



**LAW COMMISSION OF INDIA**  
**ONE HUNDRED AND FIFTY FOURTH**  
**REPORT**

**ON**

**THE CODE OF CRIMINAL PROCEDURE,**  
**1973**  
**(ACT No. 2 OF 1974)**

**(VOL. I)**

**1996**

JUSTICE  
K. JAYACHANDRA REDDY

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August 22, 1996

Dear Law Minister,

I have great pleasure in forwarding herewith the 154th Report of the Law Commission of India on the "Code of Criminal Procedure, 1973". This brings to a conclusion one of the major tasks assigned to the Law Commission by the Government of India.

2. A detailed examination of the Code with a view to do comprehensive revision was undertaken by the Commission immediately when I assumed charge on 15th July, 1995.

3. In order to elicit public opinion on the subject, the Commission circulated a working paper and detailed questionnaire on the Code of Criminal Procedure, 1973 setting out various aspects of the subject under study.

4. The Commission had also organised workshops under the auspices of High Courts at Allahabad, Ahmedabad, Mumbai, Chandigarh, Delhi, Hyderabad, Cochin, Madras, Patna and at some selected district Headquarters.

5. The Commission also examined the provisions of the Code of Criminal Procedure (Amendment) Bill, 1994, while making out recommendations.

6. We have endeavoured to make the present Report, a comprehensive one and included in it some of the provisions of the Criminal Procedure (Amendment), Bill, 1994.

7. Finally, we wish to express our appreciation for valuable help received from Dr. S. C. Srivastava, Joint Secretary & Law Officer in drafting of this report, preparing questionnaire and assisting the Commission right through.

With regards,

Yours sincerely,  
(Sd-)

(K. JAYACHANDRA REDDY)

Hon'ble Shri Ramakant Khalap,  
Minister of State for Law & Justice  
Government of India,  
Shastri Bhavan,  
New Delhi.

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## CHAPTER I

### INTRODUCTION

1. After coming into force of the Constitution of India, the First Law Commission in its Fourteenth Report on Reform of Judicial Administration made extensive recommendations on the reform of criminal justice system in 1958.<sup>1</sup> The Commission had examined the subjects of organization of criminal courts, police investigation, prosecuting agencies, delays in criminal trials, committal proceedings, criminal appeals, revisions and inherent powers, procedure for trial of perjury cases, etc. As a result, the Code of Criminal Procedure, 1898 was amended to give effect to some of the recommendations. On reconstitution, the Law Commission was asked by the Government of India to undertake a comprehensive review of the Code. While this review was in progress, the Commission rendered certain reports on specific problems arising out of certain provisions of the Code. Those were :

- (1) Report on the Evidence of Officers of the Mint and of the Indian Security Press regarding Forged Stamps, Currency Notes, etc. (S. 510 of the Code).<sup>2</sup>
- (2) Report on Section 9 of the Code regarding the Appointment of Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges.<sup>3</sup>
- (3) Report on Section 44 of the Code and a suggestion to add a Provision relating to the Reporting of, and the Disclosure in Evidence about, Offence relating to Bribery,<sup>4</sup> and
- (4) Report on Sections 497, 498 and 499 of the Code with reference to the Question of Granting of Bail with Conditions.<sup>5</sup>
- (5) Report on the first fourteen Chapters comprising sections 1 to 176 of the Code.<sup>6</sup>

1.2. The Fifth Law Commission undertook a detailed study of the Code from where the previous Commission had concluded its Report, viz., Section 177 and rendered the Forty-first Report representing a comprehensive review of the Code in 1969. Consequent to that Report, the Parliament enacted the Code of Criminal Procedure, 1973 which came into effect on April 1, 1974.

1.3. Subsequent to the coming into force of the new Code, the Law Commission has given the following Reports on specific subjects relating to the criminal justice system.

1. Some Questions under the Code of Criminal Procedure Bill, 1973.<sup>7</sup>
2. Delay and Arrears in Trial Courts.<sup>8</sup>
3. Congestion of Undertrial Prisoners in Jails.<sup>9</sup>
4. Rape and Allied Offences—Some Questions of Substantive Law, Procedure and Evidence.<sup>10</sup>
5. Section 122(1) of the Code of Criminal Procedure, 1973 : Imprisonment for Breach of Bond for keeping the Peace with Sureties.<sup>11</sup>
6. Need for Amendment of the Provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to Ameliorate the Hardship and Mitigate the Distress of Neglected Women, Children and Parents.<sup>12</sup>
7. Concessional Treatment for Offenders Who on their Own Initiative Choose to Plead Guilty Without Bargaining.<sup>13</sup>
8. Report on Custodial Crimes.<sup>14</sup>

1.4. With a view to removing certain difficulties experienced in its working, the Code of 1973 underwent several amendments in 1974, 1978, 1980, 1983, 1988, 1990, 1991 and 1993 for specific purposes.

1.5. In May, 1994 the Government of India introduced the Code of Criminal Procedure (Amendment) Bill, 1994 in the *Rajya Sabha* incorporating many amendments in the Code. The Bill is at present before the Parliamentary Standing Committee on Home Affairs.

1.6. In the meantime, the Government of India has made a reference to the Law Commission to undertake comprehensive revision of the Code of Criminal Procedure and suggest reforms in the law.

In view of the above, the Law Commission has undertaken a study of comprehensive revision of the Code of Criminal Procedure, 1973, so as to remove the *germane* problems leading to consequential delay in disposal of criminal cases.

In order to elicit public opinion on the subject, the Commission circulated a *working* paper, a detailed questionnaire on the Code of Criminal Procedure, 1973 (Annexure I & II) setting out various aspects of the subject under study. The questionnaire was sent to all the State Governments, Director General of Police of all States, Supreme Court and High Court Judges, Bar Associations, Professors of Law, Advocates and Non-Governmental Organisations. Varied responses received on the questionnaire are summarised in Annexure III.

The Commission had also organised workshops under the auspices of High Courts at Allahabad, Ahmedabad, Bombay, Chandigarh, Delhi, Hyderabad, Kochi, Madras and Patna. At all these places the Commission had the benefit of discussions with the High Court Judges, senior lawyers, District and Sessions Judges, police officers, legal academicians and non-Governmental organisations on the subjects indentified by the Commission for review and reforms. At Jaipur, the Central Law Commission and the Rajasthan State Law Commission had organised the workshop. At Guntur and Thiruvananthapuram, the Commission had meetings with local Bar Associations and Judges on the scope of the amendment of the Code (Annexure IV). The Commission has, while formulating this Report, taken into consideration the views expressed at various workshops.

1.7. The Code of Criminal Procedure (Amendment) Bill, 1994 contains 49 clauses incorporating amendments. The significant amendments pertain to the following subject-matter:

Grant of autonomy to the prosecution agency (S. 24), setting up of the Directorate of Prosecution (S. 25A), Procedure of arrests and safeguards thereon for arrest of women (Ss. 45, 46, 50A); medical examination of the accused generally, (Ss. 53 and 54) of the person accused of rape (S. 53A); identification of arrested persons (S. 54A); proclamation of absconded persons committing grave offences under IPC (S. 82); Dealing with offences under the Foreigners Act, 1946 to check the flow of undesirable foreigners into the country (S. 110); raising the *ceiling* of maintenance of parents, wives and children (S. 125); empowering the district magistrate to prohibit *drill* or *mass* training with arms in a public place in order to check communal tension and foster a sense of security for the public (S. 144A); medical examination of the victim of rape by government registered medical practitioner or in their absence, by any other registered medical practitioner (S. 164A); to facilitate *compounding* of offences at the stage of investigation for quick disposal of cases (S. 173); mandatory judicial inquiry in case of death or disappearance of a person or rape of women in police custody and conducting of post mortem examination within 24 hours of death (S. 176); empowering the magistrate to authorise further detention in custody of an accused for a limited period after recording reasons (S. 190); protection given to members of Armed Forces accused of offences to be extended to other public servants charged with the maintenance of public order (S. 197); making it obligatory on the magistrate to inquire or direct investigation of the case before summoning the accused residing beyond his jurisdiction (S. 202); empowering the Sessions Court also to hold joint trial on the application of the accused persons (S. 223); empowering the Sessions Judge to transfer a case not only to the Chief Judicial Magistrate but also to any other judicial magistrate

(S. 228): expansion of the category of cases for *summary* trials (S. 260) making *memorandum* of identification memo prepared by magistrate *admissible* in evidence without formal proof of facts stated therein, with a discretion conferred in the court to examine the magistrate on the subject matter of the memorandum on the application of the prosecution or the accused (S. 291A); empowering magistrates to issue directions to any one including an accused person to give specimen signatures and handwriting (S. 311A); permission to file an appeal in the Sessions Court instead of High Court on the basis of inadequacy of sentence passed by a magistrate (S. 377); provision for appeal against *acquittals* by magistrate to the Sessions Court (S. 378); appellate court to give notice to the prosecution before releasing on bail a person convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years (S. 389); provision that the period for which the life convict remained in detention during investigation, inquiry or trial be setoff against the period of 14 years of actual imprisonment (S. 433A); an arrested person accused of a bailable offence, if indigent and cannot furnish security, be released on execution of bond without sureties (S. 436) detention of undertrial prisoner, except the one accused of an offence punishable with death, not to exceed one-half of the maximum period of imprisonment for the offence; mandatory release on his personal bond with or without sureties; absolute *habeas* on detention beyond the maximum period of imprisonment for the offence (S. 436A); certain restrictions in the grant of bail to previous convicts of grave offences and other conditions on the grant of bail with a view to ensuring that the accused on bail does not *interfere* or *intimidate* witnesses (S. 437); provision for more stringent conditions for the grant of *anticipatory* bail by the Sessions Court and High Court (S. 438); surety to disclose to the court as to in how many cases he has already stood surety for accused persons (S. 441A); *forfeiture* of bond for appearance before a court and the court's powers thereon (S. 446); amendments to First and Second Schedules of the Code of Criminal Procedure; amendments to Indian Penal Code, namely, (i) S. 153AA punishment for violation of *prohibitory* order on mass *drill* or *training* with arms in public places, (ii) S. 174A prescribing punishment for *proclaimed* offenders, (iii) S. 229A prescribing punishment for persons released on bail failing to appear and surrender to custody.

1.8. The Law Commission had also undertaken an intensive study of the Code with a view to eliminating the problems and bottlenecks leading to delay in the disposal of criminal cases as well as other remedial measures. The Commission set about its task by *identifying* the following areas in the Code which needed redesigning and restructuring:

- (i) Establishment of Separate Investigating Agency.
- (ii) Independent Prosecuting Agency.
- (iii) Law of Arrest.
- (iv) Custody, *Remand* and Changes in Section 167(2).
- (v) Bail, Anticipatory Bail and Sureties.
- (vi) Bail—Attendance of Accused—Appellate Stage.
- (vii) Summons cases—Warrant Cases—*Summary* Trial; Changes in Procedure.
- (viii) Examination of Witnesses and Record of their Statements under sections 161 and 162.
- (ix) Protection and Facilities to Witnesses.
- (x) Examination of Accused under Section 313.
- (xi) Compounding of Offences : Section 320.
- (xii) *Plea Bargaining*.

- (xiii) Setting up of Nyaya Panchayats : Scope of Jurisdiction and Nature of Offences to be Tried by them.
- (xiv) *Victimology* and *Compensating* the Victims; Insertion of New Provisions.
- (xv) Inquiry and Trial of Persons of *Unsound* Mind.
- (xvi) Procedure for Maintenance of Wives, Children and Parents.
- (xvii) Special Protection in respect of Women.
- (xviii) Punishment of Imprisonment for Life, Sentencing and *Set Off*.
- (xix) Code of Criminal Procedure (Amendment) Bill, 1994; Proposed Changes.
- (xx) Speedy Justice.

We have examined the aforesaid problems in detail keeping in view the various *responses* received on the questionnaire and the views expressed in the workshops. Accordingly, we have made our recommendation particularly from the point of view of "speedy trials".

#### FOOTNOTES

1. 14th Report : Submitted on September 26, 1958. See. Vol. II, 714—849.
2. 25th Report : Submitted on Sept. 27, 1963.
3. 32nd Report : Submitted on May 29, 1967.
4. 33rd Report : Submitted on December 15, 1967.
5. 36th Report : Submitted on January 9, 1968.
6. 37th Report : Submitted on February 19, 1968.
7. 48th Report : Submitted on July 25, 1972.
8. 77th Report : Submitted on November 27, 1978.
9. 78th Report : Submitted on February 2, 1979.
10. 84th Report : Submitted on April 25, 1980.
11. 102nd Report : Submitted on July 2, 1984.
12. 132nd Report : Submitted on April 19, 1989.
13. 142nd Report : Submitted on August 22, 1991.
14. 152nd Report : Submitted on August 26, 1994.

## CHAPTER II

### ESTABLISHMENT OF SEPARATE INVESTIGATING AGENCY

1. The need for expeditious and effective investigation of offences as contributing to the achievement of the goal of speedy trial cannot be gainsaid. The investigating agencies have an important role to play in the administration of criminal justice.

2. Investigation of crime is a highly specialized process requiring a lot of patience, expertise, training and clarity about the legal position of the specific offences and subject matter of investigation and socio-economic factors. It is basically an art of unearthing hidden facts with the purpose of linking up different pieces of evidence for the purpose of successful prosecution. It requires specialisation and *professionalism* of a type not yet fully perceived by police agencies. For discharging such a task efficiently, a separate investigating wing of the police which replenishes its knowledge and skills from developing technology is a *desideratum*.

3. It is the common complaint of police officers that the police department is understaffed and has a heavy duty to perform. The requirements of the law and order situation, *bandobast* duties, escort of prisoners to courts, *patrol* duties, *traffic* arrangements, security to VIPs, rise in crime graphing the country in general and the creation of new kinds of substantive offences have increased manifold the work of the police. Further, many a time while the investigating officer is in the midst of the investigation, he would be called away in connection with some other duty. Consequently, he would be constrained to suspend the investigation or hand it over to a junior officer. Further, it also happens that investigating officers are transferred without being allowed to complete the investigation in hand. Even in grave offences there is piecemeal investigation by different police officials in the *hierarchy* which inevitably results in variation of statements by the witnesses examined and recorded at different times. Such variation would ultimately destroy the *efficacy* of the evidence of witnesses when examined in the court. This is a defect in the investigational process, advantage of which is taken by the defence.

4. The Law Commission in its Fourteenth Report had examined in detail the drawbacks in the then existing investigative machinery and of the investigational processes. The Commission made the following suggestions to improve the quality of investigation:

"We think on the whole that there is great force in the suggestion that, as far as practicable, the investigating agency should be distinct from the police staff assigned to the enforcement of law and order. We do not, however, suggest absolute separation between the two branches. Even officers of the police department have taken the view that if an officer is entrusted with investigation duties, his services should not be required for other work while he is engaged in investigation. The separation of the investigating machinery may involve some additional cost. We think, however, that the exclusive attention of the investigating officer is essential to the conduct of an *efficient* investigation and the additional cost involved in the implementation of our proposal is necessary. The adoption of such a separation will ensure undivided attention to the detection of crime. It will also provide additional strength to the police establishment which needs an increase in most of the States."

5. The National Police Commission in its Fourth Report bemoaned the lack of exclusive and single minded devotion of police officials in the investigation of crimes for reasons beyond their control. The Commission found on a sample survey carried out in six states in different parts of the country that an average investigating officer is able to devote only 37 per cent of his time to investigational work while the rest of his time is taken up by other duties. In view of this the Police Commission has pointed out that there is an urgent need



for increasing the cadre of investigating officers and for restructuring the police hierarchy to secure, inter alia, a large number of officers to handle investigation work.<sup>2</sup>

6. This is one of the issues on which the Law Commission had consultations with the Members of the Bench and the Bar, prosecuting agencies and senior police officers during the legal workshops held at various places. It is the unanimous opinion that investigation of serious offences punishable with sentence of seven years or more should invariably be undertaken by senior officers not below the rank of Inspector of Police. It is, therefore, desirable to separate the investigating police from the law and order police for the following reasons:

Firstly, it will bring the investigating police under the protection of judiciary and greatly reduce the possibility of political or other types of interference. The Punjab Police Commission (1961-62), the Delhi Police Commission (1968), the Goray Committee on Police Training (1972), the National Police Commission (1977-80), the M.P. Public Police Relations Committee (1983) have unanimously criticised political interference in the work of the police.

Secondly, with the possibility of greater scrutiny and supervision by the magistracy and the public prosecutor, as in France, the investigation of police cases are likely to be more in conformity with the law than at present which is often the reason for failure of prosecution in courts.

Thirdly, efficient investigation of cases will reduce the possibility of unjustified and unwarranted prosecutions and consequently of a large number of acquittals.

Fourthly, it will result in speedier investigation which would entail speedier disposal of cases as the investigating police would be completely relieved from performing law and order duties, VIP duties and other miscellaneous duties, which not only cause unnecessary delay in the investigation of cases but also detract from their efficiency.

Fifthly, separation will increase the expertise of investigating police.

Sixthly, since the investigating police would be plain clothes men even when attached to police station will be in a position to have good rapport with the people and thus will bring their co-operation and support in the investigation of cases.

Seventhly, not having been involved in law and order duties entailing the use of force like tear gas, lathi charge and firing, they would not provoke public anger and hatred which stand in the way of police-public co-operation in tracking down crimes and criminals and getting information, assistance and intelligence which the police have a right to get under the provisions of Ss. 37 to 44 of the Code of Criminal Procedure.<sup>3</sup>

7. There should be a separate cadre of investigating agency in every district subject to supervision by the higher authorities. When a case is taken up for investigation by an officer of such agency, he should be in charge of the case throughout till the conclusion of the trial. He should take the responsibility for production of witnesses, production of accused and for assisting the prosecuting agency. As observed in the Fourteenth Report of the Law Commission, there need not be absolute separation between the two branches.

8. Efficient investigation pre-supposes induction of scientific work culture in police. New technology, such as computers, photography, videography, new methods of interrogation technology, new observation gadgets and highly sophisticated search equipment, etc. are essential for effective investigation of traditional and new types of organized crimes. The rapid advances in science and technology have greatly influenced police investigation as also the techniques adopted by criminals to leave no traces or clues at the scene of crime. But the average investigating officer still depends on traditional methods of recording statements of witnesses or getting confessions from accused to complete the process of investigation. Such heavy dependence on these traditional methods may be ascribed to lack of knowledge and awareness about the scien-

tific technologies available to him for crime detection. This difficulty could be overcome by providing scientific facilities and by imparting regular in-service training at periodical intervals.' Thus there is a great need for systematized training for investigating officers in scientific methods of investigation. The nature of training and details thereof have to be worked out by the experts. Further, we are of the view that there is an urgent need to create a separate investigating agency. As to how a separate investigating agency is to be structured, is a matter of details which can be considered by the concerned departments.

9. We recommend that the police officials entrusted with the Investigation of grave offences should be separate and distinct from those entrusted with the enforcement of law and order and other miscellaneous duties. Separate investigating agency directly under the supervision of a designated Superintendent of Police be constituted. The hierarchy of the officers in the investigating police force should have adequate training and incentives for furthering effective investigations. We suggest that the respective Law and Home Departments of various State Governments may work out details for betterment of their conditions of service.

The officials of the investigating police force be made responsible for helping the courts in the conduct of cases and speedy trial by ensuring timely attendance of witnesses, production of accused and proper co-ordination with prosecuting agency. Other necessary steps should also be taken for promoting efficiency in investigation. Accordingly, we recommend that necessary changes in the Police Acts, both Central and State, Police Regulations, Police Standing Orders, Police Manuals, be made by the Home Department in consultation with the Law Departments of State Governments.

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FOOTNOTES:

1. *Fourteenth Report of the Law Commission*, Vol. II para 24, pp. 741, 762.
2. *Fourth Report of the National Police Commission*. para 27.7. p. 3.
3. See R. Deb, "Police and Administration of Criminal Justice," Vol. XXVI, No. 2 *CBI Bulletin* 7 at 8-9, (1992).
4. *Supra* note 1 at 762-763.

## CHAPTER III

### INDEPENDENT PROSECUTING AGENCY

1. In criminal law prosecution has an important role to play. Our system of administration of criminal justice contemplates fair and effective prosecution of offences. Under the present scheme of the Code of Criminal Procedure, the prosecution machinery has been completely separated from investigating agency and the prosecuting officers are supposed to be independent from police. Under section 24 of the Code, the public prosecutors of High Courts are appointed by the Central Government or the State Government, as the case may be, on the recommendations of the High Court. The public prosecutors and additional public prosecutors are appointed in Sessions Courts on the recommendations of the Sessions Judge. Section 24 also provides for appointment of such public prosecutors by the Central Government for the purpose of conducting any case or class of cases. In some States, Directorates of Prosecution have been set up. However, there is a common complaint that required number of prosecuting officers have not been appointed and the prosecutions are not being conducted efficiently and in the manner expected.

2. It has to be borne in mind that the quality of criminal justice is closely linked with the *calibre* of the prosecution system and many of the acquittals in courts can be ascribed not only to poor investigations but also to poor quality of prosecutions. There is a strong opinion in favour of the autonomy of the public prosecutors and creation of a separate prosecution agency under the control of a Directorate of Prosecution to exercise administrative supervision over the work of a network of public prosecutors at various levels. The Supreme Court in *S.B. Shahane v. State of Maharashtra*<sup>1</sup> held that the prosecution agency be autonomous having a regular cadre of Prosecuting officers. There is a general complaint that the public prosecutors in lower courts do not prepare cases carefully and that the quality of prosecutions is poor. Therefore, there should be careful selection and appointment of prosecutors who can closely *coordinate* with the investigation. No doubt, they have to closely coordinate with the police system since prosecutions are conducted on behalf of the police. There should not be communication gap between the police and the prosecutors during the investigation stage. The police, however, are of the view that investigation and prosecution form a continuous link process in the administration of justice and, therefore, both should be closely coordinated in order to ensure successful prosecution of criminal cases. They also stress that total detachment of prosecution department from the police will not only create conflicts between the two but also result in each throwing the responsibility on the other with the result that there will not be any effective control over the maintenance of law and order or prosecution of criminals. The police are firmly of the view that the prosecutors have to constantly advise the police in investigation of grave offences and collection of evidence to sustain the prosecution with success.

3. It is a matter of common knowledge, that a public prosecutor has a dual role to play, namely, as a prosecutor to conduct the trial and as a legal adviser to the police department in charge of investigation. For some reason or the other, in the present administration, the latter part is not given due weight and a virtual *communication* gap exists. The police officers also strongly feel that the concept of autonomy has done considerable harm, not from the point of objectivity but in reducing the scope for securing appropriate legal advice at the investigation stage. While nobody doubts the need for objectivity, it is felt that they should provide legal guidance at the stage of investigation. It is also noticed that some of the mistakes committed by investigating officers could have been avoided, if there had been some mechanism to provide legal guidance and assistance during the course of investigation.

4. The Law Commission in its 14th Report considered this issue. It is noted that a man of *integrity* should be chosen to be in charge of prosecution and the purpose of a criminal trial being to determine the guilt or innocence of the accused, the duty of a public prosecutor is not to represent any particular party but to act in an objective manner. The Commission also noted that very often there arise complicated cases which require legal assistance even during the

stage of investigation. But the public prosecutor has, however, neither the power to interfere in the investigation nor can he call for the police papers and scrutinise them or otherwise examine the available evidence before a report is actually filed. This is anomalous because though he is responsible for the conduct of the prosecution in court, he has no opportunity of controlling or shaping the material on which the case is to be founded and presented before the court. The Law Commission, after making an in-depth study about the prosecuting systems obtaining in other countries and also the system in our country, made several suggestions. One firm suggestion was that "the prosecuting agency should be completely separated from the police department. In every district a separate prosecution department may be constituted and placed in charge of an official, who may be called the Director of Public Prosecutions. The entire prosecution in the district should be under his control. In order to ensure that he is not regarded as the part of the police department, he should be an independent official." The Commission, however, concluded that as the head of the entire prosecuting machinery of the district, he should arrange for the prosecution of all cognizable cases through additional public prosecutors and distribute the work among them and should advise the police department and other government departments at the district level on the legal aspects of the case at any stage of criminal proceedings including the stage of investigation. The Commission also suggested "that the Director of Public Prosecutions should be a full time government servant and should not be allowed the right of private practice." The Commission has also given some guidelines for structuring such prosecuting agency at the district level.<sup>4</sup>

5. The Commission also considered the difficulties arising from the lack of cooperation between the police department and the public prosecutors and observed that the Superintendent of Police as the Head of the Police in the district has a duty to see that the prosecutors are given all the assistance and information they need at the trial.

6. We may also point out that the Law Commission in its 41st Report endorsed the recommendations made in the 14th Report and regretted that the same have not been given serious consideration by the State Governments. Further, it was recommended that "with the abolition of committal proceedings, it will be the responsibility of the public prosecutor to scrutinise the police report or charge-sheet before it is filed and see whether a case, which is exclusively triable by Court of Sessions, is made out from the evidence. At this stage, the public prosecutor should have the authority to send the case back for further investigation and to modify the proposed charge whenever he finds it necessary to do so." Of course, this will have to be done subject to the constraints of limitation prescribed.

7.1. The National Police Commission in its Fourth Report surveyed the development of the prosecution agency and suggested a new set up, namely, that "the post of Assistant Public Prosecutors, Additional Public Prosecutors and Public Prosecutors should be so designed as to provide a regular career structure for the incumbents for the entire state as one unit." "The Public Prosecutor in a district should be made responsible for the efficient functioning of the subordinate prosecuting staff in the district and he should have the necessary supervisory control over them for this purpose." The Police Commission also recommended that a supervisory structure over the district prosecuting staff should be developed with Deputy Directors of Prosecution at the regional or district level and a Director of Prosecution at the State level.<sup>5</sup>

7.2. As regards recruitment, the Police Commission also recommended minimum qualifications for being appointed to these posts and also noted that judicial officers with experience may be appointed. For appointment to the post of Assistant Public Prosecutor Grade II, Assistant Public Prosecutor Grade I, Additional Public Prosecutor, Public prosecutor, Deputy Director of Prosecution, Additional Director of Prosecution and Director of Prosecution, a specified minimum number of years of practice at the Bar or experience as a judicial officer be stipulated. For the post of Deputy Director of Prosecution, seven years practice at the Bar or seven years experience as a judicial officer of which at least three years should be as a Sessions Judge or three years experience as Additional Public Prosecutor or Public Prosecutor was recommended. For the post of Director of Prosecution and Additional Director of Prosecution, ten years practice at the

Bar or ten years experience as a judicial officer of which at least five years should be as a Sessions Judge or three years experience as Deputy Director was recommended."

8. During our workshops, though it was felt that prosecution agency should have autonomy, it was suggested that coordination between investigating agency, namely police and the prosecuting agency is vital for the efficient prosecution of cases at the trial stage. How to achieve this coordination? The National Police Commission recommended that the prosecuting cadres be constituted into a separate legal wing to function under a Director of Prosecution as an integral part of state police. This is not valid as it runs contrary to the law laid down by the Supreme Court in *Shahane's* case.

9. We also recommend that the Home Departments of the State Governments should prescribe guidelines to achieve the desirable coordination between the Director of Prosecution and the Investigating Agency of the Police for efficient prosecution of cases.

Pursuant to our recommendation that there should be a separate investigation agency for investigation of grave offences, i.e. offences punishable with imprisonment of seven years and above and/or fine, it is further recommended that such investigating agency should work in close coordination with the Directorate of Prosecution at state and district levels. We are of the view that some of the prosecutors may be earmarked at one time for advising the investigating agency.

10. We are of the view that the Directorate of Prosecution shall be structured as suggested by the National Police Commission and accordingly a cadre be created on those lines with necessary modifications as the Home and Justice Departments of the State Governments may deem fit.

11. Clause 3 of the Code of Criminal Procedure (Amendment) Bill, 1994 seeks to insert the following Explanation to section 24(6) after the proviso which shall be deemed to have been inserted with effect from 18th day of December, 1978.

- (a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, and which provides for promotion of Assistant Public Prosecutors, to that post;
- (b) "Prosecuting Officer" means a person appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.

These changes are sought to be introduced keeping in view the promotional avenues to the members of the regular cadre of prosecuting officers in a state where such cadre exists.

12. We approve of the recommendations of the National Police Commission to establish a Directorate of Investigation and also clause 4 of the Amendment Bill providing for insertion of new section 25A, which reads as under :

- "25A(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.
- (2) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.
- (3) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.
- (4) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1) or as the case may be, sub-section (8) of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

- (5) Every Public Prosecutor, Additional Public Prosecutor, and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8) of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.
- (6) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may by notification specify.
- (7) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.

We, however, feel that sub-section (4) of new section 25A placing the public prosecutors appointed under section 24(1) to conduct cases in the High Court to be subordinate to the Director of Prosecution need not be there as, in our view, the Public Prosecutors appointed exclusively to conduct cases on the appellate side in the High Court should be differentiated from those prosecuting officers appointed to conduct cases in the lower courts. In this context, we may also point out that the object underlying the establishment of Directorate of Prosecution is to facilitate and expedite the trial work and also to bring about coordination with investigating agency which is very much essential in a criminal trial.

We accordingly suggest the deletion of sub-section (4) of the proposed section 25A.

13. We recommend that the Government while appointing Public Prosecutors and Assistant Public Prosecutors under sections 24 and 25 shall, as far as practicable, appoint sufficient number of woman Public Prosecutors and Assistant Public Prosecutors so that they can effectively deal with cases involving women who are under 18 years of age and in respect of whom offences under sections 354, 376, 376A to 376E (both inclusive) proposed by the National Commission for Women and 509 of the Indian Penal Code.

14. In *Sumil Kumar Pal v. Phota Sheikh*<sup>10</sup> the Public Prosecutor appeared on behalf of accused persons which lent support to the allegation that the accused were supported by the ruling political party in the State of West Bengal. The Supreme Court held that the trial was vitiated and remanded the case to another Sessions Court for re-trial. With regard to the role played by the Public Prosecutor, the Court observed, "that is inconsistent with the ethics of legal profession and fair play in the administration of justice for the Public Prosecutor to appear on behalf of the accused."

At this stage while considering the observations made by the Supreme Court in the case of *Sumil Kumar Pal v. Phota Sheikh*, we are also of the view that where there are conflicting interests and where propriety requires that the prosecution in such a case has to be conducted by someone other than a member of the Directorate of Prosecution, such court should have the power, in its discretion, to permit any other person competent to coordinate the prosecution in consultation with the appropriate government, who shall act under section 24(8) expeditiously. The appropriate government should make the appointment in accordance with section 24(8). Section 24(8) be amended accordingly.

15. In the various workshops, views were expressed that though it is the bounden duty of the State to conduct prosecution, as crime is against society, the private complainants or victims of crime or his dependance be also given a role in bringing the offender to justice. The Code of Criminal Procedure in section 301 permit the private counsel to assist the prosecutor and section 302 empowers the Magistrate to permit the prosecution to be conducted by any other person as well.

In *Babu v. State of Kerala*, the Kerala High Court graphically described the role of Public Prosecutors as follows:<sup>11</sup>

"Public Prosecutors are really Ministers of Justice whose job is none other than assisting the State in the administration of justice. They are not

representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspects of the case. They are not there to see the innocent go to the gallows; they are also not there to see the culprits escape the conviction."

These observations were made in a case where a magistrate had refused permission under section 302 of the Criminal Procedure Code to the complainant to engage an advocate to conduct the prosecution. The High Court examined section 301 of the Code under which the advocate engaged by a private person can assist the Prosecutor in the conduct of the prosecution. But under section 302 the magistrate may permit the prosecution itself to be conducted by any aggrieved person or an advocate. The distinction is that when permission under section 302 is given, the Public Prosecutor virtually disappears from the scene and the private lawyer takes over the prosecution. There is a vast difference between assisting the Public Prosecutor under section 301 and conducting the prosecution on the basis of a permission granted under section 302. The Court pointed out that though the magistrate has a discretion under 302, this discretion be exercised only under exceptional circumstances where he feels that denial of permission will obstruct justice.

16. Section 302 has to be used if necessary, by the magistrate in granting permission to the private complainant where ends of justice require, particularly where he finds that Public Prosecutors are not effectively discharging their duties thereby subverting the process of law and justice. So far as the interest of the complainant in Sessions cases is concerned, section 301 permits a private person to instruct the prosecutor. To that extent the complainant's interest is being taken care of and such private person need not take the place of public prosecutor. Consequently, no further change is necessary in section 301. As regards Section 302 which is applicable only to the trials before the Magistrates, the magistrate has ample discretion to permit the prosecution to be conducted by any person. As observed by the Kerala High Court in *Babu's case*, in appropriate cases, the Magistrate may exercise that power by permitting the complainant's advocate to conduct the prosecution. So no change is necessary.

17. In view of the recommendations to establish the Directorate of Prosecution, section 25(3) and section 302 to the extent that they enable police officers to conduct prosecution, need to be suitably amended.

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FOOTNOTES:

1. AIR 1995 SC 1628.
2. *Fourteenth Report of the Law Commission*, para 15, page 77 (1958).
3. *Id* at para 17, page 772.
4. *Id* at paras 19, 20, page 773.
5. *Forty First Report of the Law Commission*, para 18.26, page 152 (1969).
6. *Fourth Report of the National Police Commission*, para 29.6, page 24 (1980).
7. *Id* at para 29.7, page 24.
8. *Id* at para 29.12, page 25.
9. *Id* at para 29.17, page 24-25.
10. (1984) 4 SCC 532.
11. 1984 Cri. LJ. 499 (Ker) at 502.

## CHAPTER IV

### LAW OF ARREST

1. Arrest entails deprivation of a person's liberty by legal authority or at least by apparent legal authority. In a democratic country such as ours, the Constitution and laws value personal liberty of every individual and contain provisions for safeguarding it. The right to personal liberty is a basic human right recognised by the Universal Declaration of Human Rights, 1948 and the International Government on Civil and Political Rights, 1966 which India has ratified. Furthermore, the Constitution of India recognises it as a fundamental right in Article 21 thus: "No person shall be deprived of his life or personal liberty except according to procedure established by law". In *Maneka Gandhi v. Union of India*,<sup>1</sup> the Supreme Court has interpreted that the procedure under this Article must be "right, just and fair" and not arbitrary, fanciful or oppressive.

2. The provisions relating to arrest with or without warrant and the rights of arrested persons are incorporated in sections 41 to 60 of the Code of Criminal Procedure. Section 41 specifies the various categories of persons whom any police officer may arrest without warrant or an order from a magistrate. Out of this, the most important category is found in sub-clause (a) of clause (1) which refers to any person "who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned."

3. One of the compelling issues in the sphere of the law of arrests is how to balance the protection of human rights to personal liberty consistent with the society's interest in crime detection and maintenance of law and order in civil society. As pointed out very pertinently by the Supreme Court in *Joginder Kumar v. State of U.P.*:<sup>2</sup>

"The horizon of human rights is expanding. At the same time, the crime rate is also increasing...The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the others, of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis, of deciding which comes first—the criminal or society the law violator or the law abider..."

4. The National Police Commission had observed in its Third Report that the power of arrest is one of the sources of police corruption. As a result of the sample study made of the quality of arrests made in one State during the three year period 1974-1976, the Commission observed :

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period, it was estimated that 43.2 per cent of the expenditure in the connected jails was over such persons only who in the ultimate analysis need not have been arrested at all."

5. The National Police Commission had recommended the following guidelines for making arrests.<sup>3</sup> An arrest during the investigation of a cognisable case may be considered justified in one or other of the following circumstances :

- (i) The case involves a grave offence like murder, dacoity, robbery, rape, etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.
- (ii) The accused is likely to abscond and evade the processes of law.
- (iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.
- (iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.



It would be desirable to insist through departmental instructions, that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines.

6.1 The Supreme Court in *Joginder Kumar's* case laid down some guidelines regarding the power of arrest by the police. The Court referred to the Report of Sir Cyril Phillips Committee—Report of the Royal Commission on Criminal Procedure (Command Papers 802 1981) wherein the following suggestion was made:<sup>5</sup>

“To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario [Canada] enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It would also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case.”

