

SPEECH

BY

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ON

RELATIONSHIP BETWEEN CONSTITUTIONAL CONCEPTS

AND CRIMINAL JURISPRUDENTIAL PERSPECTIVE

AT

TAMIL NADU JUDICIAL ACADEMY

ON

14.06.2014

Our glorious and organic Constitution fundamentally defines the character of the State with the avowed purpose of sustenance and endurance on certain paradigms, norms and parameters regard being had to the central idea of good governance in a Welfare Republic having justice placed on Constitutional principles at its zenith. Every Constitution essentially consists of such principles which determine the totality of the constitutional order and make up the “spirit of the Constitution.” The core of the Constitution is the conscience of the Constitution and if it is destroyed, then the entire Constitution is wiped out. Dispensation of justice as requisite in law is an essential constitutional value and judiciary at all levels is wedded to the same. Therefore, there has to be a pledge, a sacred one, to live upto the challenges living with solidity and never having to bow down.

Certain fundamental elements of Constitutional Rule are: (i) that it is rule in the public or general interest, (ii) it is lawful rule in the sense that the government is carried on by constitutional principles and not by arbitrary action and (iii)

that it means the government of citizens.

The Preamble of our Constitution and every word of it, is sacrosanct. Some may feel reproduction of the Preamble in an address would be pedestrian, yet, I with all devotion at my command shall quote it, for it vibrates our Constitutional spiritualism. It not only introduces one to the Constitutional philosophy and morality but also opens the gate for every citizen to pave the path of Constitutional religion. Hence, I quote:-

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a ¹ [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the ²[unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY

¹ Subs. By the Constitution (Forty-second Amendment) Act, 1976, S. 2, for “SOVEREIGN DEMOCRATIC REPUBLIC” (w.e.f. 3-1-1977).

² Subs. By s. 2 *ibid.*, for “unity of the Nation” (w.e.f. 3-1-1977).

ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

The aforequoted words can take an entire book to be explained. Regard being had to the context, I shall refer to a few terms.

The term ‘democratic’ signifies that India has a responsible and parliamentary form of government which is accountable to an elected legislature and hence, it has been declared as a basic feature of the Constitution. Dr. Ambedkar observed in his closing speech in the Constituent Assembly on November 25, 1949:-

“The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative”

Thus, the trinity, in one insegregable compartment, constitutes the heart of our democracy as understood in the constitutional bedrock.

The Preamble lays emphasis on the principle of equality which is basic to our Constitution. While understanding the concept of equality, I think it apt to reproduce a few line from ***M. Nagaraj***³: -

“The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction.”

Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society has to be implemented in the true spirit of the Constitution. The Constitution ensures economic democracy along with political democracy.

³ M. Nagaraj and others vs. Union of India and others (2006) 8 SCC 212

The term secularism has been held in ***Kesavananda Bharati***⁴ and ***S.R. Bommai***⁵ as a basic feature of our Constitution. The Court has further declared that secularism is a part of fundamental law and an inalienable segment of the basic structure of the country's political system. As has been held in ***Dr. Praveen Bhai Thogadia***⁶ it means that the State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person, whatever be his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's own presumptions of good social order. As per Sawant, J. in ***S. R. Bommai*** case, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution and it has been

⁴ Kesavananda Bharati vs. State of Kerala AIR 1973 SC 1461

⁵ S.R. Bommai vs. Union of India AIR 1994 SC 1918

⁶ State of Karnataka vs. Dr. Praveen Bhai Thogadia AIR 2004 SC 2081

accepted as a goal not only because it is the historical legacy and a need of national unity and integrity but also as a creed of universal brotherhood and humanism. I emphasise on the words “universal humanism”.

The Constitution is the supreme law of the land and all state organs –Legislature, Judiciary and Executive are bound by it. The Constitution has provided for separation of powers between the Legislature, Executive and Judiciary and therefore each organ must act within the limits prescribed for it. A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary. The Judiciary has to play a vital and important role, not only in preventing and remedying abuse and misuse of power, but also in eliminating exploitation and injustice. The Judiciary in India, has to be keenly alive to its social responsibility and accountability to the people of the country. It is required to dispense justice not only between one person and another, but also between the State and the citizens. Thus, the duty is onerous, but all of you have joined this institution to live upto the solemn pledge. Your duty is called divine but that should not make anyone feel

exalted, because there is a hidden warning behind the said divine sanctity. That is the warning of law and the constant watchdog – “our monumental Constitution”. That divine duty bestowed on all of us, I would humbly put, is ingrained in the essential serviceability of the institution.

