-Dr. Ajay Nathani

Bail and not jail

"The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like"

-Justice Krishna Iyer
State Of Rajasthan vs Balchand AIR1977 SC 2447

Basic rule for grant of bail underlined by the iconic judge and followed overwhelmingly in many cases by Hon'ble Supreme Court and Hon'ble High Courts cannot be defeated in any democratic country, the Constitution of which enshrines in its right to liberty and right to freedom as its core fundamental rights. It seems that provisions of Recent legislations and precedents under these newly legislated laws are not properly assimilated by the stakeholders in the trial Court judiciary and therefore there is a need to take a fresh look at the provisions of law governing bail and the precedents interpreting these provisions.

Liberty

Before considering the provisions of bail it would be appropriate to consider the provisions regarding the status of criminal trial which gives rise to the situation when a person has to come before the Court to protect his liberty. It is also necessary to understand the meaning of the word "liberty" as used in article 19 and article 21 of the Constitution of India. The concept of liberty in the pretext of Indian Constitution and Indian judicial system is explained by Hon'ble Supreme Court by taking recourse to the definition of liberty by ancient jurists and the development of law in this regard by decisions of the Supreme Court in the case of **Sidhram vs State of Maharashtra criminal appeal No. 2271 of 2010**. Hon'ble justice Dalvir Bhandari on behalf of the Court observed,

"43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

45. It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three

factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

46. "Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill viewed that "all restraint", qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and freedom is:

"Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

47. It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on "Essays on Freedom and Power" wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise "War and Civil Liberties" observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the

State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in "Liberty in the Modern State" observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."

54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed:

"By personal freedom I mean freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".

Right to life and personal liberty under the Constitution

58. We deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of life and liberty. The said Article reads as under: -

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

the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. *Right to life*
2 *Right to personal liberty.*

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of A. K. Gopalan v. The State of Madras, AIR 1950 SC 27. The expression `personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of `personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that `Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. `Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the generally accepted connotation of the expression `personal liberty', it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to `personal liberty'. This court excluded certain varieties of rights, as separately mentioned in Article 19, from the purview of `personal liberty' guaranteed by Art. 21.

64. In Kharak Singh v. State of U.P. and Others AIR 1963 SC 1295, Subba Rao, J. defined `personal liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure.

The court held that `personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In Maneka Gandhi v. Union of India and Another (1978) 1 SCC 248, this court expanded the scope of the expression `personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression `personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: "The expression `personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." So, the phrase `personal liberty' is very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article

66. Right to life is one of the basic humans right and not even the State has the authority to violate that right. [State of A.P. v. Challa Ramakrishna Reddy and Others (2000) 5 SCC 712].

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [Kartar Singh v. State of Punjab and Others (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression "personal liberty" in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the "personal liberties" or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in A.K. Gopalan (supra). But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus, protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [P.Rathinam/Nagbhusan Patnaik v. Union of India and Another (1994) 3 SCC 394.]

71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible, to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths

than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Others (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, this court has made following observations:

"..... The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomized and the common run discriminated against regarding handcuffs. The provisions in para 26.22 that every under-trial who is accused of a non-bailable offence punishable with more than 3 years prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21. The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. ... Handcuffs are not summary punishment vicariously imposed at police level, at once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under-

trial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under-trial custody is thus contrary to the unedifying escort practice. (Para 31) Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuff shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorities' stringent deprivation of life and liberty. (Para 30) It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safekeeping. (Para 23) Whether handcuffs or other restraint should be imposed on a prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing supervisory regime over the exercise of that

power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for, imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control."

90. European Convention on Human Rights, 1950. - This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading `Introduction to the doctrine of "arrest" has described as follows:

"Liberty is the most precious of all the human rights". It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, "one realizes the value of liberty only when he is deprived of it." Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres."

The well-researched observations of the Hon'ble Supreme Court are sufficient to clear our minds as to what is the definition of liberty and why it is necessary to protect personal liberty of individual and what aspects of due process of law should be followed while passing the orders for taking away liberty. The judgement further deals with the aspects of the pre-arrest bail, which I will deal in latter part of the article.

Arrest

The procedure for the trial of Penal offences even in imperial period when there was no Constitution had taken care of the aspect that it is not always necessary to arrest the accused on the allegations of committing an offence punishable under the penal code or any other law. The code of criminal procedure legislated in the year 1898 classifies the offences under the Indian penal code and other laws as cognizable and non-cognizable offences. The person alleged to have committed non-cognizable offence cannot be arrested by the police officer without procuring a warrant of arrest from the magistrate. The classification is broadly based upon seriousness of the offence on the basis of punishment prescribed. Broadly the offences punishable for more than 3 years of imprisonment are considered cognizable offences. Powers of arrest of a police officer defined under section 41 of the Code of Criminal Procedure are as under,

41. *When police may arrest without warrant.*

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house- breaking; or
(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
(h) who, being a released convict, commits a breach of any rule made under sub- section (5) of section 356; or
(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.
(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.