6.2 The Supreme Court also referred to Section 56(1) of the Police and Criminal Evidence Act, 1984 in the United Kingdom which provides:<sup>6</sup>

“Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable, except to the extent that delay is permitted by this section, that he has been arrested and is being detained there.”

6.3 The Court referred to the Royal Commission's Enunciation of Guidelines as follows:<sup>7</sup>

“We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria :

- (a) the person's unwillingness to identify himself so that a summons may be served upon him;
- (b) the need to prevent the continuation or repetition of that offence;
- (c) the need to protect the arrested person himself or other persons or property;
- (d) the need to secure or preserve evidence of or relating to that offence or to obtain 'such' evidence from the suspect by questioning him; and
- (e) the likelihood of the person failing to appear at court to answer any charge made against him.”

6.4 The Supreme Court after examining the law in England, proceeded to lay down guidelines for making arrest. Balancing the need for arrest with the right to personal liberty in Article 21 of the Constitution, the Court observed:<sup>8</sup>

The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter... A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave station without permission would do.

6.5. The Court formulated the following requirements for effective protection of Fundamental Rights of Articles 21 and 22(1):

- (1) An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.
- (2) The police officer shall inform the arrested person when he is brought to the police station of this right.
- (3) An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly."

6.6. The Court also laid down that it shall be the duty of the magistrate before whom the arrested person is produced, to satisfy himself that the requirements have been complied with.

7.1. The Law Commission in its One Hundred and Fifty Second Report on *Custodial Crimes* (1994) has recommended the insertion of two sections, namely, that in S. 41 after sub-section (1), the following new sub-section (1A) be inserted<sup>10</sup>:

"41(1A) A police officer arresting a person under clause (a) of sub-section (1) of this section must be reasonably satisfied, and must record such satisfaction, relating to the following matters:

- (a) the complaint, information or suspicion referred to in that clause, is not only in respect of a cognizable offence having been committed, but also in respect of the complicity of the person to be arrested, in that offence;
- (b) arrest is necessary in order to bring the movements of the person to be arrested under restraint, so as to inspire a sense of security in the public or to prevent the person to be arrested from evading the process of the law or to prevent him from committing similar offences or from indulging in violent behaviour in general."

7.2. A further suggestion to incorporate a new section 41A on the basis of the Supreme Court's decision in *Joginder Kumar's* case was made.<sup>11</sup>

"41A. *Notice of appearance*—Where the case falls under clause (a) of sub-section (1) of section 41, the police officer may, instead of arresting the person concerned, issue to him a notice of appearance requiring him to appear before the police officer issuing the notice or at such other place as may be specified in the notice and to cooperate with the police officer in the investigation of the offence referred to, in clause (a) of sub-section (1) of section 41.

- (2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of that notice.
- (3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police is of the opinion that he ought to be arrested.
- (4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent court."

8.1 The Law Commission of India in its 135th Report on "*Women in Custody*" the following recommendations regarding the arrest of women:

450B. *Arrest of women*.—(i) Where a woman is to be arrested under this Code, then unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed, and unless the circumstances otherwise require or unless

the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest. (See para 2.2).

- (2) Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer shall, by making a written report, obtain the prior permission of the immediate superior officer not below the rank of an Inspector for effecting such arrest or, if the case is one of extreme urgency, he shall, after making the arrest, forthwith report the matter in writing to his such immediate superior officer, with the reasons for arrest and the reasons for not taking prior permission as aforesaid and shall also make a similar report to the Magistrate within whose legal jurisdiction the arrest has been made.<sup>12</sup> (See para 2.3).

The aforesaid recommendation has been adopted as sub-section (4) of section 46 in clause 7 of the 1994 Bill in the following manner:

- "(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise and where such exceptional circumstances exist, the police officer shall, by making a written report, obtain the prior permission of his immediate superior officer for effecting such arrest or, if the case is one of extreme urgency and such prior permission cannot be obtained before making such arrest, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer explaining the urgency and the reasons for not taking prior permission as aforesaid and shall also make a report to the Magistrate within whose local jurisdiction the arrest had been made."

We reiterate this recommendation.

**8.2.** We suggest the following amendments to Section 46 of the Code of Criminal Procedure:

"In the light of the discussion in the preceding para, proviso (b) on the following lines be added to sub-section (f) of section 46 in the following manner:

"Provided that where a woman is to be arrested then, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation, arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer arresting is a female the police officer shall not actually touch the person of the woman for making her arrest."

**8.3.** We also suggest that the following new sub-section (2) be inserted in section 46 in the following manner:

- "(2) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the police officer shall, by making a written report, obtain the prior permission of his immediate superior officer for effecting such arrest, or if the case is one of extreme urgency and such prior permission cannot be obtained before making such arrest, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer explaining the urgency and the reasons for not taking prior permission as aforesaid and shall also make a report to the Magistrate within whose local jurisdiction the arrest had been made."

as provided in Clause 7 of the 1994 Bill.

**8.4.** In view of above proposed changes, the other existing sub-sections be re-numbered.

9. The Law Commission of India in its 152nd Report on Custodial Crimes recommended that a new section 50A be inserted after section 50 in the Code of Criminal Procedure, 1973 on the following lines:

- 50A. (1) whenever a person is arrested by a police officer, intimation of the arrest shall be immediately sent by the police officer (along with intimation about the place of detention) to the following person:
- (a) a relative or friend or other person known to the arrested person, as may be nominated by the arrested person;
  - (b) failing (a) above, the local legal aid committee.
- (2) Such intimation shall be sent by telegram or telephone, as may be convenient, and the fact that such intimation has been sent shall be recorded by the police officer under the signature of the arrested person.
- (3) The police officer shall prepare a custody memo and body receipt of the person arrested, duly signed by him and by two witnesses of the locality where the arrest has been made, and deliver the same to a relative of the person arrested, if he is present at the time of arrest or, in his absence, send the same along with the intimation of arrest to the person mentioned in (1) above.
- (4) The custody memo referred to in (3) above shall contain the following particulars:
- (i) name of the person arrested and father's name or husband's name;
  - (ii) address of the person arrested;
  - (iii) date, time and place of arrest;
  - (iv) offence for which the arrest has been made;
  - (v) property, if any, recovered from the person arrested and taken into charge at the time of the arrest; and
  - (vi) any bodily injury which may be apparent at the time of arrest.
- (5) During the interrogation of an arrested person, his legal practitioner shall be allowed to remain present.
- (6) The police officer shall inform the person arrested, as soon as he is brought to the police station, of the contents of this section and shall make an entry in the police diary about the following facts:
- (a) the person who was informed of the arrest;
  - (b) the facts that the person arrested has been informed of the contents of this section; and
  - (c) the fact that a custody memo has been prepared, as required by this section.

10. The Law Commission of India in its 152nd Report on Custodial Crimes recommended that Section 57A be inserted in the Code of Criminal Procedure, 1973 on the following lines:

"57A. *Duty of Magistrate to verify certain facts.*

When a person arrested without warrant is produced before the Magistrate, the Magistrate shall, by inquiries to be made from the arrested person, satisfy himself that the provisions of sections... have been complied with (sections relating to safeguards in connection with arrest, rights on arrest, etc. to be entered) and also inquire about, and record, the date and time of arrest."

11. In view of the guidelines enunciated by the Supreme Court in *Joginder Kumar's* case and also the consequent recommendations of the Law Commission in its 152nd Report the following new sub-clause to section 41 be inserted in the Code:

"41(3). A police officer arresting a person under clause (a) of sub-section (1) of this section must be reasonably satisfied that arrest is necessary and must record such satisfaction in respect of matters covered every clause of sub-section(1)."

Further a new section 41A be also inserted in the Code on the following lines:

"41A(1). The police officer may, if satisfied that immediate arrest of the person concerned is not necessary, issue to him a notice requiring him to appear before the police officer at specified time and place for further investigation and it shall be the duty of that person to comply with the terms of the notice.

(2) If such person fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned therein." (Ch. IV para 11)

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#### FOOTNOTES

1. AIR 1978 SC 597.
2. *Crimes* 1994 (2) 106 at 107.
3. *Third Report of the National Police Commission*, para 22-23, pages 30-31 (1980).
4. *Id* at 32.
5. *Supra* note 2 at 110.
6. *Id* at 111.
7. *Id* at 109-110.
8. *Id* at 110.
9. *Id* at 111.
10. See 152nd Report on "Custodial Crimes", paras 14.4-14.6, pages 165-167 (1994) (Unpublished).
11. *Ibid*.
12. See 135th Report on "Women in Custody", page 33 (1989).
13. See note 10, para 14.7 pages 167-169 (1994).
14. See note 10, para 14.9, page 172 (1994).

## CHAPTER V

### CUSTODY, REMAND AND CHANGES IN SECTION 167(2)

1. In the *Central Bureau of Investigation Special Investigation Cell-1, New Delhi v. Anupam J. Kulkarni*, the Supreme Court held that under the proviso to Section 167(2) of the Code, the police custody can be only during the first 15 days of the remand and not later. It was generally felt in all the Workshops that such limitation would cause practical difficulties in carrying out investigation in some cases. In view of this, we suggest that it should be permissible for the prosecution to seek police custody during the period of remand at any time if a need arises. However, the total remand of police custody should not exceed 15 days.

2. Of late, it has been a matter of common knowledge that investigation of many important cases is entrusted to CBI by the appropriate Government after great delay. Consequently, the CBI has been experiencing considerable difficulties in obtaining the police custody even if it became absolutely necessary. There may be cases where the original investigating agency might have obtained police custody upto 15 days or considerable part of the period. In such a situation, the CBI is very much handicapped. After having considered the various views and keeping in view the present scenario and the types of offences coming to light, it is necessary to see that the investigation by CBI is effective and meaningful. For this purpose, obtaining of the fresh police custody by CBI becomes absolutely necessary. Therefore, we are of the view that a provision should be made for a fresh police custody if sought by the CBI but it should not exceed 15 days on the whole. Accordingly, section 167(2) be amended in the following manner:

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused for a term not exceeding fifteen days at a time but the total period shall not exceed (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years, (ii) sixty days, where the investigation relates to any other offence.

2(b) During such custody the Magistrate if he thinks fit, may authorise the detention of the accused person in custody of the police for a total number of 15 days on the whole—

Provided that if the investigation is transferred to Delhi Special Police Establishment, a Magistrate may also authorise detention of accused for another 15 days on the whole irrespective of the earlier period of police custody, on being satisfied with the reasons necessitating such custody mentioned by investigating officer of Delhi Special Police Establishment, after recording reasons.

On the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter:

2(c) No Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

2(d) No Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

*Explanation I.*—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

*Explanation II.*—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (c), the production of the accused person may be proved by his signature on the order authorising detention.

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FOOTNOTE

1. (1992) 3 SCC 141.

## CHAPTER VI

### BAIL, ANTICIPATORY BAIL AND SURETIES

1. The Law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973.

2. The law of bails, which constitutes an important branch of the procedural law dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and on the other, the fundamental principle of criminal jurisprudence, namely, the presumption of innocence of an accused till he is found guilty.

3. With a view to fulfilling the above objectives, the legislature has provided directions for granting or refusing bail. Where law allows discretion in the grant of bail, it is to be exercised according to the guidelines provided therein; further the courts have evolved certain norms for the proper exercise of such discretion.

4. Though the Code of Criminal Procedure has not defined bail, the terms "bailable offence" and "non-bailable offence" have been defined.<sup>1</sup> Bail in essence means security for the appearance of the accused person on giving which he is released pending investigation or trial. The Supreme Court in *Moti Ram v. State of M.P.*<sup>2</sup> has held that bail covers both release on one's own bond, with or without securities.

5. The Code has classified all offences into "bailable" and "non-bailable" offences. Under S. 2(a) "bailable offence" means an offence which is listed as bailable in the First Schedule or which is made bailable by any other law for the time being in force and "non-bailable offence" means any other offence. The Code has not provided any criteria to determine whether any particular offence is bailable or non-bailable. It depends on whether it has been shown as bailable or non-bailable in the First Schedule. An examination of the provisions of the Schedule would reveal that the basis of the classification is based on divergent considerations. However, the gravity of the offences, namely, offences punishable with imprisonment for three years or more have been treated as non-bailable offences. But this is not a hard and fast rule. There are exceptions to the same.

6. A person accused of a bailable offence is entitled to be released on bail as a matter of right if he is arrested or detained without warrant. But if the offence is non-bailable, depending upon the facts and circumstances of the case, the court may grant bail on its discretion. The scope of discretion varies in inverse proportion to the gravity of the crime. The courts have formulated the following guidelines for grant of bail in non-bailable offences:

- (i) the enormity of the charge;
- (ii) the nature of the accusation;
- (iii) the severity of the punishment which the conviction will entail;
- (iv) the nature of the evidence in support of the accusation;
- (v) the danger of the accused person absconding if he is released on bail;
- (vi) the danger of witnesses being tampered with;
- (vii) the protracted nature of the trial;
- (viii) opportunity to the applicant for preparation of his defence and access to his counsel;
- (ix) the health, age and sex of the accused;
- (x) the nature and gravity of the circumstances in which the offence is committed;



- (xi) the position and status of the accused with reference to the victim and the witnesses and
- (xii) the probability of accused committing more offences if released on bail, etc.

7. These considerations are by no means exhaustive. Factors such as previous convictions, criminal records of the accused and the possibility of the accused committing offences if enlarged on bail are also taken into account while deciding the question of bail.

8.1. Does the bail system discriminate against the poor?

8.2. On this question, the Report of the Legal Aid Committee appointed by the Government of Gujarat, in 1971 has commented on the bail system thus:

The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.

The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences, namely; (1) though presumed innocent he is subjected to the psychological and physical deprivations of free life; (2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributing to the preparation of his defence; and (4) the public exchequer has to bear the cost of maintaining him in the jail.

8.3. Subsequently, a Central Committee on Legal Aid reported in similar vein:

...[w]e think that a liberal police of conditional release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the care of his relatives or releasing him on supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused is too poor to find sureties, there will be no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence."

8.4. In order to eliminate the discrimination against the poor and the indigent accused in the grant of bail for bailable offences, Clause 40 of the Criminal Procedure Amendment Bill, 1994 seeks to amend section 436 of the Code to make a mandatory provision that if the arrested persons accused of a bailable offence is an indigent and cannot furnish security, the court shall release him on his execution of a bond without sureties. The amendment is as follows:

In section 436, in sub-section (1)--

(a) in the first proviso, for the words "may, instead of taking bail," the words "may, and shall, if such person is indigent and is unable to furnish security", shall be substituted:

(b) after the first proviso the following Explanation shall be inserted:

Explanation: Where a person is unable to give bail within a week of the date of his arrest, it shall be sufficient ground for the officer or the court to presume that he is an indigent person for the purposes of the proviso.

**8.5.** The Commission recommends the amendments referred to above as they are consistent with the Supreme Court's pronouncements and juristic opinion that poor accused committing bailable offences should not be denied bail on the basis of indigency.

#### **Pre-trial Detention:**

**9.** The purpose of pre-trial detention is not punishment. A survey of decided cases reveals that the law favours release of accused on bail, which is the rule, and refusal is the exception.

**9.1** The plight of undertrial prisoners was vividly brought out in *Hus sainara Khaoon I v. Home Secretary*.<sup>2</sup> The case disclosed a dismal state of affairs in the State of Bihar in regard to administration of criminal justice. Hordes of men and women undertrial were languishing in Bihar jails for periods ranging from three to ten years without the commencement of trials. They were in jails for much longer periods than they would have been had they been found guilty and sentenced after trial. They were in jails not because they were found guilty but were too poor to afford bail and the trials did not commence. In this context the following observations of P.N. Bhagwati J., (as he then was) are apposite.

"One reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. It suffers from property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case, he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the magistrate about their solvency for the amount of the bail and where the bail is with sureties as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences."

It is high time that our Parliament realises that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing .....Parliament would do well to consider whether.....considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the accused wilfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties.

9.2. R.S. Pathak J. (as he then was) opined that there should be a clear provision in the Code of Criminal Procedure which enables the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation.

9.3. The first *Hussainara* decision was followed by orders passed by the Supreme Court<sup>10</sup> from time to time furnishing guidelines for release of under-trials languishing in jails for want of expeditious disposal of pending cases. In *Hussainara Khatoon VII*<sup>11</sup> a criminal miscellaneous petition was filed seeking general orders on the basis of guidelines already issued by the court, namely for undertaking an inquiry for setting up of additional courts in every state, providing investigating agencies with more experts, simplifying the procedure for sanction of prosecution, strict compliance with s. 167 of the Code, circulation of guidelines to the courts in states and revision of categories of undertrials in Bihar jails. The Supreme Court, while refraining from issuing general orders, observed:

The enforcement of the guidelines by the subordinate courts functioning in different states should now be the responsibility of the different High Courts.....General orders for release of under-trials without reference to specific fact situations in different cases may prove to be hazardous. While there can be no doubt that undertrial prisoners should not languish in jail on account of refusal to enlarge them on bail for want of their capacity to furnish bail with monetary obligations, these are matters which have to be dealt with on case-to-case basis keeping in mind the guidelines laid down by this court .....General orders in regard to judge strength of subordinate judiciary in each State must be attended to, and its functioning overseen, by the High Court of the State .....Withdrawal of cases from time to time may not always be an appropriate and acceptable remedy, but what is required is to evolve a mechanism which would enable early disposal of cases.<sup>12</sup>

9.4. In a public interest litigation case on the undertrials in Tihar Jail, Delhi, National Capital Territory, the Supreme Court in *R.D. Upadhyay v. State of Andhra Pradesh*<sup>13</sup> issued, specific directions for expediting the trial of under-trials accused of serious offences as murder, attempt to murder etc. under I.P.C., Arms Act, Customs Act, Narcotic Drugs and Psychotropic Substances Act, Official Secrets Act, Extradition Act, Terrorist and Disruptive Activities Act and Dowry Prohibition Act. The Court also issued directions for release on bail without the necessity of application for bail in cases where undertrials are charged with attempt to murder under IPC and cases have been pending for more than two years. In cases where undertrials are charged with the offences of kidnapping, theft, cheating, counterfeiting, rioting, hurt, grievous hurt or under the Arms Act, Customs Act if they have been in detention for more than one year, they should be released on bail without an application of bail.

9.5. To prevent the undertrial prisoners from languishing in jails for periods longer than the period of maximum period of imprisonment for the

**alleged offence**, clause 41 of the Code of Criminal Procedure (Amendment) Bill proposes to insert a new section 436A on the following lines:

S. 436A where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, extend the period of detention of such person for a longer period longer than one-half of the said period, or release him on bail instead of the personal bond with or without sureties.

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law;

*Explanation*---In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

10. Section 436A be inserted in the Code as a protection for undertrial prisoners accused of non-capital offences and release on bail as contained in Clause 41 of the Code of Criminal Procedure (Amendment) Bill except the words "instead of the personal bond with or without sureties." occurring in proviso to clause 41 of the Bill be omitted.

10.1 Section 437 deals with grant of bail in respect of non-bailable and cognizable offences. Clause 42 of the Criminal Procedure Code (Amendment) Bill seeks to amend section 437 to provide that if a person commits a cognizable offence and he has previously been convicted on two or more occasions of a cognizable offence punishable with imprisonment not less than three years, he shall not be released except in the circumstances specified in the provision.

10.2 It is further provided in the Bill that if an accused appears before the Court while in judicial custody and prays for bail, or a prayer for bail is made on his behalf, the Court shall grant bail only after giving an opportunity of hearing to the prosecution, if the alleged offence committed by the accused is punishable with death, imprisonment for life or imprisonment for not less than seven years.

10.3 Under the present sub-section (3) of section 437 of the Code, the court has the discretion to impose certain conditions for the grant of bail. Where conditions are thus imposed, the bond executed under section 441(2) shall incorporate those conditions.

11. In order to make the provision under section 437 more stringent and ensure that the accused released on bail does not interfere or intimidate the witnesses, Section 437 be amended as provided under clause 42 of the Code of Criminal Procedure (Amendment) Bill, 1994:

In section 437 of the principal Act, (i) in sub-section (1),

(a) in clause (ii), for the word "a non-bailable and cognizable offence", the words "a cognizable offence punishable with imprisonment for not less than three years" shall be substituted;

(b) after the third proviso, the following proviso shall be inserted, namely,

"Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor."

- (ii) in sub-section (3) for the portion beginning with the words "the Court may impose" and ending with the words "the interests of justice", the following shall be substituted, namely:

"the Court shall impose the conditions,—

- (a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,
- (b) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence and may also impose, in the interests of justice, such other conditions as it considers necessary."

We recommended the adoption of the aforesaid amendments to section 437.

12. The directions issued by the Supreme Court in *Common Cause v. Union of India*<sup>1</sup>, namely:

- "1(a) Where the offences under I.P.C. or any other law for the time being in force for which the accused are charged before any criminal court are punishable with imprisonment not exceeding three years with or without fine and if trials for such offences are pending for one year or more and the concerned accused have not been released on bail but are in jail for a period of six months or more, the concerned criminal court shall release the accused on bail or on personal bond to be executed by the accused and subject to such conditions, if any, as may be found necessary, in the light of Section 437 of the Criminal Procedure Code [Cr. P.C.].
- 1(b) Where the offences under I.P.C. or any other law for the time being in force for which the accused are charged before any criminal court are punishable with imprisonment not exceeding five years, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in jail for a period of six months or more, the concerned criminal court shall release the accused on bail or on personal bond to be executed by the accused and subject to the imposing of suitable conditions, if any, in the light of section 437 Cr. P.C.
- 1(c) Where the offences under I.P.C. or any other law for the time being in force for which the accused are charged before any criminal court are punishable with seven years or less, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in jail for a period of one year or more, the concerned criminal court shall release the accused on bail or on personal bond to be executed by the accused and subject to imposing of suitable conditions, if any, in the light of Section 437 Cr. P.C."

are salutary in liberalising the grant of bail in respect of undertrial prisoners where trials are pending and not concluded.

However the aforesaid directions should not be applicable in subsequent offences committed by the same offenders or against whom more than one case is pending or when a person has been convicted for more than one case.

#### ANTICIPATORY BAIL

13.1. Section 438 empowers the Sessions Court and the High Court to grant anticipatory bail, namely a direction to release a person on bail even before he is arrested.

13.2 The Law Commission in its 41st Report recommended the incorporation of a provision on anticipatory bail. The Commission had observed<sup>15</sup>:

The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

13.3 The Code of Criminal Procedure as amended in 1973 has incorporated the concept of grant of anticipatory bail in Section 438.

13.4 The Law Commission, in its 48th Report, gave vent to the impression that had gained ground in the interregnum about the misuse of the provision on grant of anticipatory bail in the following observations<sup>16</sup>:

[I]n order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded and if the court is satisfied that such a direction is necessary in the interest of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.

14. Since the introduction of the provision of anticipatory bail under section 438, its scope has been under judicial scrutiny. The leading case on the subject is *Gurbaksh Singh Sibbia v. State of Punjab*.<sup>17</sup> The Supreme Court, reversing the Full Bench decision of the Punjab and Haryana High Court in this case<sup>18</sup> which had given a restricted interpretation of the scope of section 438, held that in the context of Article 21 of the Constitution, any statutory provision (s. 438) concerned with personal liberty could not be whittled down by reading restrictions and limitations into it. The Court observed<sup>19</sup>:

"Since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section".

The Court also held that the conditions subject to which the bail can be granted under section 437(1) should not be read into section 438. While allowing unfettered jurisdiction to the High Court and the Court of Session, the Supreme Court fondly hoped that a convention may develop whereby the High Court and the Court of Session would exercise their discretionary powers in their wisdom. The Court laid down the following clarifications on certain points which had given rise to misgivings<sup>20</sup>:

- (i) The person applying for anticipatory bail should have reason to believe that he will be arrested. Mere 'fear' of arrest cannot amount to 'reasonable belief'.
- (ii) The High Court and the Court of Session must apply their mind with care and circumspection and determine whether the case for anticipatory bail is made out or not.
- (iii) Filing of FIR is not a condition precedent to the exercise of power under section 438.
- (iv) Anticipatory bail can be granted even after the filing of FIR.
- (v) Section 438 cannot be applied after arrest.
- (vi) No blanket order of anticipatory bail can be passed by any court.

15. The working of Section 438 has been criticised in that it hampers effective investigation of serious crimes, the accused misuse their freedom to criminally intimidate and even assault the witnesses and tamper with valuable evidence and that whereas the rich, influential and powerful accused resort to it and the poor do not, owing to their indigent circumstances thus giving rise to the feeling that some are "more equal than others" in the legal process.

16. In view of the above circumstances, some state governments have made local amendments to the Code of Criminal Procedure. Uttar Pradesh Legislature has repealed section 438 by the Amending Act of 1976. West Bengal Legislature enacted amendments in 1990 incorporating certain limitations on the power to grant anticipatory bail. Those are : (i) Mere filing of application in the High Court or Court of Session for grant of anticipatory bail does not debar the police from apprehending the offenders; (ii) the High Court or the Court of Session be required to dispose of an application for anticipatory bail within thirty days from the date of such application and (iii) in offences punishable with death, imprisonment for life or imprisonment for a term not less than 7 years, no final order shall be made without giving the state a minimum of seven days' notice to present its case.

17. The Code of Criminal Procedure Amendment Bill in clause 43 seeks to amend section 438, echoing the recommendations of the Law Commission in its 48th Report and also on some other grounds referred to above, in the following manner :

"In section 438 of the principal Act for sub-section (1), the following sub-sections shall be substituted, namely :

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors, namely :

- (i) the nature and gravity of the accusation;
- (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) the possibility of the applicant to flee from justice; and
- (iv) where the accusation has been made with the objection of injuring or humiliating the applicant by having him so arrested.

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant, if there are reasonable grounds for such arrest.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice."

18. In the various workshops diverse views were expressed regarding the retention or deletion of the provision of anticipatory bail. One view is that it is being misused by affluent and influential sections of accused in society and

hence be deleted from the Code. The other view is that it is a salutary provision to safeguard the personal liberty and therefore be retained. Misuse of the same in some instances by itself cannot be a ground for its deletion. However, some restraints may be imposed in order to minimise such misuse. We are, however, of the opinion that the provision contained under section 438 regarding anticipatory bail should remain in the Code but subject to the amendments suggested in clause 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which lays down adequate safeguards.

## SURETIES

**19.1** The bail procedure is becoming a shame in courts with the accused in criminal cases absconding after arranging fake sureties on fake identities and address. Accordingly the procedure of securing release on the basis of forged documents has become easy.

**19.2** In Delhi the practice seems to be that when the court allows accused's release on bail after a local person is willing to stand surety, the guarantor has to produce documents to the Court to prove his domicile and solvency. This is done by producing a ration card or a passport. In addition, a power-of-attorney attested by a Notary Public, a motor vehicle registration document, a bank fixed deposit receipt or a certificate from the Income Tax Department is required to be submitted to authenticate the guarantor's solvency.

**19.3** There are touts operating in the Court premises, who help out, on a price tag, those accused who scheme to obtain bail with the idea of absconding. These touts give surety on the basis of fake identity. They operate with numerous fake ration cards which substantiate their domicile in Delhi each in a different name and address. A back dated stamp paper is procured on which details regarding the power-of-attorney of the guarantor's property in Delhi are stated and is attested by a Notary Public. They also have in their possession fake letterheads of private organisations, fake identity cards of themselves as government servants and fake motor vehicle registration papers. The touts have to be paid 20% to 30% of the surety amount before the presentation of the surety.<sup>21</sup>

**19.4** Clause 44 of the Code of Criminal Procedure (Amendment) Bill seeks to incorporate a new section, S. 441A to deal with the abuse of professional and fake sureties which reads as under :

Every person standing surety to an accused person for his release on bail, shall make a declaration before the court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.

**19.5** We are of the view that section 441A be incorporated in the Code to eliminate the pernicious evil of professional and fake sureties in the bail process. It will eliminate collusion between professional sureties, administrators of criminal justice system and criminals.

**20.1** S. 446 of the Code prescribes the procedure for forfeiture of bonds either for appearance or production of property. Before forfeiting the surety bond, the court should give notice to surety to show cause as to why the surety bond be not forfeited. Once a hearing is given to the surety and the court is satisfied that the bond is forfeited, it shall record the grounds of such proof and call upon the surety to pay the penalty.

**20.2** Sub-section 3 of section 446 empowers the court, at its discretion, to remit any portion of the penalty and enforce payment in part only. It has been held by various decisions of the High Courts that a case for the exercise of discretion under this sub-section will arise in cases where the accused has been subsequently arrested or the amount forfeited is excessive and the surety is unable to pay. It is also not irrelevant to consider whether the surety did not act irresponsibly and there was no connivance or negligence on the part of the surety.<sup>22</sup>

**20.3** Clause 45 of the Code of Criminal Procedure (Amendment) Bill seeks to amend sub-section(3) to provide that the court shall record reasons before reducing the penalty.



20.4 The proposed amendment is as follows:

In section 446 of the principal Act, for the words "at its discretion", the words "after recording its reasons for doing so" shall be substituted.

20.5 We are of the view that in keeping with the tune of amendments to section 436, 437, 438 and the insertion of sections 436A and 441A, the amendment of sub-section (3) of section 446 on the lines set out above to require rigorous exercise of discretion by the Courts by recording reasons prior to the reduction of penalty and enforcement in part, is proper and warranted.

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FOOTNOTES:

1. *Supdt., & Remembrancer of Legal Affairs v. Kumar Roy Choudhury* (1974) 78 Cal W. N. 320, 325.
2. S. 2(a).
3. (1978) 4 SCC 47.
4. See *Rao Harnarain Singh v. State*, AIR 1958 123; *State v. Captain Jagjit Singh* AIR 1962 SC 253; *Gurcharan Singh v. State (Del. Admn.)* (1978) 1 SCC 118; *Gudikanth Narasimhulu v. Public Prosecutor* (1978) 1 SCC 240, *Bhagirati Singh v. Judeja*, AIR 1984 SC 372; *Johny Wilson v. State of Rajasthan*, 1986 Cri. L.J. 1235 (Raj).
5. *Report of the Legal Aid Committee* (1971) quoted in *Moti Ram v. State of M.P.* *supra* note 3.
6. *Report of the Expert Committee on Legal Aid Processual Justice to the People* (1973) quoted in *Moti Ram* case, *ibid.*
7. *Rao Harnarain Singh v. State* *Gudikanth Narasimhulu v. Public Prosecutor*, *Gurcharan Singh v. State (Del. Admn.)*, *Supra* note 4.
8. *Hussainara Khatoon [I] v. Home Secretary*, (1980) 1 SCC 81; (1980) 1 SCC 91; (1980) SCC 93; (1980) 1 SCC 98, (1980) 1 SC 98; (1980) 1 SCC 108; (1980) 1 SCC 115.
9. *Id* at 84, 85, 87.
10. *Supra* note 8.
11. *Hussainara Khatoon VII v. Home Secretary* (1995) 5 SCC 326.
12. *Id.* at 328.
13. 1996 (Crimes) 189 (SC).
14. 1996 (4) Scale, 129.
15. Forty First Report, para 39.9, page 321 (1969).
16. *Forty Eighth Report, Some Questions under the Code of Criminal Procedure Bill, 1970* para 31, page 10 (1972).
17. (1980) 2 SCC 565.
18. *Gurubaksh Singh Sibbia v. State of Punjab*, AIR 1978 P & H.
19. *Supra* note 17 at 586.
20. *Id* at 589-590.
21. See "Sureties for Sale—Bail Racket Unearthed", *Statesman (Delhi ed.)* 28th May, 1995, pages 1, 9.
22. See *Dayal Chand v. State of Rajasthan*, 1982 Cri. L.J. 1008 (Raj.); *Ramakant Simopurkaskar v. State*, 1989 Cri. L.J. 1264 (Bom.); *O.P. Anand v. State*, 1989 Cri. L.J. 2464 (Del).

## CHAPTER VII

### BAIL—ATTENDANCE OF ACCUSED—APPELLATE STAGE

1. The Code of Criminal Procedure 1973 is silent on the point of securing attendance of the accused at a later stage after the acquittal in cases where appeals against acquittals have been filed or in cases where appeals for enhancement of sentence are filed. There are many instances where the appellate courts having admitted an appeal against acquittal are not in a position to secure presence of acquitted accused. Even though non-bailable warrants are issued the police agency has been unable to serve the notices as well as the non-bailable warrants on the respondents accused in spite of lapse of long time. Some time they are returned saying that the police have no information whatsoever regarding the respondents or their whereabouts. A large number of such appeals after admission have been pending in various appellate courts including the Supreme Court without being disposed of since the service could not be effected or where the presence of acquitted accused could not be secured in spite of issuance of non-bailable warrants. Number of such matters for want of service are piling up and have added to the pendency. The Division Bench of Gujarat High Court in Appeal No. 51/91 in its judgment dated 13-1-1994 considered these aspects and have recommended to make a special provision and amend Form-45 in Schedule II of the Code, suitably.

2. Form 45 pertains to bonds and bail bonds for attendance before Office Incharge of Police Station or Court, bearing relevance to section 436, 437, 438(iii) and 440. The perusal of the form shows that it is prescribed in two proforma whereby the accused and sureties undertake to appear in the first instance before the investigating agency and in the 2nd before the Trial Court, during the trial. It does not provide for securing the attendance of the accused at the appellate stage. If this gap is not properly filled, the disposal of appeals against the acquittal in these circumstances becomes difficult and even result in injustice, and the same has to be remedied. Accordingly, we recommend insertion of a new section 437A empowering all the criminal courts (including the first appellate court) to take bail and bail bond before the conclusion of the trial or disposal of the appeal requiring the accused to bind themselves to appear before the next appellate court; in case an appeal against acquittal or an appeal for enhancement is filed in the higher court such a bond shall be in force for a period of 12 months from the date of the judgment disposing of the case either by the trial court or by the first appellate court, as the case may be. We feel the twelve months limit would be enough to cover the period of limitation for processing and filing of such appeals.

3. A question may arise whether such a provision is likely to be challenged as unconstitutional by virtue of Article 21 of the Constitution on the ground that the bail bond restricts the personal liberty of the individual. We are of the view that sections 377 and 378 Cr.P.C. provide for filing such appeals by the State, and a period of limitation is also prescribed. Therefore binding over the accused till such time will not amount to a restraint on his personal freedom. Even otherwise, it may amount to a restriction permissible under law particularly when there is no deprivation of his liberty or freedom of movement.

4. The proposed section 437-A may be on the following lines:

- (1) Before conclusion of the trial and before disposal of the appeal, the trial court or the appellate court; as the case may be, require the accused to execute bail bonds with sureties, which shall be in force for twelve months, undertaking to appear before the higher court as and when such court issues notice in respect of any appeal or petition filed against the judgement of those respective courts.
- (2) If such accused fails to appear, the bond stands forfeited and the procedure under section 446 shall be applicable.

On the same lines Form 45 has to be amended.

## CHAPTER VIII

### SUMMONS CASES—WARRANT CASES—SUMMARY TRIAL—CHANGES IN PROCEDURE

1. The Code of Criminal Procedure is essentially a procedural law with the object of providing a machinery for the punishment of offenders under the substantive criminal law. It lays down the procedure to be followed in every investigation, enquiry and trial, for every offence under the Indian Penal Code or under any other law. The concern for speedy trial is the main premise underlying the Code, both with regard to investigation and also with regard to trial. In respect of offences other than those tried at the Session Courts, a broad division into summons cases and warrant cases, is made.

2. Section 2 (x) defines warrant-case as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years.

Section 2(w) lays down that the summons-case means a case relating to an offence, and not being a warrant case, thereby implying that all cases relating to offences punishable with imprisonment not exceeding 2 years, shall come in the category of summons cases.

3. Chapter XIX provides for two types of procedure for the trial of warrant cases by the Magistrate, viz. those instituted upon a police report and those instituted upon a complaint. The procedure therein is somewhat elaborate.

In respect of cases instituted on police report, Section 239 provides for the discharge of the accused if the Magistrate upon consideration of the police report and the documents sent with it and after making such examination, if any of the accused, considers the charge to be groundless before framing of the charge and if the accused pleads guilty conviction follows under Section 241. Sections 242 and 243 lay down the procedure for taking evidence by the prosecution and defence respectively. In respect of the cases instituted otherwise than on police report the Magistrate, as provided under section 244 has to hear the prosecution and take the evidence as may be produced.