Having placed justice on a different pedestal and its dispensation as a part of divine duty with the appendage of warning, I may pave the already travelled path by many and pose a question, how would one understand the word “justice”? “Justice” is called mother of all virtues and queen of all values. In a Constitutional set up, it does not tolerate individual prejudices, notions, fancies, ideas or, for that matter, idiosyncrasies. It does not perceive any kind of terminological inexactitude or misplaced sympathy. “Justice”, one can humbly announce, is the filament of any civilized society. In this regard, one may appreciably reproduce what *Daniel Webster*⁷ had to say:-

“Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together.

⁷ -WEBSTER, Daniel, in *Life and Letters of Joseph Story* (William W. Story, ed., Boston: Charles C. Little and James Brown, 1851), Volume II, p. 624.

Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement, and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society.

In this context, it is useful to reproduce a passage from ***Jilubhai Nanbhai Kachar***⁸ wherein the Court observed thus: -

“Roscoe Pound, a sociological jurist whose writings have virtually opened new vistas in the sphere of justice, stated that ‘the justice meant not as an individual or ideal relations among men but a regime in which the adjustment of human relations and ordering of the human conduct for peaceful existence’. According to him, “the means of satisfying human claims to have things and to do things should go around, as far as possible, with least friction and waste”. In his “*A Survey of*

⁸ *Jilubhai Nanbhai Kachar and others vs. State of Gujarat and others* 1995 Supp (1) SCC 596

Social Interests”, 57th Harvard Law Review, 1 at p. 39, (1943), he elaborated thus:

“Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh more in our civilisation with the least sacrifice of the scheme of interests as a whole.”

In his *Theory of Justice*, 1951 Edn., at p. 31, he stated that:

“The law means to balance the competing interests of an individual along with the social interests of the society.”

In his work, *Justice according to Law*, he observed:

“We come to an idea of maximum satisfaction of human wants or expectations. What we have to do in social control and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can.”

According to him, therefore, that the claims or interests, namely, individual, physical, social or public interest should harmoniously be reconciled “to the balancing of social interests through the instrument of social control; a task assigned to public law for that matter”.”

Justice has been, if not the only, at least one of the foremost goals of human endeavour from the earliest times. It may have been pursued with greater scientific vigour and intensity in some societies than the others, but societies all over the world have strived for it in some form or the other. India, which is one of the most ancient surviving society, has through the ages developed its own conceptions of justice which were conceived and formulated by those who led our struggle for freedom from the British rule. These conceptions of justice have crystallized into constitutional principles that are the guiding light for the laws and their implementation in the civil and criminal justice system. It is the latter that I shall deal with.

Having stated about the broader spectrums of justice, keeping in view the subject-matter, I would concentrate on the primary facet of justice which concerns itself with the

delivery of justice in accordance with law by the courts to determine the lis between two individuals or between an individual and a State or, to put it in another way, justice that is dispensed with in accordance with law on proper adjudication remembering that it is the law's answer to the cry of justice.

Presently, I shall proceed to interlink the relationship between certain constitutional concepts and the criminal jurisprudential perspective. My effort would be to reflect upon the connective values, direct or indirect. Some are connected with Fundamental Rights, some with Directive Principles of State Policy and others with Fundamental Duties and there is also linkage with acceptable constitutional norms and values as interpreted by the Apex Court. Several principles of criminal procedure and trials have emerged from the Constitution either in association with the Code or independently which courts are expected to respect and observe.

Coming to Fundamental Rights, we must understand, they are basically fundamental to the very existence of

human being on the mother earth. In ***M. Nagaraj***, the Constitution Bench opined: -

“It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

SPEEDY TRIAL

Having stated about the status of Fundamental Rights, let me focus on speedy trial which is an inseparable facet of Article 21 of the Constitution. The said Article reads as follows: -

“21. Protection of life and personal liberty. –
No person shall be deprived of his life or personal

liberty except according to procedure established by law.”

Recently, in ***Mohd. Hussain***⁹, a three-Judge Bench has observed thus: -

“Speedy justice and fair trial to a person accused of a crime are integral part of Article 21; these are imperatives of the dispensation of justice. In every criminal trial, the procedure prescribed in the Code has to be followed, the laws of evidence have to be adhered to and an effective opportunity to the accused to defend himself must be given.”

The concept of speedy trial has an inextricable association with liberty. Liberty is a cherished principle in the bosom of every human Soul. In ***Dharmendra Kirthal***¹⁰, the Court had to say this: -

“There can never be any shadow of doubt that sans liberty, the human dignity is likely to be comatosed. The liberty of an individual cannot be allowed to live on the support of a ventilator.”

And again: -

⁹ Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi) (2012) 9 SCC 408

¹⁰ Dharmendra Kirthal v. State of Uttar Pradesh (2013) 8 SCC 368)

“**38.** When the liberty of an individual is atrophied, there is a feeling of winter of discontent. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders.”