Opening words of section 41 specify "police may arrest" which itself indicates that in every case falling under section 41 it is not necessary for the police to arrest. Hon'ble Supreme Court while interpreting provisions in the case of **Arnesh Kumar vs State of Bihar & Anr** Criminal Appeal No. 1277 OF 2014 and while considering the issue whether it is always necessary to arrest an accused if report is received regarding commission of cognizable offence Hon'ble Supreme Court found that the process is not automatic and the embarrassment and in infamy brought by the arrest shall be avoided by properly following provisions of section 41 and 41A of the Code of Criminal Procedure. Their Lordships issued following guidelines,

"Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police have not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.PC), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Cr.PC which is relevant for the purpose reads as follows:

"41. When police may arrest without warrant. -(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person –

(a)x x x x x x

(b)against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely: -

(i) x x x x x

(ii) the police officer is satisfied that such arrest is necessary – to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or to prevent such person from making 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 the police officer; or as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

X x x x x x from a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer

only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses

(a) to (e) of clause (1) of Section 41 of Cr.PC.

An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57, Cr. PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorized by the Magistrate in exercise of power under Section 167 Cr.PC. The power to authorize detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorized in a routine, casual and cavalier manner. Before a Magistrate authorizes detention under Section 167, Cr.PC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorize his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under Section 41 Cr.PC has been satisfied and it is only thereafter that he will authorize the detention of an accused. The Magistrate before authorizing detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorizing the detention and only after recording its satisfaction in writing that the Magistrate will authorize the detention of the accused. In fine, when a suspect is arrested and produced before a Magistrate for authorizing detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima

facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

Another provision i.e., Section 41A Cr. PC aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalized. Section 41A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008(Act 5 of 2009), which is relevant in the context reads as follows:

"41A. Notice of appearance before police officer. -(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice." Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1), Cr. PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr. PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

We are of the opinion that if the provisions of Section 41, Cr.PC which authorizes the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasize that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr. PC for effecting arrest be discouraged and discontinued.

Our endeavor in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorize detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

Notice of appearance in terms of Section 41A of Cr. PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine."

In view of the last quoted para these directions of Hon'ble Supreme Court apply in all cases which are cognizable and punishable with imprisonment which may extend to 7 years, that means there cannot be any arrest by the police officer on receiving complaint against the accused for commission of any cognizable offence which is punishable for imprisonment to the extent of 7 years without issuing a notice under section 41A of the Code of Criminal Procedure. Furthermore, on compliance of the terms of notice and presenting himself before the investigating officer, the officer has to record the reasons that arrest of the accused is necessary and then only can arrest the accused on the basis of a report alleging commission of offence by the accused which is punishable to the extent of 7 years. The interpretation of provisions of arrest in the Court of criminal Procedure and the guidelines issued by the Hon'ble Supreme Court discussed above make it very clear that curtailing liberty of a person by arrest is also an exception and not a rule. Observations of their Lordships are also sufficient to clear our minds that only in exceptional circumstances the arrest can be affected. One more Observation of the Hon'ble Supreme Court in respect of the above aspect is as under,

In Joginder Kumar Vs. State [1994 (4) SCC, 260] the Supreme Court considered the dynamics of misuse of police power of arrest and opined:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another...No. arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonfires of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying person his liberty is a serious matter."

It is an unfortunate part of our criminal justice system that the above said observations are neither strictly followed by the police Department nor the judiciary tries to find any fault with the suppressive process adopted by the police officer while arresting the accused. I have not come across any instance when any action as directed by the Hon'ble Supreme Court might have been taken against any of the officers in the criminal justice system for breach of these guidelines. I'm going to deal with the provisions of section 436 of the code of criminal procedure which gives right to in bailable offences however in the above context I find it proper to mention that even the accused in the case of bailable offence are not released by the police officers and are produced before the magistrate after detention of 24 hours and there also they are subjected to repressive practice to execute bail bond which surety, and if he fails to do so he's sent to jail ignoring all the guidelines of Hon'ble Apex Court regarding protection of liberty of individuals.

