LECTURE BY

HON'BLE MR. JUSTICE DIPAK MISRA

JUDGE, SUPREME COURT OF INDIA
AT NATIONAL JUDICIAL ACADEMY REGIONAL
JUDICIAL CONFERENCE AT CUTTACK
ON 30.08.2014

Hon'ble Sri Justice Dipak Mishra, Judge, Supreme Court of India addressing the participants

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. 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 has to be keenly alive to its social responsibility and accountability to the people of the country. 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. That divine duty bestowed on all of us, I would humbly put, is ingrained in the essential serviceability of the institution.

A criminal trial has its own significance. A trial has to be fair as well as speedy because that is the imperative of the dispensation of justice. In ***Mohd. Hussain***[1], it has been observed that 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.

There is emphasis is on speedy and fair trial. The effort must be to scan the provisions in the Code of Criminal Procedure which empower 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. From the said perspective Section 309 of the Code of Criminal Procedure is extremely important. It reads thus: -

> "**309. Power to postpone or adjourn proceedings.** - (1) In very 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;

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

(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***[2], 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."

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***[3] , 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

---

2. Halab Haji Hussain vs. Madhukar Purshottam Mondkar and another, AIR 1958 SC 376
3. Krishnan and another vs. Krishnaveni and another, (1997) 4 SCC 241

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***[4] , 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 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***[5] , 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***[6] , 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: -

> "**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

4. Swaran Singh vs. State of Punjab (2000) 5 SCC 668
5. Ambika Prasad vs. State (Delhi Admn.) (2000) 2 SCC 646
6. State of U.P. vs. Shambhu Nath Singh (2001) 4 SCC 667

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***[7], the Court, while not approving the deferment of the cross-examination of witness for a long 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***[8], 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 does not require Solomon's wisdom to perceive 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 his primary duty to monitor the trial and such monitoring

7. Mohd. Khalid vs. State of West Bengal (2002) 7 SCC 334
8. Gurnaib Singh vs. State of Punjab (2013) 7 SCC 108

has to be in consonance with the Code of Criminal Procedure. Eventually, the Court was constrained to say thus: -

> "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.

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 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 ***Mangal Singh***[9], 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. The Court observed :-

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

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

In ***Himanshu Singh Sabharwal***[10], 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. There has to be fairness of approach 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 society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm.

In ***Rattiram***[11], while giving emphasis on fair trial, it has been held that 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 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.

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.

LEGAL AID

Presently, I shall focus on the facet of legal aid. The right to legal aid is statutorily ensured under **Section 304** of the Code and under Articles 21,22 and 39 A of the Constitution. 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***[12]; ***Suk Das v. Union Territory of Arunachal Pradesh***[13]***; Mohd. Ajmal Amir Kasab v. Maharshtra***[14] and ***Rajoo v. MP***[15].

The Court in ***Mohd Hussain***[16] held that in a trial before the Court of Sessions, if the accused is not represented by a pleader and does not have sufficient 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

10. Himanshu Singh Sabharwal vs. State of M.P. & ors., AIR 2008 SC 1943
11. Rattiram vs. State of M.P. (2012) 4 SCC 516
12. (1981) 1 SCC 635
13. (1986) 2 SCC 401
14. (2012) 9 SCC 1
15. (2012) 8 SCC 553
16. AIR 2012 SC 750

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 Sub-Section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a needy 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, being 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 ***Mohd. Ajmal Amir Kasab***[17], the Court observed 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. 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. Thereafter, the Court directed: -

> "We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."

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 Officers Training and Research Institute to ingrain that into the intellectual marrows of the judicial officers. So, I have highlighted on that object.

Certain other significant facets

Section 156(3) of the Code

Section 156(3) of the Code vests power in the Magistrate to direct investigation in cognizable offence by an officer of a police station over which, the Court has jurisdiction. To exercise the said discretion judicially, the Magistrate must be satisfied that the complaint brought before him warrants an investigation by the police. In case the complainant has in possession of all the material evidence to

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

prove his case, no useful purpose will be served in directing investigating agency to investigate the matter and such a complaint should be treated as a complaint case and proceeded with. These principles have been stated in ***Skipper Beverages***[18] and ***Subhkaran Luharuka***[19] .