In *Manu Sharma*¹¹, the Court has opined that in Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence, an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

¹¹ *Manu Sharma vs. State (NCT of Delhi)*, (2010) 5 SCC 1

Thus, we perceive that the constitutional emphasis is on speedy and fair trial. The effort must be to scan the provisions in the Code of Criminal Procedure which empowers the trial Judge to exercise the power in an apposite manner in order to show respect to the constitutional mandate as interpreted by the Apex Court. For the said purpose, one may look at a very significant provision incorporated in Section 309 of the Code of Criminal Procedure. It reads as follows: -

“309. Power to postpone or adjourn proceedings. – (1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry

or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

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

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

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

Provided also that –

- (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
- (b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
- (c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.”

I must clarify that the last two provisos have been inserted by Act 5 of 2009 with effect from 1.11.2010. Even prior to the amendment, as per the statutory command, there is a requirement that the trial should be held as expeditiously as possible and when the examination of witnesses has begun it is to be continued from day to day until all the witnesses in attendance have been examined. Of course, the power also rests with the Court to adjourn

beyond the following day by recording reasons. Almost five and a half decades back, a three-Judge Bench in **Talab Haji Hussain**¹², speaking about criminal trial, had said thus: -

“... a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice.”

¹² Halab Haji Hussain vs. Madhukar Purshottam Mondkar and another, AIR 1958 SC 376

Thereafter, their Lordships proceeded to state that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction.

In ***Krishnan and another***¹³, though in a different context, the Court has observed that the object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out, but the recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. The Court further observed that these malpractices need to be curbed and public justice can be ensured only when the trial is conducted expeditiously.

In ***Swaran Singh***¹⁴, the Court expressed its anguish and stated: -

“36. ... It has become more or less a fashion to have a criminal case adjourned again and again

¹³ *Krishnan and another vs. Krishnaveni and another*, (1997) 4 SCC 241

¹⁴ *Swaran Singh vs. State of Punjab* (2000) 5 SCC 668

till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice.”

In **Ambika Prasad**¹⁵, while commenting on the threat meted out to the informant in that case and adjournment sought by the counsel for the defence to cross-examine the said witness, the Court was compelled to say: -

“11. ... At this stage, we would observe that the Sessions Judge ought to have followed the mandate of Section 309 CrPC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution.”

In **Shambhu Nath Singh**¹⁶, while deprecating the practice of a Sessions Court adjourning the case in spite of the presence of the witnesses willing to be examined fully, the Court ruled thus: -

¹⁵ *Ambika Prasad vs. State (Delhi Admn.)* (2000) 2 SCC 646

¹⁶ *State of U.P. vs. Shambhu Nath Singh* (2001) 4 SCC 667

“11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words “as expeditiously as possible” have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words “as expeditiously as possible” has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination “shall be continued from day to day until all the witnesses in attendance have been examined”. The solitary exception to the said stringent rule is, if the court finds that adjournment “beyond the following day to be necessary” the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme

contingency for which the second proviso to sub-section (2) has imposed another condition, namely,

“provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, *except for special reasons to be recorded in writing*”.

(emphasis supplied)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are “special reasons”, which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.”

In ***Mohd. Khalid***¹⁷, the Court, while not approving the deferment of the cross-examination of witness for a long

¹⁷ Mohd. Khalid vs. State of West Bengal (2002) 7 SCC 334

time and deprecating the said practice, observed that grant of unnecessary and long adjournments lack the spirit of Section 309 of the Code of Criminal Procedure. When a witness is available and his examination is over, unless compelling reasons are there, the trial court should not adjourn the matter on the mere asking.

Recently, in **Gurnaib Singh**¹⁸, a two-Judge Bench was compelled to observe that on a perusal of the dates of examination-in-chief and cross-examination and the adjournments granted, it neither requires Solomon's wisdom nor Aurgus-eyed scrutiny to observe that the trial was conducted in an absolute piecemeal manner as if the entire trial was required to be held at the mercy of the counsel. This was least expected of the learned trial Judge. The criminal-dispensation system casts a heavy burden on the trial Judge to have control over the proceedings. The criminal-justice system has to be placed on a proper pedestal and it cannot be left to the whims and fancies of the parties or their counsel. A trial Judge cannot be a mute spectator to the trial being controlled by the parties, for it is

¹⁸ Gurnaib Singh vs. State of Punjab (2013) 7 SCC 108

his primary duty to monitor the trial and such monitoring has to be in consonance with the Code of Criminal Procedure. Eventually, the Court was constrained to say thus: -

“35. We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform. They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same.