Criteria for remanding the accused

Remand to police custody

Before considering illegalities of remand, one more aspect is required to be considered and it is regarding the obligation on the police officer to produce the arrested person before the magistrate. The constitutional mandate under article 22 discussed in the case of Arnesh Kumar (supra] and in view of the literal interpretation of the article, an accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57 of Cr. P.C to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. So, the outer limit of 24 hours plus the time of journey required to reach the Court of Magistrate is the longest possible time, however the requirement of the section is that the accused arrested shall be produced before the magistrate without unnecessary delay. Except in the case of very important persons like ministers, media persons supported by invisible blessings etc. are produced before the magistrate on the day of arrest before, during or after the officer hours. For rest of the accused the time of arrest is recorded even after 2 days of his detention and he is invariably produced before the magistrate on the next day of his arrest in the 2nd half of the day even if the place of arrest and the place of seat of the Court is in the same town. Rights of arrestee are recognized by the Hon'ble Supreme Court from the case of **Shri D.K. Basu, Ashok K. Johri vs State of West Bengal, State Of U.P** Writ Petition (Crl) No. 592 Of 1987

"We therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name togs with their designations.

The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest a such memo shall be attested by at least one witness. who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made? It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned Stare or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illegal Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render his liable to be punished for

contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

The requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee."

These guidelines by the Supreme Court make it very clear that even after arrest the arrestee continues to be protected by fundamental rights and his right to dignity of life shall be preserved and protected even after his arrest. Certainly it is the duty of the judiciary to see that the mandate of the Supreme Court for protection of right to dignity of life of the arrestee is not a breached by the police.

Procedure to remand an Accused to police custody is provided under section 167 (2) which are runs as under,

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 no jurisdiction to try the case, from time to time, authorize 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:

the 1st expectation of section 167 of the code of criminal procedure is that the investigation shall be completed within the period of 24 hours. As section 167(1) reads the police officer not below the rank of sub- inspector has to assess, after the arrest, whether it is not possible to complete the investigation within 24 hours and if it is so, he shall forward the accused to the magistrate forthwith and the copies of entry in the police diary, obviously to justify and explain, that the investigation of the crime cannot be completed within 24 hours and therefore remand of the accused is needed.

With the progress of technology, particularly digital mode of communication it is possible for the investigating officer to check and crosscheck statements of the accused after arrest with the persons or witnesses named by him and make progress in the investigation requiring custodial interrogation. It is however seen that no progress in the investigation is done within 1st 24 hours of arrest and the accused is routinely produced before the magistrate for police custody remand by raising the grounds such as recovery of stolen property or recovery of weapon of offence when the offence alleged to have been committed

is an offence against human body and to collect accounts and documents when the offence is concerning property. Further unfortunate part is that the magistrate before whom the case is presented also routinely deals with 1st remand by granting police custody for a few days without having, at the back of his mind, observations of Hon'ble Apex Court considered earlier. This situation the judiciary can and must change as the Constitution has made the judiciary protector of the fundamental rights of citizens. It is not only the higher judiciary but the district Court judiciary has also to safeguard fundamental rights of the citizen's as it is the organ of judiciary which has to implement "due process of law" as mandated by the Constitution.

Why law requires immediate production of the arrestee before the Magistrate Is explained by Calcutta High Court in a judgement pronounced in pre-independence era when constitutional guaranty was not in existence. The observations are as under,

Muhammad Suleman And Ors. vs Emperor on 11 August, 1926 (97 Ind Cas 961)

"As pointed out in the Order of Reference, the right to be taken out of Police custody by being brought before a Magistrate is a right given in the interest of, the accused. "It prevents arrest and detention with a view to extract confession or as a means of compelling people to give information. It prevents Police Stations being used as though they were prisons--a purpose for which they are unsuitable. It affords an early recourse to a judicial officer independent of the Police on all questions of bail or discharge."

The detention, therefore, is to be only until he can be made over to a Police Officer in the one case, or until he can be brought before a Magistrate in the other. In either case the detention is to be only for such period as may reasonably be necessary. This may be illustrated by reference to two English cases--Morris v. Wise (1860) 2 F. & F. 51: 121 R.R. 763 and Wright v. Court (1825) 4 B. & C. 596: 6 D & R. 623: 4 L.J. (sic) K.B. 17: 28 R.R. 418: 2 Car. & P. 232: 107 (sic) 1182. In the first--it was held that a person (a private individual) justified under the Statute 7 and 8 Geo. IV c. 30 in causing the arrest of another, must send him by the direct road to the lock up; for if he sent extra viam he would be a trespasser against the person so arrested. In the second [Wright v. Court (1825) 4 B. & C. 596: 6 D & R. 623: 4 L.J. (sic) K.B. 17: 28 R.R. 418: 2 Car. & P. 232: 107 (sic) 1182], a case of a Police Officer, it was held that a constable arresting a man on suspicion of felony must take him before a Justice to be examined as soon as he reasonably can, and that a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was bad on demurrer. That is a statement of the Common Law, and Section 76 of Act IV of 1866 cannot be used as an implied repeal of a general right affecting the liberty of the subject."

