Chapter 11

PRE-CONDITIONS OF BAIL REFORM

REFORMULATION of bail provisions in the code may alone be not sufficient to make the system of bail function with a purpose. In addition to the developing of a constant factor of securing public support and participation in the administration of criminal justice it would be necessary that the legislative, executive and judicial powers converge to act effectively so that the pre-conditions required for smooth operation of the bail system are fulfilled. The pre-conditions which require immediate and urgent attention in this regard have already been noticed in the course of this study. These are ; (*a*) proper functioning of police power, (*b*) developing the devices to control the police power, (*c*) speedy trial of the accused, and (*d*) availability of legal aid and legal service from the preliminary stage to the terminal end of criminal process.

Proper Functioning of Police Power

The Code of Criminal Procedure vests police with necessary powers of detention of an accused and investigation of the crime he is suspected to have committed. However, this power is somehow construed in police parlance as a mode of sure conviction of the person who has been arrested. If this objective is likely to be failing, police effort seems to convert the trial process itself into a penal process by adopting such methods in and out of the course of trial, which are often inconsistent with the established legal and constitutional norms.

The Supreme Court is of the view[1] that all power, including police power, be informed by fairness if it is to survive judicial scrutiny. The police role in the criminal process in certain cases has been unworthy of police power.

In *Prem Chand* v. *Union of India*,[2] a person against whom an externment order was passed under the provisions of the Delhi Police Act, 1978 challenged the same as *mala fide* on the ground that it had been passed because he had (earlier) been a "stock witness" of the police, but had now refused to continue to play any longer the role of a "professional perjurer". He asserted that, while in his teens, he started his career as a petty hawker with the connivance and indulgence of the police and in spite of his hesitation and unwillingness, he was forced to act as a "stock witness" for the police. According to him, he had appeared for the police in as many as 3,000 cases (a few hundred summonses issued against him were produced as proof of this), but he

1. *Prem Chand* v. *Union of India*, (1981) Cr. L.J. 5.
2. *Ibid.*

no longer wished to appear as a "stock witness". He had established a prosperous business of his own. The police were now trying to harass him by threatening his externment under the Police Act.

The Supreme Court invited the attention to the peril likely to be caused to the judicial process if professional perjurers were to be maintained captive by the police for being pressed into service for proving their "cases". It strongly condemned the systematic pollution of the judicial process and the consequent threat to human rights of innocent persons. It observed that the police need not fold up their hands and remain inactive while dealing with anti-social elements but the means adopted by them must also be as good as the ends.

As an important component of the criminal judicial administration, police has to be cloned to their newer obligations and role in a democratic social order. All these would necessarily usher in a changed police behaviour towards the issue of dignity and freedom of the individual and lead them to behave professionally and scientifically in their investigatory activities of evidence collection. A rational restructuring of the police organisation has already been the matter of in-depth studies by a number of important commissions. Measures have also been recommended for the upkeep of integrity and efficiency of the police cadre alongwith systematisation and coordinated functioning of various police sub-agencies. The recommendations of various prestigious bodies and commissions still await implementation. Inaction on this vital aspect of administration of criminal justice has also stalled a growth of the bail system to develop into a rational process.

Devices for Control of Police Power

The safety mechanisms against an abuse of police authority, as it obtains under the Indian law, has already been discussed in detail. By and large, remedial actions against the abuse of authority lies in the hands of the government by way of criminal prosecution or by according sanction for the same. A useful device to check arbitrary and unlawful actions could be through civil actions for statutory breaches committed by those policemen, who in a reckless and illegal manner, usurp and use the power as tortfeasor. The initiative of the victim to check wrong-doers within the police agency through action for damages, if encouraged, could have wholesome effects on the functioning of the entire judicial system and would thus secure to the people the kind of qualitative justice everyone is now looking for in an otherwise awry system of criminal justice.

The stunted growth of law of torts in this country has largely been responsible for this state of affair. The courts have also contributed to such factors which have not been conducive to the growth and development of law on civil wrongs. The courts have even stretchingly

applied the doctrine of 'act of state' to provide immunity to the government for statutory breaches through unlawful arrest committed by a police functionary.[3] Besides, uncertain judicial attitude in the matter of awarding losses has also been putting further brakes on the incentive of a wronged person. It has been noted in a study[4] that the precedents disclose that a damage claim for Rs. 10,000/- has been deemed worthy of Rupee one only. Two damage suits of the value of Rs. 5,000/- each were decreed for Rs. 60/- and Rs. 50/- respectively. The Nagpur High Court found that a damage claim for Rs 11,300 could well be satisfied with the award of Rs. 315/-. In Madras the plaintiff who demanded a damage of Rs. 10,000 was successful to the tune of Rs. 650/-. It may be pointed out that the claims of the persons wronged are low, and lower are the sums awarded by the courts, which become almost insignificant in the light of the time taken by the courts to decide the claim.