Section 245 provides for discharge of the accused if the evidence taken makes out no case against the accused.

Sections 246 and 247 elaborate the further procedure where the accused is not discharged, and in the opinion of the Magistrate, the regular trial has to go on after framing a charge etc.

Sections 248 to 250 deal with conclusion of the trial and are common to both types of cases.

4. In respect of the summons cases Chapter XX contains the necessary procedure. The main difference between the two procedures is that in respect of the summons cases there is no need to frame the charge. In this class of cases arising on a private complaint or on a police report, the evidence of both sides generally has to be made ready and has to be recorded at a single sitting and is to be followed by a judgement without any delay. The trial of the cases under this procedure is thus designed to occupy the minimum amount of time.

5. In both procedures section 249 and 256 provide that in the absence of the complainant, the accused may be discharged or acquitted. In the case of summons procedure section 257 provides for the withdrawal of the complaint. One other important provision in respect of summons procedure is section 259 whereunder the court has the power to convert summons case into warrant case. If in the course of the trial of a summons case relating to an offence punishable with imprisonment for a term exceeding six months, if the Magistrate thinks that in the interest of justice the offence should be tried in accordance with the procedure for the trial of warrant cases, he may do so.

6. Chapter XXI deals with summary trials. As provided under section 260, certain Magistrates of First Class, especially empowered by the High Court may try in a summary way any of the offences mentioned therein. Sub-section 2 of Section 260 lays down that when in the course of summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try summarily, he may even recall the witnesses and proceed to rehear the case in the manner provided by the Code. Section 261 gives powers to Second Class Magistrate to try summarily an offence which is punishable only with fine or with imprisonment for a term not exceeding six months.

7. Section 262, however, lays down that in summary trial the procedure specified for the trial of summons cases shall be followed except as mentioned therein. Section 262 (2) further lays down that no sentence of imprisonment for a term exceeding 3 months shall be passed in the case of any conviction under that Chapter. Section 263 gives the particulars to be entered in the record to be made at the time of summary trial. Section 264 lays down that in every case tried summarily in which accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. A combined reading the provisions of the summons procedure and the summary trial procedure would show that the latter is meant to be more brief and the summons procedure to be followed in respect of summary trials is further abridged by virtue of sections 263 and 264. The Court is required to record only reasons in a brief manner in support of the findings.

8. The Fourteenth Report of the Law Commission observed that the division between the summons cases and warrant cases is arbitrary. It has also observed that in certain classes of offences, the ingredients of the offences are the same. But some of them fall under the category of summons cases merely on the basis of sentence. The Law Commission recommended that as a general rule all offences which do not carry punishment of imprisonment for more than three years can be tried under the summons procedure without any prejudice to the accused. If such a course is adopted, there will be the addition of one hundred and twenty seven more offences under the Indian Penal Code alone to the existing list of offences triable by the procedure applicable to summons cases and that alone where sentence is of similar nature.

9. A perusal of the two procedures would show that they are somewhat alike in many respects. To ensure speedy trial, the procedure must be simplified so that the bulk of cases which are being handled by the Magistrate can be disposed of more expeditiously. In all the workshops conducted, it was unanimously voiced that the summary procedure is not being adopted and that is one of the reasons for heavy pendency and delay. It is also suggested that all the summons cases and the other offences mentioned under section 260 should be made compulsorily triable by way of summary trials. The survey conducted also shows that there is unanimity about the suggestion to convert all offences carrying punishment upto three years imprisonment into summons cases and to make it mandatory that all such offences should be tried summarily.

10. The important aspect to be noticed is whether all the summons cases can be tried summarily except such of those which by virtue of the nature or circumstances of the offences or accused warrant a full trial and if in respect of such class of cases summary procedure is not found to be salutary then whether a provision has to be made enumerating such offences which cannot be tried by way of summary trials or leave it to the discretion of the magistrate as provided under sub-section (2) of section 260. This provision applies when the magistrate during the course of the trial discovers that it will be more appropriate for the court to try the accused on the regular side because of the character and nature of the case. Naturally, such a course should be exceptional and the magistrate should give sufficient reasons for adopting such a course. For such class of cases, the warrant procedure can be applied and all the other categories of cases called summons cases should be tried summarily. Then the summons procedure under Chapter XX can be dispensed with. A provision can also be made by amending section 260 to the effect that in all cases tried summarily, the punishment cannot exceed six months or fine upto Rs. 3000/-. Accordingly Section 262(2) be deleted. If provisions are made to this effect, section 206 which provides issuing such summons in cases of petty offences

enabling the accused to put forward his plea in writing where he pleads guilty and transmit the same by post or his pleader to plead on his behalf can also be revised. In such special summons, the amount of fine to be levied can also be specified. Even scope for the accused for plea bargaining as well as indicating his willingness to compound the offence should be made available. On the basis of such plea, the magistrate can record his plea and pass appropriate orders. In all summons cases which can be tried summarily as indicated above, the procedure can be simplified as provided under sections 263 and 264.

11. We are also of the view that as voiced in many workshops, the summons procedure is not strictly being followed and the summary trial procedure is also not being adhered to and as a result, heavy pendency is there and trials are inordinately delayed.

12. In the light of the above discussion, we suggest that section 2(x) defining warrant cases should be amended to the effect that warrant case means a case relating to an offence punishable with death, or imprisonment for term exceeding three years. Likewise Section 2(w) should be amended to the effect that summons case means relating to an offence and not being a warrant case summarily triable under Chapter XXI thereby laying down that all offences, which do not fall under the definition of warrant case, fall under the category of summons cases summarily triable. In this context, it can also be noticed that section 274, which deals with the recording of evidence in summons cases, also is to the effect that in all summons cases tried, the magistrate shall, as the examination of each witness proceeds, make a memorandum of substance of the evidence in the language of the court. This is in accordance with the summary procedure under Chapter XXI as well as the changes proposed by us and this section be changed by adding the word "summarily" after the words "summons cases tried".

13. As we are trying to bring under the umbrella of summons cases all those offences which are punishable with imprisonment of three years, the coverage thus gets increased and a large number of offences can also be brought under summary trial. However, we have suggested the amendment of section 260 so that the magistrate shall have the power to award sentence of imprisonment upto a period of six months or a fine upto Rs. 3,000/-. But there may be cases of serious nature warranting higher punishment depending upon the seriousness and gravity of offence and other circumstances. In such a situation, the magistrate who is trying the case summarily can have recourse to sub-section (2) of section 260. It may be mentioned that section 259 in Chapter XX provides that the courts shall have the power to convert the summons case into a warrant case where in the course of trial of summons case relating to an offence punishable with imprisonment for a term exceeding six months, in the interest of justice, it appears to the magistrate that the same should be tried as a warrant case, he may proceed to do so. Since we are proposing to dispense with summons procedure altogether, sub-section (2) of section 260 needs further amendment to the effect that where the magistrate takes recourse thereunder should give valid reasons for doing so, namely, that it is undesirable to try summarily and he may convert the same into a warrant case and try accordingly.

14. As a consequence of the above proposed changes, Chapter XX providing for summons cases can be deleted and sub-section (1) of section 260 shall also be amended to the effect that all summons cases as per the proposed definition should be summarily tried.

In Section 260(1) the Sub-clauses (i) to (ix) stand deleted. A new clause (d) under sub-section (1) should be inserted with effect that in all cases tried summarily, the imprisonment shall be upto six months or fine up to Rs. 3,000/-. Further Section 260(2) be amended as mentioned above.

15. Coming to the procedure to be adopted in such summarily trials, the question is to what extent some of the provisions, of summons procedure are to be followed in view of section 262(1). The said provisions lay down that in summary trials under Chapter XXI, the procedure specified in the Code for the trial of summons-case shall be followed except as thereafter mentioned. Now as we are suggesting the deletion of Chapter XX dealing with the trial of summons cases, some provisions in that chapter have to be incorporated

in Chapter XXI, rather appropriately in Section 262. The aspects of procedure contained in sections 251, 252, 253, 256, 257 and 258 of the Code can suitably be incorporated in Section 262 by way of an amendment. Section 262 should then read as under:

“262. Procedure for summary trials--

- (1) When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.
- (2) If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon.
- (3) Where a summons has been issued under section 206 and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate, by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.
- (4) If the Magistrate does not convict the accused under sub-sections (2) and (3), the Magistrate shall proceed to record evidence as provided under section 274 and conclude the trial as provided under sections 263 and 264.
- (5) (a) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto which the hearing may be adjourned, the complaint does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.  
(b) The provisions of clause (a) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.
- (6) If a complaint, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.
- (7) In any summons-case tried summarily instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case release the accused, and such release shall have the effect of discharge.”

Accordingly, the existing sub-sections (1) and (2) of section 262 be deleted and substituted by the aforesaid sub-sections (1) to (7) in section 262. However, if the Magistrate does not convict the accused under section 262(2) and 3 he shall proceed with summary trial in accordance with sections 263, 264 and 265. However, in view of the deletion of clause (i) to (ix) of section 260, clause (f) section 263 stands deleted.

16. Even in respect of warrant cases triable under Chapter XIX, it has to be considered whether the procedure can be further simplified.

17. The Law Commission in its 41st Report suggested certain changes to the then existing provisions<sup>9</sup> and we find in the Code of 1973 the changes have

been introduced to a large extent. However, even in the existing provisions under Chapter XIX, we find the two procedures to some extent being the same with a difference upto a particular stage in respect of the cases arising out of police report and those arising otherwise than on a police report.

The Law Commission in its Fourteenth Report also noticed the difference and recommended no change.

18. In the workshops held, it has been voiced that the manner of examination of the witnesses needs modification. It is also highlighted that unnecessary time is being taken by postponing the proceedings in view of the procedures regulating the witnesses for further cross-examination. We find that the views expressed are correct and some changes have to be made in this regard.

19. In cases arising out of a police report, all the statements having been recorded during investigation should be supplied in advance and the cross-examination should proceed continuously. In the case of other types of cases arising otherwise than on police report also, evidence already recorded before issuing process would be available furnishing sufficient material for cross-examination, and many adjournments just for the purpose of carrying on further cross-examination can be avoided.

Accordingly Sections 242(2) (3) and 246 (4) be amended.

## CHAPTER IX

### EXAMINATION OF WITNESSES AND RECORD OF THEIR STATEMENTS: SECTIONS 161 AND 162

1. These two sections dealing with oral examination of witnesses by the Police, the record to be made of their statements and the use to which it may put subsequently have been the subject matter of many court decisions, discussions and consideration by various Commissions including the National Police Commission and they have attracted a variety of comments and suggestions. The Fourteenth Report<sup>1</sup> of the Law Commission is the earliest one to consider the issues involved. The Commission expressed the view that the discretion allowed to a Police Officer to record or not to record the statement of witnesses orally examined by him is in such restricted terms that the whole purpose of Section 173 would be defeated by a negligent or dishonest Police Officer and the Commission, therefore, recommended that the Police Officer should be obliged by law to reduce in writing to record the statement of every witness against whom the prosecution proposed to examine at the trial. This view was accepted in the Thirty Seventh Report of the Law Commission<sup>2</sup>. But the recommendation went further to suggest that statement of every witness questioned by the police under Section 161 must be recorded thereby suggesting that the recording of statement of witnesses should not be limited only to those proposed to be examined at the trial. The Law Commission again in its Forty First Report<sup>3</sup> considered these recommendations and suggested that there is no need to place any fetter on the discretion of the Police Officer at the stage of investigation and better to leave it to him to record only what in his judgment is worth recording and leave the rest to the departmental instructions and supervision.

2. Section 162(1) lays down firstly, the prohibition that no statement made by any person to a Police Officer in the course of investigation, under this chapter shall, if reduced in writing be signed by the person making it. In the Fourteenth Report, the Law Commission recommended that the literate witnesses should be required to sign the statements<sup>4</sup>. In the Thirty Seventh Report<sup>5</sup>, the Commission, however, did not favour such a change. But, in the Forty First Report, the Commission, however, recommended that where the person can read the statement so recorded, his signature can be obtained after he has read the statement. The second part of Section 162(1) has been found to be controversial. It provides that no statement of witness to the police or any record thereof whether in a police diary or otherwise or any part of such statement or record shall be used for any purpose at an enquiry or trial. But, when a witness is called for the prosecution, any part of the statement if duly quoted may be used by the accused and with the permission of the Court by the prosecution to contradict such witness in the manner provided by Section 145 of the Evidence Act. But, there had been many complaints that the police record of a witness is often inaccurate that a dishonest Police Officer can write anything he likes. The Forty First Report<sup>6</sup> of the Law Commission having considered the various views also observed that the statement under Section 164 would not be a good substitute for the statement before the police. The Commission ultimately, however, did not recommend any change.

3. The National Police Commission in its Fourth Report<sup>7</sup> considered various views and suggestions and also the voluminous case law built up on these two sections over several years. The Commission noted that under the present provisions of Section 162, the Police Officer is precluded from obtaining the signature of a person and the statement recorded from him. It was represented before the Commission that this provision operates to the greater disadvantage of the Police Officer and induces a general feeling among witnesses that they are not in any way bound by the statement recorded by the police and they could freely deviate at a subsequent stage without attracting any penal notice. The Police Commission also noted that it is imperative that the malpractices should be put down to ensure honesty and integrity of the investigation. The Commission ultimately suggested that a greater measure of credibility could be imparted to the statement of facts as recorded by the Police Officer if it is provided in law that a copy of the statement so recorded shall, if desired by the witness, be handed over to him under acknowledgment. Coming to the use of the



statements, the Police Commission suggested that there need not be a detailed recording of the statement as made by a witness and the Investigating Officer can make a record of the facts as ascertained by him on examination of witnesses which could be in third person in the language of the Investigating Officer himself and that would be adequate to assist the evidentiary value of different witnesses and accordingly cite them in the chargesheet on conclusion of investigation. According to the Police Commission, such a statement of facts as ascertained and recorded by the Investigating Officer could not be treated as an earlier statement made by the witness himself in his own language, and, therefore, the question of using that statement for contradiction or corroboration would not arise. The Police Commission also endorsed the view that no such statement of facts ascertained by a Police Officer from many persons shall, if reduced to writing be signed by the said person. But, the Commission, however, recommended that a copy of such statement duly authenticated by the Police Officer recording it shall be delivered under acknowledgment to that person on whose examination of such statement was recorded, if so desired by that person. Based on these suggestions the Police Commission also recommended necessary changes in Section 172 Cr.P.C. dealing with police diary, namely, that the Investigating Officer shall maintain a police diary in which he enters his proceedings, etc. and the statement of the circumstances ascertained and also attach to the diary for each day, copies of statement of facts ascertained and recorded under amended Section 161 Cr.P.C.

4. However, in the Forty First Report<sup>6</sup> of the Law Commission, a note of dissent regarding the proposed amendments to Sections 161(3) and 162 was made by two Members, Shri R. L. Narasimam and Shri Balakrishnan. It is observed that "the existing provisions of Section 162 Cr.P.C. have been universally condemned by the police, the Bar, the Courts and the litigant public. The need for making substantial changes in the law is accepted by all of us in the Commission. But we, two, regret our inability to agree with the recommendations of the majority regarding the proposed amendments in Section 161(3) and 162...". In the said dissent note, it is also mentioned that the fundamental anomaly in the existing provisions of Section 162 is that though the statute prohibits the use of the statements made to the police during investigation for the purpose of corroboration obviously on the assumption that the police record is not correct, yet permits their use for contradicting prosecution witnesses and that even for such contradicting obviously, the earlier statements should be presumed to have been correctly recorded and that the record cannot be at the same time to be correct and also incorrect. The two Members having discussed this issue, ultimately recommended amendment of Section 164 Cr.P.C. so as to make it mandatory for the Investigating Officer to send to the nearest Magistrate all material witnesses questioned by him during the course of investigation and have the statements recorded on oath by that Magistrate within a day or two. The two Members thus recommended amendments to Sections 161, 162 and 164 and correspondingly 172 and 173 Cr.P.C.

5. In all the workshops the subject has been discussed at great length and there has been unanimity to a large extent that substantial changes are necessary and various but divergent views have been expressed. Many of the advocates appearing for the defence, however, ultimately are of the view that in the absence of arriving at a satisfactory solution it is better to leave the provisions as they are.

6. Let us at this stage examine the necessity and the purpose of recording such statements by the police during investigation.

As we are aware, investigation in a criminal trial assumes important role and it helps the court to determine the guilt or innocence of the accused. A fair and objective investigation can unearth the crime committed and as well collect the material which can prove the guilt or innocence of the accused. Section 2(b) defines investigation and lays down that investigation includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. Investigation commences on receipt of information as provided in Sections 154 or 156 and has to be conducted as per the provisions of Chapter XII of Cr.P.C. Section 160 confers powers on police officer to summon any person acquainted with the facts and circumstances of the case.

Section 161 empowers the Police Officer to record statements of persons. Then comes Section 162. Though Section 2(b) broadly says that investigation includes all proceedings to gather "evidence", the statements recorded by police do not by themselves constitute evidence. They are part of investigation recorded while collecting material mainly for the purpose of preparing a report to be lodged in the court. In such a situation do they attain the status of a previous statement for the purpose of Sections 145 or 157 of the Evidence Act?

There is unanimity that they are not accurate and also not recorded in the manner professed to be. Many a time the thinking or ingenuity of the officer are projected into them. Therefore, they can hardly be called as the previous statements of the persons examined by the police officer.

7. After giving our earnest consideration and in view of the fact that there is unanimity in respect of the need for making substantial changes in the law, we propose that there should be changes on the following lines:

"As recommended by the National Police Commission in its 4th Report, the Investigating Officer can make a record of the facts as ascertained by him on examination of witnesses which statements could be in the third person in the language of the Investigating Officer himself. This ensures that the material witnesses have been examined at the earliest moment. Such a statement recorded in third person cannot be treated as a previous statement and, consequently cannot be used for contradiction or corroboration. To that extent, a change in section 162 Cr.P.C. is necessary. The signature of the witness on the statement thus recorded need not be obtained. But, if the witness so examined desires a copy of such statement so recorded shall be handed over to him under acknowledgment. To reflect the shift in emphasis, a corresponding amendment to Section 172 should also be made to the effect that the Investigating Officer maintaining the case diary should mention about the statement of the circumstances thus ascertained, and also attach to the diary for each day, copies of the statement of facts thus recorded under Section 161 Cr.P.C. Neither the accused nor his agent shall be entitled to call for such diaries which can be put to a limited use as provided under Section 172 Cr.P.C. Under the existing provisions of the Code, the preparation of the earliest record of the statement of witness is left in the hands of Investigating Officer and as the mode of recording as provided in Section 162 does not ensure the accuracy of the record (It is well known that many good cases are spoiled by insidious incorrect entries at the instance of the accused and it is also well known that many innocent persons are sent up along with the guilty at the instance of the informant's party), (it is necessary to amend Section 164 Cr.P.C. so as to make it mandatory for the Investigating Officer to get statements of all material witnesses questioned by him during the course of investigation recorded on oath by the Magistrate. The statements thus recorded will be of much evidentiary value and can be used as previous statements. Such recording will prevent the witnesses turning hostile at their free will. Such a change will also help the police to complete the investigation and submit a final report on the basis of such statements made on oath and on other facts and circumstances, such as recovery, etc.) On the above mentioned lines, the relevant Sections can be amended as follows:

- "161. (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
- (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
- (3) To be omitted.

- (4) The police officer may reduce into writing a statement of facts ascertained from a person in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of facts ascertained from each such person".

"162. No statement of facts ascertained by a police officer from any person in the course of an investigation under this chapter, shall, if reduced to writing, be signed by the aforeside person; but a copy of such statement duly authenticated by the police officer recording it shall be delivered under acknowledgment to the person on whose examination such statement was recorded, if so desired by that person.... No such statement of facts shall be used by the prosecution or the accused either for contradiction or for corroboration under Sections 145 and 157 of the Evidence Act."

(Proviso to be omitted).

164. (1) No change.

1(A) to be added as follows :

Every Investigating Officer shall send to the nearest Magistrate all material witnesses during the course of investigation and the Magistrate on oath record their statements, if such Magistrate is empowered to take cognizance of the case on police report, he shall keep such statements along with the FIR received by him and await the further police report under Section 173. If he is not empowered to take such cognizance, he shall send the statements thus recorded on oath to the Magistrate empowered to take cognizance of the case.

No change in remaining sub-sections.

172(1) Every police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation; and also attach to the diary for each day copies of statement of facts, if any, recorded under Section 161 in respect of the person or persons whose examination was completed that day.

- (2) Any criminal Court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.
- (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred (to) by the Court."

#### **Other alternative**

8. As discussed above most of the defence counsels while acknowledging the incongruity in the provision i.e. Section 162, however, took the stand that in the absence of having any satisfactory change it would be proper to retain the provision as it is. They are also firmly of the view that the defence and the court should know what the earliest version given by the witness and that can be the only basis for cross examination. In this context they contended that getting the statements recorded under Section 164 does not solve the problem and there would be considerable delay. Some of them, however, suggested that to ensure the authenticity of the statements some checks may be imposed. One suggestion is that the investigation officer soon after recording the statement should give a copy to the deponent and also send them to the superior officer at the earliest point of time so that any possible interference by the interested person can be avoided to a large extent. In this context, they also suggested that if the separate investigating agency is going to be set up the situation would be different and statements recorded by such officers of better status would be more authentic. Coming to the signing of the statements by the witness it

is said if he is a literate the signature can be obtained so that he may not easily prevaricate. They also pleaded that mere making a record of the facts ascertained as suggested by the Police Commission would be of no use to any body as the same cannot be used for any purpose.

9. We have also carefully considered these views. It is true that if such statements are not recorded under section 164, then the record containing statements of the facts ascertained, prepared by the Investigating Officer cannot be of any use except enabling the court to pursue which may give some aid. We do visualize that there are quite a few practical difficulties in getting the statements recorded under Section 164. There is bound to be some delay which may give scope for interference by others trying to influence the witnesses. Even after making the statement on oath under Section 164, the witness may prevaricate. It cannot also be presumed that all what was stated in such statement under Section 164 is always true; but the redeeming feature is that it is made on oath. As it is, the Magistrates who are overburdened and they may not find sufficient time to record such statements. Therefore, more number of Magistrates have to be appointed. These are some of the difficulties which we have to bear in mind, but they are not insurmountable. If sufficient number of Magistrates are appointed and if the separate investigating agency is set up promptly, the delay in recording statement under Section 164 can be avoided.

10. At this stage we shall consider one other suggestion namely tape-recording or video recording of such statements. The suggestion is attractive but the question whether it would be workable under our conditions. Firstly, it would be costly and secondly, impracticable, even such recordings cannot be fool proof and are also vulnerable to tampering. In its report the Royal Commission on Criminal Justice considered this suggestion and also opined that it would be costly and impracticable.

11. Having seriously considered all these aspects we are of the view that the other alternative for the time being that can be thought of is to retain the provision as it is and introduce some safeguards against any error or malpractice in recording with a view to make the statement more authentic.

12. If a separate investigating agency consisting of well trained and better personnel accountable only to the superior Officer is set up, they would to a large extent be sincere and honest in recording such statements. However, for the time being if a provision is made that a copy of the statement should be given to the deponent under acknowledgment and also send them to the Magistrate and to the superior officers that provision would ensure against any error or malpractice being committed by the officer Section 162 be, therefore, suitably amended.

13. If the witness is a literate, there is no harm in obtaining his signature, before giving a copy to him.

14. So far as the use of the statement is concerned, no change is necessary, it be limited for the purpose of cross examination as provided under Section 145 of the Evidence Act. The absence or presence of material omissions as found in the cross examination would be a factor in appreciating the veracity of the witness and no further corroboration need be sought from the statement recorded by the police particularly when it is not on oath recorded by a court and where its authenticity is not of such high degree.

15. However, in our considered opinion, the first course is more salutary. As recommended, if a separate investigating agency manned by officers of high calibre and integrity is established, the statements of facts ascertained by them will be more authentic. Keeping in view that the witnesses may prevaricate and the handicaps the defence may face, it is desirable that the statements should be recorded under Section 164 of the Code, which can be used both for corroboration and contradiction and that would also help in speedy trial. But this involves appointment of more number of magistrates because their present strength is wholly inadequate and they are already over-burdened. Likewise setting up

and structuring of the separate Investigating Agency is bound to take considerable time. Till such time these requirements are met, we are of the view that the other alternative course as suggested above may be adopted and the existing section 162 may suitably be amended.

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FOOTNOTES

1. *Fourteenth Report of the Law Commission*, paras 47, page 755 (1958).
2. *Thirty-Seventh Report of the Law Commission*, paras 437-440 pages 119 to 121 (1967).
3. *Forty-first Report of the Law Commission*, page 70, para 14.9 (1969).
4. *Fourteenth Report of the Law Commission*, page 754, para 46, Vol. 2 (1958).
5. *Thirty-Seventh Report of the Law Commission*, pages 119 and 120, para 437(c) (1967).
6. *Forty-first Report of the Law Commission*, page 73, para 14.13, Vol. I (1969).
7. *Fourth Report of the National Police Commission*, paras 27.12—27.19, pages 4-6 (1980).
8. *Forty-first Report of the Law Commission*, page 373, para 1, 1969 (Vol. I).

## CHAPTER X

### PROTECTION AND FACILITIES TO WITNESSES

1. The absence of witnesses or even their presence in the Courts of non-examination and the absence of a system of day-to-day hearing are some of the main causes for the delays. In many workshops held, it was highlighted that there is a plenty of justification for the reluctance of witnesses to come forward to attend courts promptly in obedience to the summons. It was also highlighted that an important reason for the reluctance of the public to cooperate with the law enforcement agencies and actively associate themselves with proceedings in the course is the fact that their attendance in courts entails a lot of inconvenience and harassment. Added to this, the listing of large number of cases and adjourning them at the fag end of the day is also an important factor which makes the witnesses refrain from coming forward to cooperate with the law enforcement agencies either at the investigation or during the trial. This is despite section 174 IPC and section 350 Cr.P.C. which provide for punishment for non-attendance by witnesses in obedience to the summons issued by the court.

2. It is said that the plight of witnesses appearing on behalf of the state against a criminal is pitiable. While adjourning the case at the fag end of the day after keeping the witness waiting for the whole day and while fixing the next date, their convenience is not at all kept in view and if he fails to turn up on the next date, harsh steps are taken against him. Even if he appears on the adjourned date, the chances are that the case would be adjourned again. After suffering all these inconveniences even if he appears and evidence is recorded, he is brow beaten by over zealous defence counsel or declared hostile or unreliable by the prosecutor. Even after undergoing this agonising experience the poor witness is not compensated for the loss of earnings of the day. Even his pocket expenses incurred are not reimbursed by anybody. Besides, there are no facilities provided whatsoever for the witness to make their long waiting in the courts bearable. Even basic amenities that are needed are not provided for to this poor lot in the court premises. Thus they have to suffer not only indignities and inconvenience but also have to spend time and money. Added to this, they have to incur the wrath of the accused, particularly hardened criminals which results in their life being at great peril. Because of this traumatic time consuming and humiliating experience, many respectables keep themselves away.

3. The allowances paid to the witnesses are very meagre because the rates of allowances are totally inadequate. Thus, there is an immediate need to enhance the rates and that witnesses summoned to the court should be paid better regardless of whether he is examined or not. Further, the procedure for disbursement of the allowances should not be cumbersome.

4. The Law Commission in its Fourteenth Report<sup>1</sup> as well as the National Police Commission in its Fourth Report<sup>2</sup> had examined these issues in depth and have firmly recommended substantive measures to alleviate the difficulties of the witnesses. In the Conference of Director Generals of Police held in 1974, it was also recommended that the witnesses should be provided sufficient protection. It has to be remembered that in the present system a poor witness is caught between the devil and deep sea. If he fails to attend the court, he shall be penally liable and if he attends, he undergoes an agonising experience resulting in great inconvenience and loss. In this situation, all the measures necessary to create good atmosphere, instilling confidence and faith in the system in the minds of the witnesses have to be immediately chalked out and implemented.

5. It is also pertinent to note that all causes of aversion and reluctance on the part of the witnesses should be removed. Such an effort should be there even from the stage of their examination by the police by treating them in friendly manner and giving self-confidence by giving adequate protection for them.

6. We recommend that the allowances payable to the witnesses for their attendance in courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. Section 312 of Cr.P.C. and the rules made thereunder will have to be suitably amended. They should be paid allowances for all the days they attend. Adequate facilities should be provided in the court premises for their stay. The treatment afforded to them right from the stage of investigation upto the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.

7. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously. The lists should be prepared in such a way that a day or two are devoted continuously to all cases of a particular police station and cases should not be proceeded mechanically just according to the chronological order regardless of the fact of the likelihood of their being tried or not. The courts also should proceed with trial on a day-to-day basis and the listing of the cases should be on those lines. The High Courts should issue necessary circulars to all the criminal courts giving guidelines for listing of cases.

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#### FOOTNOTES

1. *Fourteenth Report of the Law Commission*, Paras 3—11 pages 776—780 (1958).
2. *Fourth Report of the National Police Commission*, para 28.15, page 16 (1980).

## CHAPTER XI

### EXAMINATION OF ACCUSED UNDER SECTION 313

1. Section 313 empowers the court to examine the accused at any stage of any inquiry or trial for the purpose of enabling the accused to explain any circumstances in the evidence appearing against him.<sup>1</sup> It also makes it mandatory for the court to question the accused after the examination of evidence of the prosecution and before he enters on his defence.<sup>2</sup> The object of questioning under section 313 is that the important circumstances which if unexplained would lead to a conviction, should be specifically pointed out to him to enable him to give an explanation, if any. The rationale of the provision is based on the rules of natural justice, *audi alteram partem*.

2.1. The principles of natural justice evolved by the Indian judiciary comprise the fundamental rules of fair procedure, namely, that a man's defence must always be fairly heard and an adjudicator must give reasons for his decision. These principles form the bulwark of procedural due process in matters of judicial and quasi-judicial adjudication. In the criminal justice system the principle of *audi alteram* or fair hearing is incorporated in section 313 of the Code of Criminal Procedure which empowers a trial judge to give a reasonable opportunity to an accused to explain incriminating facts and circumstances in the case.

2.2. Fair procedure pre-supposes that both sides should be heard, *audi alteram partem*, 'hear the other side'. This is the most important principle of natural justice as it includes almost every aspect of fair procedure. This principle is broader in that it would include the rule against bias since a fair hearing must be an unbiased hearing.

2.3. All the three principles of natural justice form part of a specific design for ensuring that power is exercised considerately and fairly.

3. The accused in compliance with the provision, can file written statements with the permission of the court. In *Tilleshwar Singh v. State of Bihar*,<sup>3</sup> in a prosecution for murder under section 302 read with section 34 of IPC, the Supreme Court found that written statements were filed by the accused under section 342 of the Code of Criminal Procedure, 1898 and they were found to be very elaborate and furnished answers to all the points raised in the prosecution evidence. Though the examination of the accused was not in the question-answer form, the Supreme Court found that by filing of written statements, no prejudice was caused to him. The Supreme Court observed<sup>4</sup>:

It is no doubt true that s. 342 contemplates an examination in court and the practice of filing statements is to be deprecated. But that is not a ground for interference, unless prejudice is established. And it is nothing unusual for the accused to prefer filing statements instead of answering questions under s. 342 lest they should suffer by inadvertent admissions or by damaging statements.

This decision lays down that whatever be the form of examination of accused under section 313, no prejudice should result to the accused.<sup>5</sup>

4. The operation of this provision in practice is to have long and elaborate stereotype questions put to the accused to provide answers which many a time are found to be mechanical and meaningless without understanding the implications of the questions. The provision envisages a meaningful and realistic role of the judges in the examination of the accused putting such relevant question to him so that he can explain the circumstances appearing in the evidence against him. Preparation of questions should be in accordance with the objective enshrined in the provisions. Unwarranted and time-consuming examination causes delay of the trial. But we find that many a time the questions are prepared by the Bench Clerk of the court in a mechanical and stereotyped manner.



5. In the Workshops held at various places the Judges and senior Advocates, while reiterating the need for this provision as a valuable safeguard to the accused in the trial processes, felt that with a view to eliminating delays in trials, the Judges could take the help of prosecutor and defence counsel in preparing relevant questions.

6. We are of the view that the Court can take the assistance of the prosecutor and defence counsel and prepare the questions which are to be put in a concise form to the accused under section 313. The Court can also permit the filing of written statements by the accused as sufficient compliance with section 313.

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FOOTNOTES

1. S. 313(1) (a).
2. S. 313(1) (b).
3. AIR 1956 SC 238.
4. Id at 241.
5. See also *Ajmer Singh v. State of Punjab*, AIR 1953 SC 76; *Veer Punerjai v. State of Rajasthan*, 1990 Cr. L.J. 1692.

## CHAPTER XII

### COMPOUNDING OF OFFENCES : SECTION 320

1. The Code of Criminal Procedure in section 320 contains detailed provisions for compounding of offences. Sub-section (1) of section 320 lists 21 offences under the Indian Penal Code which may be compounded by the specified aggrieved party without the permission of the court and sub-section (2) lists 36 other offences under the Indian Penal Code which also may be compounded but only after securing the permission of the court. Under the scheme of section 320, namely sub-section 9, offences other than those specified in sub-section (1) and (2) are not compoundable.

2. The rationale for compounding of offences is that the chastened attitude of the accused and the praiseworthy attitude of the complainant in order to restore peace and harmony in society, must be given effect to in the composition of offences.

3.1. The Law commission in its 41st Report on the Code of Criminal Procedure, 1969 had not agreed to the formulation of a general rule for compounding by relating compoundable offences to the punishment provided for the offence. The Commission felt that it was "better to have clear and specific provisions such as those contained in section 345 (of the old Code) than a general rule which is likely to lead to different interpretations".

3.2. The Commission also did not approve of the abolition of the distinction between offences compoundable with and without the permission of the court. The Commission observed that "the safeguard of the court's permission is to prevent an abuse of the right to compound and to enable the court to take into account the special circumstances of the case which may justify composition. It is not in every case that such a safeguard is required".

3.3. The Commission did not approve of adding to the list of offences in sub-section (1) or in sub-section (2) of Section 345 those offences which jeopardize the public peace, order and security e.g. being member of an unlawful assembly, (s. 143); rioting (s. 147); false claim in a court of justice (s. 209), fraudulently obtaining decrees (s. 210); driving or riding on a public way so rashly or negligently as to endanger human life (s. 279) causing death by rash or negligent act (s. 304A); causing grievous hurt by dangerous weapon (s. 326), wrongful confinement for extortion (s. 347), Theft in a building (s. 380), lurking house trespass or house breaking by night (s. 456), the same in order to commit an offence (s. 457), and bigamy with concealment (s. 495).

3.4. The Commission's view was that the offence of unlawful compulsory labour punishable under section 374 IPC should not be compoundable and should be omitted from the list in section 345(1).

3.5. The Commission opined that "theft where the value of property stolen does not exceed 250 rupees" should continue to be in sub-section (2) of section 345 (old Code).<sup>5</sup>

3.6. The Commission recommended addition to the list in sub-section (2) the following offences:

(i) Assault or criminal force on women with intent to outrage her modesty (s. 354).

(ii) Receiving or retaining stolen property (s. 411).

(iii) Assisting in the concealment or disposal of stolen property (s. 414).

3.7. The above recommendations of the Law Commission were incorporated in the Code of Criminal Procedure, 1973.

4. Of late, various High Courts have quashed criminal proceedings in respect of non-cognizable offences because of settlement between the parties to achieve harmony and peace in the society. For instance, criminal proceedings

in respect of offences under Section 406, IPC, relating to criminal breach of trust of dowry articles or *Istridhan* and offences under section 498A, IPC, relating to cruelty on woman by husband or relatives of husband were quashed in *Arun Kumar Vohra v. Rectu Vohra*, *Nirlep Singh v. State of Punjab*.