Criteria to remand the accused to police custody

Hon'ble Gujarat High Court in the following case explained as to what is required to be considered before the reminding the acres to police custody. The observations are as under,

State Of Gujarat vs Swami Amar Jyoti Shyam 1989 CriLJ 501

"17. It is true that when the need for remand to police custody is made out. the Court should grant such remand and should facilitate proper and complete investigations. But it cannot be said that an order of remand to police custody is to be granted as a matter of course. Section 167(3) makes it clear that Magistrate has to record reasons for granting remand to police custody. He does not expressly provide that for refusing such custody, reasons shall be recorded. This is an indication that though investigating agency is to investigate into cognizable offence without any interference from judiciary, it does not mean that whenever

request for police remand is made, it is to be granted. The police have to make out a case that the custody of the accused with the police is necessary for further investigation."

The magistrate and in some cases the district judges assigned with the powers of special courts are burdened with the duty not only to protect liberty of individual but also to see that investigation of the crime is not hampered because of denial of the custody of the accused. Following criterias can be followed while considering the application of police custody,

1. Consider the material placed before the Court which include 1st information report and and entries in the police diary to find out whether a case is made out against the arrestee to believe that he has committed a cognizable and nonbillable offence,
2. If yes, consider the entries in police diary to find out whether the guidelines in the case of Arnesh kumar are followed before the arrest, if the allegations against the arrestee are for commission of offence punishable with imprisonment of 7 years or less,
3. In all cases satisfy yourself that the guidelines in the case of D, K. Basu are Followed,
4. If the 2nd criteria is followed when the allegations are for the offence punishable with imprisonment of 7 years or less then consider the entries in police diary and hear the accused to find out whether he has complied with the instructions in the notice issued under section 41A and consider whether the information and material tendered by the arrestee is sufficient to set the further investigation in motion without custodial interrogation of the accused.
5. When the magistrate or the special Court is satisfied that in spite of compliance of section 41A by the arrestee his custodial introgression is necessary or when the allegations are for the office punishable with imprisonment more than 7 years then consider the entries in police diary find out whether the period of 24 hours after arrest is properly utilized for completing custodial introgression of the accused.
6. After considering 5th criteria, if the magistrate or the special Court, comes to a conclusion that the investigation officer had placed on record sufficient reasons for not completing investigation within 24 hours then consider the grounds for seeking police custody to find out whether that part of the investigation can be completed without custodial interrogation. In the offences against human body police custody of the accused is generally sought for recovery of weapon of offence and after seeking police custody the weapon is recovered by recording confessional statement of the Accused and bringing the recovery within the ambit of section 27 of the Evidence Act. During trial in many cases, it is exposed that such confession and recovery is obtained by putting the accused to threat and this is facilitated as the accused was remanded to police custody. In order to avoid this aspect please consider why such a recovery was not done within 24 hours of his arrest if the accused was voluntarily ready to give the confession regarding hiding of the weapon. Many aspects of the investigation can be completed without custodial interrogation. The magistrate or the special Court has to consider all these facets while granting and extending police custody.

Period of police custody

The aspect of starting point of permissible period of 15 days police custody and whether it can be granted intermittently and whether it can be granted only during 1st 15 days of arrest or it can be beyond that is considered by Hon'ble Apex Court in details in following case. The observations are as under,

Central Bureau of Investigation, ... vs Anupam J. Kulkarni AIR 1992 SC 1768

"*The learned Additional Solicitor General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that*

in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorize the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted than the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be as different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody."

Pre arrest bail or anticipatory bail

As observed by the Supreme Court there cannot be any straitjacket formula to classify the instances in which anticipatory bail can be granted and in which anticipatory bail can be denied. Considering these observations, I complete my indulgence with this topic by citing observations of Hon'ble Apex Court into significance judgement which are as under,

Sidhram state of Maharashtra criminal appeal No. 2271 of 2010

*"93. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section **438** Cr.P.C. has not been allowed its full play. The Constitution Bench in Sibbia's case (supra) clearly mentioned that section **438** Cr.P.C. is extraordinary because it was incorporated in the **Code** of **Crimin**al **Procedure**, 1973 and before those other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section **438** Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in Sibbia's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-`-vis personal liberty while adhering to the fundamental principle of **crimin**al jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court."*

Gurbaksh Singh Sibbia Etc vs State of Punjab (AIR **1980 SC 1632)**

"Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a straight-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court

has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law.

We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficient provision contained in Section 438 must be saved, not jettisoned."

