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PROOF OF INNOCENCE BEFORE BAIL : AMENDMENTS REQUIRED

I Introduction

BAIL IS normally the rule; detention the exception. Parliament is making an effort to contain the new evolving forms of heinous crime.[1] Not only are punishments becoming severe, the pre-trial procedures are becoming stringent and securing of bail is no exception. Earlier, bail was the rule and "no bail" the exception.[2] Now, "no bail" is the rule and bail the exception.[3]

Thus the broad change in the criminal justice system from presumption of "innocence"[3a] to "presumption of guilt"[4] is *beginning to affect even pre-trial* procedures. The very concept of bail is based on the presumption of innocence, till guilt is proved. Curtailment of an individual's freedom on the ground of yet-to-be-proven guilt can be seen as unwarranted. Liberty is subject only to social defence considerations like apprehension that the suspect would tamper with evidence and judicial process or flee justice, when only bail is denied. Therefore, the two doctrines of "presumption of innocence" and "bail as the rule" are an integrated whole, mutually supportive. If one is tampered with, the other is disturbed.

The prime examples of such stringency are section 37(*b*) of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS),[5] section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) and section 15(5) of Terrorist Affected Areas (Special Courts) Act, 1984 (Terrorist Special Courts Act), all dealing with bail for the accused in similar terms. The stringent provisions when not drafted with adequate care can become prone to misuse and constitutionally suspect for enabling arbitrary action.[5a]

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1. See, H.R. Khanna "Some Reflection on Criminal Justice", 17 *J.I.L.I.* 505 (1975). The trend had started in the 1970s itself.

2. See, s.437, Criminal Procedure Code 1973.

3. See; s.20(8)(*b*), TADA Act, s.37(*b*), NDPS Act and s.15(5), Terrorist Affected Areas (Special Courts) Act 1984.

3*a*. The presumption of innocence is "the undoubted law, axiomatic and elementary and its enforcement lies at the foundation of ... criminal law". *Coffin* v. *United States*, 156 U.S. 432 (1895).

4. *Supra* note 1 at 505. The change is now statutorily entrenched as burden of proof is consistently shifted and presumptions raised against the accused. See, s. 21, TADA ss.35, 54, 66, 68-J, NDPS Act, s.111*A*, Indian Evidence Act.

For a constitutional critique of these statutory presumption, see, Vikramjit Reen, "Presumptions : Irreverence and Irrelevance", 36 *J.I.L.I.* 247 (1994): Vikramjit Reen, "The place of Anti-Terrorist Legislation under the Indian Constitution", 6 *Student Advocate* 88 (1994). The Supreme Court in *Kartar Singh* v. *State of Punjab*, (1994) 3 S.C.C. 560 had left the issue of constitutionality open.

5. As amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act 1989.

5*a*. Anti-terrorist legislation must scrupulously conform to constitutional standards. See, Vikramjit Reen, "The Place of Anti-Terrorist Legislation under the Indian Constitution", *supra* note 4.

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These provisions, in identical terms, mandate first a hearing of the public prosecutor to oppose the bail application and then require findings by the court on two grounds before bail can be granted. There are :

(*i*) a preliminary belief on reasonable grounds that the accused is "not guilty"; and

(*ii*) the accused is not likely to commit any offence while on bail.

The *first* ground is a modification of section 437 of the Code of Criminal Procedure 1973 (CrPC). Contrary to its requirement of refusal of bail on belief, based on reasonable grounds that the accused is *guilty*, the new provision requires bail to be granted only after *both* the above enumerated grounds are satisfied. Here, the condition precedent for bail is belief of "not *guilty*", (innocence?) based on reasonable grounds. Moreover, section 37(2), NDPS Act, section 20(9), TADA Act and section 15(6), Terrorist Special Courts Act make it clear that the new provisions are in addition to any limitations on granting of bail under CrPC or any other applicable law, thereby making belief of complete innocence mandatory to grant bail.