In the Workshops convened by the Law Commission at various places, it was felt that as section 498A is not included in the Tables appended to section 320 of the Code, it could not be compounded by the parties. Many instances were cited where though the parties wanted to compound yet in the absence of an enabling provision, they could not do so. This has created hardship even in genuine cases. In order to meet this situation, it is recommended that section 498A be inserted in the Table under sub-section (2) where it can be compounded with the permission of the Court.

5. Though Section 320(3) postulates compoundability of the abetment or attempt to commit such offences mentioned in the Tables appended to section 320, there is no such provision where the accused is constructively liable under sections 34 and 149 IPC. If the provision is left as it is, only in respect of substantive offences mentioned in the Tables, compounding is possible, and not in respect of cases of constructive liability for the same offences. This view was highlighted in all the Workshops.

Likewise, in respect of offence of rioting resulting in the offences mentioned in the two Tables there is no provision for compounding. The offences punishable under sections 147 and 148 of IPC committed during the same transaction, the transaction being one and the same, where the guilt is proved, the accused are to be convicted under all those sections. It will be anomalous if one part of the offence is compoundable and other part remain non-compoundable where the convictions are under both. Accordingly sub-section (3) be amended suitably.

6...The Code of Criminal Procedure (Amendment) Bill, 1994, in clause 33, has incorporated the following:

- (i) The offence of voluntarily causing hurt by dangerous weapons or means (S. 324) should cease to be a compoundable offence with the permission of the court in sub-section (2) of section 320.

But we are of the view that offences under sections 324, 325 and 335 IPC be shifted to the Table under sub-section (1) from the Table under sub-section (2) of section 320.

7. We are also of the view owing to the fall in the value of rupee resulting from inflationary conditions, the limit of Rs. 250/- in the offences in the list of offences in sub-section (2), be raised to Rs. 2,000/-, as provided under clause 33 of the Bill.

8. With the legalisation of abortion under the Medical Termination of Pregnancy Act, 1971, section 312 of IPC relating to the offence of causing miscarriage of woman, will have to be interpreted in the light of the provisions of the Act. This offence should be made compoundable by the parties with the permission of the Court. Accordingly, we recommend the incorporation of offence under section 312, IPC to the Table under sub-section (2) of section 320.

9. We recommend that as a matter of policy more offences be brought under the category of offences compoundable by the parties themselves without the intervention of the court. However, offences against the public at large, howsoever small they may be, should not be compoundable.

10. On an examination of the list of offences in the Table to sub-section (2) of section 320 (offences compoundable with the permission of the court), we are of the view that the following offences be deleted from that Table and be included in the Table to sub-section (1) of section 320. In other words, those offences be made compoundable by the parties without the permission of the court:

S. 324: Voluntarily causing hurt by dangerous weapons.

S. 325: Voluntarily causing grievous hurt.

- S. 335: Voluntarily causing grievous hurt on grave and sudden provocation.
- S. 343: Wrongfully confining a person for three days or more.
- S. 344: Wrongfully confining for ten or more days.
- S. 346: Wrongfully confining a person in secret.
- S. 379: Theft, irrespective of the value of property.
- S. 403: Dishonest misappropriation of property.
- S. 406: Criminal breach of trust, irrespective of the value of property.
- S. 407: Criminal breach of trust by a carrier, wharfinger, etc. irrespective of the value of property.
- S. 411: Dishonestly receiving stolen property, knowing it to be stolen, irrespective of the value of property.
- S. 414: Assisting in the concealment or disposal of stolen property, knowing it to be stolen irrespective of the value of property.
- S. 417: Cheating.
- S. 419: Cheating by personation.
- S. 421: Fraudulent removal or concealment of property, etc. to prevent distribution among creditors.
- S. 422: Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.
- S. 423: Fraudulent execution of deed of transfer containing false statement of consideration.
- S. 424: Fraudulent removal or concealment of property.
- S. 428: Mischief by killing or maiming animal of the value of ten rupees or upwards.
- S. 429: Mischief by killing or maiming cattle, etc, of any value or any other animal irrespective of its value.
- S. 430: Mischief by injury to work of irrigation wrongfully diverting water when the only loss of damage caused is loss or damage to a private person.
- S. 451: House-trespass to commit an offence (other than theft) punishable with imprisonment.
- S. 482: Using a false trade or property mark.
- S. 483: Counterfeiting a trade or property mark used by another.
- S. 486: Knowingly selling, or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark.

11. It was also suggested by senior police officers at the various workshops that the Code of Criminal Procedure should empower the investigating officer to compound offences, which are compoundable, at the investigation stage and make a report to the magistrate who will give effect to the composition of such offences. This step will reduce the number of cases proceeding for trial at the threshold stage itself and relieve the court docket to a great extent. In fact the National Police Commission in its Fourth Report had suggested that it would help quicker disposal of cases in the compoundable category if the procedure is amended to empower the police officers to take note of the desire of the parties for the compounding of offences from the stage of investigation and thereupon close cases and report the matter to the court which will have the authority to pass initial order from the police report as in every other case in which the police submit their report.

12. It may be pointed out that clause 20 of 1994 Bill has inserted the following new sub-section (3A) to Section 173 to give effect to the recommendations of the National Police Commission:

“(3A) If, however, in respect of offences enumerated in the Table in section 320, in the course of investigation, the person by whom the offence may be compounded under the said section gives a report in writing to the officer in charge of the police station expressing his desire to compound the offence as provided for in the said section, the officer shall mention this fact in the police report prescribed in sub-section 2(1) and forward the compounding report from the person concerned to the Magistrate who shall thereupon deal with the case under section 320 as though the prosecution for the offence concerned had been launched before the Magistrate.”

We are of the view that such a provision will have a salutary effect and to ensure that there is no coercion or abuse by the police staff, the report of the investigating police officer incorporating the desire of the disputants to compromise can be got attested by a member of the District Legal Services Authority or a member of the village Panchayat.

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#### FOOTNOTES

1. Law Commission, *41st report*, para 24.66, page 213 (1969).
2. *Id* at para 24.67, pages 213-214.
3. *Id* at para 24.69, page 214.
4. *Id* at para 24.72, page 215.
5. *Id* at para 24.71, page 214. The offence of petty theft (to the limited extent) was made compoundable in 1955.
6. *Id* at para 24.70, page 214.
7. 1995 1 All India Criminal Law Reporter 31.
8. 1993 (2) All India Criminal Law Reporter 800.
9. *Fourth Report of the National Police Commission*, para 28.8, pages 13-14 (1980).

## CHAPTER XIII

### PLEA BARGAINING

1. The arrears of criminal cases awaiting trial are assuming menacing proportions. Grievances have been vented in public that the disposal of criminal trials in the courts takes considerable time and that in many cases trials do not commence for as long as a period as three to four years after the accused was remitted to judicial custody. Large number of persons accused of criminal offences have not been able to secure bail for one reason or the other and have to languish in jails as under trial prisoners for years. It is also a matter of common knowledge that majority of the cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend considerable amount by way of legal expenses and the public exchequer has to bear the resultant economic burden. During the course of detention as under-trial prisoners the accused persons are exposed to the influence of hard-core criminals. Quite apart from this, the accused have to remain in a state of uncertainty and are unable to settle down in life for a number of years awaiting the completion of trial. Huge arrears of criminal cases is a common feature in almost all the criminal courts. It is in this background, the Law Commission felt that some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners. The Law Commission in its 142nd Report on Concessional Treatment of Offenders who on their own Initiative Choose to Plead guilty without any Bargaining (1991) considered the question of introduction of the concept of concessional treatment for those who choose to plead guilty by way of plea-bargaining.

2. The justification for introducing plea-bargaining cannot be expressed any better than what the Twelfth Law Commission in its 142nd Report had already done as below :

- (1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community.
- (2) It is desirable to infuse life in the reformatory provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now.
- (3) It will help the accused who have to remain as under-trial prisoners awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as—
  - (a) end of uncertainty.
  - (b) saving in litigation-cost.
  - (c) saving in anxiety-cost.
  - (d) being able to know his or her fate and to start of fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career.
  - (e) saving avoidable visits to lawyer's office and to court on every date or adjournment.
- (4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.
- (5) It will reduce congestion in jails.
- (6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.
- (7) Under the present system 75% to 90% of the criminal cases if not more, result in acquittals.

3. The concept of plea bargaining has not been recognized so far by the criminal jurisprudence of India. However, plea bargaining is considered to be one of the alternatives to deal with the huge arrears of criminal cases. Plea-bargaining in its most traditional and general sense refers to pre-trial negotiations between the accused, usually conducted by the counsel and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. It has two facets. One is "charge bargaining" which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the accused in exchange for guilty plea. The second one is "sentence bargaining" which refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea.

4. The practice of plea bargaining in USA dates back to a century or more. The Prosecuting Agency has a leading role in this process in that it has the discretion to reduce or dismiss some of the charges against the accused and also to make recommendations to the Court about the sentences in exchange for a guilty plea. The Supreme Court of USA in *Brady v. United States*<sup>1</sup> and *Santobello v. New York*<sup>2</sup> upheld the constitutional validity and the significant role the concept of the plea bargaining plays in the disposal of criminal cases. It has approved this practice mainly on the premise that the accused who are convicted on the basis of negotiated pleas of guilt would ordinarily have been convicted had they been subjected to trial processes. One of the main arguments advanced in favour of plea bargaining is that it helps the disposal of accumulated cases and will expedite delivery of criminal justice.

5. The Supreme Court of India has examined the concept of plea bargaining in *Murlidhar Meghraj Loya v. State of Maharashtra*<sup>3</sup> and *Kasambhai v. State of Gujarat*<sup>4</sup>. The Court did not approve of the procedure of plea bargaining on the basis of informal inducement. In *Kasambhai's* case the Court squarely observed that conviction based on the plea of guilty entered by the accused as a result of plea bargaining could not be sustained and that it was opposed to public policy to convict the accused by inducing him to confess to a plea of guilty "on allurement being held out to him that if he enters a plea of guilty he will be let off very lightly".

6. The Law Commission in its 142nd Report, having considered the concept as is being practised in other countries, recommended that the scheme for concessional treatment to offenders who plead guilty on their own volition in lieu of a promise to reduce the charge, to drop some of the charges or getting lesser punishment be statutorily introduced by adding a Chapter in the Code of Criminal Procedure. In making such a recommendation, however, the Law Commission considered the views in favour of the concept as well as against it.

7. We have examined the cases decided in USA as well as by the Supreme Court of India in respect of this concept and the 142nd Report of the Law Commission.<sup>5</sup> We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure have to be incorporated in the Code of Criminal Procedure.

8. Having given our earnest consideration, we recommend that this concept may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code. Plea bargaining can also be in respect of the nature and gravity of offences and the quantum of punishment.

9. However, plea bargaining should not be available to habitual offenders those who are accused of socio-economic offences of a grave nature and offences against women and children.

9.1. The process of plea bargaining shall be set in motion after issue of process and when the accused appears, either on a written application by the accused to the Court or *suo motu* by the Court to ascertain the willingness of the accused. On ascertainment of the willingness of the accused, the Court shall require him to make an application accordingly.

9.2. On the date so fixed for the hearing the court shall ascertain from the accused whether the application was made by him voluntarily without any inducement or pressure from any quarters, particularly from Public Prosecutors or Police. The Court shall ensure that neither the public prosecutor nor police is present at the time of making the preliminary examination of the accused.

9.3 Once the Court is satisfied about the voluntary nature of the application, the Court shall fix a date for hearing the public prosecutor and the aggrieved party and the accused applicant for final hearing and passing of final order. If the Court finds that the application has been made under duress or pressure, or that the applicant after realising the consequences is not prepared to proceed with the application, the Court may reject the application.

9.4 Such an application may be rejected either at the initial stage or after hearing the public prosecutor and the aggrieved party. If the Court finds that, having regard to the gravity of the offence or any of the circumstances which may be brought to its notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of its powers on plea-bargaining, the Court may reject the application supported by reasons therefor.

9.5 The order passed by the Court on the application of the accused applicant shall be confidential and will be given only to the accused if he so desires. The making of such application by the accused shall not create any prejudice against the accused at the ensuing trial.

9.6 We are of the view that such a plea bargaining can be availed of by the accused in the categories of offences mentioned above before the Court at any stage after the charge sheet is filed by the investigating agency in police cases and in respect of private complaints at any stage after the cognizance is taken. An order passed by the court on such a plea shall be final and no appeal shall lie against such an order passed by the Court accepting the plea.

9.7 In cases where the provisions of Probation of Offenders Act, 1958 and/or section 360 of Cr. P.C. are applicable to an accused applicant, he would be entitled to make an application that he is desirous of pleading guilty along with a prayer for availing of the benefit under the legislative provisions referred to above. In such cases, the Court after hearing the public prosecutor and the aggrieved party, may pass appropriate order conferring the benefit of those legislative provisions. The Court may be empowered to dispense with the necessity of getting a report from the probation officer in appropriate cases. The provision regarding confidentiality of the making of application and the consequence of rejection outlined in paragraph 9.5 will be applicable if the application is rejected by the Court.

9.8 If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for, the Court may, instead of rejecting the application in limine, after hearing the public prosecutor and the aggrieved party, accept the plea of guilty and pass an order of conviction and sentence to the tune of one-half of the minimum sentence provided.

9.9 The Court shall on such a plea of guilty being taken, explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the Public Prosecutor or the aggrieved person as the case may be:

- (i) impose a suspended sentence and release him on probation.
- (ii) order him to pay compensation to the aggrieved party, or
- (iii) impose a sentence, which commensurate with the plea bargaining; or
- (iv) convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.



**9.10** We recommend that a separate Chapter XXIA on Plea Bargaining be incorporated in the Code of Criminal Procedure on the lines indicated above.

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## FOOTNOTES

1. 297 US 742-25 L.Ed. 2d 747.
2. 404 US 257 (1971); *Hutto v. Ross* 50 L.Ed. 2d 876; *Choffin v. Stynchcombe*, 412 US 17 (1973); *Blackledge v. Allison*, 52 L.Ed. 2d 136; *Weatherford v. Bursey*, 429 US 545 (1977).
3. AIR 1976 SC 1929.
4. AIR 1980 SC 854.
5. *Law Commission, One Hundred Forty Second Report, Chapter IX*, paras 9.1—9.40 pp 24—34 (1991).

## CHAPTER XIV

### NYAYA PANCHAYATS

1. In India many of the existing state legislation on panchayat raj provide for some form of adjudicatory bodies by whatever name they may be described. These fora for resolution of disputes with people's participation in the administration of justice is the constitutional goal mandated by Article 39A of the Constitution. Article 39A directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen on the ground of economic or other disabilities. The Constitution now mandates us to remove impediments to access to justice in a systematic manner. Articles 40 and 243 have to be interpreted afresh in the light of the mandate in Article 39A.

2. In the past, in the organisation of nyaya panchayats, the predominant consideration had been to reduce the burden on the State Court system and not so much as to prevent denial of justice because of economic and other disabilities. The "other disabilities" referred to in Article 39A as distinct from the economic disabilities are those which arise from the profiles of the Indian legal system because of absence of suitable local grassroots organs for handling disputes and emphasis on professionalised justice. Professionalised justice with lawyers dominating the process of the justice-delivery system, cannot be extended to the bulk of the people in the rural areas because most of the lawyers are concentrated in urban areas. Moreover, in view of the voluntary nature of the profession, they cannot be dispersed adequately and equitably to serve the needs of the masses.

3. Merely procedural alterations are envisaged in Article 39A to ensure a new legal system and procedure which is operationally geared to social justice and elimination of all disabilities of the masses in getting real, remedial justice. Self-government envisaged by the Constitution must include judicial powers too and that is the rationale for nyaya panchayats which implies judicial decentralisation at the people's level.<sup>1</sup> Effective access to justice is the most basic requirement and the most basic human right of a system which purports to guarantee legal rights.<sup>2</sup>

4. These judicial institutions represent the secular, egalitarian, modernistic legal ideology for assisting the desired social change. The Law Commission in its Fourteenth Report stresses the "educative value of nyaya panchayats"; just as the village panchayats would educate the villager in the art of self-government, "so would nyaya panchayats" train him in the art of doing justice between fellow citizens and instil in him a growing sense of fairness and responsibility.<sup>3</sup> In this respect, nyaya panchayats constitute an aspect of overall development.<sup>4</sup>

5.1. The working of nyaya panchayats has been examined in detail by the Law Commission in their 114th Report on Gram Nyayalayas. The Law Commission has recommended setting up of Gram Nyayalayas with the following broad features:<sup>5</sup>

5.2. A munsif or civil judge should preside over the nyaya panchayats. They would be subject to the jurisdiction of High Courts.

5.3. To provide effective people's participation in the administration of justice, the district magistrate and the district and sessions judge for each district should draw up a panel of lay persons from respectable residents in the villages having educational attainments, preferably upto a university degree or at least a higher secondary school. In order to ensure that marginal farmers, farm workers etc. get their due share in the panel, if need arises, educational qualifications may be relaxed in their case. Depending upon the size of each taluka, the list of panelists may vary from 10 to 20. The list should be approved by the High Court.

5.4. Whenever a dispute is brought to the panchayat judge having his headquarters at the taluka level, he would proceed to select two from the panel of lay persons, keeping in view the fact that they must be as far as possible, from the geographical location of the dispute. The panchayat judge and the two members of the panel will constitute a nyaya panchayat for the dispute. Such a composition would ensure legal expertise and peoples' participation and would avoid caste, communal and political contamination.

5.5. The Commission was of the view that the Gram Nyayalaya must have jurisdiction to try all offences which can be tried under the Code of Criminal Procedure, 1973 by the Judicial Magistrate, First Class.

6. We are of the view that the recommendation of the Law Commission in its 114th Report on the presiding officers of Gram Nyayalaya may not be feasible because serving Munsifs/Civil Judges will not be able to shoulder the additional burden of presiding over Gram Nyayalayas in the rural areas. As it is, there is docket explosion in the civil courts and the civil justice delivering system is adversely affected by the phenomenon of huge backlog of cases leading to long delays in disposals. Restricting to serving judicial officers only prevents the consideration of retired judicial officers and other personnel who have served in the government in various capacities. We are also not in favour of engaging lawyers by the parties to appear before the Nyaya Panchayats for it would introduce technical legal formalities into the system leading to delays in the disposal of cases. Indeed it would frustrate the very purpose for which the Gram Nyayalayas are being introduced.

7. We are of the view that the State have to enact legislation on Nyaya Panchayats to suit their local needs and conditions. The Andhra Pradesh Mandala Nyaya Panchayats Bill, 1995 may be adopted as a model on the composition, powers and jurisdiction of the Nyaya Panchayats. (See Annexure-V).

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#### FOOTNOTES

1. Justice V.R. Krishna Iyer, *Our Courts on Trial* (1987).
2. Cappelletti, Mauro and Garth, Bryant (ed) *Access to justice* 4 volumes (1978-79).
3. The Law Commission of India, *Fourteenth report on Reform of Judicial Administration* (1958); see also Government of India, *Report of the study Team of Nyaya Panchayats* (1962).
4. Upendra Baxi, Access Development and Distributive Justice, Access Problems of the "Rural" Population, 18 *Journal of the Indian Law Institute* 375 (1976).
5. Law Commission of India, *One Hundred and Fourteenth Report on Gram Nyayalayas* (1980).

## CHAPTER XV

### VICTIMOLOGY

1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimisation and protection of victims of crimes<sup>1</sup>. Crimes often entail substantive harm to people and not merely symbolic harm to the social order. Consequently, the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognized method of protection of victims is **compensation to victims of crime**. The needs of victims and their family are extensive and varied.

2. One school of thought justifies compensation in the criminal process in terms of the aims of sentencing. The Widgery Committee in Britain has listed several views about the rationale of the concept of compensation, namely, "benefit to the victims, possible deterrent effect on the offender or on the public, the possible educative or preventive effect on public morality, the possible **reformatory effect on offender**, its effect in depriving the offender of ill gotten gains and the view that compensation has an 'intrinsic moral value of its own'"<sup>2</sup>. The Law Reform Commission of Canada also was of the same view holding that compensation was consistent with the 'core values' of the community<sup>3</sup>.

3. The proponents of state compensation justify it as (i) another form of **public assistance for the disadvantaged** and (ii) a medium of fulfilment of neglected state obligation to its citizens. The state has a humanitarian responsibility to assist crime victims. The assistance is provided because of the social conscience of the citizens and as a symbolic act of compassion. The state is responsible to maintain law and order, ensure peace, harmony and tranquility in society, to use force to suppress crime and punish offenders, to protect people and their property. If the law and order machinery of the state, police is negligent or unable to prevent crime, the state is responsible to make preparation to the victims. In addition, state compensation is also considered as a matter of social justice to crime victims, as the state system namely, its political, economic and social institutions, generate crime by poverty, discrimination, unemployment and insecurity.

4.1. Historically, the ancient Babylonian Code of Hammurabi (about 1775 BC) makes the earliest reference to governmental compensation for crime victims. The Code mandated territorial governors to replace a robbery victim's lost property if the criminal was not captured. In the case of a murder, the governor was to pay the heirs a specific sum in silver from the treasury. In the succeeding centuries, restitution to the victim by the offender replaced compensation of the victim by the state. But that too disappeared during the Middle ages. The victim of crime was left with no remedy except to sue for damages in civil court.

4.2. When movement for prison reform began in Europe during 1800s focussing attention on the plight of convicts interest in compensation surfaced again, calling attention to the plight of crime victims. Jeremy Bentham contended that crime victims should be protected by the society to which they had contributed.

4.3.1. In the Anglo-Saxon legal system it was Margery Fry, an English magistrate who advocated state compensation for crime victims in the late 1950s. Thanks to her efforts, Britain set up its programme in 1964.

4.3.2. The scheme was brought into force through the exercise of the **Royal Prerogative** and the payments were made **ex-gratia** in the sense that there was no statutory authority for the scheme. The necessary funds, however, were voted by Parliament annually. Compensation was given in the shape of a lump-sum arrived at in the same manner as a civil award of damages for personal injury based on tort, subject to an upper limit on the amount attributable to loss of earnings. The scheme was administered by the Criminal Injuries Compensation Board, consisting of a Chairman and a panel of Queen's Counsel and solicitors.

4.3.3. With a view to giving statutory form to the scheme, the British Government, acting on the recommendations of an Inter-departmental Working Party, incorporated Part VII to the Criminal Justice Act, 1988 (sections 108 to 117 together with Schedules 6 and 7). According to these provisions the scheme would be administered by a statutory board, appointed by the Secretary of State subject to certain exceptions and limitations, claims for compensation were to be determined and the amounts payable to be assessed on the basis of principles of tortious liability. There would be a right of appeal from the Board's determination to the High Court or the Court of Session, as the case may be. The statutory scheme was not brought into force.

4.3.4. In the interim, consequent on a policy change reflected in a White Paper "Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme" presented to Parliament in 1993, the existing scheme was replaced with a new tariff scheme in 1994 by a government order. The tariff scheme broke the link with common law damages. The system is based on a tariff or scale of awards under which injuries of comparable severity will be combined together for which a fixed payment is made. A lump sum award related to the severity of the injury will be paid.

4.3.5. The method of introduction of the new tariff scheme was held unlawful by the Judicial Committee of the House of Lords in *Regina v. Secretary of State for the Home Department, ex parte Fire Brigades Union*. Consequently, the tariff scheme was withdrawn and the former scheme reinstated. Since the House of Lords' decision related only to the method of introduction of the tariff scheme and not its merits, the government enacted the Criminal Injuries Compensation Act, 1995 which incorporates the tariff based scheme with certain improvements. The scheme provides that the tariff would be increased in appropriate cases by payment for loss of earnings, special care and dependency. In cases where the victim has lost his life, not only will family members receive a fixed tariff payment but also in cases where they are financially dependant on the victim, they will receive payment for the loss of dependency and support (s. 2).

4.3.6. The Act repealed the provisions of the Criminal Justice Act, 1988 relating to the Criminal Injury Compensation scheme (s. 12).

4.3.7. The scheme will be administered by Scheme Managers. The Act provides for internal review of the case for compensation by a person other than the one who made the decision (s.4.). It also provides for appeal against decision taken on review to a panel of adjudicators. The panel of adjudicators will come under the supervision of the Council on Tribunals. Apart from hearing appeals, the panel of adjudicators has an advice giving role to the Secretary of State (s.5).

5.1. The movement in Britain caught on in the United States of America. In the United States California was the first State to legislate on victim compensation in 1965. Since then many more States set up boards and courts to administer financial aid to victims. In 1984, after a sustained campaign of nearly twenty years the Congress enacted the Victims of Crime Act, 1984<sup>3</sup> to provide compensation to crime victims. The Act established a fund described as Crime Victims Fund within the U.S. Treasury, collected from fines, penalties and forfeitures. Attorney-General administers the fund, half of which is earmarked annually for state compensation programmes; the balance goes to help pay for victim assistance programmes and services and victims of federal crimes<sup>4</sup>.

5.2. Most of the states in USA have victim compensation programmes administered by compensation boards. Compensation is given only to innocent victims. If the boards find evidence to prove victim's complicity in the crime, compensation is reduced in amount or disallowed entirely. A common feature is that compensation programme deals only with the most serious crimes, those which result in injury or death. Payments include medical expenses and for earnings lost because of missed work. In case of death of victims, their families are eligible for assistance, reasonable funeral costs and sometimes a death benefit or pension for surviving dependants. All state programmes prohibit double recoveries, namely any money received from insurance policy or other government agencies is deducted from the board's financial determination.

6.1. The need for compensating victims of crime was reiterated by UN Agencies also. The General Assembly of the United Nations in its 96th plenary meeting on 29th November, 1985, made a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recognising that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognised and also that frequently their families, witnesses and other who aid them are unjustly subjected to loss, damage or injury. The Assembly affirmed the necessity of adopting national and international norms in order to secure universal and effective recognition of and respect for, the rights of victims of crimes and abuse of power. It was also declared that offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. This Declaration has been described as "a kind of Magna Carta of the Rights of the Victims" worldwide.

6.2. The Declaration defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power."

6.3. The Declaration states:

"12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization."

6.4. "13. The establishment strengthening, and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for the purpose, including those cases where the state of which the victim is a national is not in a position to compensate the victim for the harm."

As regards assistance to victims the Declaration states:

"14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means."

6.5. The Declaration also refers to the necessity of establishing and strengthening "judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedure that are expeditious, fair, inexpensive and accessible."

7. Article 15B of the Statute of the Council of Europe also highlights the ideology of victimology. The Committee of Ministers of the Council of Europe adopted a recommendation on crime victims in the framework of criminal laws and procedure in accordance with this Article. The preamble of the Statute of Council of Europe highlights the principles of victimology as laid down below:<sup>9</sup>

"Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender;

Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;

Considering that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim;

Considering that it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness:

Considering that, to this end, it is necessary to have more regard in the criminal justice system to the physical, psychological, material and social harm suffered by the victims and to consider what steps are desirable to satisfy his needs in these respects:

Considering that measures to this end need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender:

Considering that the needs and interests of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process."

The recommendations cover action at the police level and the state:

1. Police officers should be trained to deal with victims in a sympathetic constructive and reassuring manner;
2. The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation;
3. The victim should be able to obtain information on the outcome of the police investigation;
4. In any report of the prosecuting authorities, the police should give as clear and complete a statement as possible on the injuries and losses suffered by the victim;

**In respect of Prosecution :**

5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender;
6. The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information;
7. The victim should have the right to ask for review by a competent authority of a decision not to prosecute, or the right to institute private proceedings."

#### **Questioning of the Victim**

At all stages of the procedure, the victim should be questioned in a manner giving due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them.

8. The movement for compensation for victims of crime has, as we have examined above, gained momentum globally and in countries of Anglo-Saxon legal systems as in U.K., Canada, New Zealand, Australia and USA. Statutory mechanisms are in place for providing succour to crime victims through compensation.

9.1. The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwork for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates, *inter alia*, that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51-A makes it a fundamental duty of every Indian citizen, *inter alia* 'to have compassion for

living creatures' and 'to develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

9.2. However, in India the criminal law Provides compensation to the victims and their dependants only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the Criminal Courts to grant compensation to the victims.

9.3. Under Section 357 compensation can be given in different ways and that too only when the offender is convicted and sentenced. Under Section 357 (1)(b) if the sentence is of fine, it can be applied in the payment of compensation, but limits the payment to cases when compensation is, in the opinion of the court, recoverable by the victim in a civil court. Similarly, compensation may be paid at the sentencing stage to persons who are under the Fatal Accidents Act, 1855 entitled to recover damages from the convict (s. 357 (1)(c)). So also in cases of theft, misappropriation, cheating and the like, the bonafide purchaser of property from the convict may also be compensated, the victim of the theft or cheating being also entitled to return of the property (s. 357 (1)(d)). Under section 357(3) if the sentence is not fine, the court may order the accused to pay specified amount of compensation to the victim.

9.4. The code of Criminal Procedure, 1973 made an improvement over the old Code of 1898 in that under sub-section (3) of section 357, it recognised the principle of compensating the victims even when no sentence of fine is imposed. Under the old Code, no compensation could be awarded unless a substantive sentence of fine was imposed and the amount of compensation too was limited only to the extent of fine actually realised. But order of compensation under section 357(3), will be futile against an accused without property or other financial resources or if he dies.

9.5. Under Section 5 of the Probation of Offenders Act, 1958, while releasing an accused on probation or with admonition, the court may order the offender to pay compensation as well as cost to the victim.

10. The aspect of compensatory justice in criminal law has been elaborately dealt with by the Supreme Court in the leading case of *Hari Singh v. Sukhbir Singh*. The Court pertinently observed:

"[S. 357(3)].....is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgement of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is an addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default."

11. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realised. The State should accept



the principle of providing assistance to victims out of its own funds. (i) in cases of acquittals, or (ii) or where the offender is not traceable but the victim is identified, or (iii) and also in cases when the offence is proved.

12. The Law Commission of India in its 152nd Report on *Custodial Crimes* has recommended insertion of a new Section 357A in the Code of Criminal Procedure regarding compensation to the victims of custodial crimes which is as follows:

- (1) Notwithstanding the provisions of Section 357, where the court convicts a public servant of an offence resulting in death or bodily injury, being an offence constituted by an act of such public servant against a person in his custody, the provisions of this section shall apply.
- (2) The court, when passing judgment in any case to which this Section applies, shall order that the Government in connection with the affairs of which such public servant was employed at the time when such act was committed, shall be liable jointly and severally with such public servant to pay, by way of compensation such amount as may be specified in the order.
- (3) An order for payment of compensation under this section may also be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.
- (4) While awarding compensation in any subsequent suit relating to the same matter, the civil court shall take into account any sum paid or recovered as compensation under this section.
- (5) The amount awarded under this section shall not be less than:
  - (a) Rupees twenty five thousand in case of bodily injury, not resulting in death;
  - (b) Rupees one lakh, in case of death;
  - (c) In fixing the amount of compensation under this section, the court shall, subject to the provisions of sub-section (5), take into account all relevant circumstances, including but not necessarily limited to the following:
    - (i) the type and severity of the injury suffered by the victim;
    - (ii) the mental anguish suffered by the victim;
    - (iii) the expenditure incurred or likely to be incurred on the treatment and rehabilitation of the victim;
    - (iv) the actual and projected earning capacity of the victim and the impact of its loss on the person entitled to compensation and other members of the family;
    - (v) the extent, if any, to which the victim himself contributed to the injury;
    - (vi) the expenses incurred in the prosecution of the case.
- (6) In case of death or permanent disablement of the victim, the court may take into account the estimated annual income of the victim as multiplied by the number of years of his estimated span of life.
- (7) Pending final determination of the proceeding, the court may award, by way of interim relief, such compensation as it may think proper in the circumstances of the case at any stage of the case, even before judgment of conviction is passed.
- (8) The Government may recover any amount paid by it as compensation under this section wholly or partly as it may think proper, from the delinquent public servant."

The above recommendations of the Law Commission though confining to victims of custodial crimes, have not been given effect to.

13. In view of the weaknesses of the existing provisions for compensation to crime victims in the criminal law, we are of the view that it is necessary to incorporate a new Section 357-A in the Code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. Heads of compensation are for (i) for injury, (ii) for any loss or damage to the property of the claimant which occurred in the course of his/her sustaining the injury and (iii) in case of death from injury resulting in loss of support to dependants.

In the State of Tamil Nadu, a Fund called "Victim Assistance Fund" has been created and Rupees one crore has been allocated to the scheme during 1995-96. The scheme provides for financial assistance to the victim of murder, serious injuries, rape and particularly to help women, children and bread winners in distress. The amount is placed at the disposal of the Director-General of Police who will sub-allocate the amount to the Commissioners of Police of Madras, Madurai and Coimbatore and Superintendents of Police of other districts with reference to requirements and the cash relief would be sanctioned to the victims or legal heir in case of murder on the following scales:

S. No.	Particulars	Amount of cash (Rs. ten thousand only)	To whom it should be paid
1.	Murder	Rs. 10,000/- (Rs. ten thousand only)	To the legal heir
2.	Grievous injury	Rs. 5000/- (Rs. five thousand only)	To the victim
3.	Rape	Rs. 5000/- (Rs. five thousand only)	To the victim

The said Scheme provides for setting up District Victims' Assistance Committee in each district comprising the following officials with the District Superintendent of Police/Deputy Commissioner of Police (Headquarters) acting as Member Secretary:

Name of the Committee	Chairman	Member
(a) District Victims Assistance Committee	District Collector	(i) District Superintendent of Police
(b) City Victims Assistance Committee at Madras, Madurai, Coimbatore	Commissioner of Police	i) Deputy Commissioner of Police (Head quarters) ii) City Public Prosecutor.

The application received from the victims seeking financial assistance from the fund in District Superintendent of Police Office/Commissioner of Police Office under the scheme is required to be placed before the Committee for consideration and decision.

The assistance from the "Victim Assistance Fund" will not be given to those victims or to legal heirs, if the victim is involved in any cognizable offence.

The Tamil Nadu Scheme which is limited only to a certain class of victims is being referred to as a model to be adopted in a comprehensive manner covering all victims.

14. In order to ensure that opportunities for securing justice are not denied to any citizen by raising of economic or other disabilities as per the mandate under Article 39 A of the Constitution, the Legal Services Authorities Act, 1987 was enacted by the Parliament. It seeks to provide for the constitution of the National Legal Services Authority consisting of the Chief Justice of India and some other members. Likewise, the Act provides for constitution of the State Legal Services Authority consisting of the Chief Justice of the High Court or any other serving or retired judge of the High Court to act as its Chairman and such other members possessing the requisite experience and qualifications. The State Authority performs functions, namely to (a) give legal services to persons who satisfy the criteria laid down under this Act; (b) conduct Lok Adalats; (c) undertake preventive and strategic legal aid programmes; and (d) perform such other functions as the State Authority may, in consultation with the Central Government, fix by regulations.

The Act further provides for the constitution of Legal Services Authority for every district in the State consisting of district Judge, who shall be its Chairman and such other members possessing such qualifications and experience as may be prescribed and nominated by the Government. The District Authority performs the functions of co-ordinating the activities of legal services in the district; organizing Lok Adalats within the district and such other tasks as the State Authority may, in consultation with the State Government, fix by regulations.

15. State and District Services Authorities may be vested with the power to award the compensation in the appropriate manner by making a provision under Section 357A.

16. While awarding compensation the District Legal Services Authority or the State Legal Services Authority, as the case may be, should make a special consideration in cases of (i) victims of custodial crimes, (ii) rape victims, (iii) victims of child abuse, and (iv) physically and mentally disabled victims.

17. Accordingly, a new Section S. 357A may be incorporated in the Code on the following lines:

Section 357A--Victim Compensation Scheme--

- (1) Every State Government in co-ordination with the Central Government shall prepare a Scheme for providing funds for the purpose of compensating the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
- (2) Under the Scheme the District Legal Services Authority at the district level and the State Legal Services Authority at the State level shall decide the quantum of compensation to be awarded whenever a recommendation is made by the trial court to that effect.
- (3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357(3) is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may recommend to the District Legal Services Authority if the compensation in its view is less than Rs. 30,000. or to the State Legal Service Authority if the compensation is more than Rs. 30,000.
- (4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place it is open to the victim or his dependents to make an application under sub-section (2) to the District Legal Services Authority at the district level and the State Legal Services Authority at the State level for award of compensation.
- (5) On receipt of such recommendations or on the application under sub-section (4), as the case may be, the District Legal Services Authority

or the State Legal Services Authority, as the case may be, shall after due enquiry award adequate compensation by completing the enquiry within two months.