Post arrest bail

power to grant bail under section 439 of the Code of Criminal Procedure

Post arrest bail provisions can be compartmentalized in 3 compartments. The 1st compartment is in respect of bail in bailable offence, the 2nd is in respect of powers of the magistrate to grant bail in non bailable offences which include offences punishable with imprisonment for 7 years and less and offences punishable with imprisonment for more than 7 years when the offence has been committed by particular class of persons and a 3rd compartment is in respect of exclusive powers of sessions Court and High Court to grant bail under section 439 of the code of criminal procedure. These are the special powers to grant bail to the accused of crime who is facing allegations of committing heinous and gruesome crime. The powers are therefore restricted to sessions Court and High Court. Let's 1st consider the provisions under section 439 of the code.

439. Special powers of the 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 subsection (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 an 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.

The powers are referred a special power which itself indicate that the powers are required to be used with care and caution. The Calcutta High Court in the case of **Nagendra Nath Chakrabarthi vs King-Emperor (AIR 1924 Cal 476)** enlisted some of the criterias which are required to be considered while taking a decision whether to grant or not to grant bail under section 439 of the code of criminal procedure

"14. It is indisputable that bail is not to be withheld merely as a punishment. The requirements as to bail are to secure the attendance of the accused at the trial: R v. Rose [1898] 18 Cox. C.C. 717. The proper test to be applied in the solution of the question, whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial: Re Robinson [1859] 23 L.J.Q.B. 286, R. v. Scaifa [1841] 9 D.P.C. 553. The test is applied by reference to the following considerations:

(a) The nature of the accusation: R. v. Barronet [1853] 1 El. & Bl. 1; R. v. Butler [1881] 14 Cox. C.C. 530.

(b) The nature of the evidence in support of the accusation: Re Robinson (1859) 23 L.J.Q.B. 286; R. v. Butler [1881] 14 Cox. C.C. 530; R. v. McCormic [1864] 17 Ir. C.L.R. 411.

(c) The severity of the punishment which conviction will entail: Re Robinson [1859] 23 L.J.Q.B. 286; and this explains the reluctance of Courts to grant bail on charges of murder: Re Barthelemy [1852] 1 El. & Bl. 8; R. v. Andrews [1844] 2 D. & L. 10. In this connection we may recall that in England, bail in treason or felony is discretionary in the High Court or Courts having jurisdiction to try the offence: R. v. Mc Cartie [1859] 11 Ir. C.L.R. 188; R. v. Platt [1777] 1 Leach 157; on the other hand, bail in misdemeanour is said to be of right at common law : R. v. Spilsbury [1898] 2 Q.B. 615; R. v. Badgar [1843] 4 Q.B. 468; Re Frost [1888] 4 J.L.R. 757; see also R. v. Crowe [1829] 4 C. & P. 251; R. v. Beardmore [1836] 7 C. & P. 497; R. v. Osborne [1837] 7 C. & P. 799; King v. Fortier [1902] 13 Quebec K.B. 251. This distinction is reflected in sections 496 and 497 of the Criminal Procedure Code which treat respectively of the grant of bail in cases of what are described in the phraseology of the Indian Legislature as bailable and non-bailable offences.

15. The substance of the matter is that the discretionary power of the Court to admit to bail is not arbitrary, but is judicial, Manikam v. Queen [1882] 6 Mad. 63, and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is, whether a recognizance would affect that end. In seeking an answer to this enquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and standing of the accused."

Hon'ble Supreme Court in the case of High Court Of Judicature For Rajasthan Versus The State of Rajasthan & Anr. Appeal (Criminal) No.5618 Of 2021) considered the previous judgements to highlight what criterias are required to be considered while considering bail under section 439 of the code of criminal procedure.

"14. ---------- The right of an accused, an undertrial prisoner or a convicted person awaiting appeal court's verdict to seek bail on suspension of sentence is recognized in Sections 439, 438 and 389 of the 1973 Code. Similarly, the factors guiding appeal provision is contained in the 1989 Act. If there is a blanket ban on listing of these applications, even for offences with lesser degree of punishment, that would effectively block access for seekers of liberty to apply for bail and in substance suspend the Fundamental Rights of individuals in or apprehending detention. Such an order also has the effect of temporarily eclipsing statutory provisions.

15. In the case of Nikesh Tara Chand Shah v. Union of India & Anr. [(2018) 11 SCC 1], a Coordinate Bench of this Court traced the history and highlighted importance of bail provisions in criminal jurisprudence, starting from Clause 39 of Magna Carta to the case of Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565]. It was, inter-alia, observed in this judgment: -

"In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565: 1980 SCC (Cri) 465], the purpose of granting bail is set out with great felicity as follows: (SCC pp. 586-88, paras 27-30) "27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC online Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, 1931 SCC online All 60 : AIR 1931 All 504 : 1932 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L.