A larger Bench in **P. Ramachandra Rao**¹⁹ observed that it is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21, 19 and 14 and the Preamble of the Constitution as also from the Directive Principles of State Policy. It is high time that the Union of India and the various States realize their constitutional obligation and do something concrete in the direction of strengthening the justice delivery system.

I have deliberately quoted in extenso from number of authorities as the recent trends of conducting trial had pained many. When there is violation of Section 309 of the Code, as is perceptible, it hampers two concepts, namely, speedy and fair trial. Thus, it is not merely a statutory violation but also offends the constitutional value. I have been told that there are difficulties, but when law forbids certain things or grants very little room, difficulties should be ignored. Remember, there is the fate of the accused on one hand and the hope of the victim or his/her family

¹⁹ P. Ramachandra Rao vs. State of Karnatana, (2012) 4 SCC 578

members on the other and above all the cry of the collective for justice. And never forget, your reputation which is the greatest treasure possessed by man this side of the grave rests on one hand and the difficulties projected by parties on the other. I can only repeat that you are required to be guided by constitutional conscience, nothing more, nothing less.

FAIR TRIAL

In *Best Bakery case*²⁰, considering the jurisprudence of fair trial, powers of the criminal court under the Code and the Evidence Act including retrial of a criminal case, the Court observed:

“33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation—peculiar at times and related to the nature of crime, persons involved—directly or operating behind, social impact and societal needs and even so many powerful

²⁰ Zahira Habibulla H. Sheikh vs. State of Gujarat (2004) 4 SCC 158

balancing factors which may come in the way of administration of criminal justice system.”

In the said case, it was also opined that in a criminal case, the fair trial is the triangulation of interest of the accused, the victim and the society. The learned Judges further ruled that “interest of the society are not to be treated completely with disdain and as persona non grata”. The said decision was explained in **Satyajit Banerjee**²¹ wherein it was held that the law laid down in **Best Bakery case** in the aforesaid extraordinary circumstances cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in every case where acquittal of accused is for want of adequate or reliable evidence. In **Best Bakery case**, the first trial was found to be a farce and is described as ‘mock trial’. Therefore, the direction for retrial, was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by the Court in **Best Bakery case**.

²¹ Satyajit Banerjee vs. State of W.B. (2005) 1 SCC 115

In ***Mohd. Hussain***²², the Court, drawing the distinction between speedy trial and fair trial, has expressed thus: -

“40. “Speedy trial” and “fair trial” to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the

²² Mohd. Hussain alias Julfikar Ali vs. State (Government of NCT of Delhi) 2012 9 SCC 408

right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.”

In ***Mangal Singh***²³, while determining various aspects of speedy trial, the Court observed that it cannot be solely and exclusively meant for the accused. The victim also has a right, as observed by the Court: -

“14. ... Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the

²³ Mangal Singh vs. Kishan Singh (2009) 17 SCC 303

accused and to completely deny all justice to the victim of the offence.”

In ***Himanshu Singh Sabharwal***²⁴, it was observed that the principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the

²⁴ Himanshu Singh Sabharwal vs. State of M.P. & ors., AIR 2008 SC 1943

society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm.

In ***Rattiram***²⁵, while giving emphasis on fair trial, it has been held as follows: -

“Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.”

My singular purpose of highlighting the distinction is that trial Judges have to remain alert and alive to the right of the accused as well as to the right of the victim and that alertness has to be judicially manifest and must get reflected from the procedure adopted and the ultimate determination. That demonstration is the litmus test.

²⁵ Rattiram vs. State of M.P. (2012) 4 SCC 516

LEGAL AID

Presently, I shall focus on the facet of legal aid. The right to legal aid is statutorily ensured by **Section 304** of the Code and constitutionally by Articles 21,22 and 39 A. Right to legal aid in criminal proceedings is absolute and a trial and conviction in which the accused is not represented by a lawyer is unconstitutional and liable to be set aside as was held in ***Khatri (III) v. State of Bihar***²⁶; ***Suk Das v. Union Territory of Arunachal Pradesh***²⁷; ***Mohd. Ajmal Amir Kasab v. Maharashtra***²⁸ and ***Rajoo v. MP***²⁹.

Article 39-A of the Constitution, inter alia, articulates the policy that the State shall provide free legal aid by a suitable legislation or schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Court in ***Mohd Hussain***³⁰ held that in a trial before the Court of Sessions, if the accused is not represented by a pleader and does not have sufficient

²⁶ (1981) 1 SCC 635

²⁷ (1986) 2 SCC 401

²⁸ (2012) 9 SCC 1

²⁹ (2012) 8 SCC 553

³⁰ AIR 2012 SC 750

means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution, has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39A of the Constitution by the 42nd Amendment Act of 1976 and enactment of Sub-Section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of

no avail if within itself it does not include the right to be heard through Counsel.