- (6) The District Legal Services Authority or the State Legal Services Authority, as the case may be, to alleviate the suffering of the victim may order immediate first aid facility or for medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the Officer-in-Charge of the police station or a Magistrate of the area concerned or any other interim relief as the appropriate authority deems fit.

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FOOTNOTES

1. See generally Justice V. R. Krishna Iyer, *Human Rights—A Judge's Miscellany* (1995); V. N. Rajan *Victimology in India* (1995); R. I. Mawby and S. Walklate, *Critical Victimology* (1994); Essat A Fattah (ed), *The Plight of Crime Victims in Modern Society* (1989); Andrew Carmen, *Crime Victims: An Introduction to Victimology* (2nd ed. 1989); Chokkalingam (ed) *Readings in Victimology: Towards a Victim Perspective in Criminology* (1985); Emilo C Viano, *Victims and Society* (1976).
2. Advisory Council on the Penal system (1970) *Reparation by the Offender* (London HMSO) (Widgery Report).
3. Law Reform Commission of Canada (1974) *Restitution and Compensation: Working Paper No. 5.*
4. 1995 2 A11 E.R. 244.
5. 42 USC 10601, S. 1402.
6. K. Peak, "Crime Victim Reparation: Legislative Revival of the Offended Ones", *Federal Probation*, September, pp. 36-41 (1986) quoted in Andrew Karmen *Crime Victims: An Introduction to Victimology* 307 (2nd ed. 1989).
7. See Essat A Fattah (ed.), *The Plight of Crime Victims in Modern Society* (1989).
8. See Justice V. R. Krishna Iyer, "A Burgeoning Global Jurisprudence of Victimology" in *Human Rights—A Judge's Miscellany* 158-215 (1995).
9. (1988) 4 SCC 551; see also *Dr. Jacob George v. State of Kerala* (1994) 3 SCC 430 (Fine imposed for offence under Section 314 of Indian Penal Code in addition to sentence of imprisonment, Supreme Court enhanced the fine from Rs. 5000 as awarded by the High Court to Rs. 1,00,000 to be paid as compensation for the upkeep of the deceased's child); *Baldev Singh v. State of Punjab* (1995) 6 SCC 593 (appellants were directed under section 357(3) to pay compensation to the tune of Rs. 35,000 each to the widow of the victim and her children); *Balraj v. State of U.P.*, AIR 1995 S.C. 1935 (appellants directed to pay by way of compensation a sum of Rs. 10,000 to the victim's widow under section 357(3)).

## CHAPTER XVI

### ENQUIRY AND TRIAL OF PERSONS OF UNSOUND MIND

1. It has been recognized that the primary objective of the law of criminal procedure is to ensure that accused persons are granted a fair trial. The right to be informed of the accusation and an opportunity to prefer defence is granted to the accused by the Code of Criminal Procedure (Cr. P.C.); whilst the right to consult counsel is conferred by the Constitution.

2. An accused who is of unsound mind at the time of the inquiry or trial may not comprehend the charges levelled against him and may be unable to explain the alleged criminal conduct. The accused being the alleged doer of the act possesses the best knowledge of his own activities in relation to the incriminating circumstances. If due to unsoundness of mind he is unable to provide this vital information to his counsel, his defence cannot be conducted to his best advantage. If the inquiry or trial is proceeded with in his absence, the accused cannot impart instructions for cross-examination nor in the course of his examination under section 342 of the Code explain the circumstances appearing against him. Due to these dysfunctional consequences provisions have been incorporated in the Cr. P.C. which lay down that the inquiry proceedings or trial of a person, who is incapable of defending himself due to unsoundness of mind, may be postponed. The motivation for including these provisions in the Cr. P.C. is to ensure that an accused incapacitated due to unsoundness of mind is not denied his basic human right to a fair trial.

1. This principle is embodied in Section 328 which is as follows:

S. 328(1): When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall enquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the Civil Surgeon of the District or such other medical officer as the State Government may direct, and, therefore, shall examine such surgeon or other officer as a witness and shall reduce the examination to writing.

(2) .....

(3) If such Magistrate is of opinion that the person referred to in subsection (1) is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

4. Section 329 deals with the procedure of trial of person of unsound mind by Magistrate or Court of Session. It runs as:

Section 329(1): If at the trial of any person before a Magistrate or a Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity and, if the Magistrate or Court, after considering such medical or other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

(2) The trial of the fact of the unsoundness of mind incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court.

5. Once an undertrial is found incapable of standing trial due to unsoundness of mind the trial has to be postponed. During the interregnum of the postponement and resumption of the trial, the undertrial can be released on surety of *safe conduct*. However, if the case is not fit for the grant of bail

or if no surety for the release of the accused is offered, the accused can be detained in safe custody. The safe custody can be that of a jail or a mental hospital.

6. The law grants no entitlement of treatment to the insane undertrial. A guarantee of safe conduct and not treatment is sought from surety seeking release of the undertrial. Without a right to treatment, detention in jail will only be custodial guarding against the alleged dangerous propensities of the accused but providing no facilities for alleviating the incapacitating condition of the accused.

7. The Code provides no time-limit for which the postponement will subsist and the only safeguard against indefinite confinement is the obligation to send six monthly medical reports on the mental condition of the accused to the state government. This safeguard in no way protects the accused against needless, if not lifelong, incarceration has been demonstrated by *Veena Sethi v. State of Bihar*.<sup>1</sup> Veena Sethi unearths from the jails of Bihar cases of individuals whose trials were postponed because they were incapable of defending themselves. Subsequent to postponement of their trials they were lodged in Hazari Bagh Central Jail wherein they were detained for periods ranging from 19 to 37 years. This detention continued even after the accused regained sanity.

8. The confinement of insane undertrials in jail even after they have regained sanity has been held to be an infringement of their constitutional rights under Article 21. Section 428 of the Cr. P. C. provides that time spent by the accused as an undertrial should be set off with the sentence ordered on conviction. This section can be invoked only after the trial is concluded. In *Veena Sethi's* case when insane undertrial had spent periods in jail longer than the maximum period of sentence that could be ordered against them, the Supreme Court ordered their release invoking this section.

9. Article 14 of the Indian Constitution prohibits both different treatment of similar groups and similar treatment of different groups. Sections 328 and 329 authorise the postponement of the criminal trial of all persons of unsound mind who are incapable of defending themselves. This postponement whilst benefiting persons of unsound mind who are suffering from a treatable condition, could lead to lifelong incarceration of the incurable mentally ill and mentally retarded. Both groups are incapable of regaining capacity, hence postponement does not promote fair trial for them, rather it operates as a punitive device. This similar treatment of the incurables and the curables violates the equality provision.

10. Section 330 provides for release of persons of unsound mind pending inquiry or trial. It reads as:

Section 330(1): Whenever a person is found, under section 328, or section 329, to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court, or such officer as the Magistrate or Court appoints in this behalf.

(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the State Government.

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

11. Recognition to the therapeutic rights of insane undertrials is also mandated by the right of speedy trial guaranteed under Article 21. The provisions

in the Code which accord recognition to the right of speedy trial do not apply to the insane undertrial. Since an insane undertrial is treated differently from a sane undertrial, it can be logically contended that the manner of their disposition should be suited to their varied needs. A sane undertrial who is to be released on bail is kept in jail in order to prevent him from fleeing or tampering with the investigation procedure. An insane undertrial not released on surety can also be confined in jail. Confinement in jail can be only protective custody, and protective custody is not what the insane detenu needs for early resumption of trial. The right of speedy trial as extended to the insane undertrial requires that the detenu should be confined in conditions which would alleviate the incapacity and aid early resumption of trial. The speedy trial rights of insane undertrials are infringed not only by their confinement in jails but also because no time limit is provided for keeping the trial in abeyance and the accused in detention. In *Hussainara Khatoon*<sup>8</sup> the Supreme Court whilst enunciating the right to speedy trial ordered the release of those undertrials whose trial had not commenced even after the period specified for such commencement in the Code has expired. The rationale of specifying a time limit within which a trial should begin is to save the accused from the disadvantages occasioned by stale or tampered evidence and frail memory of witnesses.

12. The trial of a person of unsound mind who is incapable of defending himself is postponed to promote fair trial. If this postponement operates for periods as long as 10 years then even when the accused regains sanity he may still be incapable of defending himself not due to unsoundness of mind but because the evidence has gone stale or witnesses are lost. The right of speedy trial as extended to the insane undertrial mandates that a time limit should be fixed for the period of postponement of trial. Indefinite postponement is an infringement of the personal liberty and rights of insane undertrials.

13. It is the standard of treatability that should provide justification for postponement of enquiry or trial; hence treatability and not dangerousness should be the guiding force of sections 328 and 329. It is the prospect of recovery alone which explains the postponement of enquiry or trial of persons of unsound mind and the continuance of the proceedings for persons for who are not of unsound mind. The criterion of treatability should be accorded recognition at each stage of the enquiry or trial. At the stage of observation, medical opinion should be sought not only on whether the accused was of unsound mind and incapable of defending himself but also whether the mental condition was amenable to treatment. For the accused whose mental condition is diagnosed as incurable at this stage, a procedure different from postponement needs to be devised. For those categorized as treatable the time required to regain fitness needs to be inquired. The time needed for treatment should be accorded due cognizance in fixing the period of postponement.

14. All accused categorized as treatable may not respond to treatment. In order that personal liberty is not arbitrarily deprived in the name of therapy, it is essential that the period for which the enquiry or trial can be postponed, should be subject to limitation.

15. For the accused whose condition is treatable and who can be better equipped to defend themselves, postponement of trial furthers fair trial. For incurables, postponement is of little utility and only operates as a mechanism for punishing without trial. It, therefore, seems appropriate that they should be discharged of the charged offence. If their mental condition makes them a danger to themselves or others i.e. they are incapable of looking after themselves and nobody is available who is willing to look after them, then the procedure for involuntary civil commitment should be initiated to institutionalize these persons.

16. We accordingly suggest the following amendments to sections 328, 329 and 330 in respect of the pre-inquiry and pre-trial proceedings.

16.1 After section 328 (1) a new sub-section (1A) may be inserted on the following lines.

S.328(1A): "That if the civil surgeon finds the accused is of unsound mind, the accused shall be referred to a psychiatrist or clinical psychologist for care, treatment and for prognosis of the condition. The

psychiatrist or clinical psychologist shall also inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation."

16.2. Further, for the existing sub-section (3) of Section 328 the following sub-section (3) be substituted :

S.328(3) : If such magistrate is informed that the person referred in sub-section (1A) is a person of unsound mind, the magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the magistrate shall record a finding to that effect. On such a finding of unsoundness of mind of the accused arrived by the Magistrate, he shall examine the record of evidence produced by the prosecution and after hearing the lawyer of the accused but without questioning the accused, if he finds that no *prima facie* case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with the accused in the manner provided under the proposed section 330(3) :

Provided that if the Magistrate finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused and order the accused to be dealt with as provided under the proposed section 330(3).

16.3. A new sub-section (4) to Section 328 be inserted as follows :

If such magistrate is informed that the person referred to in sub-section (1A) is a person with mental retardation, the magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence and if the accused is found so incapable, the magistrate shall order closure of the inquiry and deal with the accused in the manner provided under the proposed Section 330(3).

16.4. Section 329(1) shall be amended as follows :

S. 329(1) : If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall refer such person to a psychiatrist or clinical psychologist for care, treatment and for prognosis of the condition. The psychiatrist or clinical psychologist shall also inform the Magistrate or Court whether the accused is suffering from unsoundness of mind or mental retardation.

16.5. In place of existing sub-section (2) of section 329, the following sub-section (2) shall be inserted :

S. 329(2). If such Magistrate or Court is informed that the person referred to in sub-section (1) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect. On such a finding of unsoundness of mind of the accused arrived at by the Magistrate or Court, he or it shall examine the record of evidence produced by the prosecution and after hearing the lawyer of the accused but without questioning the accused, if he or it finds that no *prima facie* case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with the accused in the manner provided under the proposed section 330(3) :

Provided that if the Magistrate or Court finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he or it shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.



A new sub-section (3) of Section 329 shall be inserted in the following manner:

S. 329(3): If the Magistrate or the Court finds that a *prima facie* case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with the proposed section 330(3).

16.6. The existing Section 330(1) shall be amended as follows:

Section 330(1): Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the magistrate or court, as the case may be, whether the case is one in which bail may be taken or not, order release on bail provided the accused is suffering from unsoundness of mind or mental retardation which does not mandate inpatient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

16.7. The existing Section 330(2) shall be amended as follows:

S. 330(2): If the case is one in which, in the opinion of the magistrate or court, as the case may be, bail shall not be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government.

16.8. A new sub-section (3), be inserted in Section 330:

S. 330(3): Whenever a person is found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of act committed and the extent of unsoundness of mind or retardation further determine if the release of the accused can be ordered.

(i) If on the basis of medical and other specialist opinion the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under sections 328 (3) and (4) and 329 (2) and (3), such release may be ordered if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person.

(ii) If the Magistrate or Court is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.

17. Coming to the proceedings after the person concerned has ceased to be of unsound mind and on the consequent resumption of inquiry or trial, the relevant section to be noted are sections 331 to 339 of the Code.

18. Acceptance of the defence of insanity results in acquittal but not discharge. A court acquitting on the ground of insanity is required to make an express finding whether the accused had committed the act. If the accused had committed the alleged act, the Magistrate or Court is required to either make an order for the accused to be detained in a place of safe custody or to be discharged on surety of safe conduct to a relative or friend. The place of safe custody can either to a jail or a mental hospital. Commitment to a mental hospital is to be ordered according to rules made under the Lunacy Act. From first of April 1993 the rules made under the Mental Health Act, 1987 would be applicable because the Lunacy Act, 1912 has been repealed by the Mental Health Act, 1987. No order for delivery of the accused to relative or friend can be made, except on the application of such relative giving security to the satisfaction of the court that the accused shall be prevented from causing injury to others or to himself.

19. Sections 335 to 339 deal with the accused acquitted after the completion of the trial held in accordance with sections 331 to 334. These sections may suitably be modified to provide better treatment and rehabilitation of such persons on the lines indicated in the proposed section 330(3) and the provisions of the Mental Health Act, 1987. All references to the Indian Lunacy Act, 1912 in the Code shall be deleted.

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FOOTNOTES:

1. AIR 1983 SC 339. see also "Acquitted after 32 Years." in *Indian Express* (Delhi ed) May 1, 1996 (Sixty five year old A.N. Ghosh. was arrested in 1964 on charges of murdering his brother. A city court in Calcutta found him to be insane and asked the jail authorities to keep him for treatment. Though Ghosh regained his mental balance after some time, he continued to languish behind the bars awaiting trial. He was released from the Presidency jail in Calcutta after his case was taken by a local NGO, Antara.)
2. *Hussainara Khatoon. Re* (1980) 1 SCC 91.
3. *Abdul Latif v. State of Assam*, 1981 Cri. L.J. 1205.

## CHAPTER XVII

### PROCEDURE FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

1. Sections 125—128 in Chapter IX of the Code of Criminal Procedure lay down a self-contained speedy procedure for provision of maintenance to wife, including divorced wives, children and parents. The provisions are aimed at ensuring that the neglected wives, children and parents are not left destitute on the scrap-heap of society and consequently driven to a life of vagrancy, immorality and crime for their sustenance<sup>1</sup>.

2. These provisions are applicable to all persons, irrespective of the religions they profess, and thus have no relationship with the personal law of the parties.<sup>2</sup>

3. Since the comprehensive review of the Code in 1973, many problems have arisen in the working of these provisions. Though it is supposed to be a summary remedy to help wives, children and parents in distress, several factors leading to hardships and injustice have been visible in the operation of these provisions. As a consequence, the Law Commission undertook an exercise *suo motu* and rendered a comprehensive report in 1989. One Hundred Thirty-Second Report entitled "Need for Amendment of the Provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to ameliorate the Hardships and Mitigate the Distress of Neglected Women, Children and Parents". The Report contains several valuable recommendations to alleviate the hardships to women (wives), children and parents. However, the Code of Criminal Procedure (Amendment) Bill, 1994 has not incorporated any of those recommendations. The only amendment made in the Bill is the one relating to the quantum of maintenance, an increase in statutory ceiling from Rs. 500 to Rs. 1500/-. At the several workshops held under the auspices of the Law Commission of India, it was unanimously recommended that section 125 needs to be amended on the lines indicated below :

4. We may examine the following issues arising from the scope of section 125 creating hardship to awardees.

5. **Ceiling.**—The fixation of the ceiling of Rs. 500/- made in 1955 and which continued in 1973, is a source of hardship and injustice to the claimants after a passage of more than 41 years.

The Law Commission in its 132nd Report strongly felt that the ceiling on the quantum of maintenance be dropped altogether. The Commission observed :

It cannot be overlooked that if a ceiling is retained, it would require to be revised from time to time taking into account the inflation and rise in cost of living. It would be extremely difficult to amend the provision periodically, time and again, for it would result in investment of legislative time unnecessarily. The present experience reinforces this apprehension in as much as the ceiling of Rs. 500/- has remained unrevised for 30 years without anyone (including women's activist groups) even becoming aware of the resultant anomaly and injustice.

Accordingly, it recommended that the ceiling limit in sub-section (1) of section 125 and in the first proviso to sub-section (1) of section 127 be deleted.

We are of the view that the increase in ceiling from Rs. 500/- to Rs. 1500/- suggested in the 1994 Bill would not serve the purpose owing to spiralling inflationary conditions. We are also not in favour of dropping altogether the ceiling limit provided under the Code. We feel that justice would be done to awardees if the ceiling is raised to Rs. 5000/-. This view has found unanimous support in the various Workshops conducted by the Law Commission.

#### 6.1. Date from which order for monthly payment of maintenance be made.

Section 125 (2), as it stands, provides that monthly allowance shall be payable from the date of the order or from the date of the application for maintenance, if so ordered, by the magistrate. It is left to the discretion of the magistrate to order payment from the date of application for maintenance. In view of the fact that right to claim maintenance existed on the date on which the petition was instituted and also because of the time-lag in the disposal of the proceeding in the courts of first instance, it would be fair and just that the amount of maintenance be payable from the date of the making of the application by the claimant. Section 125(2) needs to be amended accordingly.<sup>1</sup>

#### 6.2. Should the concept of 'potentiality to earn' be included as a factor in the interpretation of the phrase "unable to maintain herself" in section 125 (1)(a)?

In section 488 of the Code of Criminal Procedure, 1898 the pre-condition "unable to maintain herself" existed in relation only to the child. But in section 125 of the Code of 1973 this condition has been expressly made applicable to the case of wife. This phrase was introduced in 1973 for the first time in case of wives presumably in the light of conflict of decisions among some High Courts on the question whether separate income of the wife can be taken into account in determining the amount of maintenance payable under section 488 of the Code of 1898. The Delhi High Court in *Nanak Chand v. Chander Kishore*<sup>2</sup> and the Punjab High Court in *Major Joginder Singh v. Bibi Raj Mohinder Kaur*<sup>3</sup> had held that the separate income of the wife could not be taken into account. But the Kerala High Court had ruled to the contrary in *P.T. Ramankutty Achan v. Kalyanikutty*<sup>4</sup>. This controversy was ultimately settled by the Supreme Court in *Bhaawan Dutt's* case in 1975 by overruling the Delhi and Punjab High Court decisions and upholding the Kerala High Court view. Since the law had not been settled by the time the Code of 1973 was formulated, the phrase "unable to maintain herself" was introduced.

6.3. The Bombay High Court has also held in *Vimal's*<sup>5</sup> case that while construing the expression "unable to maintain herself", the concept of the able bodied person's ability to earn cannot be presumed. However, the Kerala and Karnataka High Courts have held to the contrary<sup>6</sup>.

6.4. The Law Commission in its 132nd Report had recommended that *there was no warrant* to inject the concept of "potentiality to earn" in the expression "unable to maintain herself" in section 125 (1)(a). The only condition is that the wife has no adequate income of her own for her maintenance on the date of the institution of the petition. Consequently, it was recommended that "an Explanation should be added to S. 125(1) that the phrase "unable to maintain herself" concerns itself with the actual separate income, if any, of the wife and not with the possibility or potentiality of the wife being able to earn for herself by securing employment or by exerting herself". We endorse the above view.

#### 7. Need for criteria for determining the quantum of maintenance.

An analysis of judicial decisions of High Courts<sup>7</sup> on the amount of maintenance awarded reveals that the amount has invariably been determined with reference to the monthly income of the husband and not the assets, movable and immovable, of the husband on the date of the institution of the petition. The Law Commission in its 132nd Report suggested that for a fair and just determination of the amount, the provision may be amended to lay down that not only the monthly income of the husband but also all his other resources existing on the date of the institution of the petition, may be taken into account.

We reiterate the aforesaid recommendation.

#### 8.1. Recovery of Monthly Allowance: Problems.

The awardee is required to approach the court for enforcement of the order of maintenance every month if a recalcitrant person defaults or neglects to make payment regularly. This would involve considerable effort, costs for engaging legal counsel, etc. It is unlike the problem of a decree-holder in a civil matter where he has to file an execution application in one proceeding. In the present

case, whenever there is a default, the aggrieved person has to go to Court. To ameliorate the distress of the awardees, the 132nd Report had recommended the following<sup>11</sup>:

The Magistrate passing the order for monthly allowance should be empowered to direct the person held liable to pay the allowance to deposit in advance six months' allowance at the rate determined by him and keep it deposited till the order of maintenance holds the field unless, for reasons to be recorded in writing, he considers it unjust to do so in the circumstances of the case... The magistrate must also be empowered to direct the employer, if any, of the person held responsible to make a deduction of the amount of monthly allowance from the salary of the person held liable to pay it to the awardee in the manner specified by the learned magistrate. It should also be provided that wilful default in making the deduction will constitute contempt of court.

8.2. First proviso to section 125(3) precludes the awardee from going to the court for issuance of a warrant for recovery after the lapse of one year from the date on which it fell due. The Law Commission in its 132nd Report felt that the period of one year limitation was unjust and oppressive to the claimants and no prejudice would be caused to the person held liable if no period of limitation exists. Accordingly the Commission recommended the deletion of the first proviso to section 125(3). We are in agreement with this view.

8.3. The second proviso to section 125(3) allows reopening the controversy at the stage of recovery whether or not wife is entitled to refuse to live with the husband. This question would have been examined at the stage of determination of the right to maintenance on merits.

The Law Commission in its 132nd Report recommended the deletion of the proviso along with the explanation on the ground that "the existence of the provision serves no better purpose than providing a weapon of harassment to the errant husband in as much as a husband can always make an application just in order to tire out the wronged wife who has won a decision in her favour after a prolonged, costly and unequal battle"<sup>12</sup>. We are in favour of the deletion as suggested above.

#### 9.1. Right of Appeal

Under the existing law, there is no right to appeal against an order passed by the magistrate under Section 125. Only a revision is possible. There is need to amend the law providing right to appeal in the following manner.

9.2. With the passing of the Family Courts Act, 1984, the jurisdiction to hear proceedings for maintenance is now vested in the family court under sections 7(1) and 7(2)(a). Consequently, wherever family courts have been set up, pending proceedings stood transferred to them. Under section 19 of the Family Courts Act an appeal is provided against every final decision of the family court. In the very same state, there will be discrimination against two sets of litigants. One set under the jurisdiction of family courts will enjoy the right of appeal and the other set under the jurisdiction of the magistrate under section 125 will be deprived of the right of appeal. This is patently discriminatory. Under the circumstances, in order to bring uniformity and to avoid discrimination, Section 125 may be amended to provide for a right of appeal against an order passed by a magistrate, however, if the person liable to pay maintenance prefers an appeal, the appeal shall be maintainable only when it is supported by an affidavit of the appellant to the effect that he has deposited or paid all arrears of maintenance and shall make future payments regularly. The appellate court may be empowered to relax this rule in case of genuine hardship to the appellant and may extend the time for making the deposit or exempt him from making deposit of only portion of arrears.<sup>13</sup> It is apposite that similar conditions be also imposed under the Family Courts Act.

9.3. Since section 125 procedure is summary for expeditious justice, it needs to be further streamlined for achieving the objective. One way is to empower the magistrate to decide the matter on affidavits with opportunity to the other party to cross examine the deponents of the affidavits<sup>14</sup>. The procedure

under section 126 in this regard should be summary for expeditious justice and as such we are recommending the deletion of summons procedure under the Code. Summary trial procedure for recording evidence etc. be adopted and the evidence by way of affidavits also be made admissible. Accordingly section 126(2) be amended.

9.4. At the stage of execution of the magistrate's order, the awardees are put to great hardship. If the order is flouted with impunity what remedy will the awardees have? It is necessary to empower the magistrate to attach the property of the person liable and sell in order to recover the amount. If the husband is employed, the magistrate shall have power to direct the employer to deduct the amount of maintenance and arrange the payment. To give effect to the suggestion, section 128 has to be amended suitably. The magistrate may also pass orders for detaining such person in jail for a limited period. The magistrate may transmit the order for attachment and sale of the property to a civil Court with a request to enforce the order in the same manner in which a decree passed by a civil court may be executed. The civil court can enforce the order as if it was executing an order under rule 2A of Order XXXIX of the Code of Civil Procedure 1908".

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FOOT NOTES:

1. *Bhagwan Dutt v. Kamala Devi* (1975) 2 SCC 386.
2. *Nanak Chand v. Chand Kishore Aggarwal* (1969) 3 SCC 802.
3. See Law Commission of India, 132nd Report, para 34, page 5 (1989).
4. *Id* at para 3.5, page 6; see also *Premkanta Sahai v. Ram Niranjan Sahai* 1989 Supp (2) SCC 731 wherein the Supreme Court held that reduction of amount of maintenance and making the same payable from date of order instead of the date of application was improper. The order of the magistrate was restored.
5. AIR 1969 Del. 235.
6. AIR 1960 Punj. 249.
7. AIR 1971 Ker. 22.
8. 1981 Cri. L.J. 210 (Bom).
- 8a. See *Saraswati v. Madhavan* 1961 (2) Cri. L.J. 642 (Ker); *Abdul Manji v. Satima* 1974 Cri. L.J. 172 (Kant).
9. 132nd Report; *supra* note 3, para 3.6, page 9.
10. *Id* at para 3.7, page 10.
11. *Id* at para 3.10, page 12.
12. *Id* at para 3.12, page 12.
13. *Id* at paras 3.13, 3.14, page 13.
14. 132nd Report; *supra* note 3 at para 4.4, page.
15. *Id* at para 4.7, page 16.

## CHAPTER XVIII

### SPECIAL PROTECTION IN RESPECT OF WOMEN

The Criminal Law (Amendment) Act, 1983 incorporated important amendments to the Indian Penal Code, 1860 on the law of rape introducing the concept of custodial rape and minimum sentence therefor, to the Indian Evidence Act, 1872 setting up a presumption as to absence of consent in custodial rapes and to the Code of Criminal Procedure mandating enquiry into and trial of rape in camera and prohibiting publication of the proceedings of such inquiry or trial without the permission of the Court.

2. The amendments were a sequel to the 84th Report of the Law Commission "Rape and Allied Offences—Some Questions of Substantive Law, Procedure and Evidence" in 1980. The Report had incorporated the major demands of the campaign on rape law reform by women's organisations triggered off by the Supreme Court decision in the *Mathura case*<sup>1</sup>. The Commission had, *inter alia* recommended certain pre-trial procedures, namely, women should not be arrested at night, a policeman should not touch the body of a woman while arresting her, and the statements of women should be recorded in the presence of a relative, friend or social worker. It also recommended that a police officer's refusal to register a complaint of rape should be treated as an offence. However, the Bill introduced by the Government in 1980 did not incorporate the above recommendations of the Commission regulating powers of the police. The Bill had sought to make publication of proceedings of rape trial a non-bailable offence which was rather harsh in that it blocked out media publicity which would help in the articulation of public protests against heinous offence like rape. In the face of public criticism, the Bill was referred to a Joint Committee of Parliament for further discussion. In so far as relevant to the Code of Criminal Procedure, the publication of reports of rape trials was made into a bailable offence.

3. In the decade following the 1983 amendments to the Code, a significant development took place. The National Commission for Women was set-up under the National Commission for Women Act, 1990. The Commission had organised a seminar on Child Rape which made recommendations for amending the Indian Penal Code, Code of Criminal Procedure and the Indian Evidence Act. Pursuant to the Seminar, a Bill to give effect to its recommendations was formulated. The Bill was examined by the Commission's Expert Committee on Law and Judiciary which gave its opinion and the Bill then was approved by the Commission. For the purpose of identification, the Bill as approved by the National Commission for Women is hereinafter referred to as Bill (NCW).

4.1. The Bill (NCW) has made the following recommendations for the amendment of Code of Criminal Procedure.

4.2. S. 26, specifies the different courts by which offences under the Indian Penal Code and other laws are triable.

The Bill (NCW) has recommended the incorporation of a proviso to clause (a), namely,

"Provided that an offence under section 376 of the Indian Penal Code [rape] shall be tried only by any such court presided over by a woman."

However, the Code of Criminal Procedure Amendment Bill, 1994 does not contain the above amendment.

We are of the view that an absolute condition provided in proviso to clause (a) of the Bill formulated by National Commission for Women, namely, that an offence under section 376 of the Indian Penal Code [rape] shall be tried only by any such court presided over by a woman may not be feasible.

in practice always. As the aim is to have speedy trial, emphasis should be on **speedy investigation and commencement** of rape trials. So we suggest that the word "only" be substituted by "as far as practicable" in the above proviso.

4.3.1. S. 54 provides for examination of arrested person by medical practitioner at the request of the arrested person.

4.3.2. The Law Commission in its 135th Report on "Women in Custody" had recommended that where a female accused desires a medical examination in order to prove her innocence, she could insist that such an examination be done by a female registered medical practitioner and with regard to decency. The National Commission for Women had endorsed the Law Commission's recommendation.

4.3.3. The Bill (NCW) has recommended the insertion of the following proviso to section 54, namely:

"Provided that where the arrested person is a female, the examination of the body of such person shall be made only by or under the supervision of a female registered medical practitioner."

In essence this amendment reflects the principle underlying sub-section (2) of section 53 which deals with examination of women accused by women doctors at the request of police officers.

4.3.4. The 1994 Bill does not contain a provision to this effect.

4.3.5. We, however, are of the view that the proviso referred to above is a salutary provision and section 54 be amended to that effect.

5.1. Section 157 deals with the procedure for investigation of offences by the police.

5.2. The Bill (NCW) has proposed the insertion of the following proviso to section 157, namely:

"(a) Provided further that in relation to an offence of rape, the investigation under this sub-section shall be conducted only at her residence by a woman police officer and the person on whom such offence is alleged to have been committed is a woman under fifteen years of age, she should be questioned only in the presence of her parents or social workers appointed for the locality and the questioning should be as brief as possible".

(b) in sub-section (2), for the word "proviso", the word "the first proviso" shall be substituted.

5.3. The 1994 Bill does not contain this provision.

5.4. We are in agreement with the amendment as approved by the National Commission for Women. However, we feel that the age of the woman to be questioned only in the presence of her parents etc. should be *eighteen* and not *fifteen*. The U.N. Convention on the Rights of the Child, 1989 to which India is a party, defines 'child' as:

"For the purposes of the present Convention a child means every human, being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier."

Consequently, in accordance with the Convention, it is desirable to raise the age to eighteen in the above provision.

6.1. Section 160(1) deals with police officer's power to require attendance of witnesses. Under this provision, the investigating police officer can, by a written order, require the attendance of any person who is acquainted with the facts and circumstances of the case and is within the limits of his police station or of any adjoining police station. The proviso to sub-section (1) exempts a person below fifteen years of age or a woman from attending any place other



than their place of residence. The provision is intended to afford special protection to children and woman against exploitation and harassment resulting from the abuse of powers by the police.

6.2. This amendment has been effected as a sequel to the Law Commission Reports on "Rape and Allied Offences" and "Women in Custody".

6.3. But the Bill (NCW) has suggested that in sub-section (1), for the proviso, the following proviso shall be substituted, namely:

"Provided that no male person under the age of eighteen years or a woman should be required to attend at any place other than the place in which such male person or woman resides."

6.4. We approve of this recommendation as eminently desirable, as a protection to children (both male and female) and women. By specifying the age of eighteen years only to male persons, the provision extends to all women irrespective of their age.

6.5. The Bill (NCW) has also suggested the incorporation of the following provisions after sub-section (2) of section 160 in the Code of Criminal Procedure:

(3) Where under this Chapter, the statement of a person under the age of twelve years is to be recorded either as first information of an offence or in the course of investigation into an offence, or the woman is a person against whom an offence under sections 354 or 376B of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded either by a female police officer or by a person authorised by such organisation interested in the welfare of women or children and recognised in this behalf by the State Government by notification in the Official Gazette.

(4) Where the case is one to which the provisions of sub-section (3) apply and a female police officer is not available, the officer incharge of the police station shall, in order to facilitate the recording of the statement, forward to the person referred to in that sub-section, a written request setting out the points on which information is required to be elicited from the woman.

(5) The person to whom such a written request is forwarded shall, after recording the statement of the woman, transmit the record to the officer incharge of the police station.

(6) Where the statement recorded by such person as forwarded under sub-section (5), appears in any respect, to require clarification or amplification on specified matters and such person shall thereupon record the further statement of the woman in conformity with the request and return the papers to the officer incharge of the police station.

(7) The statement of the woman recorded and forwarded under sub-sections (3) to (6) shall, for the purpose of the law relating to the admissibility in evidence of the statement made by any person, be deemed to be a statement recorded by a police officer."

6.6. The origin of this suggestion in its embryonic form can be traced to the Law Commission's Reports on "Rape and Allied Offences" and "Women in Custody".

6.7. The Bill (NCW) has gone beyond the Law Commission's earlier recommendations in that, insisting on the presence of a female police officer. Though the presence of such female officer is useful and necessary, their absence should not lead to delay in the investigation of the offences. Sub-sections (4), (5), (6) and (7) referred to above obligates the officer incharge of the police station to forward the person to a representative of a government, recognised women's organisation and the statement recorded by such person shall be deemed to be a statement recorded by the police officer.

6.8. It may be pointed out that the 1994 Bill does not incorporate the above amendment.

6.9. We are of the opinion that section 160 be amended on the lines suggested above subject to certain modifications. The recommendation made in sub-section (4) of NCW Bill is not practicable having regard to the present condition and dearth of female police officers. It may also not be practicable for the victim or any person interested in her to approach the person mentioned in sub-section (3). Instead, we suggest that sub-section (4) may be amended to the effect that where a female police officer is not available and to contact the person mentioned in sub-section (3) is difficult, the officer in charge of the police station, for reasons to be recorded in writing, shall proceed with the recording of the statement of the victim in the presence of a relative of the victim.

Further, the age of "twelve years" be raised to "eighteen years" in conformity with the Convention on the Rights of the Child.

7.1. Clause 19 of the 1994 Bill seeks to insert new section 164A in the Code to provide for a medical examination of the victim of rape by a registered medical practitioner of a government hospital or in his absence, by any other registered medical practitioner and also for an early despatch of the medical report to the investigating officer, who shall forward it to the concerned magistrate.

164A (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be forwarded to such registered medical practitioner without delay.

(2) The registered medical practitioner, to whom such woman is forwarded shall without delay, examine her, person and prepare a report of her examination giving the following particulars namely:

- (i) the name and address of the woman and of the person by whom she was brought;
- (ii) the age of the woman;
- (iii) whether the woman was previously used to sexual intercourse;
- (iv) marks of injury, if any, on the person of the woman;
- (v) general mental condition of the woman; and
- (vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

*Explanation.*—For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meaning as in section 53.

7.2. The recommendation of new section 164A was made by the Law Commission as early as 1980 in its 84th Report on Rape and Allied Offences. However, it was not incorporated in the 1983 Criminal Law (Amendment) Bill.

