

## CHAPTER III

# CRIMINAL PROCEDURE AND THE RIGHT TO A SPEEDY TRIAL

### 3.1 Is Indian Criminal Procedure at fault for not giving effect to the right suitably?

Given the large numbers of people incarcerated and awaiting trial in India, one may well wonder whether this is due, in some measure, to the criminal process that exists in the country<sup>149</sup>. Does India's criminal procedure adequately reflect the constitutional guarantee of right to speedy trial?

In this chapter, by a careful study of the provisions of the Code of Criminal Procedure, 1973, and connected statutes, it is sought to be pointed out, that even though the right to speedy trial runs through the veins of criminal procedure in India, our courts may well be at fault for not infusing more rigour and vitality into the provisions so as to make the right a more effective one. For instance, courts keeping in mind the object and scheme of the Code and the provisions relating to expeditious disposal, could well read into the provisions specific time-limits for conclusion of criminal proceedings- as was sought to be done in several cases by the Supreme Court- but unfortunately overruled in subsequent decisions<sup>150</sup>. Yet another area where the courts

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<sup>149</sup>The Law Commission of India has on the whole, commended the adoption of the English system of criminal and civil procedure in India. The system is seen as being fundamentally sound, not requiring any radical changes. The rules of procedure are generally not supposed to be responsible for delays. See for example, the 77<sup>th</sup> Report of the Law Commission of India on Delays and Arrears in Trial Courts (1978), paras 1.11, 3.20 and the 79<sup>th</sup> Report of Delay and Arrears in High Courts and Other Appellate Courts (1979), para 1.35.

<sup>150</sup>*P. Ramachandra Rao vs. State of Karnataka* 2002(4) SCC 578 overruled several previous cases wherein specific time-limits were held to flow from the provisions of the Code of Criminal Procedure, 1973.

could play a more proactive role is by strengthening the right to bail and making it less dependent on the financial capacity of the accused to furnish it- thereby supplementing legislative interventions that provide for a presumption of indigence where an accused fails to provide bail within a week of his arrest<sup>151</sup>.

### 3.2 Right to bail and right to speedy trial

How is one to understand the right to bail vis-à-vis the right to a speedy trial? Are they synonymous? It is submitted that the right to bail whilst being a *part* of the right to speedy trial, does not *entirely* exhaust the right. A person whose right to speedy trial is infringed may get some relief by being let off on bail- but the prosecution against him would continue nonetheless. He could continue to demand enforcement of his right even after being let off on bail since he would continue to suffer various deprivations due to the existence of a criminal prosecution against him: loss of reputation, increased costs and efforts, anxiety and uncertainty due to “the sword hanging”, loss of evidence due to death of witnesses, faded memories and loss of documentary evidence, etc<sup>152</sup>. He could continue to agitate for quashing of the proceedings against him due to violation of his right to speedy trial. Presumably, it might be possible for the victims and the State to also agitate for speedy disposal of the matter, in spite of the release of the accused on

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<sup>151</sup> The proviso to Section 436(1) CrPC provides that in the case of bailable offences, the officer or Court, may and shall, if the accused is indigent and is unable to furnish surety, instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance. Further, the explanation to the proviso, inserted with effect from 23-06-2005, provides that where a person is unable to give bail within a week of arrest, he can be presumed indigent. The moot question is why this presumption should apply only to *bailable* offences under section 436 and not other offences? This is explored in subsequent paragraphs of this chapter.

<sup>152</sup> These aspects are gone into in more detail in para 2.13.

bail<sup>153</sup>. Thus, it is submitted that the accused's right to bail, has to be treated as being a *part of* the right to speedy trial, but only as *one of their incomplete remedies* for violation of the right, insofar as the accused is concerned. As we consider the different stages of the criminal process, we shall see that the provisions relating to bail are intertwined with provisions setting time-limits and mandating expeditious steps to be taken, at each stage.

### **3.3 Criminal procedure or Constitutional criminal procedure?**

Another question that arises is this: are supposed deficiencies of the courts in interpreting criminal procedure to be treated as such, or are such deficiencies to be treated as deficiencies in interpreting the Constitution? For example, the Supreme Court could interpret Article 21 to mean that specific time-limits should be set for conclusion of criminal proceedings by virtue of the right to speedy trial being a part of the said Article<sup>154</sup> or, it could in the alternative, interpret section 309 CrPC, which provides that "proceedings shall be continued from day-to-day" to imply that specific time-limits should be set for conclusion of proceedings- thereby confining itself to the four corners of the statute. It is submitted that it would be more beneficial to read time-limits as being inherent in section 309 CrPC *and in* Article 21, since the right would then additionally be a *constitutional* right, not just a statutory right. Indeed, one notices that much of criminal procedure is *constitutional* criminal procedure i.e., many of the rights and obligations in this branch of the law have been deemed important enough to be enshrined expressly in the Articles of the constitution. Several provisions contained in the Code of Criminal Procedure, 1973, are nothing but re-enactments of constitutionally

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<sup>153</sup>The question whether the victims and the State could invoke the right to speedy trial is explored in the last chapter.

<sup>154</sup>Which has been done in several cases. See Chapter 4.

enshrined principles. For instance, the constitutional right under Article 22(2) to be produced within 24 hours of arrest before a Magistrate is reproduced in section 57 of the Code of Criminal Procedure, 1973.

Every study of criminal procedure would indeed have to be prefaced by the relevant constitutional articles that permeate much of criminal procedure and inform it:

**Article 20: Protection in respect of conviction for offences**

- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.
- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) No person accused of any offence shall be compelled to be a witness against himself.

**Article 21: Protection of life and personal liberty**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Article 22: Protection against arrest and detention in certain cases**

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

**(3) Nothing in clauses ( 1 ) and ( 2 ) shall apply -**

**(a) to any person who for the time being is an enemy alien; or**

**(b) to any person who is arrested or detained under any law providing for preventive detention.**

**(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -**

**(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:**

**Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or**

**(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clause (a) and (b) of clause (7).**

**(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.**

**(6) Nothing in clause ( 5 ) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.**

**(7) Parliament may by law prescribe-**

**(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause ( 4 );**

**(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and**

**(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause ( 4 ).**

### 3.4 History of the Code of Criminal Procedure, 1973

Our criminal procedure is largely a legacy of British rule<sup>155</sup>. The first 4 Law Commissions of India, constituted by the British before Independence, were responsible for the initial codification of our procedural laws<sup>156</sup>. Their personnel, consisting of some of the leading jurists of England, had the onerous task of creating a co-ordinated system of courts and well-defined, unified systems of rules of law, which would be "alike honourable to the English government and beneficial to the people of India."<sup>157</sup> This task had to be undertaken in the face of a perplexing system which lacked certainty and uniformity. Macauley's words: "I believe that no country ever stood so much in need of a Code of Law as India, and I believe also that there never was a country in which the want might be so easily supplied. Our principle is simply this- uniformity when you can have it; diversity when you must have it; but, in all cases, certainty."<sup>158</sup> The Indian Evidence Act, 1872, came into being by virtue of the efforts of the distinguished Sir James Fitzjames Stephen and was passed in 1872. The law relating to criminal procedure applicable to all criminal proceedings in India was enacted in the Code of Criminal Procedure, 1898<sup>159</sup>.

Amendments have been carried out from time-to-time by Central and State legislatures, the most important being the Central amendments of 1923 and

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<sup>155</sup>The 37<sup>th</sup> Report of the Law Commission of India on the Code of Criminal Procedure, 1889, December 1967, observes that the history of the Code seems to represent 4 stages: the period of formation; the period of consolidation; the period of revision and finally the period of refinement. Para 17.

<sup>156</sup>See the 14<sup>th</sup> Report of the Law Commission of India on Reform of Judicial Administration, 1958, Chapter 2.

<sup>157</sup>14<sup>th</sup> Report of the Law Commission of India on Reform of Judicial Administration (1958): Chapter 2, para 15.

<sup>158</sup>Cited by Whitley Stokes, *The Anglo-Indian Codes*, Volume 1, pg. x.

<sup>159</sup>Statement of Objects and reasons to Act 2 of 1974.

1955. The 1955 amendments were extensive and intended to simplify procedure and speed-up trials as far as possible<sup>160</sup>. Speedy trial has always been an important theme of the Code.

The first Law Commission presented the 14<sup>th</sup> *Report on the Reform of Judicial Administration* in 1958 and made some recommendations. A systematic examination of the Code was undertaken by the 41<sup>st</sup> Report, which was presented in September 1969. This report took into account recommendations made in earlier reports as well namely, the 14<sup>th</sup>, 25<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 36<sup>th</sup>, 37<sup>th</sup> and 40<sup>th</sup> reports<sup>161</sup>. Taking these recommendations into account, the Code of Criminal Procedure, 1973, was enacted and came into force on April 01, 1974.

The Statement of objects and reasons accompanying the Code of Criminal Procedure, 1973<sup>162</sup>, indicates that the Code is indeed preoccupied with the three questions of *delay, fair trial and justice to the poor*.

#### **Statement of Objects and Reasons**

**... The recommendations of the Commission were examined carefully by the Government, keeping in view, among others, the following basic considerations-**

- (i) **an accused person should get a fair trial in accordance with the accepted principles of natural justice;**
- (ii) **every effort should be made to avoid delay in investigation and trial which is harmful not only to individuals involved but also to society; and**

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Act 2 of 1974, which came into force with effect from 01-04-1974.

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community...

...

Some of the more important changes proposed to be made with a view to speeding up the disposal of criminal cases are-

- (a) ...committal proceedings ...is being abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences;
- (b) Provision ...to enable adoption of summons procedure ...this would enable a large number of cases being disposed of expeditiously;
- (c) The scope of summary trials is being widened...

...

(f) when adjournments are granted at the instance of either party, the court is being empowered to order costs...

...

(h) in petty cases, the accused is being enabled to plead guilty by post...

...

Some of the more important changes intended to provide relief to the poorer sections of the community are-

- (a) Provisions have been made for giving legal aid to an indigent...
- (b) ...payment of compensation by the accused to the victims of crimes...

...

In addition to these specific provisions, the steps taken to reduce delays would themselves automatically benefit the poorer sections, as it is they who particularly suffer by the prolongation of criminal cases. (underlining supplied)

As one studies the different segments of the Code, it is indeed clear that the themes of delay (speedy trial), fair trial and justice to the poor permeate much of the provisions. In addition of course, there are several other themes, most important of which is that the criminal law be enforced by convicting the guilty<sup>163</sup>- thereby upholding the law of the land and ensuring a safe and healthy society. The 154<sup>th</sup> Law Commission of India Report on the Code of Criminal Procedure, 1973, indeed stated that the concern for speedy trial is the main premise underlying the Code, both with regard to investigation and trial<sup>164</sup>.

### 3.5 Scheme and major concepts under the Code

It is clear that several of the major conceptual categories created by the Code are put in place primarily to ensure ease and speed of trial and also to avoid undue harassment by arrest:

- The differentiation between *warrant* and *summons* cases<sup>165</sup> helps courts adopt a simpler, faster procedure for the trial of less serious summons offences.
- The differentiation between *bailable* and *non-bailable offences*<sup>166</sup> ensures that bail is given as a matter of right for lesser offences.

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<sup>163</sup>What William Twining calls *rectitude of decision* ie, the application of the substantive law to correctly identified facts. William Twining, *Rethinking Evidence: Exploratory Essays*, Northwestern University Press, Evanston, Illinois, 1994. Some of the other themes would be: excluding certain types of evidence, special protection of women and children, preventing crime, riots and the like through preventive detention measures, ensuring participation and compensation to the victims of crime, etc. The question of how to reconcile competing themes that might underlie our criminal procedural law is taken up in the last Chapter.

<sup>164</sup>154<sup>th</sup> Report of the Law Commission of India (1966) on the Code of Criminal Procedure, Chapter 8, para 1.