In ***Hussainara Khatoon***³¹, the Court observed that it is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation. The Court further observed as under:-

“Legal aid is in fact the delivery system of social justice. It is intended to reach justice to the common man who, as the poet sang:

“Bowed by the weight of centuries he leans
Upon his hoe and gazes on the ground,
The emptiness of ages on his face,
And on his back the burden of the World.”

We hope and trust that every State Government will take prompt steps to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided

³¹ *Hussainara Khatoon and ors. vs. Home Secretary, State of Bihar, Patna, (1980) 1 SCC 108*

to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality.”

In ***Mohd. Ajmal Amir Kasab***³², the Court observed as under:-

“474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any

³²Mohd.Ajmal Amir Kasab vs. State of Maharashtra, (2012) 9 SCC 1

failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.”

In ***Mohd. Sukur Ali***³³, the Court observed as under:-

“Seervai who has said in his *Constitutional Law of India*, 3rd Edn., Vol. I, p. 857:

“The right of a person accused of an offence, or against whom any proceedings were taken under the CrPC is a valuable right which was recognised by Section CrPC. Article 22(1), on its language, makes that right a constitutional right, and unless there are compelling reasons, Article 22(1) ought not to be cut down by judicial construction. ... It is submitted that Article 22(1) makes the statutory right under Section 309 CrPC a constitutional right in respect of criminal or quasi-criminal proceedings.”

12. We are fully in agreement with Mr Seervai regarding his above observations. The Founding Fathers of our Constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign

³³Mohd. Sukur Ali vs. State of Assam, (2011) 4 SCC 729

rule, and who had themselves been incarcerated for long period under the formula “Na vakeel, na daleel, na appeal” (No lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers.”

If an accused remains unrepresented by a lawyer, the trial court has a duty to ensure that he is provided with proper legal aid. Now I may sound a note of caution. Many of you might feel, what is the necessity of harping on grant of legal aid. It is because even recently I have come across cases where the accused have been tried without being represented by a counsel. When the constitutional as well as statutory commands are violated by some, it is the duty of the Judicial Academy to ingrain that into the intellectual marrows of the judicial officers. So, I have highlighted on that object.

RIGHT AGAINST SELF INCRIMINATION

The right against self-incrimination in Article 20 (3) and Section 161(2) of the Code gives an accused person the right not be a witness against himself which includes the right to be informed that he has a right to call a lawyer before answering any of the questions put to him by the police. In this context, I may usefully quote a passage from **Nandini Satpathi's case**³⁴: -

“20. Back to the constitutional quintessence invigorating the ban, on self incrimination. The area covered by Article 20(3) and Section 161(2) is substantially the same. So much so, we are inclined to the view, terminological expansion apart, that Section 161(2) of the Cr.P.C. is a parliamentary gloss on the constitutional clause.”

The Court, repelling the suggestion as to truncated and narrow interpretation, observed:

“Such a narrow meaning may emasculate a necessary protection. There are only two primary queries involved in this clause that seals the lips into permissible silence, (i) Is the person called

³⁴ Nandini Satpathi vs. P.L. Dani, (1978) 2 SCC 424

upon to testify 'accused of any offence', (ii) Is he being compelled to be witness against himself ?

We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like-not legal penalty for violation. "So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right,

but then, a stance of silence is running a calculated risk. On the other hand, **if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).**"

As per **Section 41 D** of the Code, when any person is arrested and interrogated by the police, he is entitled to meet an advocate of his choice during interrogation, though not throughout the interrogation. Also oral or written statement conveying personal knowledge likely to lead to incrimination by itself or furnishing a link in the chain of evidence comes within the prohibition of Article 20(3). Accordingly, narcoanalysis, polygraph and brain electrical activation profile tests are not permissible under Article 20 (3) and any evidence collected through them cannot be produced in the courts as laid down in **Selvi v. Karnataka**³⁵ and **Mohd. Ajmal Amir Kasab v. Maharashtra**³⁶.

³⁵ (2010) 7 SCC 263

³⁶ (2012) 9 SCC 1

LAW AND ORDER IN A DEMOCRACY AS A CONSTITUTIONAL NORM AND THE CONCEPT OF SENTENCING

In *Ramlila Maidan Incident*³⁷, it has been held that the term 'social order' has a very wide ambit which includes 'law and order', 'public order' as well as 'security of the State'. In other words, 'social order' is an expression of wide amplitude. It has a direct nexus to the Preamble of the Constitution which secures justice - social, economic and political - to the people of India. An activity which could affect 'law and order' may not necessarily affect public order and an activity which might be prejudicial to public order, may not necessarily affect the security of the State. Absence of public order is an aggravated form of disturbance of public peace which affects the general course of public life, as any act which merely affects the security of others may not constitute a breach of public order. The 'security of the State', 'law and order' and 'public order' are not expressions of common meaning and connotation. To maintain and preserve public peace, public safety and the public order is the unequivocal duty of the State and its organs. To ensure social security to the citizens of India is not merely a legal

³⁷ *Ramlila Maidan Incident vs. Home Secretary, Union of India and ors.* (2012) 5 SCC 1

duty of the State but also a constitutional mandate. There can be no social order or proper state governance without the State performing this function and duty in all its spheres.