Section 167 of the Code

Remand of an accused to the custody is not an idle formality. The Code provides that endeavour has to be made to complete the investigation within 24 hours of the arrest and it is only if the investigation is not complete in 24 hours and the custody of the accused is warranted for carrying out investigation then only police custody remand should be directed. The accused has a valuable right to be produced before the Magistrate within 24 hours of the arrest. The purpose whereof is not only to ward off illegal detention but also that if the accused has something to state or produce before the Court he can do so on the first available opportunity. While granting the remand, the Magistrate is duty bound to peruse the case diaries and see whether further detention of the accused in police custody or judicial custody is necessary or not. One of the checks and balances to maintain a fair investigation is to sign the case diary when produced before the Magistrate while seeking remand of the accused. In case, the case diaries are signed at that stage then chances of tempering with the investigation carried on is ruled out.

In ***Nirala Yadav***[20] the Court was dealing with a case wherein application was filed immediately after expiry of period stipulated from filing of the charge sheet. To get the benefit of the default provision as engrafted under proviso to sub-Section (2) of Section 167 of the Code the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. In that context, the court ruled: -

> "There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct."

---

18. Skipper Beverages Pvt. Ltd. vs. State 92 (2001) DLT 217
19. Shri Subhkaran Luharuka & Anr. vs. State & Anr. ILR (2010) VI Delhi 495
20. Union of India through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav (Crl. A. 786 of 2010 decided on 30.6.2014)

Section 193 of the Code

The controversy in relation to the exercise of power has been put to rest by the Constitution Bench in ***Dharam Pal***[21] wherein it has been held that

> "... the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein."

Section 319 of the Code

Section 319 of the Code, as has been held by the Constitution Bench in ***Hardeep Singh***[22] , is discretionary and extraordinary power. Though the accused subsequently is impleaded, he has to be treated as if he had been an accused when the court initially took cognizance of the offence and thereafter, the degree of satisfaction that is required for summoning a person under Section 319 of the Code would be the same as for framing the charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different. The controversy has always been struck up whether the word "evidence" used in Section 319(1) of the Code could only mean evidence tested by cross-examination. The Constitution Bench has opined that considering the fact that under Section 319 of the Code a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) of the Code the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by the cross-examination. I must state here that this has been the consistent view of the High Court of Madhya Pradesh.

Sentencing

The Court, in ***Jameel's case***[23] , 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

21. Dharam Pal and others vs. State of Haryana and another (2014) 3 SCC 306
22. Hardeep Singh etc.etc. vs. Staet of Punjab and others (2014) 3 SCC 92
23. Jameel vs. State of U.P. (2010) 12 SCC 532

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

Recently, in ***Sumer Singh***[24] , 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 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."

In ***Gopal Singh v. State of Uttarakhand***[25], the Court opined that just punishment is the collective cry of the 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

24. Sumer Singh vs. Surajbhan Singh and others 2014 (6) SCALE 187
25. (2013) 7 SCC 545

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.

ISSUE OF NON-BAILABLE WARRANT ON THE CONSTITUTIONAL TOUCHSTONE

In ***Raghuvansh Dewanchand Bhasin***[26], 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 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***[27] the Court had issued certain guidelines to be kept in mind while issuing non-bailable warrant:

> "53. 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

26. Raghuvansh Dewanchand Bhasin vs. State of Maharashtra, AIR 2011 SC 3393
27. Inder Mohan Goswami vs. State of Uttaranchal (2007) 12 SCC 1

- it is considered that the person could harm someone if not placed into custody immediately.

54. 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.

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, we caution courts at the first and second instance to refrain from issuing non-bailable warrants."

While concurring with the observations, the learned Judges in ***Raghuvansh Dewanchand Bhasin*** issued further guidelines as under: -

"(a) All the High Court shall ensure that the subordinate courts use printed and machine numbered Form 2 for issuing warrant of arrest and each such form is duly accounted for;

(b) Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

(c) The presiding Judge of the Court (or responsible officer specially authorised for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

(d) The court must ensure that warrant is directed to a particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;

(e) Every court must maintain a register (in the format given below at p. 804), in which each warrant of arrest issued must be entered chronologically

and the serial number of such entry reflected on the top right hand of the process;

(f) No warrant of arrest shall be issued without being entered in the register mentioned above and the court concerned shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the case concerned;

(g A register similar to the one in para 28.5 supra shall be maintained at the police station concerned. The Station House Officer of the police station concerned shall ensure that each warrant of arrest issued by the court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

(h) Ordinarily, the courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

(i) On the date fixed for the return of the warrant, the court must insist upon a compliance report on the action taken thereon by the Station House Officer of the police station concerned or the officer in charge of the agency concerned;

(j) The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

(k) In the event of warrant for execution beyond jurisdiction of the court issuing it, procedure laid down in Sections 78 and 79 of the Code must be strictly and scrupulously followed; and

(l) In the event of cancellation of the arrest warrant by the court, the order cancelling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the authority concerned, requiring the process to be returned unexecuted forthwith. The date of receipt of the unexecuted warrant will be entered in the aforesaid registers. A copy of such order shall also be supplied to the accused."