<sup>165</sup>Section 2 (x) CrPC: *warrant-case* means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Section 2 (w) CrPC: *summons-case* means a case relating to an offence, and not being a warrant case. The procedure for the trial of summons cases is simpler under chapter XX of the Code whereas trial of warrant cases under chapters XVIII or XIX is more detailed.

- The differentiation between *cognizable* and *non-cognizable cases*<sup>167</sup> ensures that the police do not arrest without warrant for smaller offences.
- The Code provides different sets of procedures for trial, depending upon the seriousness of the offence – thereby making the trial of less serious or heinous crimes simpler and faster. Chapter XVIII provides for *trial procedure before a Court of Session* (High Courts and Sessions Courts may pass higher sentences including death sentences under section 28). Chapter XIX provides for *trial procedure for warrant-cases by Magistrates* (who may pass lesser sentences under section 29): this Chapter further treats *cases instituted on a police report* differently from *cases instituted otherwise than on police report*. Chapter XX provides the procedure for *trial of summons-cases by Magistrates*.
- Chapter XXI provides for *summary trial of inter alia*, offences not punishable for a term exceeding two years, thereby prescribing a simpler procedure for small offences<sup>168</sup>(under section 262, no sentence of imprisonment exceeding 3 months shall be passed in the case of summary trials).

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<sup>166</sup>Section 2 (a) *bailable offence* means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force. Section 436 CrPC provides for the right to bail for bailable offences ie, a person arrested for a bailable offence is bound to be released if he furnishes the bail fixed. With non-bailable offences however, bail is not a matter of right but a matter of discretion, regulated by the CrPC.

<sup>167</sup>Section 2 (c) *cognizable offence* means an offence for which, and *cognizable case* means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. Section 2(l) *non-cognizable offence* means an offence for which, and *non-cognizable case* means a case in which, a police officer has no authority to arrest without warrant.

<sup>168</sup>Section 260 provides that the Chief Judicial Magistrate or Metropolitan Magistrate or any Magistrate of the 1<sup>st</sup> Class specially empowered in this behalf by the High Court may, if he thinks fit, try in a summary way the smaller offences listed thereunder. Under section 261 the High Court may confer powers on a Magistrate of the 2<sup>nd</sup> Class the power to try summarily any offence which is punishable only with fine or with imprisonment for less than 6 months with or without fine and any abetment of or attempt to commit any such offence.

- *Plea-bargaining*, introduced in the year 2006, is yet another concept that is addressed towards reduction of delays and congestion, and speedy disposal of criminal cases. However, it applies only where the offence involves punishment for less than 7 years imprisonment, and where the offence does not affect the socio-economic condition of the country or is not committed against a woman or a child below the age of 14 years. Under section 265-E, by availing plea-bargaining, the accused can avoid trial and get the case disposed of quickly by getting  $\frac{1}{2}$  the minimum punishment provided for the offence alleged, or where no minimum punishment has been prescribed,  $\frac{1}{4}$ <sup>th</sup> of the punishment provided for the offence.
- A special procedure is further provided in section 206 in the case of *petty offences*<sup>169</sup>. The accused may plead guilty to the charge without even appearing before the Magistrate, by transmitting his plea of guilty in writing along with the specified fine to the Magistrate.
- *Compounding of offences* is yet another technique which ensures speedy resolution of criminal litigation. Section 320 provides a table of offences which can be compounded, which would have the effect of an acquittal of the accused<sup>170</sup>.

### 3.6 The right to speedy trial at the stage of arrest

The Code of Criminal Procedure, 1973, provides great detail as to when exactly a person can be arrested. Blanket powers of arrest are not conferred

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<sup>169</sup>*Petty Offence* is defined in section 206(2) to mean any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 1939, or under any other law which provides for convicting the accused person in his absence on a plea of guilty.

<sup>170</sup>The Table provides by whom the offence may be compounded – some of the offences require the leave of the court.

on police and courts. The law-makers have tried to ensure that valuable personal liberty is safeguarded against whimsical or capricious deprivations thereof. In spite of the detailed regulation, it is unfortunate to note that these provisions are some of the most ignored and misused provisions by the police in India. *The National Police Commission* in its 3<sup>rd</sup> Report<sup>171</sup> observed that the power of arrest is one of the chief sources of corruption in the police and that 60% of arrests were unnecessary or unjustified.

Only in cognizable cases<sup>172</sup>, a police officer may arrest without a warrant, that too when his powers are exercised in conformity with one of the express provisions of the Code:

**Section 60A : Arrest to be made strictly according to the Code**

**No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.**

The authorization for arrest is carefully delineated in section 41 (when police may arrest without warrant in cognizable cases), section 42 (arrest on refusal to give name and residence), section 43 (arrest by private person) and section 44 (arrest by magistrate) and some other provisions<sup>173</sup>.

Several safeguards have been built into the police's power to arrest such as the existence of *reasonable suspicion*<sup>174</sup> in the mind of the police that a person has committed a cognizable offence, *reason to believe* in the commission of the offence<sup>175</sup> by the person, and the existence of a state of

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<sup>171</sup> Cited by the *Report of the Committee on Reforms of the Criminal Justice System, March 2003*, para 7.26.1 and also by the *213<sup>th</sup> Report of the Law Commission of India on Fast Track Magisterial Courts for Dishonoured Cheque Cases*, November 2008.

<sup>172</sup> *Ibid*, Note 167.

<sup>173</sup> Here a detailed study of the various provisions of the Code relating to arrest is not attempted for the sake of brevity.

<sup>174</sup> Section 41 (1)(b)

<sup>175</sup> *Ibid*.

affairs where arrest is *necessary*<sup>176</sup> to prevent further offences, or for proper investigation, or to prevent tampering with evidence or to ensure the presence of the arrested person in court. The police officer is further required to record his reasons for the arrest in writing.<sup>177</sup> Only if the cognizable offence *is committed in the presence of a police officer*, it is obvious that the arrest would have to be made then and there, without all these preliminaries being observed<sup>178</sup>.

In several decisions, the Supreme Court has laid down that the power to arrest must be exercised within the ambit of the law, judiciously and not whimsically or capriciously.<sup>179</sup> Personal liberty, which is the most valuable of civil liberties, must not be interfered with lightly. Arrest of a person would cause serious hardship to a person's body and mind, as well as to his reputation in society.

The CrPC also provides for various additional safeguards that inure to the person arrested, including prescribing a procedure for arrest (section 41B: police officer shall be identifiable, shall prepare a memorandum of arrest and shall inform the person arrested that he has a right to have a relative or friend be informed of his arrest), right of arrested person to meet an advocate of his choice during interrogation (section 41D), right to be informed of grounds of arrest and of right to bail for bailable offences (section 50), obligation of police officer arresting to inform relatives regarding the arrest (section 50A), obligation to take reasonable care of the health and safety of the arrested person (section 55A), and the right to be produced before a

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<sup>176</sup>Section 41 (1)(b) (ii)

<sup>177</sup>Section 41(1)(b)

<sup>178</sup>Section 41 (1)(a)

<sup>179</sup> See for examples: *Siddharam Satlingappa Mhetre vs. State of Maharashtra* 2011(1) SCC 694; *Joginder Kumar vs. State of UP* 1994(4) SCC 260; *Amesh Kumar vs. State of Bihar* 2014(8) SCC 273.

Magistrate within 24 hours, if further detention becomes inevitable (section 57).

Indeed, the Code deems the proper use of arrest powers so important that compensation for wrongful arrest is expressly provided in section 358.

**Section 358 : Compensation to persons groundlessly arrested**

**(1) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding one thousand rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.**

**(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding one hundred rupees, as such Magistrate thinks fit.**

**(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.**

In spite of the small sum of Rs. 1,000/- being fixed, it is noteworthy that such a provision exists. In addition, the wronged party may presumably also be able to sue in tort for false imprisonment and wrongful confinement.

Perhaps the most important of all safeguards to prevent abuse of arrest powers is the requirement that arrest beyond a period of 24 hours must be only by the order of the Magistrate. Section 57 is a reflection of this valuable *constitutional right* contained in Article 22(1):

**Section 57: Person arrested not to be detained more than twenty-four hours**

**No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.**

Thus, any detention beyond 24 hours by the police must stand the test of *judicial* oversight. This provision ensures that the arrested person is produced before a Magistrate as soon as possible so that judicial scrutiny can be brought to bear on his arrest and thereby prevents unnecessary deprivation of liberty. It also ensures that the criminal process is set into motion in an expeditious manner; it is thus an important aspect relating to the right to speedy trial<sup>180</sup>.

It is important to point out that during the period *after* arrest and *before* the person is produced before a Magistrate, the police officer concerned is *bound* to release the person on bail if the offence is bailable and the person is ready to furnish bail (under section 436), and *may* release the person on bail if it is a non-bailable offence and the requirements of section 437 are satisfied<sup>181</sup>. Thus, the remedy of bail is available from the very start of the proceedings. Section 436 provides further that if the person is indigent and unable to furnish surety, instead of taking bail from such person, the police officer shall discharge him on his executing a bond without sureties for his appearance. The explanation inserted in 2006 provides that 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 to presume that he is an indigent person for the purposes of this proviso. These provisions introduced with the object of

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<sup>180</sup>As explained in Chapter 1, the phrase "right to speedy trial" is used to include the right to speedy criminal proceedings *before* and *after* trial as well.

<sup>181</sup>Sections 436 and 437 CrPC.

ameliorating the distressing condition of the poor who are arrested, are indeed noteworthy and important<sup>182</sup>.

In spite of the existence of strict rules regulating the power to arrest and the existence of various constitutional and statutory safeguards relating to the law of arrest, it is unfortunate indeed that arrest powers are routinely misused by police authorities. Arrests to the tune of 1.3 per IPC case and 1.1 per SLL case were made in 2013<sup>183</sup>. The poor quality of the Indian police force has been documented by the Supreme Court as well as by several studies over the years<sup>184</sup>. As the police continue to misuse arrest powers, the numbers of incarcerated poor under-trials continue to swell.

The powers of arrest under the provisions relating to preventive detention need to be mentioned. Whilst the powers of arrest under the Code can mostly be invoked only when the police believe that an offence *has been committed*, Chapters VIII and XI confer power on the police authorities to take preventive measures even *before* any crimes are committed, to *prevent* the commission of crimes. Around the world, preventive detention is difficult to justify as per modern human rights standards<sup>185</sup> and as per constitutional guarantees of personal liberty,<sup>186</sup> since the launching of criminal process against a person on the apprehension that he *might* do something illegal is a power that is liable to great misuse. Under Chapter VIII, an Executive

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<sup>182</sup>They are considered in greater detail in the subsequent paragraphs.

<sup>183</sup>*Crime in India Statistics 2013*, page 539.

<sup>184</sup> See for example, the reports of the *National Police Commission*. The *National Police Commission (NPC)* was appointed by the Government of India in 1977 with wide terms of reference covering the police organisation, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc. The Commission produced eight reports between 1979 and 1981, suggesting wide ranging reforms in the existing police set-up.

<sup>185</sup>See *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, David Cole, 97 *California Law Review* 693 (2009).

<sup>186</sup> Article 22 of the Indian Constitution provides for various safeguards against misuse of the power of preventive detention.

Magistrate may require a person to provide security for good behavior or for keeping the peace, if he is of opinion that any person is likely to commit a breach of the peace or disturb public tranquility or do any wrongful act thereof (section 107) or is disseminating seditious matters (section 108) or when a person is taking precautions to conceal his presence with a view to commit a cognizable offence (section 109) or when a habitual offender is within the jurisdiction (section 110). Section 122 provides for imprisonment upon failure to provide security as ordered. Section 151 provides that a police officer knowing of a design to commit any cognizable offence may arrest the person so designing, where the crime cannot otherwise be prevented (i.e., where it would be too late to arrest after obtaining a warrant from the Magistrate).

