

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. A serious effort of securing public support and participation in the administration of criminal justice, coupled with necessary legislative, executive and judicial powers to act effectively are most warranted. Such an effort alone can help in fulfilling the pre-conditions required for smooth operation of the bail system. Urgent attention in this regard is needed towards the : (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, due to perpetuating heritage of colonial days, 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 view¹ 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 summons issued against him were produced as proof of this), but he 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.

1. *Prem Chand v. Union of India* (1981) Cr. LJ 5.

2. *Ibid.*

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 the growth of the bail system to develop into a rational process.

Devices to Control 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 lie 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 wrongdoers 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 affairs. 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

3. See D.C. Pandey, *Law of Torts, XIV ASIL* 474 esp. f.n. 7 at 477 (1978).

losses has also been putting further brakes on the incentive of a wronged person. It has been noted in a study⁴ 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 plaintiff has to bear initially, the damage claims asked for had been for smaller sums. The reduction of claims to disproportionate limits by the courts also inculcate a belief in the mind of a tort victim about the futility of resorting to legal action. It looks like 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.

In contrast to this situation, the development of jurisprudence of fundamental rights has been a significant contribution of the Indian Supreme Court. The Court as a guardian of liberty awarded compensation to those who had been illegally detained or wrongfully arrested. In *Rudul Shah v. State of Bihar*,⁵ a compensation of Rs. 35,000 was awarded for excessive confinement of the victim. This being compensation awarded by a writ court, cannot prevent claim of appropriate damages by a suit. Compensation of Rs. 10,000 has been awarded for wrongful handcuffing.⁶ For death in police custody a compensation of Rs. 1.5 lakhs has been awarded.⁷

Speedy Trial

In criminal cases 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. It

4. *Ibid*; D.C. Pandey, Law of Torts, XV *ASIL* 194-198 (1979).

5. AIR 1983 SC 1086; see also *Bhim Singh v. State of J & K*, AIR 1986 SC 494.

6. *State of Maharashtra v. Ravikant* (1991)2 SCCC 373.

7. *Nilabati Behera v. State of Orissa* (1993)2 SCC 746.

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 to speedy trial is being denied or has been denied to a person. Mere directions and passing of severe strictures alone are not sufficient devices 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*⁸ 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 enunciated in article 21.

It was once again reiterated in *Kadra Pehadiya v. State of Bihar*⁹ that the right to speedy trial is a fundamental right. It is being continuously felt 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. This phenomenon is by itself enough to show 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 repeated declarations and directions of the courts. The Supreme Court has at times noted with anguish and pain that so far the right has remained a "paper promise".¹⁰

The unsavoury tales in the *Kadra Pehadiya case*¹¹ 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

8. *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360.

9. (1981) Cr. LJ 481 at 482 3(SC)

10. *Ibid.*

11. *Ibid.*

commentary on both the functioning and the functionaries of the judicial system.

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 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 have virtually ceased to exist.

Reservations about speedy trial being a fundamental right, have also come up in the minds of judges. In *State of Maharashtra v. Champalal Punjabi Shah*¹² 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. The decision thus comes as a step backwards in the direction of declaring speedy trial as a person's fundamental right.

As a matter of fact the presumption of prejudice can be 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. Pursuant to this reality, the Courts gave due consideration to the matter of delay in proceeding in granting bail in cases like *Virsha Singh v. State through CBI*,¹³ and many others, discussed earlier.¹⁴ The delay in conducting investigation and trial can be a ground for bail even in very serious cases, which is evident from section 167(2) and 437(6) of the Code."¹⁵

12. Cr. App. No. 126 of 1975. Decided on 27.1.85 alongwith W.P. (Cr.) No. 7207.

13. 1992 Cr.LJ 164.

14. *Jai Singh v. State of Rajasthan* 1992 Cr.LJ 2873.

15. *Om Prakash v. State of Rajasthan* 1996 Cr.LJ 819.