The said guidelines are to be followed as an endeavour to put into practice the directions stated therein. Be it clarified, the guidelines have been issued keeping in view the constitutional principle and the statutory norms. That is the bond between the constitutional concepts and criminal jurisprudential perspective. And for that reason I have used the phraseology sanctity of the Code.

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 humanistic principle. In this context, I may usefully quote a passage from ***Nawabkhan Abbaskhan***[28] , it has been ruled that one of the first principles of the 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 is required to proceed in accordance with the provisions, hear the accused on the question of sentence, and then pass an order of sentence according to law. Interpreting the said provision, the Court in ***Allauddin Mian***[29] opined that: -

> "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 sub-section (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 sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit is vitiated. 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."

---

28. (1974) 2 SCC 121
29. Allauddin Mian and others vs. State of Bihar, (1989) 3 SCC 5

Be it noted, the said principle was reiterated in ***Ajay Pandit***[30] placing reliance on ***Santa Singh***[31] and ***Muniappan***[32].

This 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***[33], 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 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."

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***[34], 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 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

30. Ajay Pandit alias Jagdish Dayabhai Patel vs. State of Maharashtra (2012) 8 SCC 43
31. Santa Singh vs. State of Punjab (1976) 4 SCC 190
32. Muniappan vs. State of T.N. (1981) 3 SCC 11
33. Rashmi Rekha Thatoi and anr. vs. State of Orissas and ors. (2012) 5 SCC 690
34. Ash Mohammad vs. Shiv Raj Singh alias Lalla Babu and another (2012) 9 SCC 446

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.

Thereafter the Court opined that liberty, although 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.

At this juncture, I am obliged to say that the courts while dealing with applications for grant of bail have to be careful keeping in view nature of offence and gravity. Sometimes it is noticed that no reasons are given. That does not mean one is required to ascribe elaborate reasons. But, laconically allowing a bail application is totally undesirable. As far as grant of anticipatory bail is concerned, one has to be more cautious. The impact of the crime has to be seen. When judicial officer is rejecting the applications, no further observations like "when he surrenders" or "on his surrendering" or "if he files bail bonds", etc. never be made. In ***Ranjit Singh***[35] the High Court, while rejecting the application under Section 438 of the Code, had passed the following order: -

> "Considering the nature of the allegation and the evidence collected in the case-diary, the petition is disposed of with a short direction that the petitioner

35. Ranjit Singh vs. State of M.P. and others 2013 (12) SCALE 190

shall surrender before the Competent Court and shall apply for regular bail and the same shall be considered upon furnishing necessary bail bond."

On the basis of the aforesaid order, the learned Additional Sessions Judge immediately instead of seeking any clarification from the High Court granted the benefit of bail to the accused under Section 439 of the Code. The victim approached the High Court and the High Court cancelled the bail order. On being approached by the accused the Apex Court on other reasons declined to interfere and granted liberty to the accused to surrender to custody and move for regular bail with further stipulation that the same shall be considered independently on its own merits.

Thereafter it was compelled to observe that the order passed by the learned single Judge was potent enough to create enormous confusion. My purpose of saying this is that while passing an order, every judicial officer has to be extremely careful what kind of directions he is issuing. All attempts are to be made to avoid this kind of confusion. I am compelled to say so as such kind of orders have become quite frequent.

CONCLUSION

In conclusion, I must state that I have made a humble endeavour to present to you the sanctity of certain provisions under the Code and duty of the Court to sustain the same. I have also endeavoured to show the inter-connectivity between our constitutional norms and concepts and criminal jurisprudence. That is where precisely the sanctity of the Code emerges. I have found on many an occasion that some of the judicial officers feel themselves alienated in their own perception from the Constitution. You can never be a stranger to our compassionate and humane Constitution in the 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 be 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 would 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. Do live by sanctity of law.

Thank you.

❍❍❍