The preventive detention measures in the CrPC have generally come under a great deal of criticism. The *CHRI* observes<sup>187</sup> that these provisions are mostly misused to swell arrest figures by the police. Poor and impoverished persons who happen to be in the wrong place at the wrong time, are routinely rounded up and incarcerated, to show that the police are acting effectively against crime. The Mulla Committee, 1983, had recommended that the sections in the CrPC relating to Preventive Detention should be reviewed and suitably amended to restrict their use only in very genuine cases<sup>188</sup>. But this has not yet happened.

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<sup>187</sup> *Pre-Trial Detention and Access to Justice in Orissa*, Priti Bharadwaj, 2009-2010, Chapter 4, page 21.

<sup>188</sup> Recommendation 4.34.21, 1980-83, *Report of the All India Committee on Jail Reforms*, Ministry of Home of Affairs, Government of India.

### 3.7 The right to speedy trial at the stage of investigation

This is a valuable aspect of the right to speedy trial. As affirmed by the Supreme Court in several cases<sup>189</sup>, the right to speedy trial inures not just at the trial stage, but even *before* the trial has commenced – at the stage of police investigation itself.

#### A. The right to default bail under section 167 CrPC

Under section 57 the further detention of a person beyond the period of 24 hours has to be authorized by a judicial magistrate. Section 167 further provides that the Magistrate may authorize further detention in *police* custody but the total term in police custody cannot exceed 15 days. Thereafter, the Magistrate cannot authorize police custody but can only authorize further *judicial* custody, 15 days at a time. Judicial custody also cannot continue indefinitely: -

- (a) the maximum period of custody cannot exceed 90 days where the investigation relates to an offence punishable for a term of imprisonment of not less than 10 years, life imprisonment or death<sup>190</sup>;
- (b) the maximum period of custody cannot exceed 60 days where the investigation relates to any other offence<sup>191</sup>.

If within the time-limits specified in section 167, the police have not filed the charge-sheet, then the section provides that the accused person *shall* be released on bail if he is prepared to and does furnish bail. Thus, section 167 contains an important provision relating to the ***right to bail***, at the stage of investigation by the police. The further safeguards provided are that the

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<sup>189</sup> See for example *Abdul Rehman Antulay vs. R.S. Nayak* 1992(1) SCC 225.

<sup>190</sup> Section 167(2)(a)(i)

<sup>191</sup> Section 167(2)(a)(ii)

Magistrate should be satisfied that *adequate grounds* exist for further detention<sup>192</sup>; that extension of police custody can only take place if the accused is produced *in person* before the Magistrate every time extension is sought<sup>193</sup>; that extension of judicial custody can take place if the accused is produced *either in person or through electronic video linkage*<sup>194</sup>; that if the Magistrate authorizes police custody he must record his reasons for doing so<sup>195</sup> and that if a Magistrate who is not a Chief Judicial Magistrate has authorized detention, he shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate<sup>196</sup>.

**167: Procedure when investigation cannot be completed in twenty-four hours**

**(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.**

**(2) 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 in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:**

**Provided that-**

**(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days,**

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<sup>192</sup>Section 167 (2)

<sup>193</sup>Section 167(2)(b)

<sup>194</sup>Ibid.

<sup>195</sup>Section 167 (3)

<sup>196</sup>Section 167 (4)

**if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-**

**(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;**

**(ii) sixty days, where the investigation relates to any other offence, and, 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 sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;**

**(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;**

**(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize 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 clause (b), the production of the accused person may be proved by his signature on the order authorizing detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:**

**Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.**

**(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a**

**Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorized, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):**

**Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.**

**(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.**

**(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it to the Chief Judicial Magistrate.**

**(5)...**

**(6)... (underlining supplied)**

In *Devender Kumar vs. State of Haryana*<sup>197</sup> the Supreme Court held that the Magistrate may remand the accused to either judicial or police custody within the first 15 days of arrest, but once the period of 15 days is over, the

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<sup>197</sup>2010(6) SCC 753

Magistrate cannot pass orders for police remand<sup>198</sup>. Police custody, even though limited to 15 days, is an important period for the investigating authorities to interrogate the arrested person and get to the truth of the matter.

The Supreme Court has had to balance protection of liberty with the need for effective police investigation in cases where multiple FIRs are filed in different police stations against the same accused. In *State of West Bengal vs. Dinesh Dalmia*<sup>199</sup> the respondent before the Supreme Court was involved in various criminal investigations and FIRs lodged against him in Chennai, Calcutta and New Delhi. Whilst in judicial custody in Chennai, the respondent claimed to have voluntarily surrendered before the Chennai Magistrate on 27-02-2006 with regard to the *Calcutta case*. When he was produced before the Magistrate in Calcutta on 13-03-2006, the Investigating Officer requested the court to hand over custody of the accused to the police for investigation. But this was opposed by the Respondent on the ground that since he had surrendered before the Chennai Magistrate on 27-02-2006 itself, there was no question of any further police custody since the initial 15-day period had lapsed. Allowing the Special Leave Petition of the State, the Supreme Court held that his voluntary surrender could not be treated as detention in police custody at Calcutta. Such *notional* custody could not be treated as police custody for counting the required period. It was pointed out that a notorious criminal may have a number of cases pending in various police stations- if notional surrender for another FIR in another police station is counted, then the police would not get an opportunity for custodial investigation. Thus, from

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<sup>198</sup>The appellant Devender Kumar was produced before the Magistrate pursuant to an FIR lodged against him alleging offences *inter alia*, under sections 498A, 406 r/w 34 IPC. Applications for police custody filed by the investigating authorities having been rejected, the complainant approached the High Court wherein the orders rejecting police custody were quashed. On appeal to the Supreme Court, the appeal was allowed, relying upon the decision in *CBI vs. Anupam J. Kulkarni* (1992) 3 SCC 141.

<sup>199</sup>2007 (5) SCC 773 (2 judges)

*Dinesh Dalmia* it appears that where multiple criminal investigations are pending against a person, he would be bound to undergo police custody for each investigation. However, this would obviously have to be with the stipulation that each investigation is for a *separate and distinct transaction*-else the person would have to undergo police custody for every FIR filed against him. This has been clarified in *Budh Singh vs. State of Punjab*<sup>200</sup> wherein the Supreme Court relied upon its earlier decision in *CBI vs. Anupam J. Kulkarni*<sup>201</sup> to clarify that there cannot be any detention in police custody after the expiry of the first 15 days, even in a case where more offences *with regard to the same transaction* come to light at a later stage. However, this does not apply if it is a *different transaction*. In *Narinderjit Singh Sahni vs. Union of India*<sup>202</sup> it was reiterated that if the accused is involved in a large number of criminal cases in different parts of the country, and is not freed even after getting bail orders in some cases because he is in custody for other cases, this by itself would not violate Article 21.

The famous bail case of the Bollywood film actor Sanjay Dutt in *Sanjay Dutt vs. State through CBI Bombay (II)*<sup>203</sup> provided a Constitution Bench of the Supreme Court an opportunity to clarify the manner in which section 167 would operate. In that case, questions involved in granting bail to the accused Sanjay Dutt by the Designated Court under the *Terrorist and Disruptive Activities (Prevention) Act, 1987*, in regard to the Bombay Blasts case, were referred by a Division Bench of the Supreme Court to the Constitution Bench. The controversial *Terrorist and Disruptive Activities (Prevention) Act, 1987*, (*TADA*), had been formulated in the background of growing terrorist violence in Punjab and contained severe provisions with

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<sup>200</sup>2000(9) SCC 266(3 judges)

<sup>201</sup> 1992(3) SCC 141

<sup>202</sup>2002(2) SCC 210

<sup>203</sup>1994(5) SCC 410

regard to grant of bail<sup>204</sup>. Under section 20 (4) of TADA, the period of 15 days' police custody under section 167 was enhanced to 60 days; the time-limits for filing charge-sheets were enhanced from 60 and 90 days under section 167 to 180 days. Further, it was provided that if it was not possible to complete investigation in 180 days, the Designated Court could extend the period up to 1 year<sup>205</sup>. Further, under section 20(8) of TADA, it was provided that no person accused of an offence under the Act or any rule made thereunder shall be released on bail or on his own bond unless – (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that the accused is *not* guilty of such offence and that he is *not likely to commit any offence while on bail*. Thus, getting bail under the Act was extremely difficult, if not impossible. The reference *inter alia*, sought answers to the questions as to what was the nature of the right of an accused to be released on bail on default of investigation within the time-limits and secondly, what was the proper construction of section 20(8). The Constitution Bench held<sup>206</sup> that upon default in filing charge-sheet within the specified period, the right to bail was *indefeasible*, the court could look into neither the gravity of the offence nor the merits of the case; the court was *bound* to release the accused. However, the indefeasible right of bail upon expiry of the investigation period can be enforced only until the police *challan*<sup>207</sup> is filed, not thereafter. Once the *challan* is filed, bail has to be considered on merits- custody is now governed not under section 167, but under other provisions of the CrPC. It was pointed out further that even if the accused has been granted default bail, if he violates the terms of the bail he

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<sup>204</sup>The Act died a natural death in May 1995 when it was allowed to lapse. However, cases initiated when TADA was in force continue to be valid.

<sup>205</sup>On the report of the Public Prosecutor and in view of special reasons for detention.

<sup>206</sup>Following *Hitendra Vishnu Thakur vs. State of Maharashtra* 1994(4) SCC 602.

<sup>207</sup>Charge-sheet.

can be re-arrested, as provided in the CrPC. Finally, it was held that section 20(8) did not impose unreasonable conditions on the grant of bail. Whilst the decision of the Supreme Court must be lauded for its clarity on the question of *default bail*, upholding and refusing to read down the drastic conditions for grant of bail in section 20(8) TADA, does not speak much of the Supreme Court's human rights jurisprudence. Fortunately, TADA died a natural death as it was allowed to lapse in May 1995<sup>208</sup>.

*Sanjay Dutt* led to certain interpretive issues. In *Uday Mohanlal Acharya vs. State of Maharashtra*<sup>209</sup> the accused having completed the statutory period of 60 days on 16-08-2000, filed an application for default bail on the next day i.e., 17-08-2000- but this application was rejected by the Magistrate. The accused approached the High Court- but in the meanwhile, the accused was charge-sheeted on 30-08-2000. The High Court refused to grant bail on the ground that charge-sheet had already been filed. A three-judge bench of the Supreme Court in an appeal by the accused allowed the appeal. It was pointed out that section 167 uses the words "the accused *shall* be released on bail if he is prepared to and does furnish bail"- the bail was *compulsive bail*. Upon completion of the period fixed under section 167(2) the Magistrate *has to* release the accused- he does not have any jurisdiction to refuse. It was further noted that in *Sanjay Dutt* it was held that the indefeasible right does not survive or remain enforceable on the *challan* being filed, *if not already availed of*. The accused must be held to have availed of his indefeasible right the moment he files his application for bail and offers to abide by the terms of bail- it is not necessary that he should have actually been released on bail to "avail of" the right. A contrary interpretation would defeat section 167(2) since the prosecution could defeat the rights of the

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<sup>208</sup> More discussion on TADA and other legislation relating to prevention of terrorism is taken up at a later stage.

<sup>209</sup> 2001(5) SCC 453

accused by filing a charge-sheet *after* the application for default bail. However, if the accused was unable to furnish the bail and the charge-sheet was filed in the meanwhile, the right to obtain default bail would stand extinguished<sup>210</sup>. Thus, the Supreme Court rightly gave an interpretation to section 167 that would protect the right of the accused to default bail and prevent the police from subverting this right by filing charge-sheet after the application for default bail has been filed.