Hutchinson, 1931 SCC online All 14: AIR 1931 All 356: 1931 Cri LJ 1271], AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various Sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. State [Gudikanti Narasimhulu v. State, (1978) 1 SCC 240: 1978 SCC (Cri) 115] that: (SCC p. 242, para 1) '1. … the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. … After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.'

29. In Gurcharan Singh v. State (UT of Delhi) [Gurcharan Singh v. State (UT of Delhi), (1978) 1 SCC 118: 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29) '29. … There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.'

30. In AMERICAN JURISPRUDENCE (2nd, Vol. 8, p. 806, para 39), it is stated: 'Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.' It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail…"

I think these wise words of the Supreme Court are sufficient to explain as to how the discretion for grant of bail under section 439 is to be utilized by the courts having jurisdiction to grant bail under this section.

Powers of Magistrate to grant bail

Bail in bailable offences

let's 1st have a look to the provisions under section 436(1) of the code of criminal procedure.

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, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A .

Sub section 3 of section 116 is in respect of execution of bond to prevent breach of peace and section 446A refers to breach of conditions of the bail bond. Sub section 2 of section 436 also consider the circumstances of breach of conditions of bail bond. These provisions are therefore not in context with subject of the article. As I have pointed out earlier, in spite of this express provision, which empowers not only the magistrate but also the police officer to release the arrestee on his personal bond for his appearance, the person arrested for bailable offences is invariably brought before the Court after spending 24 hours in police

custody. After production before the magistrate, the magistrate in most of the cases refuses to release him on personal bond on the ground that the accused will not be available for trial, if released on personal bond. Consequently, many of the accused arrested on allegations of committing bailable offence remain languishing in jail until their family members find some surety or their ingenious advocates arrange some professional surety for them. The jails in every city and town in India are overcrowded and many of the under-trial prisoners are in prison as they are accused of committing bailable offence but are unable to provide surety for the release on bail as demanded by the Court. Considering this very situation Hon'ble Apex Court in the case of **Hussainara Khatoon & Ors vs Home Secretary, State of Bihar, 1979 AIR 1369** made following observations,

"Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contract with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding-always taking something away from them and not as a positive and constructive social device for changing the socio-economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services."

The Supreme Court issued following guidelines for release of accused on bail on their personal bond and directed that if the accused satisfies the magistrate of existence of circumstances enlisted by their Lordships he shall be released on execution of personal bond with such conditions which are not so stringent so as to deny bail. As observed by Hon'ble Apex Court, *"There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the Courts to fully acquaint themselves with the nature and extent of their discretion in exercising it."*

Observations of their Lordships in **Hussainara Khatoon & Ors vs Home Secretary, State of Bihar, AIR 1979 SC 1360** further explain,

"Ours is a socialist republic with social justice as the signature tune of our constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organizations etc., should be the determinative factors in grant of bail and the accused should be in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the accused willfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pretrial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our Courts in regard to pretrial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter

him from fleeing, the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community.

2. his employment status, history and his financial condition,

3. his family ties and relationships,

4. his reputation, character and monetary condition,

5. his prior criminal record including any record or prior release on recognizance or on bail,

6. the identity of responsible members of the community who would vouch for his reliability.

7. the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and

8. any other factors indicating the ties of the accused to the community or bearing on the risk of willful failure to appear."

"In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the Courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966:

"In determining which conditions of releases will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pretrial release in India could be avoided or, in any event, greatly reduced See Moti Ram and Others v. State of Madhya Pradesh.

I consider it desirable to refrain from making any final comment or observation on the legality and propriety of the continued detention of the undertrial prisoners whether on the ground of infringement of Article 21 of the Constitution or on other grounds. That, I think, should await the final determination of the habeas corpus petition.

These are the reasons which have influenced me in making the order dated February 5, 1979.

While concluding, it seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of undertrial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance. Where that is the only reason for their continued incarceration, there may be good ground for complaining of invidious discrimination. The more so under a constitutional system which promises social equality and social justice to all of its citizens. The deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our law-makers would take an important step in defence of individual liberty if appropriate provision was made in the statute for non-financial releases."