7.3. We are of the view that the insertion of section 164A is eminently desirable subject to the modification that medical examination be made preferably by a female medical practitioner. A speedy and detailed medical examination of rape victims by doctors is essential for effective trial of rape offences. Likewise, speedy despatch of the report to the investigating officer is also necessary.

8.1. Under section 167 when a person is arrested or detained in custody and it appears that investigation cannot be completed within the period of 24 hours as fixed under section 57 and there are grounds for believing that the accusation is well founded the officer incharge of the police station or the investigating police officer (not below the rank of sub-inspector) shall forthwith send a copy of the entries in the case diary to the nearest Judicial Magistrate and shall also at the same time forward the accused to such magistrate. If Judicial Magistrate is not available, the copies of the entries in the case diary as well as the accused person may be sent to the nearest Executive Magistrate on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred.

8.2. The Bill (NCW) has suggested the following amendment to sub-section (2) of section 167:

“Provided that where the accused person is a woman who is under eighteen years of age, the detention of such accused shall be authorised to be in the custody of a remand home or recognised social institution.”

8.3. This provision is to safeguard the female child accused from being sent to prison. We endorse the above recommendation.

9.1. Section 173 (1) mandates that every investigation of offence shall be completed without unnecessary delay. With a view to completing investigation of child rape offence speedily, the Bill (NCW) has suggested the addition of the following clause in sub-section (1) of section 173 at the end, namely:

“and where the offence is under [proposed by the National Commission for Women] sub-section (3) of section 376 of the Indian Penal Code, it shall be completed within three months from the date on which the information relating to the commission of offence was first recorded by the officer incharge of the police station.”

On the completion of investigation, the officer-in-charge of the police station is required to send a report of the concerned magistrate stating the names of the parties, the nature of the information, the names of persons who appear to be acquainted with the circumstances of the case, whether any offence has been committed and if so, by whom, whether accused has been arrested, whether he has been released on his bond, and, if so, whether with or without sureties and whether he has been forwarded to custody of the magistrate under section 170.

9.2. The Bill (NCW) has suggested another amendment. In sub-section (2) of section 173 in clause (ii) after sub-clause (g) the following sub-clause shall be inserted:

“(h) Whether the report of the medical examination of the woman concerned has been attached where the investigation relates to an offence under section 376, 376A, 376B, 376C or section 376D of the Indian Penal Code.”

9.3. This amendment aims at ensuring that the police report in cases of rape and custodial rape includes the report of the medical examination. This is a salutary provision. We are of the opinion that the aforesaid amendments in section 173 be made.

10.1. Section 198 deals with prosecution of offences against marriage. Sub-section (6) of section 198, prohibits the court from taking cognizance of the offence of marital rape when the wife is under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.

10.2. The Bill (NCW) has increased the age-limit of wife from "fifteen years" to "seventeen years".

10.3. We endorse this amendment subject to the modification that the age-limit be raised to "eighteen years".

11.1. Section 309 mandates the court to conduct inquiry and trial expeditiously; it also empowers the court to grant adjournments after recording reasons therefor.

11.2. In order to prevent trials in rape cases including child rape from being unduly delayed, the Bill (NCW) has sought to prescribe a time-limit of two months from the date of commencement of the examination of witnesses, for completion of trial.

In sub-section (1) of section 309 of the Code, the following proviso shall be added, namely:

"Provided that when the inquiry or trial related to an offence under section 376 to 376E [proposed by the both inclusive] of the Indian Penal Code, judgment shall, as far as possible, be delivered within a period of two months from the date of commencement of the examination of witnesses."

12.1. Consequent on the recommendations of the Law Commission in its 84th report of Rape and Allied Offences, the Code of Criminal Procedure was amended by Criminal Law (Amendment) Act, 1983. Section 4 of the Amending Act incorporated new sub-sections (2) and (3) to section 327 introducing the concept of trial *in camera* for trial of the offences of rape including custodial rapes and also preventing the printing or publication of the trial proceedings except with the permission of the Court respectively.

12.2. The Bill (NCW) seeks to amend sub-section (2) and (3) in the following manner:

"In sub-section (2), for the words "shall be conducted in camera" the words "shall be conducted only by a woman judge or magistrate in camera" shall be substituted.

(b) For sub-section (3) the following sub-section shall be substituted, namely: "Where any proceedings are held under sub-section (2) it shall be lawful for any person to print or publish any matter in relation to such proceedings except with the previous permission of the court but the names and addresses of the parties to such proceedings shall not, in any case, be included in such matters."

12.3. While we agree with the spirit of the amendment in sub-section (2) that trial of rape cases including custodial rape offences be tried by woman judges or magistrates, to limit such trials *only* by woman judges or magistrates as a mandatory condition could, in our opinion, unduly delay trials resulting in loss of relevant evidence and trial memory of witnesses etc. Expeditious completion of trial whether by judges and magistrates of either sex should be the aim. Therefore, we recommend that the word "only" be substituted by the words "as far as practicable" in sub-section (2).

12.4. We approve of the amendment in sub-section (3) lifting the ban on printing or publication of rape trial proceedings but maintaining confidentiality of the names and addresses of the parties.

13.1. Under section 416 if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may if it thinks fit, commute the sentence to imprisonment for life.

13.2. The Law Commission in its 135th Report on "Women in Custody" had recommended that commutation of death sentence to one of life imprisonment be made mandatory in case of convicted pregnant woman. Accordingly, the Commission suggested the amendment of section 416 on the following lines:<sup>5</sup>

"S. 416. If a woman sentenced to death is found to be pregnant, the High Court shall commute the sentence to one of imprisonment for life."

13.3. We approve of this amendment which makes it mandatory for the High Court to commute the sentence of death to one of life imprisonment.

14.1. Section 437 deals with the grant of bail in cases of non-bailable offences. First proviso to sub-section (1) of section 437 confers discretion on the Court to release on bail persons committing grave offences with previous convictions, if they are under the age of sixteen years or woman or sick.

14.2. The Bill (NCW) seeks to amend the first proviso referred to above in the following manner:

"In sub-section (1) of section (1) of section 437 of the Code, for the first proviso, the following proviso shall be substituted," namely :

"Provided that where such person is a female, she shall ordinarily be released on bail unless the court considers it otherwise for special reasons to be recorded by it in writing."

14.3. We approve of this amendment. But it shall be second proviso.

In the first proviso, the age of "sixteen years" be raised to "eighteen years".

The existing second proviso shall be third proviso and the existing third proviso shall be fourth proviso.

15.1. Section 432 empowers the appropriate government to suspend or execution of sentence or remit the whole or any part of the punishment to which an accused is sentenced. In criminal jurisprudence sentencing is a judicial function. Suspension or remission of sentence by the government does not interfere with the order of conviction passed by the court; it only affects the execution of the sentence.

15.2. Section 433 empowers the appropriate government to commute different types of sentences as laid down therein.

15.3. In 1978, the Code of Criminal Procedure (Amendment) Act added a new section 433-A, which is as follows:

"S. 433-A: Notwithstanding anything contained in S. 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under S. 433 in to one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

15.4. The purport of this section is that "lifers" convicted of capital offences should undergo actual imprisonment for at least fourteen years. The objective of enacting this section seems to be to place restrictions on the government's power of remission of sentences under section 432. The experience of the working of section 432 in many States revealed that "lifers" of capital offences are granted remission under the relevant rules leading to their release in a few years.<sup>6</sup>

15.5. The constitutionality of this section was challenged but upheld by the Supreme Court in *Maru Ram v. Union of India*<sup>7</sup> and *Ashok Kumar v. Union of India*.<sup>8</sup>

15.6. The question whether women should not be exempted from the bar imposed by section 433-A was examined by the Law Commission in its 135th Report on "Women in Custody". The Commission posed the issue thus<sup>9</sup>:

"In the case of a woman prisoner, sentenced to imprisonment for life (and therefore subjected to the stringent provisions of section 433-A of the Code of Criminal Procedure, 1973), is it proper that the law should insist on the prisoner's undergoing minimum 14 years of imprisonment mandatorily laid down in section 433-A?"

The Commission was of the view that rigorous application of this section to women prisoners would cause grave hardship. Therefore, the Commission recommended the removal of bar in case of women prisoners. Such removal would not mean that women 'lifers' would not have to undergo 14 years of imprisonment but it would only mean that the appropriate government could grant remission of sentence on the merits of each case under section 432. Section 433-A has been held not to apply to juveniles convicted under the Borstal schools Act applicable in Andhra Pradesh.<sup>10</sup> Consequently, the Commission had recommended that a similar approach should be adopted in regard to women prisoners, particularly because long and continuous imprisonment of women prisoners might prejudicially affect the welfare and well-being of other members of their families.

15.7. We are also of the view that women prisoners be exempted from rigour of section 433-A for the reasons set out above.

16. Special provisions on the law of arrest for protection of women are dealt with in Chapter IV.

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FOOT NOTES:

1. *Tukram v. State of Maharashtra*, AIR 1979 SC 185.
2. See paras 2.5—2.6 (1989).
3. See paras 3.24 and 3.25, page 18. (1980).
4. See para 2.11, (1989).
5. See para 2.13, (1989).
6. See *Maru Ram v. Union of India* (1981) 1 SCC 107.
7. *Ibid.*
8. (1991) 3 SCC 498.
9. See paras 2.17, 2.18, 2.19 (1989).
10. See *State of A.P. v. Vallabhapuram Ravi* (1984) 4 SCC 410.

## CHAPTER XIX

### PUNISHMENT OF IMPRISONMENT FOR LIFE, SENTENCING AND SET-OFF

Section 53 of Indian Penal Code, 1860 as it stood prior to amendment in 1955 sets out six different punishments, the second one being "transportation". Under section 55 IPC in every case in which sentence "transportation" was passed, the Provincial Government could commute the punishment to imprisonment of either description for a term not exceeding fourteen years.

In section 53, the punishment, namely, "transportation for life" was substituted by the words "imprisonment for life" by Act 26 of 1955. Section 53A which has been added by Act 26 of 1955 states that in every case in which a sentence of transportation for a term has been passed the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term. Questions often arose before the courts whether the punishment of "imprisonment for life" means "rigorous imprisonment for life". In *Gopal Vinayak Godse v. State of Maharashtra* the Constitution Bench held that a sentence for "imprisonment for life" *prima facie* means imprisonment for whole of remaining period of the convicted person's natural life unless the said sentence is commuted or remitted by the appropriate authority under the provisions of I.P.C. or Cr.P.C. The Law Commission of India in its 39th Report noted that there is no clear provision as to how the person sentenced imprisonment for life should be dealt with under the law as it now stands, namely, whether it should be treated same as sentence of rigorous imprisonment for life or simple imprisonment for life and whether it is a punishment different in quality despite being different in duration from the sentence of imprisonment of either description or for a specified term and whether it is legally permissible for a court passing a sentence to lay down that the imprisonment for life shall be rigorous or simple. In Godse's case (supra) the Supreme Court, while referring to the Section 53A, observed that under that Section a person transported for life or any other term before the enactment of that section would be treated as a person sentenced to rigorous imprisonment for life or for a said term. The question again came up in Naib Singh case<sup>2</sup>. The Bench after referring to the earlier cases affirmed the view by adding that by necessary implication the sentence for transportation for life which is now substituted by "imprisonment for life" by section 53 awarded for serious offences must mean rigorous imprisonment for life. The Supreme Court also overruled the decision of the Kerala High Court in *Mathammal Saraswathi v. State of Kerala*<sup>3</sup>. The Bench also referred to the Law Commission's 39th Report in which the amendment was suggested, namely, that a new section 56 be inserted to the effect "imprisonment for life shall be rigorous", with a view to resolve the doubts regarding the nature of punishment of imprisonment for life. Accordingly we recommend insertion of new section 56 in the Indian Penal Code to that effect.

2. A perusal of several sections of the Indian Penal Code, 1860, as well as the Code of Criminal Procedure, 1973 shows that both the Codes appear to make a distinction between "imprisonment for life" and "imprisonment for a term". Section 53 of the Indian Penal Code mentions the nature of punishments which can be awarded. "Imprisonment for life" and "imprisonment of either description, namely, rigorous or simple" are two types of punishments prescribed therein. So far as sentence of imprisonment for life is concerned, its nature, namely, whether it should be rigorous or simple, is not specified therein. Section 55 provides for commutation of sentence of imprisonment for life which could be imprisonment of either description for a term not exceeding fourteen years. Section 57 lays down that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. A combined reading of these sections would go to show the imprisonment for life could be for a term, namely, for twenty years or, if commuted, for a term of fourteen years. Chapter XXXII of the Code of Criminal Procedure, 1973 deals with execution, suspension, remission and commutation of sentences. Sections 432 to 435 specifically deal

with suspension, remission and commutation of sentences. Section 433(b) provides that a sentence of imprisonment for life can be commuted by the appropriate government for imprisonment for a term not exceeding fourteen years or for fine. However, section 433A which was introduced in 1978 by Act No. 45 of 1978, section 32 places a restriction on powers of remission or commutation in certain cases and lays down that notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment. Even though this provision has a nexus with section 55 of the Indian Penal Code but imposes a restriction that a convicted person who is sentenced to imprisonment for life, shall not be released unless he has served for at least fourteen years of imprisonment.

A question arose whether the benefit of the set-off contemplated by section 428 of the Code of Criminal Procedure should be available to life convicts and whether the sentence of imprisonment for life can be equated as a sentence for a term. In *Kartar Singh v. State of Haryana*<sup>1</sup> a Bench of three judges held that a clear distinction between imprisonment for life and an imprisonment for a term is maintained in both the Codes and that Section 428 would apply only to cases where the sentence of imprisonment is for a term and not in cases where the sentence imposed is imprisonment for life. In arriving at this conclusion, the Bench referred to *Godse's*<sup>2</sup> case and *Maru Ram's*<sup>3</sup> case wherein it was held that imprisonment for life means imprisonment for the whole of the remaining period of the convicted person's natural life. However, the same question came up for consideration again before a Constitution Bench in *Bhagirath's*<sup>4</sup> case. The Constitution Bench, having noted that the expressions "imprisonment for life" and "imprisonment for a term" are used in the Indian Penal Code and the Code of Criminal Procedure, however, ruled that a person sentenced to imprisonment for life should be held to have been sentenced to a term, namely, the term of his life. The Constitution Bench also observed that the assumption that the word "term" used in section 428 implies a concept of ascertainability runs contrary to the letter of the law as found in that section which is a benevolent provision. In that view of the matter, the Constitution Bench overruled *Kartar Singh's* case (supra). It is clear from the aforesaid decision that the Constitution Bench based its finding more on equity, justice and fair play.

We feel that in order to make the provision explicit so as to give benefit of set-off to the life convicts Section 428 can be amended by adding the words "or imprisonment for life" after the words "sentenced to imprisonment for a term".

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#### FOOTNOTES

1. A.I.R. 1961 SC 600.
2. 1983 (2) SCC 454.
3. A.I.R. 1957 Ker 102.
4. A.I.R. 1982 SC 1439.
5. A.I.R. 1961 SC 600.
6. A.I.R. 1980 SC 2147.
7. A.I.R. 1985 SC 1050.



## CHAPTER XX

### CODE OF CRIMINAL (AMENDMENT) BILL, 1994 PROPOSED CHANGES

1. The Bill was introduced in Rajya Sabha for carrying out a number of changes in the Code. While the Bill is at present pending before the Parliamentary Standing Committee on Home Affairs, the Government in February 1995 had made the reference to the Law Commission of India to undertake a comprehensive revision of the Code of 1973 and make necessary recommendations particularly from the point of view to have speedy trials. The Statement of Objects and Reasons for introducing the Bill shows that the recommendations already made by the Law Commission, Police Commission and the suggestions received from the State Governments and others in this regard have been taken into account.

2. The Law Commission has undertaken the study of the comprehensive revision of the Code so as to remove the germane problems relating to delays in the disposal of criminal case.

3. There are altogether forty nine clauses in the Bill (Annexure). A detailed Questionnaire was issued and views of several authorities concerned with criminal justice delivery system were obtained. As mentioned already several Workshops were also held at several places and views of cross sections were gathered. Apart from the areas covered by the Bill, the Commission, in the background of the discussions held and the responses to the Questionnaire, has made an indepth study of various other aspects and has made several recommendations which are incorporated in the earlier chapters and they have a bearing on some of the clauses of the Bill. We, therefore, feel that some of the clauses require to be considered and we propose to deal with them in this chapter.

4. Clauses 2, 3, 6, 9, 11 to 16, 23 to 27, 30, 31, 34, 35, 45 to 48 of the Bill deal with minor changes which may be retained.

5.1. Clause 18: 'After section 144 a new section 144A is to be inserted in the Code to enable the District Magistrate to prohibit mass drill (or training) with the arms in public places. We are also of the view that in order to curb the militant activities of certain communal organisations there is a need to strengthen the hands of the State authority. For effectively checking communal tension, such a provision is necessary.

5.2. Clause 21: Under this clause section 176 is being amended to provide that in the case of death or disappearance of a person or a rape of a woman while in the custody of police, there shall be a mandatory judicial inquiry and in case of death, examination of the dead body shall be conducted within twenty-four hours of death. In view of the increase in the incidence of custodial crimes, such an amendment is a welcome measure.

5.3. Clause 22: This clause seeks to insert a proviso to sub-section (1) of section 190 of the Code to empower a magistrate to authorise further detention in custody of an accused person for a period not exceeding a week, after recording reasons, during the interim period of submission of the police report and before taking cognizance of the offence disclosed by the police report. Such a provision is necessary to enable the Magistrate to pass an order of remand where it is not possible for him to take cognizance of an offence under clause (b) of Section 190.

5.4. Clause 29: Under this clause a new section 291A is sought to be inserted with a view to making a memorandum of identification prepared by the Magistrate admissible in evidence without formal proof of facts stated therein where they are not in dispute. But in case the court on an application deems fit to examine such Magistrate, it can do so. We also feel that dispensing with the examine of the Magistrate would save time.

5.5. Clause 32: It is in respect of obtaining specimen signatures or handwriting of any person including accused. Section 311A is sought to be introduced pursuant to the observations made by the Supreme Court in *State of U.P. v. Ram Babu* when the Magistrate is entrusted with such power, other proceedings would be more effective.

5.6. Clause 38: This clause adds two provisos to sub-section (1) of section 389 of the Code to the effect that the Appellate Court would give notice to the prosecution before releasing a convicted person on bail, if he was convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. It also enables the prosecution to move an application for cancellation of such bail granted by the Appellate Court. Having regard to the fact that the convicted person after being released on bail by the Appellate Court continues to indulge in committing crimes, such a provision is necessary.

5.7. Clause 39: This clause adds a proviso to Section 428 providing for a set off of the period of detention during investigation and trial against period of 14 years of actual imprisonment. This amendment is necessary so that the convicted accused can get a benefit of the period suffered by him as detention during the trial and investigation being set off against period of 14 years mentioned in section 433A.

5.8. Clause 40: In respect of bailable offences, there are instances where the person has to remain in jail for his inability to furnish bail, till the case is disposed of. The amendment of section 436(1) to make mandatory provision to release such indigent person on an execution of a bond without sureties, is a salutary provision.

5.9. Clause 43: Under this clause Section 438 providing for anticipatory bail is sought to be amended by adding some more clauses regarding giving notice to the Public Prosecutor etc. We have already dealt with this aspect in Chapter V (Bail and Anticipatory Bail) and, therefore, some amendments on those lines are necessary.

5.10. Clause 44: Some of the persons have taken it as a profession to stand sureties for any number of accused which is a highly pernicious practice. This clause seeks to include section 441A which provides that a person standing surety for an accused person shall disclose as to in how many cases he has already stood surety for accused persons. Such an information may entail the rejection of the surety.

5.11. Clause 49: This clause provides for the addition of new sections 153AA, 174A and 229A to the Penal Code. Since the Bill for amendment of the Indian Penal Code is also likely to come up before the Parliament, relevant clauses in this context inserting these three new sections can be added. We shall give our recommendations of amendment to IPC in this regard.

6. Then we are left with the remaining clauses Nos. 4, 5, 7, 8, 10, 17, 19, 20, 28, 33, 36, 37, 41, 42.

6.1. Clause 4: This clause seeks insertion of a new section 25A empowering the State Government to establish the Directorate of Prosecution. We have already discussed this topic and have recorded our recommendations giving approval to this clause in chapter III. However, we have indicated that the Government while appointing the Public Prosecutor and Additional Public Prosecutor shall, as far as practicable, appoint sufficient number of women Public Prosecutors so that they can effectively deal with the cases in respect of offences against women.

6.2. Clause 5: This clause seeks to amend section 29 of the Code to enhance the sentencing power of the Magistrate of the First Class to impose fine from five thousand rupees upto twenty five thousand rupees and Magistrate of the Second Class from one thousand rupees upto five thousand rupees. This proposal is made keeping in view the depreciation of the value of the rupee. Further, in the Questionnaire issued the opinions of the cross sections were sought and there was unanimous approval to enhance the sentencing power of the Magistrate.

6.3. Clause 7: This clause seeks to amend section 46 to empower the police officer concerned to use all means necessary to effect the arrest including causing death in the case of proclaimed offender under sub-section (4) of section 82. The new sub-section (4) is being added to section 46 to prohibit arrest of a woman after sunset and before sunrise except in unavoidable circumstances. We have considered the issue of arrest in detail in Chapter III. We have opined that the Law Commission of India in its 135th Report on "Women in Custody" made such a recommendation and on that basis a new sub-section is being added to section 46 and we have approved the same. However, we recommend a proviso to section 46(1) regarding the arrest of a woman providing that where the woman is to be arrested and submission to custody on an oral intimation the arrest shall be presumed. However, we suggested that existing sub-section (2) will be numbered as sub-section (3) and sub-section (3) as sub-section (4).

6.4. Clause 8: Under this clause a new section 50A is sought to be inserted requiring the police to give information about the arrest of the person as well as the place where he is being held to any one who may be nominated by him for communicating information. In our discussion in Chapter III we have referred to the recommendation of the Law Commission of India in its 152nd Report on "Custodial Crime" which recommended insertion of a similar section. Section 50A is sought to be included on the same lines. But the section as recommended in the 152nd Report is more elaborate and section 50A sought to be inserted may be framed on those lines.

6.5. Clause 10: Under this clause a new section 53A is sought to be inserted providing for an examination of the person accused of rape by a registered medical practitioner. With a view to obtaining valuable evidence at the earliest such a provision will be an eminently desirable one.

6.6. Clause 17: On the recommendations made in the Chief Justice' Conference and in view of the depreciation of the value of money it is proposed to amend section 125 of the Code to enhance the payment of maintenance. On this subject our recommendations are in Chapter XIII wherein we have recommended that the upper limit may be raised to Rs. 5,000/-, taking into consideration the unanimity expressed in the several workshops, and this change may be incorporated under clause 17.

6.7. Clause 19: This clause seeks to insert new section 164A in the Code to provide for a medical examination of the victim of rape by a registered medical practitioner. We have adverted to this clause in Chapter XIV on "Special Provisions in respect of Women". We have pointed out that the recommendation for insertion of new section 164A was made by the Law Commission of India in 1980 itself and therefore we have observed that insertion of this section is very much required.

6.8. Clause 20: A new sub-section (3A) is sought to be added to section 173 to enable the police to take note of the desire of the parties to compound offences even at the stage of investigation. In our Questionnaire we have mentioned about this clause and have also discussed in Chapter IX. There has been unanimity that such a provision is salutary one.

6.9. Clause 28: Under this clause it is proposed to amend section 260 to make summary trial of offences specified therein mandatory. We have considered the three procedures, namely summon cases, warrant cases and summary trial, in detail in Chapter VII. We have recommended the deletion of summons procedure and instead suggested summary trial of all cases punishable upto three years. The amendment sought to be made under this clause has to be modified on the lines of the recommendations made in this regard.

6.10. Clause 33: Under this clause amendment to the Table appended to sub-section (2) of section 320 of the Code is sought to be inserted. In Chapter IX we have dealt with amending of section 320 comprehensively and have made several recommendations and this clause may be redrafted in accordance with those recommendations.

6.11. Clause 36: Section 377 is sought to be amended to permit the filing of an appeal in the Court of Session instead of the High Court on the

ground of inadequacy of sentence passed by a Magistrate. The amendment sought is a salutary one.

**6.12.** Clause 37: In order to guard against the arbitrary exercise of power and to reduce reckless acquittals, section 378 is sought to be amended providing an appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence filed on a police report to the Court of Session as directed by the District Magistrate. In respect of all other cases filed on a police report, an appeal shall lie to the High Court against an order of acquittal passed by any other court other than the High Court, as directed by the State Government. The power to recommend appeal in the first category is sought to be vested in the District Magistrate and the power in respect of second category would continue with the State Government. In our Workshops we have highlighted this issue and there was near unanimity in favour of incorporating such a provision.

**6.13.** However, the next question is whether an appeal or revision would lie against an order passed by the Sessions Court in such appeal against acquittal or in an appeal for enhancement. The Bill is silent on this aspect. Section 376(b) lays down that where Sessions Court passes a sentence of 3 months no appeal would lie, but this would apply to a trial before that court. But a similar limitation can be made applicable to the orders passed by Sessions Court in the appeals filed under the proposed amendment of sections 377 and 378. Consequently, we suggest a further amendment by way of a proviso to clauses (a) and (c) of Section 386 to the effect that where the sentence passed by Sessions Court does not exceed six months no appeal would lie.

**6.14.** Clause 41: A new Section 436A, be inserted in the Code providing for release of undertrial prisoners who are in jail for a long period. We have discussed this aspect in great details in Chapter V dealing with bail and anticipatory bail. After an indepth study dealing with bail we have recommended certain changes in section 437 etc. Regarding the inclusion of section 436A, we recommended certain changes in para 10.5 of that chapter and the new section proposed under this clause may accordingly be modified.

**6.15.** Clause 42: This clause seeks to amend section 437 and in the chapter dealing with the bail we have adverted to this aspect and in para 11.1.5 we have made some recommendations. Paragraphs 11.1.3 to 11.1.5 may be referred to and the changes may accordingly be incorporated in this clause.

**6.16.** Pursuant to the changes suggested above, we are of the view that the relevant clauses be modified accordingly.

**6.17.** In the earlier chapters, we have dealt with some more aspects and have made recommendations for incorporating certain new provisions which may also be included in the Bill in a comprehensive manner before the same comes up before the Parliament.

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**FOOTNOTES:**

1. AIR 1980 SC 791.

## CHAPTER XXI

### SPEEDY JUSTICE

1. Speedy justice is *sine qua non* of criminal jurisprudence.<sup>1</sup> It is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation but also to limit the possibility of impairing the ability of an accused to defend himself. Indeed there is a societal interest in providing a speedy justice. This right has been actuated in the recent past and the courts in a series of decisions opened new vistas of fundamental rights.

The concept of speedy trial has been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act, establishing a set of time-limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases and similar provisions exist in Canada.

The right to speedy trial is recognised as a common law right flowing from the Magna Carta. This is the view in U.K., U.S.A. Canada and New Zealand. However, this view is not accepted in Australia. The right whether under common law or otherwise is not absolute relief is to be given based on various well settled guidelines evolved in the judicial decisions.

Under Article 14 of the International Convention Civil and Political Rights, 1966, the right to a speedy trial is provided. Similarly Article 3 of the European Convention of Human Rights and the Sixth Amendment to the US Constitution refers it as a basic right.

2. The right to speedy trial is an integral and essential part of fundamental right to life and liberty enshrined in Article 21 of the Constitution of India.

3. The Supreme Court in *Hussainara Khatoon (1) v. Home Secretary, State of Bihar*<sup>2</sup> while dealing with Article 21 of the Constitution of India has observed thus :

"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The Question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21."

4. The Supreme Court, while delivering its constitutional bench judgment in the case of *Abdul Rehman Antulay v. R. S. Nayak*<sup>3</sup> declared that right to speedy trial is implicit in Article 21 of Constitution and thus constitutes a fundamental right of every persons accused of a crime, is one among them. The Court referred to the following observations made in *Maneka Gandhi v. Union of India*<sup>4</sup> regarding integral connection between Articles 14 and 21 of the Constitution.

"The procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive: otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

The Supreme Court in *A.R. Antulay's case* (Supra) held that the aforesaid observations establish in unmistakable terms that the law and procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Articles 19 and 14. It establishes that the procedure prescribed by law within the meaning of Article 21 must be right and just and fair and not arbitrary, fanciful or oppressive. It emphasised that it is this principle of fairness and reasonableness which was construed as taking within its purview the right to speedy trial. In the *Hussainara Khatoon(I)*<sup>3</sup> *Bhagwati J.* had observed :

"Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."

While quoting the aforesaid observations, the Supreme Court in *Antulay's case* (Supra) posed the questions "what is the consequence of denial of this right? Does it necessarily entail the consequence of quashing of charges/trial? These questions were not answered by *Bhagwati J.* in *Maneka Gandhi's case*." However, the Supreme Court in *A. R. Antulay's case* (Supra) has dealt with that question and approved the ratio of the *Maneka Gandhi's*<sup>4</sup> case laying down the following propositions :

1. Right to speedy trial is implicit in the broad sweep and content of Article 21.
2. That unless the procedure prescribed by law ensures a speedy trial, it cannot be said to be reasonable, fair or just. Expeditious trial and freedom from detention are part of human rights and basic freedoms and that a judicial system which allow incarceration of men and women for long periods of time without trial must be held to be denying human rights to such undertrials.

2.4. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

The Supreme Court laid down in *A. R. Antulay's case*<sup>5</sup> the following propositions meant to serve as guidelines. These propositions are :

- (1) Fair just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.
- (2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.
- (3) The concerns underlying the right to speedy trial from the point of view of the accused are :
  - (a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

- (b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and
- (c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.
- (4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. The prosecution for whatever reason, also delays the proceedings. Therefore in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is -- who is responsible for a delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on *ex parte* representation.
- (5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witness, the workload of the court concerned, prevailing local conditions and so on -- what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of pendantic one.
- (6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in *Barker* "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in *U.S. v. Ewell* in the following words:
- '... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'
- However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.
- (7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in *Barker and other* succeeding cases.'
- (8) Ultimately, the court has to balance and weigh the several relevant factors -- 'balancing test' or 'balancing process' -- and determine

in each case whether the right to speedy trial has been denied in a given case.

- (9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order—including an order to conclude the trial within a fixed time where the trial has concluded as may be deemed just and equitable in the circumstances of the case.
- (10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that non-fixing of any such outer limit infatuates the guarantee of right to speedy trial.
- (11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis. However, these propositions were held by the court to be not exhaustive. According to the Court, "it is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules."

5. In *Sheela Barse v. Union of India*<sup>6</sup> where a petition was filed for the release of all children, below the age of 16 years detained in various jails in different states, and seeking detailed information in respect of them, the Court observed that the problem of children under detention would more easily be solved if the investigation and trial in respect of the charges against them could be expedited. The Court directed the state governments to take steps for completing the investigation within three months in cases lodged against children below the age of sixteen and to establish adequate number of courts to expedite trial of such cases.

6. The Supreme Court in *Supreme Court Legal Aid Committee v. Union of India*<sup>7</sup> while dealing with NDPS Act and section 309 Cr. P.C. Supreme Court has given a number of directions. With respect to pending cases it directed as under :

- (i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in Jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence he is charged with prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.
- (ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.



- (iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.
- (iv) Where a undertrial accused is charged with the commission of an offence punishable under sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clause (i), (ii), and (iii) above shall be subject to the following general conditions:

- (i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;
- (ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;
- (iii) the benefit of the direction in clause (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;
- (iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country and shall appear before the special Court as and when required;
- (v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;
- (vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;
- (vii) the Special Judge will be at liberty to cancel bail if any of the above conditions is violated or a case for cancellation of bail is otherwise made out; and
- (viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrial who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in section 309 of the code.

The above directions are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Courts power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order."

7. Lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not wait formal indictment or charge."

8. A survey of the aforesaid cases reveals that Supreme Court in a series of judicial pronouncements has emphasised and re-emphasised that speedy trial is one of the facts of the fundamental right to life and liberty enshrined in Article 21 and the law must ensure reasonable, just and fair procedure which has a creative connotation after the decision of this Court in *Maneka Gandhi*."

We now propose to refer to the recommendations made by various Committees and Commissions to achieve speedy justice.

### 9.1 Rankin Committee

To deal with the question of delay in the disposal of civil cases both in the High Courts and in the subordinate courts, a Committee was appointed in 1924 under the Chairmanship of Mr. Justice Rankin of the Calcutta High Court. The task of the Committee was "to enquire into the operation and effects of the substantive and adjective law, whether enacted or otherwise, followed by the courts in India in the disposal of civil suits, appeals, applications for revision and other civil litigation (including the execution of decrees and orders), with a view to ascertaining and reporting whether any and what changes and improvements should be made so as to provide for the more speedy, economical and satisfactory despatch of the business transacted in the courts and for the more speedy, economical and satisfactory execution of the process issued by the Courts". The Committee, after a thorough and careful enquiry into the various aspects, forwarded an exhaustive report in 1925.

### 9.2 Arrears Committee of 1949

In 1949, a High Courts Arrears Committee was set up by the Government of India under the Chairmanship of Mr. Justice S. R. Das, for enquiring and reporting as to the advisability of curtailing the right of appeal and revision, the extent of such curtailment, the method by which such curtailment should be effected, and other measures, if any, which should be adopted to reduce the accumulation of arrears. A number of recommendations were then made by the Committee.

### 9.3. Review Committee appointed by the Government of India

In 1967, the Government of India, greatly concerned at the problem of accumulation of arrears in various High Courts, conducted a review of the state of work in each High Court and found that inadequacy of judges was the main cause of the accumulation of arrears. Government increased the strength of judges in some of the High Courts, taking into account the arrears of cases then pending, fresh institutions and disposals. Though this had some effect, no appreciable result was produced.

At the end of the year 1969, the Government of India constituted a Committee presided over by Mr. Justice Hidayatullah, the then Chief Justice of India, to suggest ways and means for reducing arrears of cases pending in the High Courts. Upon the retirement of Mr. Justice Hidayatullah, Mr. Justice Shah was appointed the Chairman of the Committee. When Mr. Justice Shah retired as the Chief Justice of India, Government requested him to continue as Chairman of the Committee. The Report of the Committee will be referred to in due course.

### 9.4 Committees appointed in various States

Apart from the above three Committees which worked at all India level, some Committee were appointed in different States to look into the problem of delay and other matters concerning judicial administration.

One such Committee was in West Bengal. The Committee was constituted in 1949 under the Chairmanship of Sir Tervor Harries, the then Chief Justice

of the Calcutta High Court. Another Committee was constituted in 1950 in Uttar Pradesh under the Chairmanship of Mr. Justice K. N. Wanchoo.

#### 10. Law Commission of India

10.1. The Law Commission made various recommendations in the past in its Thirty Second Report on Section 9 of the Code of Criminal Procedure (1967); Thirty Third Report on Section 44 of the Code of Criminal Procedure (1967); Thirty Fifth Report on capital Punishment (1967); Thirty Seventh Report on Sections 1 to 176 of the Code of Criminal Procedure (1967) and Forty first Report on the Code of Criminal Procedure (1969) to remove anomalies, ambiguity of the Criminal Justice Process and to suggest ways and means of speedy trials and avoiding delays.

In view of the recommendations made by the Law Commission, the new Code of Criminal Procedure 1973 has been enacted taking into consideration the need for speeding up disposal of criminal cases on the following aspects:

- (i) The preliminary inquiry otherwise known as committal proceedings is abolished, since it causes delay;
- (ii) the jury trial is abolished;
- (iii) a provision is made for the summons procedure for trial of offences punishable with imprisonment upto two years;
- (iv) a provision is made for the summons procedure for all summary trials for offences punishable with imprisonment upto two years;
- (v) the powers of revision against interlocutory orders are taken away;
- (vi) the compulsory stoppage of proceedings by a subordinate court on mere intimation from a party of his intention to move a higher court for transfer of the case is omitted;
- (vii) a provision is made for payment of costs by the party at whose instance adjournments are granted.
- (viii) a provision is made for service of summons by registered post in certain cases;
- (ix) in petty cases, the accused is enabled to plead guilty by post and remit the fine specified in summons;
- (x) a re-trial need not necessarily be ordered in case a court of appeal or revision discover any error, omissions or irregularity in the charge leading to failure of justice; and
- (xi) continuation of part-heard cases by the successors in office in respect of courts of magistrate is extended to courts of sessions.