The recent decision in *Pragyna Singh Thakur vs. State of Maharashtra*<sup>211</sup> raised interesting issues. Pursuant to a bomb blast in 2008 an FIR was registered against the appellant *inter alia* under sections 302 and 307 IPC read with offences under the Explosive Substances Act, 1908. One of the contentions raised by the appellant was that she was entitled to default bail as the charge-sheet had been filed belatedly, if calculated from the date of her arrest. The Supreme Court pointed out that in any event, as per several earlier Supreme Court decisions<sup>212</sup>, the relevant date for counting 90 days was *the date of the first order of remand, and not the date of arrest*. The charge-sheet had thus been filed within time. The appellant had also contended that the police had harassed her and violated Article 22(2) by keeping her in detention for more than 24 hours without production before a Magistrate and consequently, she was entitled to bail. Negating this contention, the Supreme Court held that she could have sought liberty on that ground only when she was in police custody; after remand by the Magistrate, she could not seek bail on the ground of non-compliance with

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<sup>210</sup>BN Agarwal partly dissented on the interpretation of the phrase "if not already availed of" used in *Sanjay Dutt*.

<sup>211</sup>2011 (10) SCC 445

<sup>212</sup>*Chaganti Satyanarayana vs. State of AP* (1986) 3 SCC 141; *CBI vs. Anupam J. Kulkarni* (1992) 3 SCC 141; *State vs Mohd. Ashraff Bhat* (1996) 1 SCC 432; *State of Maharashtra vs. Bharati Chandmal Varma* (2002) 2 SCC 121 and *State of MP vs. Rustam* (1995) Supp (3) SCC 221.

**5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.**

**(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.(underlining supplied)**

Several aspects of section 167(5) and (6) need to be noted. First, the time-limit of 6 months only applies to summons- cases triable by Magistrates- it does not apply to warrant cases. Thus, investigations relating to the more serious warrant cases do not have any time-limit. One wonders why this must be so. Why did the legislature not introduce time-limits for investigations in warrant cases also? Is this a legislative lapse? Can investigations in warrant cases go on for ever and ever? Section 173 CrPC provides that every investigation under Chapter XII should be completed without unnecessary delay- obviously therefore, even in warrant cases, there can be no unnecessary delay. Second, sub-clause (5) mandates that the Magistrate *shall* make an order stopping further investigation. Thus, he is bound to put an end to the investigation and consequently, the criminal proceedings. Third, if the investigating officer satisfies the Magistrate however, that continuation of the investigation is necessary, for special reasons and in the interest of justice, then the Magistrate can permit the investigation to continue beyond 6 months. Lastly, the order of the Magistrate stopping the investigation can be reviewed on application or *suo motu* by the

Sessions Judge and he can permit the investigation to further continue. Overall, the imposition of time-limits for investigation under clauses (5) and (6) of section 167 seems rather weak and ineffective.

Upon conclusion of the investigation, the police are not bound to forward the accused to the Magistrate in every case. Only where the evidence gathered in investigation is sufficient or there are reasonable grounds for suspicion the accused needs to be forwarded to the Magistrate for further action against him under section 170 CrPC. If the evidence is not sufficient, or if there are no reasonable grounds of suspicion, then the accused shall be released under section 169 CrPC, if he has been in custody, upon him executing a bond with or without sureties. We see therefore, that even at this stage, the law tries to bring the proceedings to a quick conclusion and secure liberty for the accused<sup>216</sup>:

**169: Release of accused when evidence deficient.**

**If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.**

Section 173 (1) CrPC further mandates that *every* investigation under Chapter XII shall be completed without unnecessary delay. This would include *warrant* cases as well. Further, under section 170 (1A), which was

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<sup>216</sup>This of course is a provision relating primarily to bail: but is included here for the sake of convenience. Also to be noted is section 170 (1) which provides for release on bail during the period from completion of investigation to court appearance.

introduced in 2009, the investigation in relation to the rape of a child may be completed within three months from the date of the FIR.

**173: Report of police officer on completion of investigation.**

**(1) Every investigation under this Chapter shall be completed without unnecessary delay.**

**(1-A) The investigation in relation to rape of a child may be completed within 3 months from the date on which the information was recorded by the officer in charge of the police station.**

**(2) (i) as soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-**

...

Whilst the introduction of time-limits for completing investigation into the rape of a child is a welcome step, why has Parliament not thought it fit to specify time-limits for other categories of offences, including all warrant cases? Further, even under section 173 (1-A) the introduction of time-limits is weak: the provision uses the word “may” instead of “shall” and does not indicate what is to happen if the investigation is not completed within three months- is the investigation to be stopped? If not, what is the effect of the said provision? These aspects are not clear.

### **3.8 The right to speedy trial at the stage of taking cognizance**

After the police have forwarded their report to the court for taking further action against the accused, or upon receiving a complaint<sup>217</sup> directly, the

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<sup>217</sup>Under section 2 (d) *complaint* means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

court does not mechanically issue process to the accused. Here again, the law ensures that only if there is a *prima facie* case made out against the accused, the proceedings are continued. The Magistrate is required to apply his mind to the police report or complaint and the facts and circumstances of the case to see whether they disclose *prima facie*, the commission of an offence- he is thus required to take *cognizance* of the offence<sup>218</sup>. If there is any legal bar to criminal prosecution, then also the Magistrate cannot take cognizance<sup>219</sup>. If no *prima facie* case is made out, or if there is any legal bar to the prosecution, then the Magistrate may dismiss the complaint and refuse to take cognizance upon police report<sup>220</sup>. Thus, even at this stage, the criminal proceedings will quickly be terminated, avoiding harassment, delay and expense to the accused and the prosecution.

Significantly, Chapter XXXVI of the CrPC provides that no Court shall take cognizance of certain categories of offences, after the expiry of the period of limitation.

#### Section 467: Definitions

For the purposes of this Chapter, unless the context otherwise, requires, "period of limitation" means the period specified in section 468 for taking cognizance of an offence.

#### **Section 468: Bar to taking cognizance after lapse of the period of limitation**

**(1) Except as otherwise provided elsewhere in this Code, no court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.**

**(2) The period of limitation shall be-**

**(a) six months, if the offence is punishable with fine only;**

<sup>218</sup>Section 190 CrPC; Sections 203 and 204 CrpC. If no *prima facie* case is made out, then the Magistrate has to dismiss the complaint or reject the police report.

<sup>219</sup>For examples, see Chapter XIV CrPC

<sup>220</sup>*Ibid.*, note 217.

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

**Section 469: Commencement of the period of limitations**

(1) The period of limitation, in relation to an offender, shall commence, -

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded.

**Section 470: Exclusion of time in certain cases**

(1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a court of first instance or in a court of appeal or revision, against the offender, shall be excluded:

Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

**Explanation-** In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.

(4) In computing the period of limitation, the time during which the offender-  
(a) has been absent from the India or from any territory outside India which is under the administration of the Central Government, or  
(b) has avoided arrest by absconding or concealing himself, shall be excluded.

**Section 471: Exclusion of date on which court is closed**

Where the period of limitation expires on a day when the Court is closed, the Court may take cognizance on the day on which the Court reopens.

**Explanation-** A Court shall be deemed to be closed on any day within the meaning of this section, if, during its normal working hours, it remains closed on that day.

**Section 472: Continuing offence**

In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

**Section 473: Extension of period of limitation in certain cases**

Notwithstanding anything contained in the foregoing provisions of this Chapter, any court may make cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.(underlining supplied)

Chapter XXXVI prescribes periods of limitation only for smaller offences punishable by imprisonment of not more than three years. For all other offences, there is no limitation prescribed. Further, even for smaller offences, the court is empowered to take cognizance even after the lapse of the period of limitation if it is satisfied that delay has been properly explained or that it is necessary so to do in the interests of justice. Since Chapter XXXVI prescribes limitation for taking cognizance *by the court*, can the police authorities *investigate* even a time-barred offence with the hope that the limitation period will be extended? Such questions have been rendered redundant by the decision of the Supreme Court in *Japani Sahoo vs. Chandra Shekar Mohanty*.<sup>221</sup> In that case, a complaint was lodged against an Inspector of Police under sections 161, 294, 323 and 506 IPC on 05-02-1996, alleging that he had demanded money from the complainant and tried to extract money by misusing his authority, on 02-02-1996. The judicial magistrate examined the complainant and witnesses for several months and then took cognizance on 08-08-1997, when summons was issued to the accused. However, the accused preferred a petition under section 482 CrPC to the High Court, pointing out that by the time cognizance was taken, the limitation period of 1 year had already lapsed. The High Court quashed the order taking cognizance, on the ground of limitation. In the appeal before the Supreme Court, the Supreme Court relied upon its earlier decision in *Bharat Damodar Kale vs. State of Andhra Pradesh*<sup>222</sup> to hold that as per a cumulative reading of the provisions of Chapter XXXVI, it was clear that the limitation was *not for taking cognizance*, but *for the filing of the complaint*; the court is always empowered to take cognizance once a complaint has been lodged within the limitation period; mere taking of cognizance is an act of the court over which the prosecuting agency or complainant have no control; a complaint filed within time cannot be rendered infructuous by the act of the

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<sup>221</sup>(2007) 7 SCC 394

<sup>222</sup>2003(8) SCC 559

court- *actus auriæ neminem gravabit*- an act of the court shall prejudice no man; the legislature could not have intended otherwise. The order of the High Court was set aside.

The common-law approach in England has generally been prescribed in the maxim *nullum tempus occurrit regi*<sup>223</sup>: lapse of time does not bar the right of the Crown, which launches the prosecution in criminal matters, since a criminal offence is considered an injury caused not only to the victim, but also to society<sup>224</sup>. However, whilst introducing this Chapter<sup>225</sup>, the *Joint Committee of Parliament* in its Objects and Reasons held as follows<sup>226</sup>:

**These are new clauses prescribing periods of limitation on a graded scale for launching a criminal prosecution in certain cases. At present there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been prescribed for criminal prosecution in the laws of many countries and the Committee feels it will be desirable to prescribe such periods in the Code as recommended by the Law Commission.**

**Among the grounds in favour of prescribing the limitation the following may be mentioned:**

- 1. As time passes the testimony of witnesses become weaker and weaker because of lapse of memory and evidence becomes more and more uncertain with the result that the danger of error becomes greater.**
- 2. For the purpose of peace and repose it is necessary that an offender should not be kept under continuous apprehension that he may be prosecuted at any time particularly because with the multifarious laws**

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<sup>223</sup>Quoted in *Assistant Collector of Customs vs. LR Melwani* [AIR 1970 SC 962] & in *Japani Sahoo vs. Chandra Shekar Mohanty* [[2007] 7 SCC 394].

<sup>224</sup>*The Code of Criminal Procedure*, Ratanlal and Dhirajlal, 19<sup>th</sup> Edition, page 1969.

<sup>225</sup>In the year 1972.

<sup>226</sup>Report of the Joint Committee of Parliament dated 04-12-1972, pp. xxx, xxi

creating new offences many persons at some time or the other commit some crime or the other. People will have no peace of mind if there is no period of limitation even for petty offences.

3. The deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of the persons concerned.
4. The sense of social retribution which is one of the purposes of criminal law loses its edge after the expiry of a long period.
5. The period of limitation would put pressure on the organs of criminal prosecution to make every effort to ensure the detection and punishment of the crime quickly. The actual period of limitation provided for in the new clauses would, in the Committee's opinion be appropriate having regard to the gravity of the offences and other relevant factors.

### 3.9 The right to speedy trial at the stage of framing charges

Even after investigation is complete by the police, cognizance has been taken of the offence by the court and the proceedings are at the threshold of trial i.e., at the stage of the Sessions<sup>227</sup> Court framing charges against the accused, the law hesitates to subject the accused to a lengthy and tedious trial – if there is no *prima facie* evidence to sustain a conviction.

#### **Section 226: Opening case for prosecution**

**When the accused appears or is brought before the court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.**

#### **Section 227: Discharge**

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<sup>227</sup>The provisions are not identical insofar as trial before Sessions Courts and trial before Magistrates are concerned.