Sentencing, in the context of law and order and the role of the court in imposition of adequate sentence as regards offence is extremely significant. In ***Shailesh Jasvantbhai***³⁸, the Court observed: -

“Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of ‘order’ should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that: ‘State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.’ Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the

³⁸ Sailesh Jasvantbhai vs. State of Gujarat (2006) 2 SCC 359

crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.”

The Court, in ***Jameel's case***³⁹, held that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing in mind and

³⁹ Jameel vs. State of U.P. (2010) 12 SCC 532

proceed to impose a sentence commensurate with the gravity of the offence.

Recently, in ***Sumer Singh***⁴⁰, noticing inadequate sentence of seven days of imprisonment for an offence punishable under Section 326 IPC, where the convict had chopped off the left hand of the victim from the wrist, the Court was constrained to observe: -

“It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court’s accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is

⁴⁰ Sumer Singh vs. Surajbhan Singh and others 2014 (6) SCALE 187

guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying “the law can hunt one’s past” cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption.”

Before parting with the case, the Court quoted a passage from Felix Frankfurter: -

“For the highest exercise of judicial duty is to subordinate one’s personal pulls and one’s private views to the law of which we are all guardians – those impersonal convictions that make a society a civilized community, and not the victims of personal rule.”⁴¹

In ***Gopal Singh v. State of Uttarakhand***⁴², the Court opined that just punishment is the collective cry of the

⁴¹ Frankfurter, Felix, in Clark, Tom C., “Mr. Justice Frankfurter: ‘A Heritage for all Who Love the Law’”. 51 A.B.A.J. 330, 332 (1965)

⁴² (2013) 7 SCC 545

society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. There can neither be a straitjacket

formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which have been indicated hereinbefore and also have been stated in a number of pronouncements by the Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

POWER OF ARREST

The power of arrest has been regulated under the Code in order to protect the fundamental rights under Arts 21 and 22. Under **Section 41B** of the Code, every police officer

while making an arrest is required to (a) bear an accurate, visible and clear identification of his name which will facilitate easy identification; (b) prepare a memorandum of arrest which shall be— (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made; (ii) countersigned by the person arrested; and (c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest. The power of the police to arrest has been further regulated by **Section 46** and **Section 49**.

Article 22 (2) is violated if remand orders (**Section 167 of the Code**) are given by a judge without the production of the accused under **Section 57** of the Code within 24 hours of arrest. In all cases, the courts are expected to ensure if an alleged act constitutes any crime before remanding a person to police or judicial custody as has been held in the cases of **Bhim Singh**⁴³ and **D.K. Basu**⁴⁴ and other cases

⁴³ Bhim Singh vs. J & K, (1985) 4 SCC 677

⁴⁴ D.K. Basu vs. State of WB, (1997) 1 SCC 416

wherein directions have been given in respect of arrested persons and persons in police custody.

Recently, the principle was highlighted in ***Hema Mishra***⁴⁵: -

“Above mentioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of Sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India.”

SUMMONING

The Code takes care that the summoning power of the court is regulated and the rights of the accused and

⁴⁵ Km. Hema Mishra vs. State of U.P. and ors. AIR 2014 SC 1066

witnesses are protected under Art 21. **Section 53** provides that non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when it is reasonable to believe that the person will not voluntarily appear in court; or the police authorities are unable to find the person to serve him with a summon; or it is considered that the person could harm someone if not placed into custody immediately. **Section 54** provides that as far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive. As per **Section 55**, in complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the

accused seem to be avoiding the summons, the court, in the second instance, should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, the Code 'cautions' courts at the first and second instance to refrain from issuing non-bailable warrants.