Section 167, 309 and 468 of the new Code synthesis the above mentioned changes particularly relating to speedy trial, elimination of delays in investigating and trial proceedings. <sup>10A</sup>

10.2. Earlier the Law Commission of India presided over by Mr. M. C. Setalvad, in its Fourteenth Report made in 1958, went into all aspects relating to Reform of Judicial Administration, including the question of delay in the disposal of cases in different courts and exhaustively dealt with the matter. Successive Law Commissions have, after that also, when making their recommendations for revision of the procedural Codes, addressed themselves, *inter alia*, to the need for reducing delay at various stages of the trial, both in civil and in criminal cases. Reference may be made, in particular, to the 27th and 54th Reports of the Law Commission dealing with the Code of Civil Procedure and the 41st Report dealing with the Code of Criminal Procedure.

When the Law Commission reviewed the structure and jurisdiction of the higher judiciary (58th Report), it took note of the imperative need to reduce arrears in the higher courts.

While dealing with the question of delay and arrears in Trial Courts in criminal cases, the Law Commission of India in its 77th Report on 'Delay and Arrears in Trial Courts' made the following recommendations:

"In criminal cases, it is particularly necessary that delay be eliminated, since the decision upon oral rather than documentary evidence, and with the passage of time, the memory of witness fades."

Every criminal court should keep a register showing the number of witnesses summoned for a date, the number examined, the number sent back and reasons for sending them back without examination. The tendency of some criminal courts of sending back witnesses without examining them must be deprecated.

The law should be amended to enable a Session Judge to act on evidence partly or wholly recorded by his predecessor.

At least two police officials at every police station should be set apart for getting service of summons effected upon witnesses for cases relating to that police station and for ensuring their presence on the date of hearing.

The police quite often deliberately refrain from producing all material witnesses on one date, the object being to clear up the lacunae in the prosecution evidence after the defence case becomes manifest by cross-examination. This practice is unfair and not warranted by the Criminal Procedure Code, and results in prolongation of the trial.

In one metropolitan city, in the courts of Magistrates, there was a huge pending file relating to traffic and municipal offences to be tried summarily, some of which were more than one or two years old. Delay in disposal was attributed to the fact that the police had not been able to get service effected upon the accused.

Officials at the police station who are concerned with investigation should concentrate on investigation. As far as possible, they should not be deputed for other purposes.

Desirability of separating the investigating agency of the police from that dealing with law and order may have to be considered. The question whether the investigating agency should not be susceptible to executive interference and, for that purpose, be independent of executive control may also need consideration.

The Motor Vehicles Act, 1939, section 130(1) provides for a special procedure for certain traffic offences whereunder the accused can plead guilty to the charge by post and remit the specified fine. In the case of persons other than professional drivers for some specified offences of a minor nature, the ticket issued by the policeman should also contain separately the amounts of fine for various categories of traffic offences in respect of different types of vehicles, so that if the person committing the infraction of law is so inclined, he can plead guilty and also remit the amount of fine to the court concerned before the date of hearing.

Disposal of cases in which there is a large number of accused, gets delayed because one of the accused absents himself on the date of hearing. The trial court in such contingencies should consider the advisability of directing representation of the accused by counsel.

Having regard to the importance attached to the framing of the charge, the trial magistrates should not leave it to the prosecutor to frame a charge.

In recording statements of the accused under section 313, Cr. P.C. the magistrates should ensure that all incriminating pieces of evidence are put to the accused.

Complaints have been heard that there are not enough number of prosecutors, particularly in cases under the Prevention of Food Adulteration Act and those investigated by the central Bureau of Investigation. Steps should be taken to ensure that there are as many prosecutors as there are Criminal Courts.

Where the same Judicial Officer exercises both civil and criminal powers, normally he should not fix both types of cases on the same day. If such a course cannot be avoided, he should set apart separate time for civil and criminal cases.

Cases in which there is possibility of death sentence should receive priority over all other cases.

#### 11. Causes for Accumulation of Arrears

The Satish Chandra Committee as also the Arrears' Committee, 1990 headed by Justice V. S. Malimath has also identified various causes for accumulation of arrears in High Courts which, *inter alia* include:

1. Litigation explosion.
2. Radical change in the pattern of litigation.
3. Increase in Legislative activity.
4. Additional burden on account of Election Petitions.
5. Accumulation of First Appeals.
6. Continuance of the ordinary original civil jurisdiction in some High Courts.
7. Inadequacy of judge strength.
8. Delays in filling up vacancies in the High Courts.
9. Unsatisfactory appointment of judges.
10. Inadequacy of staff attached to the High Courts.
11. Inadequacy of accommodation.
12. Failure to provide adequate forums of appeal against quasi judicial orders.
13. Inordinate concentration of work in the hands of some members of the Bar.
14. Lack of punctuality amongst judges.
15. Civil Revisions—Indiscriminate exercise of jurisdiction.
16. Second Appeals—ignoring the limitations on exercise of jurisdiction.
17. Long arguments and prolix judgements.
18. Lack of priority for disposal of old cases.
19. Failure to utilise grouping of cases and those covered by rulings.
20. Granting of unnecessary adjournments.
21. Unsatisfactory selection of Government Counsel.
22. Lawyers not appearing in courts due to strikes, etc.
23. Population explosion.
24. Hasty and imperfect legislation.
25. Plurality of appeals and hearing by Division Benches.
26. Inordinate delay in the supply of certified copies of judgements/orders.
27. Indiscriminate resort to writ jurisdiction.
28. Letters Patent Appeals.

29. Inadequacy in classification and grouping of cases.
30. Constitution of Benches and their frequent changes.
31. Indiscriminate closure of courts.
32. Appointment of sitting Judges as Commissions of Inquiry.
33. Printing of Paper Books in Criminal matters. (pp. 118-19 of the Report.)

## 12. Arrears' Committee

The Arrears' Committee (Supra) recommended various remedial measures for arrears on criminal side as follows:

36. Criminal appeals involving sentence of death or imprisonment for life and appeals against acquittals in cases which are likely to result in the imposition of the sentence of death or imprisonment for life should alone be heard by a Bench of two Judges. The relevant rules or statutory provisions applicable to different High Courts should be suitably amended.
37. The Court of Session should have exclusive power of revision against orders of criminal courts subordinate thereto. High Court should have power of revision only against the orders of the Court of Session/Special Courts other than those passed in exercise of their revisional jurisdiction. Section 397 of the Code of Criminal Procedure be suitably amended.
38. Power of granting anticipatory bail under section 438 of the Code of Criminal Procedure should be restricted to the Court of Session by effecting suitable amendment.
39. State Governments may set up proper machinery to carefully and objectively scrutinise proposals for preferring appeals against orders/judgments of acquittals to prevent frivolous appeals being filed by the State against such decisions.
40. State Governments should appoint not less than two Additional Public Prosecutors for each Criminal Courts. Adequate attention must be paid to appoint competent lawyers as Public Prosecutors.
41. No paper books need be prepared in criminal appeals which are required to be heard by a single Judge.
42. The statutory rules or provisions which require printing of paper books/record in criminal cases involving sentence of death be suitably modified providing for typed or cyclostyled paper books.
43. Every criminal court should be provided with at least one photocopying machine to speed up preparation of paper books and furnishing of copies under section 207 of the Code of Criminal Procedure.
44. Adequate number of police constables should be attached to each police station exclusively to attend to the work of each court as per its direction.
45. Appropriate provision should be made for effecting services on medical officers, expert witnesses and even investigating officers through their respective Heads of Departments.
46. Respective State Governments should take immediate steps for providing presiding officers to man all the criminal courts.
47. All States Governments should promptly provide adequate staff, funds and stationery for all the criminal courts within their respective States."

13. The National Police Commission felt that substantial improvement in criminal justice system could be effected by reducing the institution of fresh cases, withdrawing old cases from courts according to some accepted norms and expediting the disposal of pending cases by simplifying the procedure. (Para 28.5,

Ch. XXVIII. Fourth Report of the National Police Commission) Venugopal Rao in "Criminal Justice—Problems and Perspectives in India" at p. 195 while endorsing the recommendations of the National Police Commission and recommendations of Arrears Committee observed:

"It would a good proposition to devise some guidelines regarding the disposal of old cases and fix priorities for the disposal of new ones.

If this strategy is properly planned and more time is provided for the disposal of new cases in preference to the old, the system can improve. At the same time as suggested by the National Police Commission, a periodical review of the old pending cases can be undertaken with a view to striking them out from the court calendars. It may appear contrary to the principles of natural justice, but what is happening in the present situation is not only a gross violation of the Directive Principles of the Constitution but a virtual denial of justice. It is a question of choice of the better of two bad options."

14. All the aforesaid reports demonstrate the frightful urgency for combating the problems of over-loading and arrears. Indeed, the problem of delay in trial of criminal cases has, of late, assumed gigantic proportions. It has shaken the confidence of the people in the criminal justice system. While the reforms that emerge from the recommendations of various committees and commissions as mentioned above, if fully implemented might meet the long term requirements of the current situation of judicial stagnation.

We, however, feel that there is still ample scope for additional measures mentioned below which might relieve the present stagnation and help the judicial machinery to start rolling smoothly for dispensation of justice. The reforms which we have suggested in are intended to avoid delay in disposal of criminal cases and expedite the disposal of pending cases as well as discharge of the accused in certain old and long pending cases involving minor offences.

15. There should be a separate cadre of investigation agency in every district subject to supervision by the higher authorities. In this regard an officer of such agency should be in charge of the case throughout till the conclusion of the trial. He should be enjoined the responsibility of production of witnesses, production of accused and for assisting the prosecuting agency. Such a measure will have a definite impact of speeding up the trial in as much as the officer in charge of the investigation will be accountable and responsible for expeditious prosecution of the case. (Ch. II, para 7)

16. With the advent of the modern scientific gadgets and technology, accused are often using modern scientific techniques to commit crime as well as to avoid tracing out their involvement. In such a situation, outdated methods of investigation do not match the modern techniques of committing the crime. Consequently, new technology such as computers, photography/videography, new methods of interrogation technology, new observation gadgets and highly sophisticated search equipments, etc. are essential for effective investigation of traditional and new types of organised crimes. (Ch. II, para 8)

17. Much delay in trial of cases has been caused due to lack of coordination between investigating agency and the prosecuting agency. In order to minimise delay on this ground, there should be coordination between investigating agency, namely police and prosecuting agency for the efficient prosecution of cases at the stage. (Ch. III, paras 8, 9 & 10)

18. A Directorate of Prosecution be established as provided in clause 4 of the Code of Criminal Procedure (Amendment) Bill, 1994 and a new section 25A be inserted on those lines. However, sub-section 4 of the proposed section 25A whereby public prosecutor appointed for the High Court has been placed subordinate to the Directorate of Prosecution be deleted as the public prosecutor appointed to conduct cases on the appellate side in the High Court should be separate from those public prosecutors appointed to conduct cases in the lower courts. (Ch. III, para 12)

19. The Government while appointing public prosecutors and assistant public prosecutors under section 24 and 25 shall, as far as practicable, appoint sufficient number of Women Public Prosecutors and Asstt. Public Prosecutors to effectively deal with cases involving women. (Ch. III, para 14)

20. A provision should be made in the Code for obtaining a fresh police custody of accused if sought by CBI during investigation but it should not exceed 15 days on the whole. Accordingly, Section 167(2) be amended. (Ch. V, para 2).

21. In order to avoid delay in disposal of appeals against acquittal and for enhancement and to secure presence of the acquitted accused, a new section 437A be inserted in the Code, empowering all the criminal courts (including the First Appellate Court) to take bail and bail bond before the conclusion of the trial or disposal of the appeal requiring the accused to bind themselves to appear before the next appellate court in case an appeal against acquittal or for enhancement of sentence is filed in the higher court. Such a bond shall be in force for a period of 12 months from the date of the judgment disposing of the cases either by the trial court or by the First Appellate Court as the case may be, subject to order by the higher Appellate Court, if any for furnishing fresh bail bond. (Ch. VII, para 2)

22. In order to reduce the pendency in the High Courts, we suggest amendments to Section 377 and 378 of the Code permitting of filing of appeals in the Sessions Court against the orders of the Magistrate in respect of enhancement or against the order of acquittal. (Ch. VII, Para 3)

23. In order to avoid multiplicity of procedure which is resulting in delay of trials, summons procedure can be dispensed with. We feel that all summons cases should be tried summarily except those which by virtue of their nature or circumstances of the offences or accused warrant a regular full trial when the court finds that the summary procedure is not salutary. However, when a magistrate wants to have recourse to such a procedure, he should give valid reasons for dispensing with the summary procedure in that particular case. This will act as a check in exercising the discretion indiscreetly. Since the summons procedure is being dispensed with, a suitable amendment to section 260 to cover such situations is also recommended. Further section 2(x) defining "warrant cases" be amended to the effect that warrant case means a case relating to an offence punishable with death, or imprisonment for term exceeding three years. Likewise Section 2(w) should be amended to the effect that summons case means relating to an offence and not being a warrant case summarily triable under Chapter XXI thereby laying down that all offences, which do not fall under the definition of warrant case, fall under the category of summons cases summarily triable. (Ch. VIII, Paras 12 and 14)

24. In order to curtail the delay in trial of cases we recommend that in cases arising out of a police report, all statements having been recorded during investigation should be supplied in advance and the cross examination should proceed continuously. In cases other than on police report also, evidence already recorded before issuing process would be available furnishing sufficient material for cross examination, and thus many adjournments granted by the court just for the purpose of carrying on further cross-examination can be avoided. Accordingly, Sections 242(2), (3) and 246(4) of the Code be amended on the aforesaid lines. (Ch. VIII, para 17)

25. We feel that some changes are necessary with regard to the examination of witnesses by police and recording of their statements under sections 161 and 162 to make the police statements more authentic so that they can properly be used while examining the witnesses during the trial for corroboration or contradiction. In view of the inaccuracies that may creep in the recording of the statement by the police, we recommend that statements of material witnesses should be recorded under section 164 which should be more authentic and also prevent the witnesses from turning hostile. We also feel that sections 161, 162, 164 and 172 be also amended on the lines suggested in Chapter IX, para 7. This course is more salutary and can be very effective in rendering criminal justice in a speedy manner. However, the changes contemplated, namely, setting up and separating the investigating agency, and structuring the same and appointment of large number of magistrates will take some time. We, in the alternative:



recommend to retain the provisions of sections 161, 162 and 172 as they are but with some checks in the direction of improving the authenticity of such statements recorded by the police and also obtaining signatures of the persons examined, if they are literate. Further, a copy of the statement should be given to the deponent under acknowledgement and also send them to the Magistrate and to the superior officers. That provision would ensure against any error or malpractice being committed by the officer. Accordingly, section 162 be suitably amended, (Chapter IX paras 7, 8, 11, 12, 13 & 15).

26. In order to avoid delay in trials the listing of cases should be done in such a way that the witnesses who are summoned, are examined on the day they are summoned, for and adjournment should be avoided meticulously. The list should be prepared in such a way that a day or two are devoted continuously to all cases of a particular police station and cases should not be proceeded mechanically just according to the chronological order regardless of the fact of their likelihood of their being tried or not. The courts should also proceed with trial on a day to day basis and the listing of the cases should be on those lines  
(Chapter X para 7).

27. The plight of witnesses appearing on behalf of the State expenses is pitiable. The allowances paid to them are very meagre. That apart, they are kept waiting for the whole day without being examined and the cases are adjourned in the last moment. Therefore, necessary steps have to be taken in the matter of paying allowances on realistic basis for all the days they attend. They should also be provided with adequate facilities for their stay in the Court premises and they should be given necessary protection and instil confidence and faith in their minds so that they can dutifully attend the Courts.  
(Chapter X, para 2).

28. In order to reduce the docket explosion in the Courts, State should enact legislation on Nyaya Panchayats to suit their local needs and conditions. The Andhra Pradesh Mandala Nyaya Panchayats Bill, 1995 may be adopted as a model on the composition, powers and jurisdiction of the Nyaya Panchayats.

However, we feel that the recommendations of the Law Commission in its 114th Report on the presiding officers of Gram Nyayalayas may not be feasible because serving Munsifs/Civil Judges will not be able to shoulder the additional burden of presiding over Gram Nyayalayas in the rural areas. We are also not in favour of engaging lawyers by the parties to appear before the Nyaya Panchayats for it would introduce technical legal formalities into the system leading to delays in the disposal of cases. Indeed it would frustrate the very purpose for which the the Gram Nyayalayas are being introduced.  
(Chapter XIV, para 6)

29. To minimise the delay in trial we recommend that the court can take the assistance of the prosecutor and defence counsel and prepare the questions which are to be put in a concise form to the accused under section 313 of the Code. The court can also permit the filing of written statements by the accused as sufficient compliance with section 313 of the Code.  
(Chapter XI, para 6)

30. As a measure of rendering speedy justice to the accused at an early stage we are of the view that there is need to properly avail the scope of stages provided under sections 227, 239, 245 of the Code of Criminal Procedure.

Section 226 of the Code obliges the prosecution to describes the charge brought against the accused and to state by what evidence the guilt of the accused would be proved. Under Section 227 of the Code, if upon consideration of the record of the case and the documents submitted therewith and after hearing the prosecution and the accused, the Judge comes to the conclusion that no sufficient ground exists to proceed against the accused he shall discharge him. However, he has to record the reasons in writing therefor. Similarly under Section 239 of the Code (which deals with trial of warrant cases) on prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith.

Section 245 contemplates when accused shall be discharged in cases instituted otherwise than on police report. It envisages that if upon taking all the evidence referred to in section 244, the Magistrate considers that no case against has been made out shall, if rebutted would warrant his conviction, the Magistrate shall discharge him. However he has to record reasons in writing therefor.

In the aforesaid provisions the common question arises whether the accused shall be discharged or whether there is sufficient ground to proceed against the accused. In so deciding the Judge under section 226 has to consider (i) the record of the case and (ii) the documents produced therewith. Under section 239 the Magistrate has to consider the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary. Under section 245(1) the Magistrate has to consider all the evidences referred to in section 244. Further an incidental question arises as to what would be the scope of hearing the submissions of the practice. Should it be confined to hearing oral arguments alone. We feel that if the accused succeeds in producing any relevant material at that stage which might fatally affect even the very sustainability of the case, it would be too harsh in the interest of the accused to suggest that no such material shall be looked into by the Court at that stage.

If the case ends at that stage itself, it will save a lot of time of the Court, avoid human efforts, cost and harassment to various parties. The underlying fact is that if the materials produced by the accused even at that early stage can clinch the issue, there is no reason as to why the Court should shut it out only on the ground that such material would be looked into only during the trial despite the fact that the Court feels certain that there is no prospect of the case ending in conviction. The heavy pressure of work load on the Courts is undeniable.

In a recent case of *Satish Mehra v. Delhi Administration*<sup>1</sup> the Supreme Court also laid down under paragraphs 13, 14, 15 as follows:

"Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the Code enjoins on the Court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage. Here the "ground" may be any valid ground including insufficiency of evidence to prove charge.

The stage of providing such an opportunity as is envisaged in Section 227 of the Code is to enable to Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and saves much human effort and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should be Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code.

But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the sessions courts in India are under heavy pressure of work-load. If the Sessions Judge is almost certain

that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself."

In order to make the scope of such stage effective, as suggested by the Supreme Court, any materials produced by the accused even at that early stage which would clinch the issue, the Court shall take them into consideration at that stage itself instead of putting them off for consideration at a later stage so that delay can be avoided. This aspect has to be borne in mind by the Criminal Courts at the stage contemplated under Sections 227, 239 and 245 as well as in the preliminary stages of the summary trials.

31. On the aspect of compounding of offences under subsection (2) of section 320 (offences compoundable with the permission of the court) we recommend that sections 324, 325, 335, 343, 344, 346, 379, 403, 406, 407, 411, 414, 417, 419, 421, 422, 423, 424, 428, 429, 430, 451, 482, 483 and 486 should be deleted from the Table laid down under sub-section and be included in the Table to sub-section (1) of section 320. (Chapter XII, para 10)

Further, Section 498A be inserted in table under sub-Section (2) of Section 320 whereby it can be compounded with the permission of the Court in order to avoid hardship in cases, wherein though the parties wanted to compound yet in the absence of enabling provision, they could not do so. The parties, therefore, have to resort to proceedings under Section 482 of the Code to get quashed the proceedings pending against the accused. (Chapter XII, para 4)

There is no provision mentioned in the tables appended to the Section 320 regarding compoundability where the accused is constructively liable under Sections 34 and 149, IPC. If the provision is left as it is, then only in respect of substantive offences mentioned in the tables, compounding is possible and not in respect of cases of constructive liability for the same offence. Likewise, in respect of offence of rioting resulting in the offence mentioned in the two Tables, there is no provision for compounding. The offences punishable under Sections 147 and 148 of IPC committed during the same transaction, the transaction being one of the same, where the guilt is proved, the accused are to be convicted under all those sections. It will be anomalous if one part of the offence is compoundable and other part remains non-compoundable where the convictions are capable of being made under both the provisions. Accordingly, sub-section 3 be amended suitably. (Ch. XII)

32. In order to reduce the arrears of cases pending before the trial courts or appellate courts, we feel that in case of offences compoundable with the permission of the court under section 320, if the accused pleads guilty, the court may pass an order of conviction and suspend the sentence if the accused agrees to pay the aggrieved party compensation. If the accused, however, fails to pay compensation to the aggrieved party, he will be required to undergo imprisonment for default in payment. In cases of offences compoundable by the agreement of the parties, the proceedings may be terminated by recording the compromise and the accused may be acquitted by the court. (Chapter XII)

33. We are also of the view that the Code of Criminal Procedure should empower the investigating officer to compound offences which are compoundable, at the investigation stage and make a report to the magistrates who will give effect to the compounding of such offences. This step will reduce the number of cases proceeding for trial at the threshold stage itself and relieve the court docket to a great extent. We recommend for insertion of a new sub-section (3A) to section 173 of the Code on the lines indicated. In order to ensure that there is no coercion or abuse by the police staff, the report of the investigating police officer incorporating the desire of the disputants to compromise can be got attested preferably by a member of the District Legal Services Authority after the same is signed by the respective disputants. Such a measure will have salutary effect and will be contributory in expeditious disposal of cases. (Chapter XII, Paras 11 & 12)

34. In order to reduce delay in disposal of criminal trials and appeals and also to alleviate the suffering of undertrial prisoners, we feel that the concept

of plea bargaining be made applicable as an experimental measure to offences which are liable for punishment with imprisonment of less than 7 years and/or fine including the offences covered by Section 320 of the Code. We further recommend that plea bargaining can also be availed of in respect of nature and gravity of offences and the quantum of punishment. (para 8, Chapter XII). However, plea bargaining should not be available to habitual offenders, accused of social/economic offences of a grave nature and offences against women and children.

(Chapter XIII, para 8)

35. To enable a quick disposal of petty cases and to reduce congestion in the court of Magistrate, we recommend that under Section 206(1) of the Code the amount of fine be raised from Rs. 100 to Rs. 1,000 since the value of the money has gone down considerably as laid down in Section 25 of the Code of Criminal Procedure (Amendment) Bill, 1994. Accordingly, we endorse the proposed amendment in sub-section (1) of Section 206 on the following lines:

- (a) in the opening paragraph, after the words and figures "under section 260", the words and figures "or section 261" shall be inserted;
- (b) in the proviso, for the words "one hundred rupees", the words "one thousand rupees" shall be substituted.

36. In order to give discretion to the Session Judge to transfer a case either to the Chief Judicial Magistrate or to any other Judicial Magistrate of the First Class and to fix a date for the appearance of the accused before the Chief Judicial Magistrate or the Judicial Magistrate as the case may be, so that lot of time which is wasted in summoning the accused by the Magistrate, may be saved, as provided in clause 27 of the Code of Criminal Procedure (Amendment) Bill, 1994, we feel that in section 228 of the principal Act, in sub-section (1), in clause (a), for the words "and thereupon the Chief Judicial Magistrate", the words "or any other Judicial Magistrate of the first class direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit and thereupon such Magistrate" shall be substituted. Accordingly, we have endorsed the provisions of clause 27 of the bill in Chapter XIX.

37. The right of speedy trial as extended to the insane undertrial mandates that a time limit should be fixed for the period of postponement of trial. Indefinite postponement is an infringement on personal liberty and rights of insane undertrials. We also suggest that amendments to sections 328, 329 and 330 in respect of pre-enquiry and pre-trial proceedings as specified in para 16 of Chapter XVI be made.

(Chapter XVI, para 16)

38. For expeditious justice in respect of the maintenance of wives, children and parents, we recommend that the summary trial procedure for recording evidence etc. be adopted and the evidence by way of affidavits also be made admissible. Accordingly, Section 126 (2) of the Code be amended.

(Chapter XVII, para 9.3)

### 39. Adjournment in Criminal Trials

39.1. Section 309 of the Code of Criminal Procedure, 1973 which deals with postponement and adjournment of Criminal proceedings provides:

- (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.
- (2) If the Court after taking cognizance of an offence, or commencement or trial, finds it necessary, or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time,

for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

*Explanation 1.*—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

*Explanation 2.*—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

**39.2** In *A. Lakshman Rao v. Judicial Magistrate*,<sup>32</sup> the Supreme Court while examining the Constitutional validity of section 344 of the Code of 1898 which corresponds to section 309 of the Code of 1973 observed:

“Apart from the fact that it is only when either from the absence of a witness or some other reasonable cause the Court considers it either to be necessary or advisable to postpone the commencement of the inquiry or trial or adjourn the hearing of the case that the order can be made, the court is also required to record the order in writing giving the reasons why it thinks fit that the case should be postponed or adjourned. It is further open to the Court to impose terms and to fix the period which cannot exceed 15 days at one time. This discretion being vested in Court of law has to be exercised judicially on well-recognised principles and is in our view immune from challenge on the ground of arbitrariness or want of guidelines. In our opinion, therefore, not only are the guidelines clearly contained in the statute but the discretion being judicial is required to be exercised on general principles guided by rules of reason and justice on the facts of each case, and not in any arbitrary or fanciful manner. It may also be remembered that if the discretion is exercised in an arbitrary or unjudicial manner remedy by way of resort to the higher Courts is always open to the aggrieved party.”

**39.3** It is, however, unfortunate that despite the provision under section 309 of the Code which contemplates for holding the proceedings as expeditiously as possible and examination of witnesses day to day, yet it is an open fact that on account of adjournments there is inordinate delay in disposal of criminal cases. Such adjournments often take place on unsound grounds at the instance of the accused and prosecution and also due to laxity on the part of the court and the investigating agency. The causes which led to such untenable and avoidable adjournment both at the stage of trial, appeal and revision may be classified as under:

#### **During the Trial**

1. Non-appearance of the accused.
2. Non-production of the accused from jail.
3. Copies of the documents not ready/not supplied.
4. Non-appearance of the witness after service.
5. Witness not served/summons not issued or not returned by police station.

6. Non-production of case property.
7. Non-availability of the Defence Counsel.
8. Non-preparedness of the Defence Counsel.
9. Non-appearance of the Prosecutor.
10. Non-preparedness of Prosecutor.
11. Presiding Officer on leave.
12. No time left/Court busy with other case.
13. The day of hearing declared a holiday.
14. Judgment/Order not ready.
15. Stage completed (hence, adjourned for next stage).
16. Listed for misc. work, therefore, adjourned.

#### **During the Appeal and Revision**

1. Information not available.
2. Non-appearance of the Petitioner.
3. Non-appearance of the Respondent.
4. Presiding Officer on leave/official duty.
5. Awaiting Order of transfer.
6. Non-supply of record of lower court.
7. Non-preparedness of counsel for petitioner.
8. Adjourned for next stage.
9. No time left/court busy with other case.
10. Listed for miscellaneous work, therefore, adjourned.
11. Judgment/Order not ready.
12. Information not available.

A perusal of the aforesaid causes reveals that they are not insurmountable and can be avoided by taking prompt and necessary steps by concerned authorities, namely, investigation agencies, prosecuting agencies, defence counsel and witness and the process servers and above all the courts.

39.4 Experience shows that the accused often adopt delaying tactics so that prosecution witnesses may not be examined early against him so that he may be able to win them over with the passage of time or as is well said that scars of wound heal up with the passage of time. In many cases, the intensity of vengeance to teach bitter lesson to the accused for his deeds, fades away with the passage of time. Thus, ultimately, the accused goes scot free sheerly on account of manoeuvring adjournments by the accused, during the trial. Even the prosecution also can be absolved from the blame of seeking adjournments on various grounds. Mr. Justice O. Chinnappa Reddy in *State of Maharashtra v. Champatal*<sup>33</sup> observed:

“We are not unmindful of the delays caused by tardiness and tactics of the prosecuting agencies. We know of trials which are over delayed because of the indifference and somnolence of the deliberate inactivity of the prosecuting agencies. Poverty struck dumb accused persons too feeble to protest, languish in Prisons for months and years on and awaiting trial because of the insensibility of the prosecuting agencies.....Sometimes when the evidence is of a weak character and a conviction is not probable result the prosecuting agencies adopt delaying tactics to keep the accused persons in incarceration as long as possible and to harass them. This is a well known tactic in most conspiracy cases. Again, an accused person may be seriously jeopardised in the conduct of his defence with the passage of time.

Witnesses for the defence may become unavailable and their memories too may fade like those of the witnesses for the prosecution. In such situations, in appropriate cases, we may readily infer an infringement of the right to life and liberty guaranteed by Article 21 of the Constitution .....

39.5 The Constitution Bench of the Supreme Court in *M.S. Sheriff v State of Madras*<sup>14</sup> held that "it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust."

39.6 It is therefore, quiet-essential to combat with the problem of adjournments on this count. This can be dealt with by providing the similar measures as laid down under order XVII of the Code of Civil Procedure introduced with effect from Feb. 1, 1977 by Act 104 of 1976. The Law Commission in its Seventy Seventh Report on Delay and Arrears in Trial Courts, chapter 6, para 6.10 has also recommended for strict enforcement of these provisions. Clauses (a) to (e) of the Proviso to sub-order 1(2) of Order XVII are reproduced herein below for our ready reference:

"Provided that

- (a) when the hearing of the suit has commenced, it shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.
- (b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party.
- (c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment.
- (d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time.
- (e) where a witness is present in court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid."

The Law Commission in its Seventy-Seventh Report also observed that the suggestions made regarding delay and arrears in respect of civil cases will also hold good for criminal cases.

39.7 We feel that in view of delay in trial of criminal cases also on account of adjournment it is desirable to incorporate the following additional provision in the light of the decision in *State of Gujarat v. Navender Singh Lakhubhai*:<sup>15</sup>

- (f) Where the court is of the opinion that the inquiry or trial of the case is being delayed or adjourned on account of any official belonging to the prosecuting agency or associated with it, the court shall make an order holding the person responsible for such act and communicate the order to the concerned head of the agency for incorporating in the service records of the concerned official as well as for recommending suitable criminal and disciplinary action against him.

In order to further keep a check upon the court there is a need to further provide the following measures:

- (g) Every criminal court shall send a return in the prescribed proforma to the Chief Justice of the High Court stating the particulars of the cases in which the adjournments were granted by them during the inquiry or trial of cases detailed reasons therefor".

We feel that the aforesaid measure, if strictly adhered to, would further curtail to a great extent delay caused on account of adjournments unduly sought by the accused as well as the prosecuting agencies.

**40.1 Appointment of Special Magistrates.**— In India, the Criminal Procedure Code, 1898, provided for appointment of Honorary Magistrates. These magistrates were appointed by the government to relieve the regular magisterial courts. However, it was felt that the system was used to reward many persons who were loyal to the government. Many persons were appointed as Special Magistrates who did not possess either qualification or experience to discharge judicial duties. It is also alleged that such persons were attracted by the honour attached to the post rather than by a sense of duty or service. They did not have the knowledge or inclination to perform magisterial work.

**40.2** After India became independent, the desirability of having honorary magistrates was examined by a Joint Select Committee of Parliament while considering the Code of Criminal Procedure Bill, 1970. The Committee took note of the criticism of the working of honorary magistrates but at the same time did not lose sight of the possible assistance the honorary magistracy could render to the judiciary to relieve it of some of its burden of work. The Committee came to the conclusion that the facility of appointment of Special Magistrates should be retained. However, safeguards were introduced in the Code of Criminal Procedure to forestall abuse of system.

**40.3** The Code of Criminal Procedure, 1973 brought following changes in the system of special magistrates:

- (i) Magisterial powers could be conferred on Special Magistrates by the High Court of a State and not by the State Government as was the position earlier.
- (ii) The persons to be appointed as Special magistrates had to be persons who held or had held any post under the government.
- (iii) The High Courts were given the power to prescribe qualifications or experience in relation to legal affairs to be satisfied by a person before his appointment as a Special Magistrate.
- (iv) The term of appointment of a Special Magistrate was restricted to a maximum of one year at a time; and
- (v) The High Courts could grant all or any of the powers of a first class or a second class magistrate on a Special Magistrate.

**40.4** Section 13 of the Code of Criminal Procedure, 1973 which provides for the institution of Special Magistrates reads:

- (1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Judicial Magistrate of the first class or of the second class, in respect to particular cases or to a particular classes of cases, in any local area, not being a metropolitan area.

Provided that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.

- (2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may by general or special order, direct.



- (3) The High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area outside his local jurisdiction.

**40.5** Likewise, Section 18 of the Code which provides for the institution of Special Metropolitan Magistrates runs as follows:

- (1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate in respect to particular cases or to particular classes of cases, in any metropolitan area within its local jurisdiction.

Provided that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.

- (2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.
- (3) The High Court or the State Government, as the case may be, may empower any Special Metropolitan Magistrate to exercise, in any local area outside the metropolitan area, the powers of a Judicial Magistrate of the first class.

**40.6** Though after the amendment of the Code of Criminal Procedure in 1978, first class magisterial powers can be conferred upon Special Judicial Magistrates, but even with second class powers the Special Judicial Magistrates can try a wide variety of cases. The offences enumerated in the IPC which can be tried by a second class Judicial Magistrate are enumerated in the Schedule and fall in the following broad categories:

- (a) Offences against public tranquillity like, being a member of an unlawful assembly; knowingly joining or conducting any assembly of five or more persons after it has been commanded to disperse; giving provocation with intent to cause riot; harboring persons hired for an unlawful assembly or committing affray.
- (b) Offences relating to weights and measures like fraudulent use of false instruments for weighing; fraudulent use of false weights or measures.
- (c) Offences affecting public health, safety, convenience decency, and morals; for example, negligently doing any act known to be likely to be spread infection of any disease, adulterating food or drink intended for sale so as to make it noxious or selling any good or drink knowing the same to be noxious; offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated; making the atmosphere noxious to health; driving or riding on a public way so rashly or negligently as to endanger human life; committing a public nuisance or singing obscene songs.
- (d) Offences relating to religion, for example, causing disturbance to an assembly engaged in religious worship with intention to wound the feelings of the members of such assembly; to insult the religious feelings of any person or uttering any word or making any sound in the hearing of any person or making any gesture in the sight of any person with the intention to wound his religious feelings.
- (e) Offences affecting the human body like attempt to commit suicide; voluntarily causing hurt; wrongfully confining any person; unlawful compulsory labour.
- (f) Offences relating to property like cheating; mischief, criminal trespass.

- (g) Criminal intimidation, insult and annoyance, for example, uttering any word or making any gesture intended to insult the modesty of a woman; appearing in a public place in a state of intoxication and thereby causing annoyance to any person.

In addition, a large number of crimes related to violations of special Acts, such as Municipal Acts and bye laws, Cinematography Act, Police Act are amenable to the jurisdiction of a Special Judicial Magistrate.