If, upon consideration of the record of the case and the documents submitted herewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

**228: Framing of charge**

**(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-**

**(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and 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 try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;**

**(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.**

**... Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.**

Under the above sections, the Prosecutor is required to initially state by what evidence he hopes to prove the guilt of the accused. Under section 227, upon consideration of the record of the case and the documents submitted therewith; and after hearing the submissions of the prosecution *and the accused* in this behalf, if the judge finds that there is no prima facie case, he should discharge the accused after recording his reasons for so doing. This is indeed a valuable provision for the accused to avoid lengthy trial and anguish where the prosecution case would not result in a conviction, in any

case. In *P. Vijayan vs. State of Kerala*<sup>228</sup> it was reiterated that this provision was introduced to avoid wastage of public time and also to save the accused from avoidable harassment and expenditure. The case of *Dilawar Balu Kurana vs. State of Maharashtra*<sup>229</sup> is instructive. The appellant was a lecturer in a college affiliated to a University in Kolhapur and was part of the University evaluation team. The prosecution alleged that a student had paid a bribe of Rs. 400/- which was accepted by the appellant for passing the student in a particular paper. After a delay of one week, the FIR was lodged by the Deputy Registrar of the University. Search by the police at the house of the appellant did not reveal anything. Ten months later, statements of witnesses were recorded by the police and charge-sheet was filed thereafter. Aggrieved, the appellant initially approached the High Court in a writ petition, but was directed to approach the trial court instead. The appellant filed an application before the trial court under section 227 CrPC, praying that he be discharged since no *prima facie* case was made out. This was rejected by the trial court and on revision, by the High Court as well. The Supreme Court however, allowed the appeal and quashed the prosecution against the appellant holding that no *prima facie* case had been made out: the FIR was filed belatedly, no incriminating articles had been found in the possession of the accused, the statements of witnesses were recorded after much delay of 10 months. It was reiterated that *the trial judge cannot act as mere post-office or mouth-piece of the prosecution*, but has to consider the broad probabilities of the case.

The question what would constitute a *prima facie* case at this stage and what test would determine the existence of a *prima facie* case has come up in several cases. In *Yogesh alias Sachin Jagdish Joshi vs. State of*

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<sup>228</sup>2010 (2) SCC 398

<sup>229</sup>2002(2) SCC 135

*Maharashtra*<sup>230</sup> it was held that there was no rule of universal application to determine whether a *prima facie* case was made out. If two views were possible, and if the evidence only gave rise to *suspicion* as opposed to *grave suspicion*, the trial judge would be fully within his rights to discharge the accused. The broad test to be applied was *whether the material on record, if unrebutted, make a conviction reasonably possible*. The issue came up again in *Amit Kapoor vs. Ramesh Chander*<sup>231</sup> before a Division Bench. An FIR was lodged by a person claiming that his mother had committed suicide due to the harassment of the accused. The suicide note written by the mother also blamed the accused for the suicide stating that his fraudulent financial transactions with her and his illegal occupation of her house had driven her to take this extreme step. Charges came to be framed under section 306 and 448 IPC. The accused preferred Criminal Revision to the High Court against the framing of charges, which was allowed in part. The complainant (son of the deceased) preferred an appeal to the Supreme Court contending *inter alia*, that the High Court had exceeded its revisional and inherent jurisdiction under sections 397 and 482 CrPC by interfering with the charges framed by the trial court. The Supreme Court allowed the appeal, thus allowing the prosecution to continue. It was held that under section 228 CrPC the presumption required is not a presumption of law as such- the satisfaction required may be *even weaker than the satisfaction of the existence of a prima facie case*; at the stage of framing charge, the Court was not concerned with proof but with the existence of a *strong suspicion*. The matter was again considered at length in *Central Bureau of Investigation vs. K. Narayana Rao*<sup>232</sup>. The CBI had registered an FIR against certain employees of Vijaya Bank alleging that they had abused their official positions as public servants and conspired with private individuals to defraud

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<sup>230</sup>2008(10) SCC 394

<sup>231</sup>2012(9) SCC 460

<sup>232</sup>2012 (9) SCC 512

the Bank by sanctioning and disbursing housing loans to 22 borrowers in violation of the Bank's rules and guidelines, thereby causing loss to the tune of Rs. 1.27 crores to the Bank. After completion of investigation, the CBI filed a charge-sheet in which the Respondent, a panel advocate of Vijaya Bank, was also arrayed as an accused. It was charged that it was his duty to verify the records and give legal opinion to the Bank; he had given false opinions to the Bank with regard to the housing loans. The Respondent filed a petition under section 482 CrPC before the High Court wherein the prosecution against him was quashed. The CBI preferred an appeal to the Supreme Court. Whilst dismissing the appeal on the ground that there was no tangible evidence to show that the advocate associated with the other conspirators, the Supreme Court looked at previous decisions under sections 227 and 228 CrPC in detail and laid down *inter alia*, the following principles:

- a. The judge while considering the framing of charges under section 227 has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out; the test to determine prima facie case would depend upon the facts and circumstances of each case;
- b. Where the materials placed before the Court disclose *grave suspicion* against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial;
- c. The Court *cannot act merely as a post-office or mouthpiece* of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc., but not as though it was conducting a trial;
- d. If on the basis of the material on record the court could form an opinion that the accused *might* have committed the offence, it can frame the charge, though for conviction the proof is required beyond reasonable doubt;

- e. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial judge can discharge the accused and at this stage, he is not to see whether the trial will end in conviction or not.

An aspect of section 227 where the Supreme Court appears to have faltered is with regard to the question whether any material *produced by the accused* at the stage of framing charges can be taken into account by the judge in exercising his powers. In *State of Orissa vs. Debendra Nath Padhi*<sup>233</sup> a reference was made to a three-judge bench on this question. It was argued for the accused that Article 21 of the Constitution mandates minimizing unnecessary harassment and delay to the accused as well as waste of court time and expenses and therefore, the Court is bound to take into account even material produced by the accused at this stage if the proceedings can come to a quick end. *Per contra*, it was argued that a mini-trial would result at the stage of framing charges, leading to more time being spent on the case. The Supreme Court unfortunately held that “record of the case” does not include the material or documents filed by the accused; only the material produced by the prosecution alone could be taken into account; the only right of the accused at this stage, was the right *to be heard*. Distinguishing *Minakshi Bala vs. Sudhir Kumar*<sup>234</sup> where the High Court had looked into unimpeachable evidence produced by the accused, the Supreme Court further held that a *High Court under section 482 CrPC* could consider the accused’s evidence to quash proceedings, but *not* the trial court under section 227. It is submitted that this decision is flawed. Would an accused, who has in his custody unimpeachable evidence that would acquit him, have to file a 482 petition to the High Court instead of simply bringing that evidence to the notice of the trial judge? Such an interpretation would defeat

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<sup>233</sup>2005(1) SCC 568

<sup>234</sup>1994(4) SCC 142

the object of section 227 by needlessly causing delay and harassment to the accused who has unimpeachable evidence in his custody and would run contrary to Article 21 which mandates speedy justice to the accused. In *Rukmini Narvekar vs. Vijaya Satardekar*<sup>235</sup> the Supreme Court tried to clarify *Debendra Nath Padhi* by holding that even though ordinarily, defense material cannot be looked into, there may be some *rare and exceptional case* where some defense material when shown to the court, *would convincingly demonstrate that the prosecution version is totally absurd or preposterous*; in such cases, defense material *can* be looked into at the time of framing charges. Unfortunately however, *Rukmini Narvekar* was decided by a smaller Bench of two judges hence, the law laid down in *Debendra Nath Padhi* would continue to hold the field.

Insofar as the trial of warrant cases by Magistrates instituted upon police reports are concerned, Section 239 contains provisions identical to section 237 enabling the discharge of the accused before framing charges, if there is no case made out against the accused:

**239: When accused shall be discharged.**

**If, upon considering 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 and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.**

**240: Framing of charge**

**(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate**

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<sup>235</sup>(2008) 14 SCC 1

is competent to try and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried. (underlining supplied)

### **3.10 The right to speedy trial at the trial stage**

Even after the prosecution evidence has been led, the law ensures that the proceedings are brought to a quick conclusion if no case is made out against the accused. He need not suffer the *entire* trial and produce evidence in rebuttal, if the prosecution itself fails to discharge its initial burden of establishing guilt. With regard to trials before the Sessions Courts, section 232 provides as follows:

#### **Section 232: Acquittal**

**If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the judge shall record an order of acquittal.**

#### **Section 233: Entering upon defence**

**(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.**

**(2) If the accused puts in any written statement, the Judge shall file it with the record.**

**(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is**

**made for the purpose of vexation or delay or for defeating the ends of justice.  
(underlining supplied)**

Thus, only if the prosecution succeeds in building up a case against the accused, he will be called upon to enter on his defence and produce evidence in support thereof.

A similar provision exists insofar as trial of warrant cases by Magistrates instituted otherwise than on police report are concerned:

**245: When accused shall be discharged**

**(1) If, upon taking all evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.**

**(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging he accused at any previous stage of the case if, for reasons to be recorded Magistrate, he considers the charge to be groundless.(underlining supplied)**

Under section 245 it is made clear that the discharge can take place *at any previous stage* of the case also.

Insofar as trial of summons cases by Magistrates instituted otherwise than on a complaint are concerned, section 258 provides that the Magistrate may stop the proceedings *at any stage*:

**258: Power to stop proceedings in certain cases**

**In any summons case 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. (underlining supplied)

Moving on now to section 309, this is arguably the most important provision that seeks to give effect to the right to speedy trial.

**309: Power to postpone or adjourn proceedings**

**(1) In every inquiry or trial the proceedings 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:**

**Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.**

**(2) If the court after taking cognizance of an offence, or commencement of 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:**

**Provided also that -**

- (a) No adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
- (b) The fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
- (c) 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.

**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. (underlining supplied)

The crucial aspect of section 309 is that it mandates continuance of the trial *from day-to-day i.e., not a single day is to be lost*, unless the court records reasons in writing for adjournment beyond the following day. In several cases, the Supreme Court has relied upon these words in section 309 to read the right to speedy trial into the Code and to hold that the right to speedy trial is *inherent* in our procedural law<sup>236</sup>. The Supreme Court has also been able to prescribe time-limits for conclusion of criminal proceedings, by relying upon section 309<sup>237</sup>. Unfortunately however, subsequent decisions of the Supreme Court have overruled cases mandating time-limits for conclusion of proceedings<sup>238</sup>. These cases will be examined at length in the next chapter.

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<sup>236</sup> See for example: A.R. Antulay vs. R.S. Nayak 1992(1) SCC 225.

<sup>237</sup> See *Raj Deo Sharma(I) vs. State of Bihar* 1998(7) SCC 507.

<sup>238</sup> *P. Ramachandra Rao vs. State of Karnataka* 2002(4) SCC 578.

The second aspect of section 309 that needs to be noted is that an express time-limit of 2 months from the date of charge-sheet has been mandated only for sexual offences under sections 376, 376A, 376B, and 376D of the IPC. Whilst this is to be welcomed, here again there are several lacunae. The wording used is that the trial shall be completed *as far as possible* within 2 months – thereby watering down the strictness of the time-limit. Further, one may ask: if time-limits could be laid down for sexual offences, why not for other categories of serious offences and indeed for *all* offences? Why is Parliament so hesitant to lay down time-limits for all categories of cases and also provide expressly for the remedies in cases of violation?

The third aspect of section 309 that deserves attention is the fact that the section seeks to regulate in a detailed manner, the grant of adjournments during trial, in order to minimize delay. The following rules are laid down:

- a. Adjournment can only be by *recording reasons* in writing; if witnesses are in attendance then *special* reasons have to be recorded.
- b. No adjournment is to be granted only for the purpose of enabling the accused to show cause against the sentence proposed to be imposed on him.
- c. Adjournments can be granted at the request of a party only if circumstances exist that are *beyond the control* of that party.
- d. The mere fact that the pleader of a party is engaged in another court is not sufficient ground.
- e. If witnesses are present, but the parties or their counsel are not present or willing to perform their tasks, the court can itself record their statements and dispense with examination or cross-examination.
- f. The court is empowered to impose costs for adjournments on the prosecution or the accused.