ISSUE OF NON-BAILABLE WARRANT ON THE CONSTITUTIONAL TOUCHSTONE

In *Raghuvansh Dewanchand Bhasin*⁴⁶, it has been opined that it needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically but only after recording satisfaction that in the facts and circumstances of the case it is warranted. The courts have to be extra-cautious and careful while directing issuance of non-bailable warrant, else a wrongful detention would amount to denial of the constitutional mandate as envisaged in Article 21 of the Constitution of India. At the

⁴⁶ Raghuvansh Dewanchand Bhasin vs. State of Maharashtra, AIR 2011 SC 3393

same time, there is no gainsaying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain the rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand, and the State on the other. Indeed, it is a complex exercise. Thereafter, the Court referred to the authority in ***Inder Mohan Goswami***⁴⁷ wherein the Court had issued certain guidelines to be kept in mind while issuing non-bailable warrant. While concurring with the observations, the learned Judges in ***Raghuvansh Dewanchand Bhasin*** observed thus: -

“... we feel that in order to prevent such a paradoxical situation, we are faced with in the instant case, and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirement.”

The said guidelines are to be followed as an endeavour to put into practice the directions stated therein. I am not enumerating the directions but it is the command of law

⁴⁷ Inder Mohan Goswami vs. State of Uttaranchal (2017) 121 SCC 1

which has to be followed and, be it stated, the said guidelines were issued keeping in view the constitutional principle and the statutory norms that is the bond between the constitutional concepts and criminal jurisprudential perspective.

DOUBLE JEOPARDY

The constitutional doctrine of double jeopardy which finds expression in Art 20 (2) has statutory recognition in Section **300 Cr.PC.**

In the case of ***Maqbool Hussain***⁴⁸, the Constitution Bench, while discussing the concept of double jeopardy, ruled that: -

“The fundamental right which is guaranteed in Art. 20(2) enunciates the principle of *autrefois convict*” or “double jeopardy”. The roots of that principle are to be found in the well established rule of the common law of England “that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the

⁴⁸ *Mazbool Hussain vs. State of Bombay*, AIR 1953 SC 325

same offence.” (Per *Charles J.* in *Reg. vs. Miles* (1890) 24 Q.B.D. 423 (A).) To the same effect is the ancient maxim “*Nimo Bis Debet Puniri Pro Uno Delicto*”, that is to say that no one ought to be twice punished for one offence or as it is sometimes written “*Pro Eadem Causa*” that is for the same cause.”

Placing reliance on the same, a two-Judge Bench, in

Sangeetaben Mahendrabhai Patel⁴⁹, opined that: -

“**14.** This Court in *Maqbool Hussain* held that the fundamental right which is guaranteed under Article 20(2) enunciates the principle of “*autrefois convict*” or “double jeopardy” i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim *nemo debet bis punire pro uno delicto*, that is to say, that no one ought to be punished twice for one offence. **The plea of *autrefois convict* or *autrefois acquit* avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other**

⁴⁹ *Sangeetaben Mahendrabhai Patel vs. State of Gujarat and another*, (2012) 7 SCC 621

and not that the facts relied on by the prosecution are the same in the two trials. A plea of *autrefois acquit* is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.”

Be it reiterated, the said principle is ingrained in Section 300 of the Code and to understand the concept, it is necessary to appreciate the ratio laid down by the Apex Court in the cases of ***S.A. Venkataraman*⁵⁰, *Om Prakash Gupta*⁵¹, *Veereshwar Rao Agnihotri*⁵², *Leo Roy Frey*⁵³, *S.L. Apte*⁵⁴, *Bhagwan Swarup Lal Bishan Lal*⁵⁵ and *L.R. Melwani*⁵⁶.**

Natural justice and its significance under the Code

Natural justice, under the Constitution of India, may not be existing as a definite principle but it is read in by the Courts to the great heights engrafted in Chapter III of the Constitution. This is a facet of constitutional

⁵⁰ S.A. Venkataraman vs. Union of India, AIR 1954 SC 375

⁵¹ Om Prakash Gupta vs. State of U.P. AIR 1957 SC 458

⁵² State of M.P. vs. Veereshwar Rao Agnihotri, AIR 1957 SC 592

⁵³ Leo Roy Frey vs. Supt., District Jail AIR 1958 SC 119

⁵⁴ State of Bombay vs. S.L. Apte AIR 1961 SC 578

⁵⁵ Bhagwan Swarup Lal Bishan Lal vs. State of Maharashtra AIR 1965 SC 682

⁵⁶ Collector of Customs vs. L.R. Melwani AIR 1970 SC 962

humanistic principle. In this context, I may usefully quote a passage from ***Nawabkhan Abbaskhan***⁵⁷:-

“In Indian constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by Courts into those great rights enshrined in Part III as the quintessence of reasonableness. We are not unmindful that from Seneca’s Medea, the Magna Carta and Lord Coke to the constitutional norms of modern nations and the Universal Declaration of Human Rights it is a deeply rooted principle that “the body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished nor destroyed in any way” without opportunity for defence and one of the first principles of this sense of justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side.”