The fact, however, remains that the poor of the country have not so far been able to avail the fruits of these court deliveries, the reason being the lack of change in the structure through legislation and the attitudes of the police and lower judiciary.

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*,¹⁶ 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 thus been held to be a fundamental right which is implicit in article 21 of the Constitution.

Since the Supreme Court in *Hoskot's case*¹⁷ 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*,¹⁸ the Gauhati High Court emphasised the need for providing legal aid as a necessary constituent of a fair procedure implicit in article 21. In this respect, it may be noted that the Supreme Court in *Sheela Barse v. State of Maharashtra*,¹⁹ directed that "whenever a prisoner is arrested by the police and taken to the police lock-up, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such legal Aid Committee will take immediate steps for the purpose of providing legal aid/assistance to the arrested person at state cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction." The Supreme Court has also upheld the right of a person under police custody to get assistance of an advocate of his choice.²⁰ In 1987 the Parliament of India enacted the Legal Service Act which was amended after a nation wide debate and brought to

16. *Supra* note 9.

17. *M.M.Hoskot v. State of Maharashtra*, AIR 1978 SC 1548.

18. (1981) Cr.LJ 1736.

19. (1983)2 SCC 96.

20. *Nandni Satpathy v. P.L.Dani* 1978 (3) SCR 608.

effect in November, 1995. The Act provides a uniform base for constituting legal Service Authorities at the state, district and *taluck* levels, headed by National Legal Services Authority. Cover of the legal services is extended alongwith others to persons in custody also. In a true quest to seek gains the role of all governmental agencies, NGOs, lawyers, and the police has to be positive. Till date lethargy and wilful ineptitude continue.

The Maharashtra High Court, through Chief Justice A.M.Battacharjee and Justice V.P.Tipnis, taking a serious view of an article²¹ in a national daily directed the State of Maharashtra and the Inspector General Prisons to submit a report of the under-trial prisoners. On the basis of the given information, the court released hundreds of persons incarcerated beyond the maximum sentence on their personal recognizant bond. The court directed all the magistrates to review cases of those charged with bailable offences and release them on personal bond. Also, the court turned the attention of magistrates towards rules relating to legal aid to unrepresented accused persons and the duty of court to explain legal aid norms to them. Under the scheme, the Director General of Police is immediately required to give intimation of the arrest to the nearest legal aid committee and to obtain from the persons arrested the name of any relative or friend whom the under-trial would like to intimate. The police is required to duly intimate the concerned relative or friend about the arrest. Duty counsels are also required to give assistance in bail matters by preparing bail applications.²²

As regards the general position now 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. State governments are bound for providing free legal services to the accused involved in possible deprivation of liberty. A magistrate has a duty to point out to the accused the provisions of section 167(2), provisos (a) and (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. To enable such an accused to get relief, the state government must provide him, at its cost, a lawyer to apply for bail. Because of any disregard to the constitutional obligations by the state and magistrates, the trial might run the risk of being vitiated as contravening article 21. It may be noted that the constitutional obligation upon the state to provide legal services begins from the time an accused is arrested. In *Sukhdas v. Union Territory of Arunachal Pradesh*,²³

21. *Times of India*, Mumbai, August 14, 1994; see also *supra* p. 146, n. 133.

22. See Colin Gonsalves, "Requiem for Legal Aid", 1998(S):3 *Law Col.* 26-29.

23. AIR 1986 SC 991.

the Supreme Court held the conviction without giving information of free legal aid to the accused as vitiated. In *Dr. Jainendra Kumar v. State of Maharashtra*,²⁴ the Supreme Court set aside the judgment of the high court for the appointed counsel not being present on trial. In *D.K. Basu v. State of West Bengal*²⁵, the Supreme Court recognised the right to compensation in cases of established unconstitutional deprivation of personal liberty or life. In this case the State has been directed to follow some safeguards in all cases of arrest and detention till legal provisions are made in that behalf as preventive measures.

24. AIR 1990 SC 1224.

25. 1997 Cr.LJ 743.