Presumably because of the high rate of court fees, which plantiff has to bear initially, the claims asked for had been for smaller sums; but the reduction of claims to disproportionate limits by the courts inculcate a belief in the mind of a tort victim about the futility of resorting to legal action because of its being a kind of high-stake gambling wherein there are odd chances to win and more chances to lose.

The responsibility of developing the potential of the undeveloped law of civil wrongs is naturally of the courts.

Speedy Trial

In criminal trials recourse to speedy trial can be had by observing the provisions of section 437(6) of the Code of Criminal Procedure, which provides that if a trial cannot be concluded within a period of ninety days from the date fixed for taking evidence in the case, the persons in custody be released on bail unless for reasons to be recorded in writing, the magistrate directs otherwise. Furthermore, if the judicial machinery is slow in moving the wheels of justice to the detriment of the valuable rights of an individual facing criminal proceedings, alternatives have to be evolved. Civil rights actions, damages, policing the police, quashing the convictions and the like are some of the modes available in certain legal systems for causing prejudices to a person by way of denying him his constitutional and legal rights in a criminal trial. Since these alternatives are not likely to evolve and grow in the near future it may be suggested that in criminal trials the concerned agency, *viz.*, the police, prosecutor, or the trial court, must be made answerable to the Supreme Court, where it may be brought to notice that the fundamental right of speedy trial is being denied or has been denied to a person. Mere directions and passing of severe strictures alone are not sufficient devices

3. See D.C. Pandey, Law of Torts, XIV *A.S.I.L.* 474 esp. f.n. 7 at 477 (1978).
4. *Ibid*, also: D.C. Pandey, Law of Torts, XV *A.S.I.L.* 194-198 (1979).

for implementation of this right and it will be naive on anybody's part to leave this right to the nursing care of the minions of executive authority or to be dealt with by supine and somnolent judges and magistrates.

The concept of fairness, a necessary ingredient of article 21 of the Constitution, has been emphasised by the Supreme Court in almost all aspects governing the application and administration of criminal laws. The crusade for fairness in criminal trials led the Supreme Court in *Hussainara Khatoon's* case[5] to lay down that no procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" so as to be sustained under article 21. Accordingly, expeditiousness in trial intertwined with fairness, was held to be an integral part of the fundamental right to life and liberty enunicated in article 21.

However in *Kadra Pehadiya* v. *State of Bihar*[6] it was once again reiterated that the right to speedy trial is a fundamental right, although the Supreme Court noted (with reference to the State of Bihar) that the directions in the nature of implementing the fundamental right of speedy trial have been flouted and ignored by the concerned authorities and institutions in the state. This phenomenon by itself was enough to make the court realise that the in-built right of a person to get a speedy trial affecting the life and liberty of an individual remains a cherished myth despite declarations and directions of the Supreme Court. The court noted with anguish and pain that so far the right has remained a "paper promise".

The unsavoury tales in the *Kadra Pehadiya* case[7] unfolded that four young lads within the age group of 12 years entered the prison walls eight years ago. They grew up to their twenties doing forced labour for prison officials. For what they had initially been brought to the prison was perhaps not known to any one. But three years later when the matter was docketed before a court for trial, it was shelved again and nobody heard thereafter about the case. No proceedings were taken up and the boys continued to languish in the prison reconciled to their fate. All this was perhaps for a "crime" which ultimately "they may be found not to have committed", or may be for an offence which might not have been committed at all. The extreme callousness of the court in symbolically commencing a trial and then abandoning the same for five more years (till the matter was brought to the knowledge of the Supreme Court by a social worker) is a sad commentary on both the functioning and the functionaries of the judical system in the state.

It is ironical that the Supreme Court, while it has the capacity and authority to create conditions for speedy trial as a fundamental right, finds itself helpless to correct the callous attitude of functionaries of the

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5. *Hussainara Khatoon* v. *State of Bihar*, A.I.R. 1979 S.C. 1360.
6. (1981) Cr. L.J. 481 at 482 3 (S.C.).
7. *Ibid.*

justice system, who conveniently forget to look into their own records. The fact that people have been caged in jail for unduly long periods of time evidently establishes that the courts and the judicial system in the State of Bihar have virtually ceased to exist. Hence the right to speedy trial, despite noble intentions of the Supreme Court remains a paper promise in that state.