Unfortunately, in spite of these guidelines trial Court judges pass mechanical orders after coming to the conclusion that the accused is entitled to bail inadvertently ask for execution of bond with solvent surety. The poor and underprivileged accused is unable to secure surety and goes behind the bars. This practice followed by some of the judges give rise to existence of new professionals such as professional sureties, professional advocates doing the business of approaching inmates in jail and promising them to getting them out by securing the presence of surety and taking all the precautions that the professional surety procured by them will be accepted as surety in spite of executing bonds in multiple cases before different courts. It is further unfortunate scenario that there is no scrutiny of the orders of the magistrates and sessions judges to find out whether the guidelines in the case of Husainara Khatun and Arnesh Kumar are followed by the police officers magistrates, special courts and sessions courts.

The graph of criminality in India is increasing day by day. The criminal justice system is overwhelmingly burdened. The police, the prosecution, the judiciary and the prison have to deal with persons committing serious crimes like terrorism and frauds of billions of rupees. There is a serious crime against women and children. In this situation the system has to use its maximum energy in dealing with the crimes which create serious alarm in the society at large. The system therefore has to follow time management and for that purpose proper implementation of provisions of section 436 and 437 of the Code Of Criminal Procedure by the police and by magistrates and implementation of guidelines in the case of Husainara Khatun and Arnesh Kumar and other cases cited above will assist the system to reduce the burden on all the departments of criminal justice system by promptly releasing the accused on personal bonds to comply the guidelines of the Hon'ble Supreme Court. With digitalization of residential proof of every citizen citizen is available and every citizen is identified by unique identification. Now it's very easy to find out whether the accused is having permanent residential address and length of his residence on that address. His affidavit and some documents regarding his assets, however little it may be, will disclose that he is having roots in the society. As criminal record is also digitalized, the police can at the click a button and tender the documentary evidence regarding criminal record of the accused, if any, before the Court. All other factors can be considered on the basis of allegations in the FIR and other material produced by the police. If this practice is followed then at least 90% of the accused to whom the bill is granted but were not able to tender the surety can be released on execution of personal bond.

Powers of the magistrates to release on bail under section 437 of the Code of Criminal Procedure

the provisions under section 437 of the code are as under,

437. When bail may be taken in case of non- bailable offence. [1]

(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 non- bailable and cognizable offence: Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail it 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.

(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 [1] *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 or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court may impose any condition which the Court considers necessary-

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(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 [1] *reasons or special seasons] for so doing.*

1. Subs. by Act 63 of 1980, s. 5 (w. e. f. 23. 9. 1980).

(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.

If the magistrates carefully read the provisions of section 436 and 437 of the Code of Criminal Procedure and the judgement cited in this article, they will find that they are in fact the protectors of liberty and dignity of life of 75% of the litigants knocking the doors of judiciary. The magistrates are granted powers to release on bail the accused alleged to have committed bailable offence, alleged to have committed nonbillable offence punishable with imprisonment of 7 years or less and not only this the Magistrate is empowered to release the accused, who is alleged to have committed offence punishable with any kind of imprisonment including death if such person is covered under classification under proviso to s. 437(1)(ii). Besides this the Magistrates are having powers to release the accused on default bail in respect of any offence in any statute book to which provisions of committal of case apply.

The Hon'ble Supreme Court in the case of **Gurcharan Singh & Ors vs State (Delhi Administration) AIR 1978 SC 179,** interpreted the provisions of section 437 as under,

"Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the court to believe that there are no reasonable ground for believing that the person accused of or suspected of the commission of much an offence has been guilty of the same, there is a ban-imposed u/s 437(1) Cr. P.C. against granting of bail. On the other hand, if to either the officer in charge of the police station or to the court there appear to be reasonable grounds to believe that the accused has been guilty of such an offence there will be no question of the court or the officer granting bail to him. In all other non-bailable cases judicial discretion win always be exercised by the court in favour of granting bail subject to sub-sec. 3 of Sec. 437 Cr. P.C. with regard to imposition of conditions if necessary. Under sub-sec. 4 of S. 437 Cr. P.C. an officer or a court releasing any person on bail under sub-s. 1 or sub-s. 2 of that section is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life. reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf. Section 437 Cr. P.C. deals, inter alia with two stages during the initial period of the investigation of a non- bailable offence. Even the officer in charge of the police station may, by recording his reasons in writing, release a person accused of or suspected of the commission of any non- bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence. Quick arrests by the police may be necessary when there are sufficient materials for the accusation or even for suspicion. When such an accused is produced before the court, the court has a discretion to grant bail in all non- bailable cases except those punishable with

death or imprisonment for life, if there appear to be reasons to believe that he has been guilty of such offences. The Courts over-see the action of the police and exercise judicial discretion in granting bail always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer.' After the court releases a person on bail under sub-s. 1 or sub-Sec. 2 of S. 437 Cr. P.C. it may direct him to be arrested again when it considers necessary so to do. This will be also in exercise of its judicial discretion on valid grounds"