II The problem

This most stringent requirement of the *second* ground creates complications in the judicial process.[5b] The stipulation of a finding that the accused is not likely to commit *any* offence while on bail, coupled with a very long period for remand provided under these Acts,[6] underscores the need for careful scrutiny by courts of all bail applications under these enactments. The power of High Courts to grant bail has been read by the Supreme Court as completely excluded by these Acts.[7] The question of constitutionality of such stringent provisions was left open at that time. However, in *Kartar Singh* v. *State of Punjab*[8] the Supreme Court has upheld the constitutionality of the bail provision of TADA on the narrow technicality that the condition "there are grounds for believing that he is not guilty of an offence" in a different form is also incorporated in section 437(1)(*i*), CrPC, section 35(1), FERA and section 104(1), Customs Act and cannot be said to be unreasonable. The court without going in depth into the second ground, brushed aside the issue in one sentence.[9] As enunciated earlier, the doctrines of presumption of innocence, right of bail and fair trial are an integrated whole and mutually reciprocative. If one is tampered with, the others are disturbed. The presumption is done away with and a belief on reasonable grounds that the accused is 'not guilty' *and* is not likely to commit any offence while on bail, is substituted. That destroys the right to bail. It will be pertinent to undertake an examination of this aspect of the changing concept of "bail" in India.

5*b*. The Constitution as interpreted by the judiciary, safeguards the citizens from arbitrary law. See, Benjamin N. Cardozo, *Nature of the Judicial Process*, 92-3.

6. See, s.20, TADA Act.

7. See, *Usmanbhai Dawoodbhai* v. *State of Gujarat*, 1988 Cri. L.J. 939 (S.C.); *Narcotics Control Bureau* v. *Kishan Lal*, 1991 Cri. L.J. 654, *Kamalabai* v. *State of Karnataka*, 1992 Cri. L.J. 561.

8. 1994 (3) S.C.C. 569 at 707.

9. See also, *Sanjay Dutt* v. *State (II)*, (1994) 5 S.C.C. 410 at 443.

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Overstringency is the main difficulty with these enactments. These provisions tend to create absurd situations so that even if the FIR and case diaries adduced by the police do not contain a shred of connection between the accused and commission of the offence whereby only ground (*i*) can be answered, how can the court be sure of ground (*ii*) as it involves a prediction of *future* conduct of the accused. Thus bail may be denied on this ground alone. This places an innocent at the mercy of police or public prosecutors.[10] Prediction of a man's *future* volition would be a case even more difficult than the lament of Lord M'Naughten when faced with inferring present intention - "Human mind is a trait. Even the Devil does not know the mind of man, what of a poor judge like me."

In *Bimal Kaur Khalsa* v. *Union of India*,[11] th second ground of "not likely to commit any offence while on bail" was struck down as unconstitutional by the Punjab and Haryana High Court which observed :

> [T]he Court...may not be in a position to say with certainty and clear conscience that the accused, if released on bail, would not commit any offence.[12]

Moreover the reference to '*any* offence' could be bad for over-breadth[13] since it does not limit itself to offences akin to those made punishable by the Acts. No guideline is given. It is submitted that the present yardsticks are not judicially manageable standards, thereby causing the difficulties enumerated. These provisions may also be self-defeating and contradictory as neither release by the investigating officer under section 169, CrPC nor discharge by the court under section 227, CrPC (both of which are applicable to a trial under these Acts), require such conditions if belief in innocence of the accused is reasonably possible, whereas in case of bail the court is saddled with strict conditionalities.[13a]

Now that the Supreme Court has upheld such bail provisions (even while the problem persists), the solution to the paradox lies in noting that these special bail provisions are intended to indicate an attitude or approach of mind on the part of the legislature. It reflects the overriding concern of Parliament to prevent a recurrence of similar heinous offences[14] if the accused is released on bail. When viewed from such an angle, the second requirement for grant of bail does not lay down clear guidelines or judicially manageable standards. The provision seems to be improperly drafted and would not seem to attain the purpose of realising the legislative intent and at the same time protect innocent citizens against any

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10. See, *Kuldip Chandra Sharma* v. *State (Delhi Administration)*, Criminal Petition No. 68 of 1993 pending the in Delhi High Court. See also, *supra* note 8

11. 1988 Cri.L.J. 869 (F.B.).

12. *Id.* at 896. (Emphasis added).