In spite of this meticulous regulation of adjournments during trial, it is axiomatic that adjournments are sought and granted routinely in criminal courts, with very little respect for these rules laid down by Parliament<sup>239</sup>. The fact that courts are overburdened with cases, creates a situation wherein adjournments are granted merely for the asking<sup>240</sup>. The Supreme Court has in fact come down heavily on trial judges who fail to abide by the mandate of section 309. In *State of UP vs. Nath Singh*<sup>241</sup> an appeal by Special Leave had been preferred by the State of UP against an order of acquittal. Nine persons had been charged for *inter alia*, murder and other offences. The prosecution case had been that these 9 persons had formed themselves into an unlawful assembly and armed with deadly weapons, had caused the murder of one person, as well as serious injuries to others. *PW1*, one Jiyawoo, who was a crucial eye-witness, had not been cross-examined for several days before the trial court by the defence, on one pretext or the other. On the day that he was absent, the trial judge closed the prosecution evidence and acquitted the accused on the ground of insufficient evidence after the matter had been pending for 5 years before the trial court and 45 dates had been taken. Reprimanding the trial court, *Thomas J.*, held that the trial court should have itself examined the witness. Noting the series of adjournments granted, it was held that once examination of witnesses has started, the court is bound to continue the trial from day-to-day especially if the witnesses are present, except if special reasons are recorded for adjournment. It was noted that trial courts commonly flout the said command with impunity. It was further pointed out that in the *Raj Deo Sharma* case, a time-frame had been laid down partly in consideration of the legislative mandate in section 309. In

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<sup>239</sup>In *N.G. Dastane vs. Shrikant S. Shivde* 2001(6) SCC 135 it was held that seeking repeated adjournments for examination of witnesses present in court would even amount to misconduct on the part of the advocates concerned.

<sup>240</sup> See for example the case of *Gurnaib Singh vs. State of Punjab* 2013(7) SCC 108

<sup>241</sup>2001(4) SCC 667

the instant case, it was held, miscarriage of justice had been occasioned due to the failure of the trial court to comply with the mandatory provisions of the CrPC. The appeal by the State was allowed. Again, in *Chief Enforcement Officer vs. Jairaj V. Java*<sup>242</sup> the trial court was directed to expedite trial in strict compliance with section 309 CrPC. Further, it was ordered that if the trial court wishes to depart from the procedure in section 309, it must obtain the permission of the High Court. In *Ambica Prasad vs. State (Delhi Administration)*<sup>243</sup> the Supreme Court noted that if the strict mandate of section 309 CrPC is followed, there is less chance of threatening or winning over witnesses. In the said case, the brother of the deceased, who had in fact lodged the FIR against the accused, turned hostile to the prosecution. Whilst his chief-examination was concluded on 06-02-1984, he was cross-examined only in July 1985, thereby giving ample time for witness manipulation. The court held that such adjournment was highly improper.

Yet another provision that assumes importance at the trial stage is to be found in section 437(6) which provides for the right to default bail before the Magistrate if trial of a person accused of a non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence in the case:

**Section 437: When bail may be taken in case of non-bailable offence**

...

**(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the**

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<sup>242</sup>2000(9) SCC 232

<sup>243</sup>2000(2) SCC 646

**satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. (underlining supplied)**

Section 437(6) is restricted in its effect by several aspects. First, it applies only to offences triable by Magistrates, not the more serious offences triable by Courts of Session. Second, it only provides for *bail*, no mention is made of release of the accused on personal bond without sureties, which would benefit the poor. Third, the Magistrate can nonetheless authorize further detention in writing. Fourth, it does not provide for stopping of the trial but only for the limited right to bail.

### **3.11 Set-off under section 428 CrPC**

The Code in section 428 provides that the period of detention undergone by an undertrial prisoner shall be set-off against any sentence of imprisonment that may ultimately be imposed upon him, on conviction. The question whether this is an appropriate remedy and issues relating to the different remedies that can be invoked for violation of the right to speedy trial, and their adequacy, shall be considered in later chapters.

### **3.12 Bail in appeal**

Section 389 provides for suspension of sentence and release of the appellant on bail, or on his personal bond<sup>244</sup>, before the appellate court. The lower court whilst convicting the accused can also release the accused on bail, to enable him to prefer an appeal – but only in the case

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<sup>244</sup> Generally, strong grounds have to be made out before the appellate court to obtain suspension of sentence and bail.

of bailable offences or where the sentence is for less than 3 years' imprisonment<sup>245</sup>. In *Kashmira Singh vs. State of Punjab*<sup>246</sup> it was held that where the appellate court is not able to hear the appeal of the accused within a reasonable time, it should normally release the accused on bail.

### 3.13 The right to bail under Chapter XXXIII CrPC

Sections 436 (bail in the case of bailable offences) section 437 (bail in the case of non-bailable offences) and section 439 (Special Powers of High Court or Sessions Court regarding bail) apply right from the stage of arrest of the person, but are considered here for the sake of convenience.

#### **Section 436: In what cases bail to be taken**

**(1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:**

**Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.**

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

**Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A.**

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<sup>245</sup>Section 389(3) CrPC

<sup>246</sup>1977(4) SCC 291

**(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446. (underlining supplied)**

Section 436 makes it clear that the arrested person has a right to bail where *bailable* offences are concerned, and if he is prepared to give the bail fixed by the police officer or the Court, he *shall* be released on bail. In *Rasiklal vs. Kishore*<sup>247</sup> it was reiterated that a person accused of a bailable offence has a right to claim bail as an *absolute and indefeasible right*.

Further, what is indeed noteworthy is that the section, as amended in 2006, makes it easy for the poor accused to obtain bail in bailable offences. Under the proviso to sub-clause (1), the police officer *may* and the Court *shall*, if the arrested person is indigent and unable to provide bail, release him on him executing a bond without sureties. The explanation to sub-clause (1) further provides that if a person is unable to give bail within a week of his arrest, the court or officer can presume that he is indigent. Thus, even the tedious process of proving indigence can be circumvented.

It is axiomatic that a large number of persons arrested and detained in our country belong to the poorest and weakest sections of society. As far back as in the year 1979, Justice Bhagwati had deprecated the existing system of bail in the country without mincing words, by pointing out the following aspects<sup>248</sup>:

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<sup>247</sup>2009 (4) SCC 446

<sup>248</sup>*Hussainara Khatoon (I) vs. Home Secretary Bihar*, 1980(1) SCC 81.

- (a) The bail system adopts a *property-oriented* approach which proceeds from the erroneous assumption that monetary loss is the only deterrent from fleeing from justice;
- (b) The existing system results in trial judges mechanically insisting on sureties, who have to be solvent- very often the poor will not be able to get such sureties;
- (c) Only the rich get the benefits of the existing bail system whilst the poor bear the brunt of the system;
- (d) The basic premise of the bail system is itself doubtful and further, it is virtually impossible to translate the risk of non-appearance into precise monetary terms;
- (e) There are in fact, several considerations that deter persons from fleeing from justice and monetary loss is not a very significant one;
- (f) The experience of enlightened bail projects like the *Manhattan Bail Project* and the *DC Bail Project* in the USA show that even without monetary bail it is possible to secure the presence of the accused at trial in a large number of cases;
- (g) Social justice being the signature tune of our Constitution, instead of focusing on monetary loss, other aspects such as family ties, roots in the community, job security, membership of stable organisations, etc., should be taken into account;
- (h) In suitable cases, the accused should be released on his personal bond without enquiring into his financial condition and without insisting on sureties.

Only in the year 2006, Parliament introduced the explanation into section 436(1) proviso providing for a *presumption of indigence* where the arrested person is unable to give bail within a week of his arrest. This is a welcome insertion which hopefully, would have the effect of reducing the numbers of poor incarcerated under-trials who are caught in the web of the criminal

justice system. What is unfortunate however, is that such release on the ground of indigence and presumption of indigence, is not made a part of sections 437 and 439 for *non-bailable*, ie, more serious offences. Why should this be so?

**Section 437: When bail may be taken in case of non-bailable offence**

**(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but-**

**(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;**

**(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:**

**Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:**

**Provided further that the court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:**

**Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court:**

**Provided also that no person shall, if the offence allege 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.**

**(2) If it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.**

**(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) 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 commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and**

**(c) 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.**

**(4) An officer or a court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.**

**(5) Any court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.**

**(6) If, in any case triable by a Magistrate, the trial of a person accused of any non bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.**

**(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered. (underlining supplied)**

The first aspect to be noticed about section 437 is that unlike section 436, there is no provision for releasing a person unable to give bail due to indigence. Even though sub-clause (2) empowers the court to release the accused on the execution of a bond without sureties, the onerous condition is imposed that that there are *not* reasonable grounds for believing that the accused has committed a non-bailable offence. Further, there is no presumption of indigence as in section 436. The same objections could be raised with regard to sub-clause (7) of section 437. This would imply that the onerous property-oriented bail system would continue to make life difficult for the poor who are accused of more serious non-bailable offences. The Law Commission of India in its *154<sup>th</sup> Report*<sup>249</sup> expressly approved the amendment of section 436 CrPC, providing for release without sureties and for the presumption of indigence with regard to bailable offences. But why the Commission stopped there without suggesting similar amendments to section 437 also, is curious. After all, if a man's poverty should not result in imprisonment for a bailable offence, why should a man's poverty result in imprisonment for a non-bailable offence? Merely because the offence is

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<sup>249</sup>Para 8.4, *154<sup>th</sup> Report on the Code of Criminal Procedure, 1973* (1996).

more serious, can his poverty be held against him, once the court has decided to grant bail? What logic is there in the differentiation?<sup>250</sup>

Secondly, the section confers authority on the police and courts (other than the Sessions Courts or High Court) to grant bail- but imposes some restrictions on the discretion to be exercised by the trial courts:

- (a) The arrested person shall not be released if there are reasonable grounds for believing he is guilty of an offence punishable with death or life imprisonment<sup>251</sup>;
- (b) The arrested person shall not be released if the offence is cognizable and he has been previously convicted of an offence punishable with imprisonment for 7 or more years, life imprisonment or death or has been previously convicted on two or more occasions for cognizable offences punishable with imprisonment for three or more years, but not less than seven years<sup>252</sup>;
- (c) An opportunity of hearing shall be given to the Public Prosecutor if the offence alleged is punishable by imprisonment of 7 or more years, life imprisonment or death;
- (d) Conditions would be imposed on the grant of bail<sup>253</sup>; and,
- (e) The police officer or court is required to record reasons or special reasons for release, in writing.

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<sup>250</sup>The 78<sup>th</sup> Report of the Law Commission of India had also gone into the question of release on personal bond without sureties. In paras 6.1 to 6.4 of its report, it held that there was a need to widen the scope of the power to release on personal bond without sureties since a large number of under-trials are unable to secure their release because of inability to find sureties, due to poverty. It was recommended that under section 436 CrPC if a person cannot furnish sureties within a month of arrest, that should constitute a fit case for release on the presumption that he was unable to find sureties; however with regard to section 437 it was curiously held that the officer or court should have the discretion to order release on personal bond without sureties- but there was no need for any presumption of indigence.

<sup>251</sup>However, the proviso shows some leniency for persons under 16 years, women, the sick and infirm.

<sup>252</sup>Ibid. The proviso permits the court to grant bail if there are *special* reasons. Further, the mere fact that the accused might be required for identification is not sufficient to refuse bail.

<sup>253</sup>For the offences specified in Clause (3) of section 437.

Under section 439 however, which speaks of the *special* powers of the High Court and Court of Session regarding bail, the power to grant bail is much wider and not fettered by so many conditions.

