the court if it finds that no case against the accused has been made out which, if un rebutted, would warrant, his conviction, shall record an order of acquittal.

- Thus, once after the court examine the evidences and measured its weight shall decide whether the case is proved to the extent of the required degree against the accused or not. If the court is not convinced that the case is sufficiently proved, it shall acquit the accused without requiring him to defend himself and enter an order of release of the accused if he is in custody pursuant to Art 141 of the CPC.

Case for Prosecution

- Where the case is not dispensed pursuant to the above discussion, i.e. Art 141, in other words, if the court is satisfied with evidences produced and is convinced that the accused had committed the alleged crime unless rebutted by the evidences to be produced by him it shall require him to produce all possible evidences he has to defend himself.

Art142 of the CPC:

where the court finds that a case against the accused has been made out and the witnesses for the injured party, if any , have been heard it shall call on the accused to enter up on his defense and shall inform that he may make a statement in answer to the charge and may call witness in his defense

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- All the criminal prosecutions are made with the ultimate destination of rendering judgment which would either be conviction or acquittal. To put it in simple terms, the accused would be convicted if the evidences produced by the prosecutor convinced the court to the extent of the required degree that the accused committed the alleged crime and his evidence, if any, could not rebut such evidences and affects the court's conviction. On the other hand, if the defense evidence(s) produced by the accused can falsify the evidence of the prosecution or at least shed a reasonable doubt, the court must decide for the acquittal of the accused and be released from prison if had been in custody. It is one of the responsibilities of a judge to give reason for any of its decisions

Sentencing

- Where the accused is found guilty, the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation as being provided under Art 149/3/ of the CPC. It is at this stage of the procedure that public prosecutor could reveal to the court aggravating grounds such as previous conviction(s) of the accused so that the court could take this fact in to consideration in the determination of the sentence.
- Once after the public prosecutor is given the chance to mention aggravating or mitigating grounds to the court the later shall give to the accused so that he can reply and mention any mitigating grounds he could raise, if any. The court may demand the production of evidences to prove these grounds. In practice most of our courts do not ask the production of prove to mitigating/aggravating ground mentioned by the parties. The prosecution also tends to state only aggravating circumstances while the law requires him to mention mitigating circumstances as well.