13. See, P.M. Bakshi, *An Introduction to Legislative Drafting* 8 (4th ed 1992).

13*a*. *A.M. Qureshi* v. *A.S. Samra, Commissioner of Police, Bombay*, A.I R. 1994 S.C. 1333; *A.K Roy* v. *Union of India*, A.I.R. 1982 S.C. 710 (upholding constitutionality). See also, *Karter Singh* v. *State of Punjab*, *supra* note 10 at 683.

14. See, Vikramjit Reen, "Supreme Court and Terrorism", *Economic and Political Weekly*, vol. XXIX, no. 40, p. 2631 (1994).

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possible misuse.[15]

Such a provision must by careful choice of words leave scope for judicial flexibility since the judiciary has to apply the law in diverse practical situations. Precision in law should also not be carried to an extreme. As Baxi observes :

> The idea should sometimes be allowed to have a freedom to roam over a definite area, and to choose its resting place in an appropriate manner....The criterion of precision in such drafts lies in knowing how far to go and where to stop. 'What we admire in legal draftsmanship, is not precision. It is a precisely appropriate degree of impreciseness'.[16]

III The solution

The main flaw is that very stringent formulae[17] without some hint of flexible guidelines do not work in legislation. The alternative to get over the difficulties posed would be to redraft the provisions[18] to read :

> Notwithstanding anything contained in the Code, ...no person...shall, ..., be released on bail ... unless-
>
> (*a*) ...
>
> (*b*) Where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that *on the basis of past conduct, links or associations* he is not likely to commit any offence *of a similar nature or class, or any other connected offence*, while on bail.[19]

Hence having regard to past conduct, associations or links with other criminals, social standing or deep-roots in society of the accused, only the most deserving cases would be considered for bail through this clarification of legislative intent. The courts can examine whether past conduct, links or suspected associations indicate any likelihood of the accused having access to arms, ammunition, explosives or drugs, to form a reasonable belief of repetition or otherwise, of similar or connected offences.[20] This can as a matter of judicial policy be limited to a first time accused or offender.[21] Of course, it should be reasonably

15. *Supra* note 10.

16. *Supra* note 13 at 49.

17. P.M. Bakshi uses the term "mathematical formulae", *supra* note 13 at 49. The increasing tendency to copy the same provisions into new legislations is seen in the manner this bail provision was incorporated into the NDPS Act by amendment, where none existed before. *Supra* note 5.

18. S.20(8)(*b*), TADA Act; s. 37(*b*), NDPS Act s. 15 (5) Terrorist Affected Areas (Special Courts) Act 1984.

19. Suggested incorporations are in *italics*.

20. See, *supra* note 10.

21. In case of previous conviction for any offence, bail could be extremely difficult to obtain as *prima facie* an association with criminal elements or a tendency to commit crime has been proved through earlier judicial pronouncement. The court would therefore examine the case in great depth to decide the question of bail.

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possible for the police to verify past conduct, associations and social standing and consequently the public prosecutor would get a full opportunity to place facts before the court to help it form a correct opinion.[21a] The persons suspected of having associations or links with criminal elements shall accordingly be denied bail while the innocent shall be spared.[22]

There is enough scope here for judicial discretion[23] while simultaneously preserving the stringency of the provision in adequate measure. It automatically prevents abuse of power.[24] In such an event it would be extremely difficult, if not impossible, to impeach the fairness and practicability of these redrafted provisions.

If the legislature is not likely to redraft, the judiciary can by interpretation introduce these safeguards for freedom, liberty and human rights.[25]

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21*a*. See, *supra* note 8.

22. Under existing provisions even persons believed to be 'not guilty' (based on reasonable grounds) would not seem to obtain bail. The redrafted version at least provides such persons a chance to establish their *bona fides* to obtain bail.

23. See, *Gudikanti* v. *Public Prosecutor*, (1978) 2 S.C.R. 371.

24. See, *supra* note 10.

25. The Supreme Court has approved the concept of personal liability for illegal acts committed by a colourable exercise of power. See, *Nilabati Behera* v. *State of Orissa*, A.I.R. 1993 S.C. 1960.

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