Section 235(2) of the Code provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law. Interpreting the said provision, the Court in ***Allauddin Mian***⁵⁸ opined that: -

⁵⁷ (1974) 2 SCC 121

⁵⁸ Allauddin Mian and others vs. State of Bihar, (1989) 3 SCC 5

“The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced subsection (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed.”

Thereafter, the two-Judge Bench proceeded to rule

thus: -

“We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of subsection (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record.”

Be it noted, the said principle was reiterated in **Ajay Pandit**⁵⁹ placing reliance on **Santa Singh**⁶⁰ and **Muniappan**⁶¹.

From the aforesaid, the life link and the living constituent between the statutory provisions and the

⁵⁹ Ajay Pandit alias Jagdish Dayabhai Patel vs. State of Maharashtra (2012) 8 SCC 43

⁶⁰ Santa Singh vs. State of Punjab (1976) 4 SCC 190

⁶¹ Muniappan vs. State of T.N. (1981) 3 SCC 11

constitutional principles are perceptible. And that makes the duty of the trial Judge extremely important in this regard.

LIBERTY AND GRANT OF BAIL

Enlargement of bail or grant of bail has an association with individual liberty. Emphasising the concept of liberty, the Court in ***Rashmi Rekha Thatoi***⁶², has observed:-

“4. The thought of losing one’s liberty immediately brings in a feeling of fear, a shiver in the spine, an anguish of terrible trauma, an uncontrollable agony, a penetrating nightmarish perplexity and above all a sense of vacuum withering the very essence of existence. It is because liberty is deep as eternity and deprivation of it, infernal. Maybe for this the protectors of liberty ask, “How acquisition of entire wealth of the world would be of any consequence if one’s soul is lost?” It has been quite often said that life without liberty is eyes without vision, ears without hearing power and mind without coherent thinking faculty. It is not to be forgotten that liberty is not an absolute abstract concept. True it is, individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is

⁶² *Rashmi Rekha Thatoi and anr. vs. State of Orissas and ors.* (2012) 5 SCC 690

to be sustained and achieved when it sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy.”

Thereafter, the Court quoted a passage from E. Barrett Prettyman, Speech at Law Day Observances (Pentagon, 1962), as quoted in Case and Comment, Mar-Apr 1963, 26, who had spoken thus: -

“In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematised restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man’s capabilities, not in a massive globe of faceless animations but as a perfect realisation,

of each separate human mind, soul and body; not in mute, motionless meditation but in flashing, thrashing activity.”

Despite the fact that we have put liberty on the pedestal, yet it is not absolute. I have referred to this decision solely for the purpose that while granting bail, the court dealing with the application for bail has to follow the statutory command bearing in mind the constitutional principle of liberty which is not absolute.

In ***Ash Mohammad***⁶³, while discussing the concept of liberty and the legal restrictions which are founded on democratic norms, the Court observed that the liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes, it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic body polity which is wedded to the rule of law, an individual is expected to grow within the social restrictions sanctioned

⁶³ Ash Mohammad vs. Shiv Raj Singh alias Lalla Babu and another (2012) 9 SCC 446

by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society, an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well-accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmund Burke, while discussing about liberty opined, "it is regulated freedom". Thereafter, the two-Judge Bench proceeded to observe: -

"18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would

bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilised milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organised society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquillity and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

“Personal liberty is the right to act without interference within the limits of the law.”

19. Thus analysed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardised, for the rational collective does not countenance an anti-social or anti-collective act.”

Be it stated, in the said case, a history-sheeter, involved in number of cases pertaining to grave offences under IPC and other Acts, was enlarged on bail and the Apex Court treated the order of bail as one of impropriety and set it aside.

CONCLUSION

In conclusion, I must state that I have made a humble endeavour to present to you the inter-connectivity between our constitutional norms and concepts and criminal jurisprudence, for I have observed on many an occasion that some of the judicial officers feel themselves alienated in their own perception from the organic document. You can never be stranger to our compassionate and humane Constitution in your adjudicating process. I am certain, you are always reminded of your statutory duty but your alertness with humility would increase to keep the constitutional principles close to your heart and soul. That would elevate your work, the mindset and the sense of justice. Continuous learner of law, wherever his position is, has to remind intellectually humble and modest because

such kind of modesty nourishes virtues and enables a man to achieve accomplishments. It encourages your sense of duty and disciplines your responsibility. That apart, I would not be very much wrong, if I say, when modesty and self-discipline get wedded to each other, one can assert what is right and these assertions could not be an expression of egotism but, on the contrary, it would be an ornament to your prosperity of knowledge. Lastly, I would suggest to you to learn with delight so that it would enrich your mind you shall never feel the burden.

Thank you.