**40.7** Many State Governments and Union Territories have, however, not appointed special magistrates which led to the delay and arrears of criminal cases. The statement of contents of the affidavit filed before the Supreme Court in *Kadra Pahadia & Ors. v. State of Bihar* reveals that State of Maharashtra has not taken action to make request to the High Court under section 13 and 18 of the Code on the plea that it has forwarded a proposal to the Central Government to amend section 13 of the Code. Likewise, the State of Uttar Pradesh has also not taken any initiative in this direction. In the State of Karnataka even though the State Government has taken initiative and written to the High Court, the High Court has not yet finalised the proposal. In the State of Kerala, there is no such appointment. However, in the State of Himachal Pradesh the provision has also been invoked and the High Court has framed rules and has conferred powers on three officers. In the State of Bihar, the government has also moved the High Court to confer powers to judicial magistrates. However, no notification has been issued. Likewise, in the State of Punjab the Government has written to the High Court under section 13 and 18 and the proposal is still pending in the High Court. The State of Assam has, however, appointed 97 I.A.S. Officers as Special Judicial Magistrates. So far as Delhi is concerned, despite the fact that two lakh traffic cases were pending in magistrate courts, it has not taken any action to appoint judicial magistrates of the 2nd class under section 6(4) and Metropolitan Magistrates under section 18 of the Code. This is not a happy state of affairs. In view of this the Supreme Court in *Kadra Pahadia v. State of Bihar (supra)* issued certain directions with a view to ensure that the machinery contemplated by those provisions would be put into effect with the view to clearing of the backlog of petty criminal cases and further relieve the magisterial court of over work so that it is able to attend to more serious business.

**40.8** In the Chief Ministers & Chief Justices conference held in 1993, Resolution was adopted expressing the view that the provisions of the Code of Criminal Procedure, 1973, in regard to appointment of Judicial Magistrates of 2nd class, Special Judicial Magistrates and Special Metropolitan Magistrate, should be put to use by identifying cases which they are empowered to deal with under the Code.

**40.9** In various workshops organised by the Law Commission in various States, it was generally agreed that the system of special magistrate be revived with certain modifications.

**40.10** The Law Commission has considered the various difficulties experienced in the working of the system of honorary magistrates in the pre-1973 period. We feel that in order to meet the situation leading to delay in disposal of cases and to activate disposal of cases and timely action in the matter, new section 23A be inserted in the Code providing that the "State Government may, after consultation with the High Court review the strength of courts once in two years for setting up a new/additional court depending upon the pendency of the cases therein."

**40.11** We feel that there is need for appointing more Special Magistrates to deal with the above types of criminal cases. We, therefore, suggest necessary changes be made in sections 13 and 18 of the Code of Criminal Procedure in the following manner:

- (i) In every district or metropolitan area there may be as many Special Magistrates at such places as the State Government may after consultation with the High Court, by notification specify to be manned by a person who holds or has held any post in the Govern-

ment. local authorities or corporations provided he possesses such qualifications and experience as the High Court by rules specified in the legal affairs.

- (ii) Such Magistrates shall be appointed by the High Court and shall be called Special Magistrates.
- (iii) Such Magistrates shall be appointed for such term, not exceeding two years at a time, as the High Court may, by general or special order, direct.
- (iv) Such Magistrates shall have all or any of the powers under this Code of a I class or a II class Magistrate as the High Court may confer.

#### 41. Disposal of old cases

41.1 The Supreme Court in the very recent epoch-making judgment of *'Common Cause' a registered society through its Directors v. Union of India.*<sup>2</sup> showed its deep concern over the unduly prolonged pendency of criminal cases when it observed:

"It is a matter of common experience that in many cases where the persons are accused of minor offences punishable not more than three years or even less—with or without fine, the proceedings are kept pending for years together. If they are poor and helpless, they languish in jails for long periods either because there is no one to bail them out or because there is no one to think of them. The very pendency of criminal proceedings for long period by itself operates as an engine of oppression. Quite often, the private complainants institute these proceedings out of oblique motives. Even in cases of offences punishable for seven years or less with or without fine—the prosecutions are kept pending for years and years together in criminal courts. In a majority of these cases, whether instituted by police or private complainants, the accused belong to poorer sections of the society, who are unable to afford competent legal advice. Instances have also come before courts where the accused, who are in jail, are not brought to the court on every date of hearing and for that reason also the cases undergo several adjournments."

From the aforesaid observation it is evident that in order to ensure and obviate the pendency of criminal proceedings for long period, which by itself operates as an engine of oppression, it was considered essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21 of the Constitution.

The relevant excerpts of the directions relating to delay in criminal trial and effect thereof are given below:

- 2(a) Where criminal proceedings are pending regarding traffic offences in any criminal court for more than two years on account of non serving summons to the accused or for any other reason whatsoever, the court may discharge the accused and close the case.
- 2(b) Where the cases pending in criminal courts for more than two years under I.P.C. or any other law for the time being in force are compoundable with permission of the court and if in such cases trial have still not commenced, the criminal court shall, after hearing the public prosecutor and other parties represented before it or their advocates, discharge or acquit the accused, as the case may be, and close such cases.
- 2(c) Where the cases pending in criminal courts under I.P.C. or any other law for the time being in force pertain to offences which are non-cognizable and bailable and if such pendency is for more than two years and if in such cases trials have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.

- 2(d) Where the cases pending in criminal courts under I.P.C. or any other law for the time being in force are pending in connection with offences which are punishable with fine only and are not of recurring nature, and if such pendency is for more than one year and if in such cases trials have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.
- 2(e) Where the cases pending in criminal courts under I.P.C. or any other law for the time being in force are punishable with imprisonment upto one year, with or without fine, and if such pendency is for more than one year and if in such cases trials have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.
- 2(f) Where the cases pending in criminal courts under I.P.C. or any other law for the time being in force are punishable with imprisonment upto three years, with or without fine, and if such pendency is for more than two years and if in such cases trial have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.
3. For the purposes of directions contained in clauses (1) and (2) above, the period of pendency of criminal cases shall be calculated from the date the accused are summoned to appear in the court.
4. Directions (1) and (2) made hereinabove shall not apply to cases of offences involving: (a) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute; (b) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act; (c) Essential Commodities Act, Food Adulteration Act, Acts dealing with Environment or any other economic offences; (d) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act, (e) offences relating to the Army, Navy and Air Force; (f) offences against public tranquillity; (g) offences relating to public servants, (h) offences relating to coins and Government stamp, (i) offences relating to elections, (j) offences relating to giving false evidence and offences against public justice; (k) any other type of offences against the State; (l) offences under the Taxing enactment; and (m) offences of defamation as defined in Section 499 I.P.C.
5. The criminal courts shall try the offences mentioned in Para (4) above on a priority basis. The High Courts are requested to issue necessary directions in this behalf to all the criminal courts under their control and supervision.
6. The criminal courts and all courts trying criminal cases shall take appropriate action in accordance with the above directions. These directions are applicable not only to the cases pending on this day but also to cases which may be instituted hereafter.

41.2 We have carefully perused the aforesaid directions from the point of view of speedy trial. The aforesaid directions laid down under para 2(b), however, do not cover the offences which are compoundable without the permission of the Court. We feel that the scope of para 2(b) be widened to cover all offences which are compoundable without the permission of the Court but which could not be compounded.

41.3 The directions given by the Supreme Court *prima facie* are applicable only to cases where trial has not commenced. It is a matter of common knowledge that even though trial has commenced but is still kept pending inordinately many a time without justifiable reasons. We are of the view that in such cases also some remedial measures on the same lines have to be evolved.

With reference to para 2(b) of the direction, we feel that if the trial has commenced but not concluded then in such cases (under IPC) which are compoundable without the permission of the Court or cases under any other law

for the time being in force for offences punishable upto one year, are pending in the criminal courts for more than two years then the criminal court shall after hearing the public prosecutor and other parties represented before it or their advocates discharge or acquit the accused. Likewise, where the cases under IPC which are compoundable with the permission of the court or in cases under any other law for the time being in force for offences punishable up to three years are pending in the criminal courts for more than three years then the criminal court shall after hearing the public prosecutor and other parties represented before it or their advocates, discharge or acquit the accused as the case may be and close such cases. The difference in approach adopted by us in the above categories of offences is necessitated in view of the minor nature of offences involved in the said categories without permission of the court.

**41.4.** Likewise, the directions under paras 2(c), (d), (e) and (f) do not deal with the situation where the trials are commenced but not concluded within the period specified therein. In order to meet the situation the directions even under those paras should be made applicable on the same lines to such cases where the trials are commenced but not concluded and delayed without justifiable reasons.

**41.5.** For the aforesaid purposes the trial shall be deemed to have commenced when the accused appears in pursuance to the summons/warrant issued by the court.

**41.6.** In computing the period in respect of the case pending trial after commencement but not concluded, the period of delay attributable on the part of the accused or his counsel shall be excluded.

**41.7.** We are of the opinion that the aforesaid directions should not be made applicable to cases where the accused has been convicted more than once or against whom more than one case is pending.

**41.8.** We have made the aforesaid suggestions in respect of cases where trial has commenced but not concluded and kept indefinitely in view of the fact that the direction given by the Supreme Court in *common cause* case (supra) would not apply to such cases. It is a matter of common knowledge that in such cases, the parties have to undergo greater stress and strain as they remain bound over or remanded to custody.

**41.9.** We are also of the view that these directions should be made applicable only to the pending cases and not in respect of the future cases which may be launched. However, in respect of the future cases there should be a periodical review from time to time preferably every three years and on the lines laid down by the Supreme Court *Legal Aid Case* (supra) and also in *Hussainara Khatoon<sup>18</sup>* and *Hussainara Khatoon(VII)<sup>19</sup>*.

**42.** In *R.D. Upadhyay v. State of Andhra Pradesh & Others*,<sup>10</sup> the Supreme Court emphasising the right to speedy trial guaranteed under Article 21 of the Constitution directed the State Govt. to nominate/designate ten Additional Judges to take up exclusively trial and decide long pending cases of murder within a period of six months. This is an important measure to be adopted wherever it is necessary.

**43.** Quit apart from the observations made above pilot projects have been undertaken in some States by utilising the services of Retd. District and Sessions Judges to preside over the courts where backlog is heavy. Such pilot projects may be adopted for disposal of cases pending for more than two years. We also feel that crash programme for establishing such courts to deal with old cases have to be worked up in each State and put them into operation immediately. These steps, in our opinion, would reduce the arrears.

#### **44. Other Measures**

**44.1.** We are of the view that there should be a periodical review of the strength of the courts to effectively deal with arrears pending in the courts and

accordingly it is of the view that a new section 23A should be incorporated under the Code of Criminal Procedure which shall provide that the State Government may after consultation with the High Court review the strength of courts once in two years for setting up a new/additional court depending upon the pendency of the cases therein in order to meet the situation leading to delay in disposal of cases and to activate disposal of cases and timely action in the matter.

44.2. There is a general complaint that there is undue delay in the serving of summons or execution of warrants issued by the court which in turn results in the delay of the trial. Likewise, service is not made at the correct residential address which again results in delay. At present the service system is completely in the hands of the police in criminal cases who take their own time as they are otherwise employed. It is a common experience that more than 25% cases are adjourned due to non-appearance of the accused. It is, therefore, highly desirable that a separate process serving agency directly under the control of the courts is established so that these delays can be avoided.

44.3. Lack of police personnel to escort the accused to the court is yet another cause for the delay, non-production of the accused by the police due to lack of police personnel is causing delay in a number of cases. Therefore, a special machinery has to be provided with proper vehicles for producing the accused before the court on each date in time.

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FOOTNOTES

1. See Black's Law Dictionary, 6th Edn. p. 1400.
2. (1980) 1 SCC 81.
3. (1992) 1 SCC 225; The Supreme Court referred to various decisions concerning delays in trial e.g. *Hussainara Khatoon (iii) v. Home Secretary, State of Bihar*, (1980) 1 SCC 98; *State of Bihar v. Uma Shankar Kejriwal*, (1982) 1 SCC 75; *Kadar Pahadiya v. State of Bihar*, (1983) 2 SCC 104; 1983 SCC (Cri) 361 : *State of Maharashtra v. Champalal Punjaji Shah* (1981) 3 SCC 610; 1981 SCC (Cri) 762; (1982) 1 SCR 299; *T.V. Vatheeswaran v. State of T.N.* (1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348 : *Sheela Barse v. Union of India* (1986) 3 SCC 632; *S. Guin v. Grindlays Bank Ltd.*, (1986) 1 SCC 654; *Raghubir Singh v. State of Bihar* (1986) 4 SCC 481; 1986 Sppl. SCC 505; *Srinivas Gopal v. Union Territory of Arunachal Pradesh* (1988) 4 SCC 36; *T.J. Stephen v. Parle Bottling Co. Pvt. Ltd.*, 1988 Sppl. SCC 458.
4. AIR 1978 SC 597.
5. *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*, (1980) 1 SCC 81.
6. 15 L Ed 2d 627.
7. *Willie Mac Barkar v. John Wingo*, 33 L. Ed. 2d 101. See also *Strunk v. United States*, 37 L Ed. 2d 56.
8. A.I.R. 1986 SC 1773, 1778.
9. (1994) 6 SCC 731.
10. See also (1) *Sunil Batra v. Delhi Administration (I)*, (1978) 4 SCC 494; (2) *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*, (1980) 1 SCC 81, *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 98 (4) *Hussainara Khatoon (VI) v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 115, (5) *Kadra Pahadia v. State of Bihar, (II)* (1983) 2 SCC 104, (6) *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68 and (7) *Abdul Rehman Antulay v. R.S. Nayak*, (1992) 1 SCC 225.
- 10A. See also K.L. Bhatia, Gurdeep Singh, Jagmohan Singh: "A Riddle Wrapped in a Mystery inside an Enigma" 37 J.I.L.I. pp. 42, 45-46 (1995).

11. 1996(5) SCALE 523.
12. AIR 1971 SC 186.
13. AIR 1981 SC 1675.
14. AIR 1954 SC 397, 399.
15. 1995(1) Crimes 445.
16. 1995(6) SCALE 45.
17. 1996(4) SCALE 127.
18. (1980) 1 SCC 81; (1980) 1 SCC 91; (1980) 1 SCC 93; (1980) 1 SCC 98; (1980) 1 SCC 108 and (1980) 1 SCC 115.
19. *Hussaina Khatoon & Other (VII) v. Home Secretary Bihar* (1995) 5 SCC 326.
20. 1996 (1) Crimes 189 (SC).

## CHAPTER XXII

### CONCLUSIONS AND RECOMMENDATIONS

1. In the light of the discussions made in the earlier chapters of this report the Commission is of the opinion that it is essential to make appropriate amendments in the Code of Criminal Procedure, 1973, particularly for rendering Speedy Justice. We have also examined the proposed changes brought out in the Code of Criminal Procedure (Amendment) Bill, 1994.

2. We have indicated in each chapter of the report, the provisions which should be made in lieu of, or in addition to, the existing provisions, and also the amendments, both major and minor, to be made in them. We do not consider it necessary to give a complete summary of all the recommendations made in the foregoing pages. The main changes proposed by us are set out below in broad outlines.

3. There should be a separate and exclusive cadre of investigating agency to investigate grave offences in every district subject to supervision by the higher authorities. When a case is taken up for investigation by an officer of such agency, he should be in charge of the case throughout till the conclusion of the trial. He should take the responsibility for production of witnesses, production of accused and for assisting the prosecuting agency.

(Ch. II, para 7)

4. The police official entrusted with the investigation of grave offences should be separate and distinct from those entrusted with the enforcement of law and order and other miscellaneous duties. Separate investigating agency directly under the supervision of a designated Superintendent of Police be constituted. The hierarchy of the officers in such agency should have adequate training and incentives for furthering effective investigations. The respective Law and Home Departments of various State Governments may work out details for structuring and betterment of their conditions of service.

(Ch. II, para 9)

5. The officials of the investigating police force be made responsible for helping the courts in the conduct of cases and speedy trial by ensuring timely attendance of witnesses, production of accused and proper co-ordination with prosecuting agency. Other necessary steps should also be taken for promoting efficiency in investigation. Accordingly, that necessary changes in the Police Acts, both Central and State, Police Regulations, Police Standing Orders, Police Manuals, be made by the Home Department in consultation with the Law Departments of State Governments.

(Ch. II, para 9)

6. A Directorate of Prosecution be established as provided in clause 4 of the Code of Criminal Procedure (Amendment) Bill, 1994, and new section 25A be inserted. However, sub-section (4) of new section 25A placing the public prosecutors appointed under section 24(1) to conduct cases in the High Court to be subordinate to the Director of Prosecution need not be there as, the Public Prosecutors appointed exclusively to conduct cases on the appellate side in the High Court should be differentiated from those prosecuting officers appointed to conduct cases in the lower courts. Accordingly, sub-section (4) of the proposed section 25A be deleted.

(Ch. III, para 12)

7. The structuring of the proposed Directorate of prosecution shall be on the lines recommended by the National Police Commission. Some of them may be earmarked to advise the investigating agencies and to examine whether there is a fit case for filing the charge-sheet. However, the Government while appointing Public Prosecutors and Assistant Public Prosecutors under sections



24 and 25 shall, as far as practicable, appoint sufficient number of woman Public Prosecutors and Assistant Public Prosecutors so that they can effectively deal with cases involving women who are under 18 years of age and in respect whom offences under sections 354, 376, 376A to 376E (both inclusive) proposed by the National Commission for Women and 509 of the Indian Penal Code.

(Ch. III, paras 9, 10 & 13)

8. In view of the recommendations to establish the Directorate of Prosecution, section 25(3) and section 302 to the extent that they enable police officers to conduct prosecution, needs to be suitably amended.

(Ch. III, para 17)

9. Regarding law of arrest in view of the guidelines enunciated by the Supreme Court in *Joginder Kumar's* case and also the consequent recommendations of the Law Commission in its 152nd Report on "Custodial Crimes" the new sub-section to section 41 be inserted in the Code. Further a new section 41A be also inserted in the Code.

(Ch. IV, para 11)

10. The police custody need not be during the first fifteen days of remand alone. A provision should also be made for a fresh police custody, if sought by the CBI during investigation but it should not exceed 15 days in the whole. Accordingly, Section 167(2) be amended.

(Ch. V, paras 1 & 2)

11. In order to eliminate the discrimination against the poor and the indigent accused in the grant of bail for bailable offences, clause 40 of the Criminal Procedure Amendment Bill, 1994 seeks to amend section 436 of the Code to make a mandatory provision that if the arrested persons accused of a bailable offence is an indigent and cannot furnish security, the court shall release him on his execution of a bond without sureties. The amendments referred to above as those are consistent with the Supreme court's pronouncements and juristic opinion that poor accused committing bailable offences should not be denied bail on the basis of indigency.

(Ch. VI, paras 8.4 & 8.5.)

12. Section 436A be inserted in the Code as a protection for undertrail prisoners accused of non-capital offences and released on bail as contained in Clause 41 of the Code of Criminal Procedure (Amendment) Bill, 1994 except the words "instead of the personal bond with or without sureties" occurring in the proviso to clause 41 of the Bill.

(Ch. VI, para 10)

13. In order to make the provision under Section 437 more stringent and ensure that the accused released on bail does not interfere or intimidate the witnesses section 347 be amended as provided under clause 42 of the Code of Criminal Procedure (Amendment) Bill, 1994.

(Ch. VI, para 11)

14. The provision contained under Section 438 regarding anticipatory bail should remain in the Code but subject to the amendments suggested in clause 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which provides adequate safeguards.

(Ch. VI, para 18)

15. To eliminate the pernicious evil of professional and fake sureties in the bail process Section 441-A be incorporated in the Code as provided in clause 44 of the Code of Criminal Procedure (Amendment) Bill, 1994.

(Ch. VI, paras 19.4 and 19.5)

16. In keeping with the tune of amendments to sections 436, 437, 438 and the insertion of sections 436A and 441A, the amendment of sub-section (3) of section 446 on the lines set out in clause 45 of the Bill be inserted.

(Ch. VI, paras 20.3 to 20.5)

17. A new section 437A be inserted empowering all the criminal courts (including the 1st appellate court) to take bail and bail bond before the conclusion of the trial or disposal of the appeal requiring the accused to bind themselves to appear before the next appellate court; in case an appeal against acquittal or an appeal for enhancement is filed in the higher court. Such a bond shall be in force for a period of 12 months from the date of judgement disposing of the case either by trial court or by the 1st appellate court as the case may be. We feel, the twelve months limit would be enough to cover the period of limitation for processing and filing of such appeals.

(Ch. VII, para, 2)

18. Summons Procedure be dispensed with. Accordingly, Chapter XX be deleted. The definition of warrant case be amended as one relating to an offence punishable with imprisonment for a term exceeding three years. Likewise, definition of summons cases be amended relating to an offence not being warrant case summarily triable. Section 260 be also amended that all summons cases as per the proposed definition should be summarily tried and the magistrate shall have the power to award sentence of imprisonment only up to a period of six months or a fine up to Rs. 3000. However, in case of serious nature if the Magistrate is of the opinion that it is undesirable to try summarily, he may convert the same into a warrant case and try accordingly after giving sufficient and valid reasons. Sub-sections (1) and (2) of the section 260 be amended accordingly. The new comprehensive procedure as per the amended Section 262(2) and also in the existing sections 263 and 265 shall be followed.

(Ch. VII, paras 12, 13, 14 & 15)

19. In cases arising out of a police report, all the statements having been recorded during investigation should be supplied in advance and the cross-examination should proceed continuously. In the case of other types of case arising otherwise than on police report also, evidence already recorded before issuing process would be available furnishing sufficient material for cross-examination, and many adjournments just for the purpose of carrying on further cross-examination can be avoided. Accordingly, Sections 242(2)(3) and 246(4) be amended.

(Ch. VIII, para 17)

20. The statements of material witnesses recorded under section 164 which could be more authentic and also prevent the witnesses from turning hostile. Further sections 161, 162, 164 and 172 be amended on the lines suggested in Chapter IX, para 7. This course is more salutary and will prove to be very effective in rendering criminal justice in a speedy manner. However, the changes contemplated, namely, setting up and separating the investigating agency, and structuring the same and appointment of large number of magistrates will take some time. We, in the alternative, recommend to retain the provisions of sections 161, 162 and 172 as they are but with some checks in the direction of improving the authenticity of such statements recorded by the police and also obtaining signatures of the persons examined, if they are literate. Further, a copy of the statement should be given to the deponent under acknowledgement and also send them to the Magistrate and to the superior officers. That provision would ensure against any error or malpractice being committed by the officer.

(Ch. IX, paras 7, 8, 11, 12, 13 & 15)

21. The allowances payable to the witnesses for their attendance in courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. Section 312 of Cr. P. C. and the rules made thereunder will have to be suitably amended. They should be paid allowances for all the days they attend. Adequate facilities should be provided in the court premises for their stay. The treatment

afforded to them right from the stage of investigation up to the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part.

(Ch. X, para 6)

22. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously. The lists should be prepared in such a way that a day or two are devoted continuously to all cases of a particular police station and cases should not be proceeded mechanically just according to the chronological order regardless of the fact of the likelihood of their being tried or not. The courts also should proceed with trial on a day-to-day basis and the listing of the cases should be on those lines. The High Courts should issue necessary circulars to all the criminal courts giving guidelines for listing of cases.

(Ch. X, para 7)

23. We are of the view that the Courts can take the assistance of the prosecutor and defense counsel and prepare the questions which are to be put in a concise form to the accused under section 313. The Court can also permit the filing of written statements by the accused as sufficient compliances with section 313.

(Ch. XI, para 6)

24. On the aspect of compounding of offences under sub-section (2) of section 320 (offences compoundable with the permission of the court) we recommend that sections 324, 325, 335, 343, 344, 346, 379, 403, 406, 407, 411, 414, 417, 419, 421, 422, 423, 424, 428, 429, 430, 451, 482, 483, and 486 should be deleted from the table laid down under sub-section and be included in the table to sub-section 1 of section 320. Further, Section 498A be inserted in table under sub-section (2) of section 320 whereby it can be compounded with the permission of the Court.

(Chapter XII, paras 4 & 10)

25. There is no provision mentioned in the tables appended to the Section 320 regarding compoundability where the accused is constructively liable under Sections 34 and 149, IPC. If the provision is left as it is, then only in respect of substantive offences mentioned in the tables, compounding is possible and not in respect of cases of constructive liability for the same offence. Likewise, in respect of offence of rioting resulting in the offence mentioned in the two tables, there is no provision for compounding. The offences punishable under Sections 147 and 148 of IPC committed during the same transaction, the transaction being one and the same, where the guilt is proved, the accused are to be convicted under all those sections. It will be anomalous if one part of the offence is compoundable and other part remains non-compoundable where the convictions are capable of being made under both the provisions. Accordingly, we are of the view that sub-section (3) be amended suitably.

(Ch. XII, para 5)

26. We recommend that the concept of plea bargaining may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code. Plea bargaining can also be in respect of the nature and gravity of offences and the quantum of punishment. However, plea bargaining should not be available to habitual offenders, those who are accused of socio-economic offences of a grave nature and offences against women and children.

(Ch. XIII, paras 8 & 9)

27. A plea bargaining can be availed to by the accused in the categories of offences mentioned above before the Court at any stage after the charge sheet is filed by the investigating agency in police cases and in respect of private

complaints at any stage after the cognizance is taken. An order passed by the court on such a plea shall be final and no appeal shall lie against such an order passed by the Court accepting the plea.

(Ch. XIII, para 9.6)

28. A separate chapter XXIA on Plea Bargaining be incorporated in the Code of Criminal Procedure on the lines indicated in para 7 to 9.9.

(Ch. XIII, paras 7 to 9.10)

29. The recommendations of the Law Commission in its 114th Report on Gram Nyayalaya regarding appointment of presiding officer may not be feasible because serving Munsifs/Civil Judges will not be able to shoulder the additional burden of presiding over Gram Nyayalayas in the rural areas. As it is, there is docket explosion in the civil courts and the civil justice delivering system is adversely affected by the phenomenon of huge backlog of cases leading to long delays in disposals. Restricting to serving judicial officers only prevents the consideration of retired judicial officers and other personnel who have served in the government in various capacities. Engaging lawyers by the parties to appear before the Nyaya Panchayats would introduce technical legal formalities into the system leading to delays in the disposal of cases. Indeed it would frustrate the very purpose for which the Gram Nyayalayas are being introduced.

(Ch. XIV, para 6)

30. The state should enact legislation on Nyaya Panchayats to suit their local needs and conditions. The Andhra Pradesh Mandala Nyaya Panchayats Bill, 1995 may be adopted as a model on the composition, powers and jurisdiction of the Nyaya Panchayats.

(Ch. XIV, para 7)

31. In view of the weaknesses of the existing provisions for compensation to crime victims in the criminal law, it is necessary to incorporate a new Section 357-A in the Code.

(Ch. XV, paras 13 & 17)

32. A time limit should be fixed for the period of postponement of trial of insane undertrial. Indefinite postponement is an infringement of the personal liberty and rights of insane undertrials. In order that personal liberty is not arbitrarily deprived in the name of therapy, it is essential that the period for which the enquiry or trial can be postponed, should be subject to limitation.

For the accused whose condition is treatable and who can be better equipped to defend themselves postponement of trial furthers fair trial. For incurables postponement is of little utility and only operates as a mechanism for punishing without trial. It, therefore, seems appropriate that they should be discharged of the charged offence. If their mental condition makes them a danger to themselves or others i.e. they are incapable of looking after themselves and nobody is available who is willing to look after them, then the procedure for involuntary civil commitment should be initiated to institutionalize these persons. Accordingly, sections 328, 329, 330 of the Code in respect of pre-enquiry and pre-trial proceedings be amended.

(Ch. XVI, paras, 12, 14, 15 & 16)

33. Regarding maintenance under Section 125 the increase in ceiling from Rs. 500 to Rs. 1500 suggested in the 1994 Bill would not serve the purpose owing to spiralling inflationary conditions. Nor altogether dropping the ceiling limit is desirable. Justice would be done to awardees if the ceiling is raised to Rs. 5000.

(Ch. XVII, para 5)

34. Under the existing law, there is no right to appeal against an order passed by the magistrate under section 125. Only a revision is possible. There is need to amend the law providing right to appeal.

(Ch. XVII, para 9.1)

35. Summary trial procedure for recording evidence etc, under section 126 be adopted and the evidence by way of affidavits also be made admissible. Accordingly section 126(2) be amended.

(Ch. XVII, para 9.3)

36. It is necessary to empower the magistrate to attach the property of the person liable to pay maintenance and sell in order to recover the amount. If the husband is employed, the magistrate shall have power to direct the employer to deduct the amount of maintenance and arrange the payment. To give effect to this suggestion, section 128 has to be amended suitably.

(Ch. XVII, para 9.4)

37. An absolute condition provided in proviso to clause (a) of Bill formulated by the National Commission for Women, namely, that an offence under section 376 of the Indian Penal Code (rape) shall be tried *only* by any such court presided over by a woman may not be feasible in practice always. The word "only" be substituted by "as far as practicable" in the proviso.

(Ch. XVIII, para 4.2)

38. The age of the woman to be questioned only in the presence of her parents etc. should be *eighteen* and not *fifteen* as suggested by the National Commission for Women.

(Ch. XVIII, para 5.4)

39. Section 160 be amended on the lines suggested by the National Commission for Women subject to certain modifications. In sub-section (3) the age of "twelve years" be raised to "eighteen years" in conformity with the Convention on the Rights of the Child. The recommendation made in sub-section (4) of National Commission on Women Bill is not practicable having regard to the present condition and dearth of female police officers. It may also not be practicable for the victim or any person interested in her to approach the person mentioned in sub-section (3). Instead sub-section (4) may be amended to the effect that where a female police officer is not available and to contact the person mentioned in sub-section (3) is difficult, the officer in charge of the police station, for reasons to be recorded in writing, shall proceed with the recording of the statement of the victim in the presence of a relative of the victim.

(Ch. XVIII, para 6.9)

40. The insertion of section 164A as recommended by the National Commission for Women is eminent desirable subject to the modification that medical examination be made preferably by a female medical practitioner. Further a speedy and detailed medical examination of rape victims by doctors is essential for effective trial of rape offences. Likewise speedy despatch of the report to the investigating officer is also necessary.

(Ch. XVIII, para 7.3)

41. Some of the amendments to section 327 mentioned in the Bill proposed by the National Commission of Women are not practicable. Accordingly, in sub-section (2), the word "only" be substituted by the words "as far as practicable" because to limit such trials only by women judges as mandatory would unduly delay the trial. However, the amendment in sub-section (3) lifting the ban on printing or publication of rape trial proceedings but mandating confidentiality of the names and addresses of the parties be made.

(Ch. XVIII, para 12)

42. The Women prisoners be exempted from the rigour of section 433-A of the Code for the reasons set out in Chapter XVIII.

(Ch. XVIII, para 15.7)

43. In order to make the provision explicit so as to give benefit of set-off to the life convicts also section 428 can be amended by adding the words "or imprisonment for life" after the words "sentenced to imprisonment for a term."

(Ch. XIX, para 2)

44. After section 144 a new section 144A is to be inserted in the Code to enable the District Magistrate to prohibit mass drill (or training) with arms in public places, in order to curb the militant activities of certain communal organisations and to strengthen the hands of the State authority for effectively checking communal tension.

(Ch. XX, para 5.1)

45. Section 176 be amended to provide that in the case of death or disappearance of a person or a rape of a woman while in the custody of police, there shall be a mandatory judicial inquiry and in case of death, examination of the dead body shall be conducted within twenty-four hours of death.

(Ch. XX, para 5.2)

46. A new proviso to sub-section (1) of section 190 of the Code be inserted to empower a magistrate to authorise further detention in custody of an accused person for a period not exceeding a week, after recording reasons, during the interim period of submission of the police report and before taking cognizance of the offence disclosed by the police report. Such a provision is necessary to enable the Magistrate to pass an order of remand where it is not possible for him to take cognizance of an offence under clause (b) of section 190.

(Ch. XX, para 5.3)

47. Two provisos to sub-section (1) of section 389 of the Code be added to the effect that the Appellate Court would give notice to the prosecution before releasing a convicted person on bail, if he was convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and also to enable the prosecution to move an application for cancellation of such bail granted by the Appellate Court.

(Ch. XX, para 5.7)

48. A proviso be added to Section 428 providing for a set-off of the period of detention during investigation and trial against period of 14 years of actual imprisonment. This amendment is necessary so that the convicted accused can get a benefit of the period suffered by him as detention during the trial and investigation being set off against period of 14 years mentioned in section 433A.

(Ch. XIX and XX)

49. In respect of bailable offences, there are instances where the person has to remain in jail for his inability to furnish bail, till the case is disposed of. The amendment of section 436(1) to make mandatory provision to release such indigent person on an execution of a bond without sureties, is a salutary provision.

(Ch. XX, para 5.9)

50. The new sub-section (4) added to section 46 to prohibit to arrest of a woman after sunset and before sunrise except in unavoidable circumstances.

(Ch. XX, para 6.3)

51. A proviso be added to section 46(1) regarding the arrest of a woman providing that where the woman is to be arrested and submission to custody on an oral intimation the arrest shall be presumed. However, we suggested that existing sub-section (2) will be numbered as sub-section (3) and sub-section (3) as sub-section (4).

(Ch. XX, para 6.3)

52. A new section 164A be inserted in the Code to provide for a medical examination of the victim of rape by a registered medical practitioner.

(Ch. XX, para 6.7)

53. A new sub-section (3A) be added to section 173 to enable the police to take note of the desire of the parties to compound offences even at the stage of investigation.

(Ch. XX, para 6.8)

54. In order to guard against the arbitrary exercise of power and to reduce reckless acquittals, section 378 be amended providing an appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence filed on a police report to the Court of Session as directed by the District Magistrate. In respect of all other cases filed on a police report, an appeal shall lie to the High Court against an order of acquittal passed by any other court other than the High Court, as directed by the State Government. The power to recommend appeal in the first category is sought to be vested in the District Magistrate and the power in respect of second category would continue with the State Government. Section 376 be accordingly amended prescribing limitations for filing the appeal and limiting the scope thereof.

(Ch. XX, paras 6.12 and 6.13)

55. A new Section 436A be inserted providing for release of undertrial prisoners who are in jail for a long period, with necessary modification.

(Ch. XX, para 6.14)

56. To combat with the problem of adjournments the measures as laid down under order XVII of the Code of Civil Procedure be inserted in the Code. Further an additional provision as laid down in *State of Gujarat v. Narendra Singh Lukhubhai*, 1995, Vol. 1 Crimes 445 be incorporate.

(Ch. XXI, para 42.7 and 42.8)

57. There is need for appointing more Special Magistrates to deal with minor nature of criminal cases. Necessary changes accordingly be made in sections 13 and 18 of the Code of Criminal Procedure.

(Ch. XXI, Para 43.11)

58. The Court may consider materials produced by the accused affecting the very maintainability of the case at the preliminary stages contemplated under sections 227, 239 and 245 as well as in the preliminary stages of the summary trials.

(Ch. XXI, Para 31)

59. In order to minimise the long pending cases, it is necessary to adopt the directions given by the Supreme Court in *Common Cause v. Union of India* 1996(4) SCALE 127 with certain modifications. Further the directions given by the Supreme Court should not be made applicable to cases where the accused has been convicted more than once or against whom more than one case is pending. Moreover, the directions of the Supreme Court should be made applicable only to pending cases and not in respect of future cases. However, there should be a periodical review from time to time preferably every three years.

(Ch. XXI, para 41.9)

60. It is highly desirable a separate Process Serving Agency under the control of courts be established to avoid delay in the service of summons or execution of warrants issued by the court.

(Ch. XXI, para 41.3)

61. A special machinery should be provided in order to procure vehicles for producing the accused before the court on each date any time.

(Ch. XXI, para 41.4)

62. There should be a periodical review of the strength of the courts to effectively deal with the arrears pending in the courts and accordingly a new Section 23A be incorporated in the Code.

(Ch. XXI, para 41.2)

63. The Court may consider materials produced by the accused which affects the very maintainability of the case at the preliminary stages contemplated under sections 227, 239 and 245 as well as in the preliminary stages of the summary trials.

(Ch. XXI, para 30)

We recommend accordingly.

Sd/-  
(JUSTICE K. JAYACHANDRA REDDY)  
Chairman

Sd/-  
(JUSTICE R. L. GUPTA)  
Member

Sd/-  
(Ch. G. KRISHNAMURTHY)  
Member

Sd/-  
(PROFESSOR ALICE JACOB)  
Member