**Section 439: Special powers of High Court or Court of Session regarding bail**

**(1) A High Court or Court of Session may direct-**

**(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;**

**(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:**

**Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.**

**(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody. (underlining supplied)**

Here again, we see that the beneficial provisions introduced in section 436 regarding release of an indigent where he is unable to furnish bail on his personal bond, and the presumption of indigence, are not made a part of section 439. The Law Commission in its 78<sup>th</sup> *Report on Congestion of Undertrial Prisoners in Jails* had recommended that after the word "bail" the words "or on bond without sureties" should be inserted in section 439- but this was not done.<sup>254</sup>

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<sup>254</sup>The Commission had also recommended that the references to bail in the CrPC should include release on a bond without sureties. Para 6.7. Arguably, the wording of section 439 is

In spite of the fact that the conditions imposed under section 437 for grant of bail by the lower courts are not made applicable to the Court of Session or High Court under section 439, in many cases the Supreme Court has nonetheless read these conditions into section 439. In *Ram Prakash Pandey vs. State of UP*<sup>255</sup> the appellant before the Supreme Court was the husband of the deceased. His wife had given evidence against the accused Respondent No. 2 as an eye-witness in another case, leading to conviction and life imprisonment for the Respondent no. 2. The accused had been out on bail by filing an appeal against his conviction. Subsequently, the accused murdered the wife of the appellant as well. FIR was lodged by the appellant on the same day. The Sessions Court rejected the application for bail filed by the accused. The accused then approached the High Court for bail- which was granted in a cursory manner, under section 439. In the appeal by the husband challenging the grant of bail, the Supreme Court set aside the order of the High Court. It was held that the High Court had ignored the provisions of section 437 (1) (ii) CrPC and had failed to give special reasons for release on bail. Similarly, in *Ram Pratap Yadav vs. Mitra Sen Yadav*<sup>256</sup> the accused had suffered an earlier conviction under section 302 IPC and had been released on remission of sentence. Nineteen other crimes had been registered against him. The Sessions Court rejected his application for bail, whereupon the accused moved the High Court and obtained bail vide an order with just one sentence: "it is a fit case for bail". On appeal by the State and the complainant, the Supreme Court was confronted with the issue whether section 439 was fettered by section 437 CrPC. Without going into that question, the Supreme Court held that irrespective of the answer to that question, previous conviction for a serious offence is a relevant factor to be

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wide enough to cover release on personal bond as well. But the presumption of indigence found in section 436 is still not made a part of section 439.

<sup>255</sup>2001(9) SCC 121

<sup>256</sup>2003(1) SCC 15

taken into consideration and a factor that should be consciously referred to by the High Court in the matter of bail. The High Court had failed to refer to the reasons given by the Sessions Court. In the circumstances, the appeal was allowed and the grant of bail set aside. Such cases<sup>257</sup> show that merely because section 439 does not expressly impose any fetters on the discretion of the higher courts in the exercise of their discretion to grant bail, the conditions in section 437 will nonetheless be taken into account to determine whether the higher courts have exercised their discretion judiciously.

In practice, the existence of concurrent jurisdictions for consideration of bail applications of the trial court, Court of Session and High Court is advantageous to the *well-to-do* accused who can afford to approach multiple courts, trying his luck in the next court, if he fails to get bail in the first.

The other factors to be taken into account by the Sessions Court and High Court in exercising their powers to grant bail are well-settled in several cases<sup>258</sup> and include:

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<sup>257</sup>See also *Kalyan Chandra Sarkar vs. Rajesh Ranjan* (2004) 7 SCC 528 where it was held that the conditions in section 437 are a *sine qua non* for grant of bail under section 439 as well.

<sup>258</sup>See for example *Prahlad Singh Bhati vs. NCT Delhi* (2001) 4 SCC 280. The 154<sup>th</sup> Report of the Law Commission of India on the Code of Criminal Procedure, 1973, cited the factors to be taken into account by the court (as per *Superintendent and Remembrancer of Legal Affairs vs. Kumar Roy Choudhury* [1974 (78) Cal WN 320] with regard to grant of bail in non-bailable offences as follows: (a) the enormity of the charge; (b) the nature of the accusation; (c) the severity of the punishment which conviction would entail; (d) the nature of the evidence in support of the accusation; (e) the danger of the accused absconding if released on bail; (f) the danger of witnesses being tampered with; (g) the protracted nature of the trial; (h) the opportunity to the accused to prepare his defense and access to counsel; (i) the health, age and sex of the accused; (j) the nature and gravity of the circumstances in which the offence is committed; (k) the position and status of the accused with reference to the victim and the witnesses and (l) the probability of the accused committing more offences if released on bail, etc. These factors would not be exhaustive; factors such as previous convictions, criminal records of the accused, etc., would also be taken into account.

- a. Whether there are any *prima facie* or reasonable grounds to believe that the accused has committed the offence alleged;
- b. Nature and gravity of the offences alleged;
- c. Severity of the punishment in case of conviction;
- d. Danger of the accused absconding or fleeing from justice;
- e. Character, behavior, means, position and standing of the accused;
- f. Likelihood of the offence being repeated;
- g. Apprehension of witnesses or evidence being tampered with; and,
- h. Previous criminal record of the accused.

Sections 440 to 450 of Chapter XXXIII lay down the details of the property-oriented regime of bail:

- a. The amount of bond should not be excessive (section 440);
- b. Where the release is on bail, *solvent* sureties are required, the court may thus hold an enquiry to determine whether the sureties are fit and sufficient (section 441);
- c. The court has the power to make further orders where insufficient sureties have been accepted through mistake, fraud or otherwise (section 443);
- d. If any surety applies for discharge and is discharged, the court may again arrest the accused to provide further sureties (section 444);
- e. If a bond given by the accused or a surety is forfeited the court will direct payment of penalty and recover the same as a fine; if the recovery cannot be effected, the surety may be liable to imprisonment in civil jail for up to 6 months (section 446).

### 3.14 Anticipatory bail under section 438 CrPC

Even before being arrested, a person who *apprehends* that he may be arrested can seek anticipatory bail from the Court of Session or High Court for a direction that in the event of arrest, he shall be released on bail.

In *Siddharam Satlingappa Mhetre vs. State of Maharashtra*<sup>259</sup> the Supreme Court used its eloquence to extol the virtues of anticipatory bail, seen to ensure personal liberty to the citizen. The appellant was a politician of the Congress party and the accused in an FIR lodged by his rival BJP candidate. The allegation was that the supporters of the accused had used violence by firing pistols to kill the rival BJP candidate, resulting in the death of one person and the assault of several others. Even though the High Court had rejected the application for anticipatory bail, the Supreme Court surprisingly set aside the order of the High Court and granted anticipatory bail to the accused, in spite of the serious nature of the allegations. The rhetoric of the Supreme Court included *inter alia*, reference to the fact that a large number of under-trials are languishing in jails<sup>260</sup>.

This decision is not very appreciable. Indeed, in a large number of cases it has been reiterated that anticipatory bail is *extraordinary*<sup>261</sup>. The reasoning that a large number of under-trials are incarcerated due to non-use of section 438 is also not *logical*. In reality, the provision relating to anticipatory bail privileges only the persons who are able to *afford* it: the privileged classes<sup>262</sup>.

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<sup>259</sup>2011(1) SCC 694

<sup>260</sup>Para 85.

<sup>261</sup> See for example *State of M.P. vs. Pradeep Sharma* 2014(2) SCC 171.

<sup>262</sup> This has been accepted by the Law Commission of India in its 154<sup>th</sup> Report, Paras 15 and 18 as well as by the *Committee for the Reforms of the Criminal Justice System*, March 2003, para 7.33 of the Report.

### 3.15 Section 436A and the right to bail

The most important recent amendment to the CrPC with regard to the right to bail is the introduction of section 436A by Act 25 of 2005<sup>263</sup>. In several earlier decisions, the Supreme Court had advocated the right to bail where the accused had been in detention for ½ the maximum period of imprisonment prescribed for the offence<sup>264</sup>. Taking cue from these judgments, section 436A provides as follows:

**436 A: Maximum period for which an undertrial prisoner can be detained**

**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, order the continued detention of such person for a 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.(underlining supplied)**

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<sup>263</sup>With effect from 23-06-2006.

<sup>264</sup> See para 4.7.

This is indeed a momentous amendment, which has the potential to free large numbers of poor undertrials who hitherto had been trapped in the property-oriented bail system. Where the undertrial has undergone ½ the maximum period of imprisonment specified for that offence, he *shall* be released *on his personal bond with or without sureties*. Thus, bail is not to be insisted upon- a personal bond is enough. Further, there need not be any sureties. However, this right does not inure to a person accused of an offence punishable with death. Further, the Court can still, after hearing the Public Prosecutor and recording reasons in writing, insist on bail or order further detention. But this detention cannot in any event, exceed the maximum period of punishment for the offence alleged.

Whilst section 436A has undoubtedly strengthened the right to bail, it is to be noted that studies by *CHRI* indicate that the provision is not yet being enforced effectively. Prison officials are as yet unaware and unsure of these provisions and the poor accused are not even able to get this right enforced in their favour by making the requisite applications for bail under this section<sup>265</sup>. Further, since a large number of incarcerated under-trials are accused of heinous offences punishable with death, such as murder, this section may bring little relief to them.

### **3.16 Further critique of the CrPC's approach to bail: the question of bail reform**

With regard to the right to bail, it is seen that sections 436, 437 and 439 CrPC provide for *regular* bail, i.e., bail upon consideration on merits, whilst sections 57, 167, 436A and 437(6) provide for *default* bail, i.e., bail due to the

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<sup>265</sup> *Pre-Trial Detention and Access to Justice in Orissa*, Priti Bharadwaj, 2010, CHRI, Chapter 3, page 13.

lapse of the time-limits prescribed. Even though it is commendable that default bail has been provided at different stages of the criminal process to protect the liberty of the individual, default bail has been qualified by various pre-conditions and the courts are authorized to *nonetheless* continue the detention of the accused in spite of the lapse of the time-limits prescribed for detention. Thus, large numbers of under-trials may continue to be incarcerated.

Whilst it is notable that Parliament introduced provisions for release on bond without sureties in sections 436 and 436A, and the presumption of indigence in section 436, similar insertions have not been made in the other provisions relating to bail. Consequently, the old property-oriented regime of bail continues, in spite of our Constitutional ethos of social justice, judicial exhortations to bring about radical changes to the existing bail system and in the face of the fact that India's jails mostly incarcerate people from the poorest strata of society. Some changes have been made in the system- but have we gone far enough?

Indian criminal procedure *does* appreciate the plight of the indigent and the poor<sup>266</sup>. For example, the right to free legal aid to the accused is a constitutional right. The Supreme Court in *Sukh Das vs. Union Territory of Andhra Pradesh*<sup>267</sup> and other cases recognized this right as flowing from Article 21. It has been held that free legal aid is essential for the reasonable, just and fair procedure envisaged under Article 21. Failure to provide free legal aid would vitiate the trial<sup>268</sup>. This constitutional right has been enshrined

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<sup>266</sup>See *Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*, Volume 1, Number 1, Fall 1974, 9 Val. UL Rev. (1974) Valparaiso University Law Review, where in the US context it is argued that the indigent's rights in the criminal process have been recognized.

<sup>267</sup>1986 AIR SC 991

<sup>268</sup>Every accused should be defended by a lawyer. *Sheela Barse vs. State of Maharashtra* AIR 1983 SC 378. In *Hussainara Khatoon (4) vs. Home Secretary, Bihar* [(1980) 1 SCC 98],

in sections 303 and 304 of the Code of Criminal Procedure, 1973. The Legal Services Authority Act, 1987, has also been promulgated by Parliament to further give effect to the right to free legal aid. Under section 12 of the Act, every person who has to file or defend a case shall be entitled to free legal aid if that person has an annual income less than the minimum fixed under the Act. Under section 13, the mere affidavit of the person concerned regarding his income, may suffice for the purposes of entitlement. Of course, the fact that the legal aid system in reality might be in shambles and largely ineffective,<sup>269</sup> is another matter. In terms of legal doctrine, the position of the indigent or poor is recognized. Why then should the law treat the poor badly when it comes to the question of bail?