Reservations about speedy trial being a fundamental right, have come up in the minds of judges. In *State of Maharashtra* v. *Champalal Punjaji Shah*[8] inordinate delay in the disposal of the case was pleaded as a ground for quashing the conviction, which the court rightly refused. In this case the delay had been caused by none else than the accused himself by journeying back and forth between the court of first instance and its superior courts at frequent interlocutory stages.

Dismissing the petition the court observed that "delayed trial is not an unfair trial" which tends to dilute the significance of speedy trial as a fundamental right. In explaining the above the court super imposed limitations on the very right to speedy trial. It laid down that speedy trial commensurates with the "reasonably expeditious trial". Since a "delayed trial is not necessarily an unfair trial" it can logically be construed that a "reasonably delayed trial" is a fair trial. According to the court a delayed trial can be deemed unfair if it could be shown that the facts and circumstances in a case raised the presumption that the accused has been prejudiced by the delay caused in the course of investigation and trial. This criterion adds up an additional burden on the person, who as an accused is privileged to have a speedy trial and entitled to avail the same as a fundamental right under article 21. The decision thus comes as a step backwards in the direction of declaring speedy trial as a person's fundamental right. No one may be inclined to counter the plea that the presumption of prejudice is raised no sooner the guaranteed protections and privileges are denied to a person exposed to criminal proceedings. The protection of liberty through speedy trial is one such guaranteed privilege.

Legal Aid and Services

Besides promotion of human values as enshrined in the Constitution, state governments are under constitutional responsibility to provide free legal services in the course of administration of criminal justice. In *Kadra Pehadiya* v. *State of Bihar*[9] the Supreme Court directed the sessions judge, Dumka, that four persons who had been rotting in jail as under-trial prisoners for a period of over eight years, be provided legal representation by fairly competent lawyers at the cost of the state. Legal aid in a criminal case has been held to be a fundamental right which is implicit in

8. Cr. App. No. 126 of 1975. Decided on 27.1.85 alongwith W.P. (Cr.) No. 7207.
9. *Supra* note 6.

article 21 of the Constitution.

Since the Supreme Court in *Hoskot's* case[10] laid bare the true meaning of the term "procedure" in article 21, it has opened a new vista in criminal jurisprudence. A long line of decisions have followed since then. The High Courts have been emphasising the need for providing to accused persons legal services and legal representation, so that their task in the dispensation of criminal justice is facilitated. It is the duty of the courts to see that law is administered fairly and in a manner which clearly shows that the judicial institutions act responsibly as upholders of the norms and standards of a civilised social order. It is in this context that in *Zarrolina* v. *Government of Mizoram*[11] the Gauhati High Court emphasised the need for providing legal aid as a necessary constituent of a fair procedure implicit in article 21. A review of cases on the subject of legal aid in the above noted case, sums up the position with regard to providing legal services in the administration of criminal law thus :

(*a*) It is the constitutional right of every prisoner, who is unable to engage a lawyer or secure legal service on account of poverty, indigence or incommunicado situation, to have free legal services provided to him by the state;

(*b*) States are under constitutional as well as judge-made mandates to provide such legal services to such accused;

(*c*) State governments must set up some machinery for providing free legal services to the accused involved in possible deprivation of liberty;

(*d*) When an under-trial prisoner is produced before a magistrate it is his duty to point out to the accused the provisions of section 167(2), provisos (*a*) & (*b*) of the Code of Criminal Procedure, 1973 as to his entitlements to be released on bail, on the expiry of ninety days or sixty days as the case may be, on failure of completion of investigation by the police within the said periods;

(*e*) To enable such accused to get such relief, as stated in (*d*) above, the state government must provide at its cost a lawyer to apply for bail; and

(*f*) In default of compliance with the constitutional obligations by the state and magistrates the trial might run the risk of being vitiated as contravening article 21; and it may further be stated that the constitutional obligation upon the state to provide legal services begins from the time an accused is produced before the magistrate, as also when he is remanded from time to time.

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10. *M.M. Hoskot* v. *State of Maharashtra*, A.I.R. 1978 S.C. 1548.
11. (1981) Cr. L.J. 1736.