In spite of specific provisions of section 437 and the above dictum of the Supreme Court it is commonly observed that the magistrates refuse to grant bail in all the cases which are triable by the Court of sessions. Most of the offences which are punishable with imprisonment for more than 3 years or 5 years are triable by Court of Sessions. As we can see subsection 2 incorporates the stage of scrutiny of the material to find out whether the material collected by the investigating officer and placed before the magistrate is sufficient to make out involvement of the accused in an offence categorized as non-bailable offence and if not the officer investigating officer or the Magistrate shall release such accused on bail in most of the cases on execution of personal bond as the subsection requires so and also by application of the mandate of the Supreme Court in the case of Husainara Khatun. It is noticed that this scrutiny is not carried out by the magistrates.

Proviso to section 437 (1) (ii) empowers the magistrate with the discretion to release persons under the age of sixteen years or woman or sick or infirm even if these categories of persons are produced before him as accused of commission of offence punishable with imprisonment for more than 7 years. The 1st category of persons i.e. the persons under the age of 16 years is taken care of by the special courts established under the Juvenile Justice Care And Protection Act. Other 3 category of persons are required to be dealt by the magistrate. When we visit the jails, we find that there are many women, sick and infirm accused languishing in jail as bail is denied to them. Visitor will be disheartened to see some women languishing in jail with their children as bail is denied to them and they have to bring their children with them as there was nobody to look after the children or infants.

What may be the reason for the judges of trial Court judiciary not utilizing their discretion while considering the applications for release of bail in spite of dictum of Hon'ble Supreme Court guiding them to use the discretion liberally and protect the liberty of the people. The main reason seems to be institutional. In case of serious crimes and particularly in case of crimes attracting media attention the atmosphere surrounding the case is surcharged. In this situation the Court at the 1st instance may be finding it appropriate to use the discretion to deny the bail and let the accused approach to the higher Court. This approach unfortunately increases the burden of higher courts and in many cases application for seeking bail, in the cases in which bail ought to have been granted by the magistrate or the session Court, is required to be filed before the Supreme Court.

If the problem is institutional then the solution shall also come from the institution. It is required that the district judiciary be trained and encouraged to use its discretion in respect of grant of bail in deserving cases instead of passing the burden to higher courts by siting routine reasons that the accused will win over the witnesses or he presence may be required to question other accused. As the High Court is looking after the administration of state judiciary, the High Court should necessarily collect the data to find out whether the observations in the case of Arnesh Kumar and Husainara Khatun are properly followed by the judges of district judiciary. It is also required to be diagnosed whether the judges of

district judiciary are enough strong and independent to withstand the pressure of surcharged atmosphere in respect of the cases brought before them and also to face the pressure of media reporting. It is also necessary to find out whether the judges can stand independent and non-prejudicial while deciding to get the cases in which wide media publicity is going on when the case is heard by the judge. The individual judges shall also make themselves strong to remain independent and nonprejudicial while deciding such cases. They should study the manner adopted by various judges and Lordships, who preferred to go in solitude before giving the historical decisions in highly contested cases and their decisions turned the course of the history.

Time-tested manner of hearing and deciding bail applications is that, the judge shall take for hearing as much bail applications which he can hear and decide on that very day. The arguments in respect of bail application shall not be allowed to be lengthy because the legal aspects regarding making out a prima facie case and the grounds for grant of bail are well founded and similar aspects are placed before the judges during hearing of all bail applications. The judges, particularly the judges working in special courts, day in and day out are dealing with similar sort of arguments while hearing bail applications. In this situation, neither it is difficult to get the hearing of the bail application shortened by informing the advocates that the Court is aware of the law laid down by the Supreme Court and Court of record nor it is difficult to pass order on the day of completion of hearing. Order in bail application shall be passed immediately after completion of arguments and more appropriately the order be dictated from the dais. By doing so, the judge will be able to avoid of carrying pressure of deciding the bail application and will also be able to avoid speculations and dirty practices followed in some cases by unscrupulous elements.

Many times there is news that the accused is granted bail but he continues in jail as the clerical formality of communication of order of the Court to the jail authorities is not completed on the day of granting bail. Presently we are in the age of digital revolution and approaching the age of artificial intelligence. Entire criminal justice system is digitalized and there are trials and remand of under trial prisoners on VC. In this situation detention of under trial prisoner in the jail for want of faster link of communication between the Court and the jail administration whether can be a legal detention is a serious question. It is necessary that the stakeholders should create some sort of mechanism by which the order of the Court of releasing the accused on bail be communicated to the jail authorities instantaneously so that the liberty of a person released on bail by the Court shall not be abridged only because of non-communication of order or not receiving the release order by the jail authorities.

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