The Law Commission of India in its 154<sup>th</sup> *Report on the Code of Criminal Procedure 1973*, (1996) pointed out that the existing system of bail discriminates against the poor,<sup>270</sup> and endorsed the view that a liberal policy 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 poorer and weaker sections of the community get justice under law. But, whilst advocating amendment to section 436, it did not go further and recommend similar amendments to section 437 and 439 also.

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the right to free legal aid was reiterated. "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side..." *MH Hoskot vs. State of Maharashtra* [ 1978 (3) SCC 544]. See also *Gideon vs. Wainwright* [(1978) 3 SCC 544].

<sup>269</sup>*Pre-Trial Detention and Access to Justice in Orissa*, Priti Bharadwaj, 2010, CHRI, Chapter 5.

<sup>270</sup>Chapter 6, para 8.1 to para 8.5.

A foray into the discourse on bail reform being conducted in the United States and other countries would be helpful at this stage. *Ryan*<sup>271</sup> points out that the modern system of bail was developed in England. The sheriff who was responsible for the prisoners personally, had the power to release the accused to the custody of a third party. If the accused then failed to appear, the 3<sup>rd</sup> party would be subjected to the punishment due to the accused. As time passed, the 3<sup>rd</sup> party was permitted to promise that he would forfeit some stated amount of property, rather than his freedom, if the accused did not appear at the trial. Thus, the bail system evolved from a hostage arrangement into a surety arrangement. Soon thereafter, the courts took over the sheriff's powers. *Ryan* further points out that in the United States, because of the broad frontiers and mobile population, the private surety was not feasible since the accused was often a new arrival in the locality. The commercial bail bondsman arose instead<sup>272</sup>. *Ryan* points out that the intrinsic fault in the US system of bail is that it demands that money be paid for release- this obviously discriminates against the poor. He further points out that the question whether such a bail system is constitutionally permissible since it denies equal protection – has not yet been answered by the US Supreme Court- but if the occasion arose, the Supreme Court may well hold such a system impermissible. Would our Indian Supreme Court hold the present system of bail in violation of Article 14<sup>273</sup>?

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<sup>271</sup>*Last Days of Bail*, John V. Ryan, *Journal of Criminal Law and Criminology*, Volume 58, Issue 4, Article 9 (1968).

<sup>272</sup>This would appear to be generally impermissible in India since section 441A CrPC requires a declaration from the surety as to the number of persons for whom he is the surety. Obviously, if the surety is doing business in this manner, the court may not accept his assurance.

<sup>273</sup>The researcher has not encountered any case where the entire system has been challenged as violating Article 14. The closest the Indian Supreme Court seems to have come is in the case of *Hussainara Khatoon vs. State of Bihar* [1980(1) SCC 81] where Justice Bhagwati condemned the existing bail system in no uncertain terms, but did not hold it unconstitutional.

*Schnacke*<sup>274</sup> points out that detention purely because the accused has failed to provide money/security is unnecessary because:

- (a) Other less-restrictive alternatives to money are available;
- (b) Money itself can never serve as a deterrent until it is actually paid- until then, it only serves to detain, that too unequally;
- (c) Demanding money for release is doctrinally impermissible under several theories of law;
- (d) No study has yet shown that monetary obligation can really serve any purpose by ensuring the presence of the accused or by preventing his misconduct;
- (e) Studies such as the *Manhattan Bail Project* show that it is possible to do away with a monetary system and yet ensure high levels of court appearance and public safety;
- (f) Pre-trial detention imposes wasteful costs.

He further argues that the present system of monetary bail suffers from two central problems: (a) it tends to cause unnecessary incarceration of those who cannot afford bail and (b) it tends to allow, and sometimes to foster, the release of high-risk accused who can afford bail.

*Schnacke's* compelling argument is that pre-trial detention and release has always been concerned with *managing risk*: the risk that an accused would abscond or commit further crimes, etc., versus the need to maximize the liberty of individuals caught up in the system. If America were a risk-averse society, then all the accused would be detained until completion of trial. However, that is not done- because American society is based on *liberty*, and therefore it allows for risk in criminal justice and bail. Notions of equality, freedom, and the rule of law demand that we embrace risk and err on the side of release when considering the right to

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<sup>274</sup> *NIC-Fundamentals of Bail, A resource guide for pre-trial practitioners and a framework for American pre-trial reform*, Timothy R. Schnacke, 2014.

bail. Sir William Blackstone wrote: "It is better that ten guilty persons escape than that one innocent suffers."<sup>275</sup> The American system of justice- one of limited government powers, fundamental human rights protected by the Constitution, Defendants cloaked with the presumption of innocence, and increasingly arduous evidentiary hurdles designed to ensure that only the guilty suffer punishment at the hands of the State – inevitably require the acceptance of risk during bail as fundamental and essential to American democracy<sup>276</sup>. Would not the thesis hold for Indian society as well, given that we have inherited our entire judicial system from the Anglo-Saxon model and have nurtured it on the same lines<sup>277</sup>?

It would be instructive to look at in more detail, some innovative approaches to the issue of pre-trial release. The *Manhattan Bail Project*<sup>278</sup> was conducted between 1961-1964, in New York City. Each year almost 60,000 accused were being incarcerated in jails prior to trials, often for minor crimes, because they were unable to pay their bail bonds; New York City administrators had long been exasperated by the costs of detention; under the project initiated by the Vera Institute of Justice, law students interviewed the accused and investigated their backgrounds, families, jobs, residences and prior records; when the accused appeared to have sufficient roots in the community, the students recommended the release of the person without bail, to the judges; the courts co-operated with the project and accordingly released several thousand accused without bail being demanded. Within the 3 years that the project was

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<sup>275</sup> *Commentaries on the Laws of England*, Sir William Blackstone, Book 4, ch.27, Oxford 1765-1769.

<sup>276</sup> Schnacke further points out that there have been three generations of bail reform in the USA.

<sup>277</sup> In addition to preserving the judicial system inherited from England our courts still refer to and respect US and British precedents.

<sup>278</sup> *Experiments in the Criminal Justice System*, Herbert Sturz, Volume 24, No. 1 (Oct 2011) pp 4-7, Federal Sentencing Reporter, University of California Press, on behalf of Vera Institute of Justice.

conducted, 3,505 persons were released without any insistence on bail- and only 56 failed to return to court. Thus, the hypothesis that poor people selected for their community ties could safely be released on their own word was put to a test and proved correct. In September 1964 the New York City Probation Department took over the program and extended it to the criminal courts in all five boroughs of the city. Since then, some 25,000 accused are stated to have been released<sup>279</sup>. The *Manhattan Bail Project* is supposed to have spurred the creation of similar programs in more than 100 other jurisdictions within the USA<sup>280</sup>. Many of its features were incorporated into the Federal Bail Reforms Act of 1966<sup>281</sup>.

Such innovative approaches question the very basic premise underlying the notion of bail- whether money or financial assurance really serves any useful purpose in securing the presence of the accused and ensuring his good conduct, and answer this question in the negative. In England and Wales, where the average length of pre-trial detention is 13 weeks,<sup>282</sup> there is a presumption in favour of releasing the Defendant pending trial, subject to certain exceptions<sup>283</sup>. Various alternatives exist to the monetary bail system:

- (a) The accused can be restricted from entering certain localities, places, etc.;

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<sup>279</sup>Ibid.

<sup>280</sup>Ibid.

<sup>281</sup>Ibid. *The Manhattan Bail Project* was followed by the *Manhattan Summons Project* where the same principle was incorporated at the stage of arrest itself. Only 3.5% of the persons released without arrest failed to appear in court. Ibid. in December 1966 the police extended the program to all 23 precincts in Manhattan. Ibid.

<sup>282</sup>*Pre-Trial Detention Comparative Research*, Fair Trials International, [http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix\\_2\\_comparative\\_research\\_en.pdf](http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix_2_comparative_research_en.pdf).

<sup>283</sup>Section 4 of the Bail Act, 1976, and Schedule 1 to the Act, Ibid.

- (b) The accused can be required to remain at specified places at specified times;
- (c) The right of the accused to leave the country can be restricted;
- (d) Reporting requirements can be imposed;
- (e) The accused can be directed to avoid contact with specific persons;
- (f) The accused can be directed not to engage in certain activities, including working in a specific area;
- (g) The accused can be prohibited from driving any vehicle;
- (h) The accused can be obliged to wear an electronic tag;
- (i) Directions can be issued to subject the accused to treatment for drug addiction, etc.<sup>284</sup>

In France, house arrest can be an alternative to jail incarceration<sup>285</sup>. Pre-trial detainees are held in a prison specially designed for persons awaiting trial. Further, a pre-trial detainee who is finally acquitted is entitled to be compensated for his material losses<sup>286</sup>. In Germany the pre-trial detainee if acquitted, is entitled to compensation at the rate of 25 Euros per day of pre-trial detention<sup>287</sup>. *Wiseman*<sup>288</sup> argues that electronic monitoring presents a superior alternative to monetary bail.

One could thus conclude that India is yet to take advantage of approaches in other jurisdictions and move away from its Victorian legacy of property-oriented bail. No person should remain in jail solely due to the inability to provide bail.

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<sup>284</sup>Ibid, note 281.

<sup>285</sup>*Pre-Trial Detention Comparative Research, Fair Trials International*, [http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix\\_2\\_comparative\\_research\\_en.pdf](http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix_2_comparative_research_en.pdf).

<sup>286</sup>Ibid.

<sup>287</sup>Ibid.

<sup>288</sup>*Pre-trial Detention and the Right to be Monitored*, Samuel R. Wiseman, <http://www.yalelawjournal.org/essay/pretrial-detention-and-the-right-to-be-monitored-Essay>.

### 3.17 Further critique of the CrPC's approach to time-limits

Insofar as the right to speedy trial *de hors* the right to bail is concerned, at the **arrest stage** section 57 mandates that the accused shall be produced before the Magistrate within 24 hours from the time of his arrest. At the **investigation stage** Section 167(5) provides for stopping investigations that have not been concluded within 6 months. However, the time-limit only applies to summons-cases triable by Magistrates and the time-limit is further watered down by the fact that the Magistrate or Sessions Judge can nonetheless permit the investigation to continue. Section 173 provides weakly, that the investigation into the rape of a child *may* be completed within 3 months. At the **trial stage**, section 309 sets a 2-month time-limit only for the trial of sexual offences, to be adhered to "as far as possible". This delicate injunction does not even apply to all cases. Thus, the CrPC is quite weak in advocating time-limits for conclusion of trials. It is no wonder therefore, that the judiciary has had to read time-limits *into* the provisions in several cases. These cases will be considered in the next chapter. The Law Commission of India has approved and advocated the setting of time-limits for conclusion of trials<sup>289</sup>- but this has not been heeded by the law-makers.

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<sup>289</sup> The first Law Commission was of the opinion that it was possible to lay down time-limits for judicial proceedings- noted by the *124th Report of the Law Commission of India: The High Court Arrears- A Fresh Look 1988*, para 2.2. In the *154th Report of the Law Commission*, Chapter 6, para 12, directions of the Supreme Court in *Common Cause vs. Union of India* [(1996) 4 SCALE 129] setting time-limits for grant of bail were approved. See also the *14th Report on Reform of Judicial Administration*, para 54; the *78th Report on Congestion of Under-Trial Prisoners in Jails*, February 1979, para 3.7; *79th Report on Delay and Arrears in High Courts and other appellate courts*, May 1979, para 1.37; *77th Report on Delay and Arrears in Trial Courts*, November 1978, para 1.10; *245th Report on Arrears and Backlog: Creating Additional (Wo)manpower*, Chapter 2.

*De hors* the question of time-limits, we see that the CrPC is indeed quite sturdy in providing for quick termination of proceedings where an adequate case is not made out against the accused, at every stage of the criminal process. However, the Supreme Court has faltered in some areas, in failing to provide interpretations that minimize delay and bring proceedings to a close.