



RIGHT TO BAIL: AN ANALYTICAL STUDY IN THE CONTEXT OF INDIAN CONSTITUTION

Dr. Vijay Pal Singh*

ABSTRACT

Criminal prosecution is based on presumption of innocence of the accused. However if bail is refused to an accused, the effect is that Investigation, trial and punishment go on simultaneously. Thus an anomaly is created. Arrest and refusal of bail during the stage of investigation is necessary to assert the power of the state and also to assure the witnesses that the state is powerful enough to protect them. At the stage of trial the accused has the right to be defended by an Advocate of his choice. For this the accused has to pay his fees. To pay the fees to his Advocate the accused needs to earn, and to earn he needs to work. To work he needs to be freed from custody on bail. Thus two fundamental Rights come into picture, Article 19 (1)(g) and Article 22 (1) of the Constitution of India which entitles a citizen to work. Article 22 (1) of the constitution of India recognizes the right of an accused to be defended by an Advocate of his choice. If an accused is not released on bail his right under Article 22(1) of the Constitution of India becomes illusory.

Key Words: *Bail, Constitution, Right, Deprived, Fundamental, etc.*

I Introduction

The relevance and necessity of bail from the point of view of the accused differ from stage to stage of a criminal prosecution. The nature of pre-conviction detention is punitive. This is clear from section 428 Cr.P.C. Refusal of bail means continued detention of an accused during the investigation and trial of his case. This has the effect of carrying out investigation, trial and punishment simultaneously. The anomaly is that the criminal trial proceeds on the presumption of innocence of the accused. Thus the stark anomaly which faces us is that the accused is presumed to be innocent unless proved guilty but he still undergoes punishment of imprisonment in all cases where bail is refused to him.

II -Questions to be considered

Question of bail relates to personal liberty of accused and is therefore dependent on the procedure established by law within the meaning of Article 21 of the Constitution of India.

Question of bail also relates to the right of an accused to consult and be defended by a legal practitioner of his choice guaranteed by the Constitution of India¹.

Article 22(1) is as under:-

“22. Protection against arrest and detention in certain cases.-

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.”

III The Right secured by Article 21 of the Constitution

It is necessary to analyze Article 21 and 22 of the Constitution of India in the context of release of an accused on bail pending investigation, trial and appeal. Bail to an accused depends on the provision of the procedure established by law. Therefore, the question that arises is as to whether there is anything in Article 21 of the Constitution of India which obliges the state to provide for bail to an accused during the pendency of the investigation, trial and appeal? Article 21 provides that “no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law”. A bare reading of this Article discloses that it only obliges the state to enact a procedure which should be followed before it takes away the life and liberty of an accused person. Article 21 of the Constitution of India taken by itself does not provide for the contents of this right. The effect of Article 21 is to elevate the provisions of the procedure established by law to the status of fundamental right. In *Maneka Gandhi v. Union of India*², Hidayatullah Chief Justice, as he then was, concludes that “Article 21 however makes it clear that violation of law whether statutory or of any other kind is itself an infringement of the guaranteed Fundamental Right. The basic right is not to be denied the protection of law irrespective of variety of that law. It need only be a right established by law”.

Now if the parliament either enacts the procedure for certain specified offences prohibiting bail to an accused person pending investigation, trial and appeal or amends the criminal procedure code repealing section 437-439 and 389 Cr.P.C. whether there is anything in part 3 of the constitution to prevent such an action by the parliament? The doctrine of just, fair and reasonable procedure on account of the impact of Article 14 on Article 21 of the Constitution of India is too vague and uncertain a standard to Judge the

*Assistant Professor (Law) at Amity University Haryana.

¹ Article 22(1), Constitution of India

² 1978 (1) SCC 248 @ page 401

validity of any legislation. The Supreme Court on the basis of this doctrine has upheld impossible conditions laid down for release of an accused on bail under TADA and NDPS Act.

IV Relationship between Articles 21 and Article 22(1) of the Constitution

Article 22(1) of the Constitution of India introduces the requirement of principles of natural justice in the realm of Criminal Trial. It guarantees an accused person the right to defend himself through a legal practitioner of his choice. In view of Article 22(1) of the Constitution of India the Procedure established by law under Article 21 of the Constitution of India should provide provisions for defence of accused. However, the right to be defended by a legal practitioner of his choice contains an inherent limitation i.e. the accused should pay the fees of the legal practitioner of his choice, and to do so he should have the means for the same. To acquire the means to pay the fees to his advocate the accused should be permitted to work. This is possible only if he is released from custody. This is how question of bail acquires constitutional importance.

V Stages of Criminal Prosecution and Necessity of Bail

For the present discussion a criminal prosecution can be divided into three stages, (i) Investigation (ii) Trial (iii) Appeal. Purpose of investigation is to collect evidence in respect of an offence. At this stage there is only an unsubstantiated allegation against the accused. Theoretically speaking there is no justification for keeping an accused in custody without there being any credible material raising a strong suspicion against the accused. However, in cases of capital offences like Murder, Dacoity, kidnapping for ransom, murder or rape etc, it would be highly impractical not to arrest a person accused of such offences. Cases above mentioned generate a lot of fear among the people of the locality where such offences are committed. If a person accused of such offences is not arrested and allowed to roam freely, the investigating officer will not be able to collect any credible evidence to prosecute the offender. Therefore arrest of an accused and keeping him in custody during investigation in capital or serious offences during investigation is necessary for the purposes of an effective investigation. Violation of a law is like challenging the Government machinery itself. Therefore arrest of an accused in serious offences is also necessary to demonstrate the power of the state. It is this demonstration of power by the state which makes the people feel safe. In a clash between theoretical legal position and practical necessity, theoretical legal position should yield to practical necessity. The presumption of innocence is confined only to trial and appeal of a criminal case.

Presumption of innocence of an accused is the corollary of the strict burden of proof on the prosecution, the doctrine of benefit of doubt and the right of accused to remain silent.

VI Bail under section 167 Cr.P.C.

Section 167 Cr.P.C. prescribe maximum period of detention of an accused pending investigation as 90 days for offences punishable with death or imprisonment for life or for offences punishable with a sentence of not less than 10 years. In all other offences the maximum period for which an accused person can be detained pending investigation is 60 days. Thus, the procedure established by law authorizes the running of sentences for 90 or 60 days as the case may be along with investigation. This provision does not in any way militate against Article 22(1) of the Constitution of India. In any event till the stage of investigation of an offence the fundamental right of an accused to be defended by a legal practitioner of his choice does not come into play. If the accused continued in detention for a period of 90 or 60 days as the case may be and the investigation is not completed the magistrate has no jurisdiction to remand him to custody and the accused is entitled to bail as of right, provided he is willing and able to execute a bail bond and sureties of an amount prescribed by the magistrate. In case the accused fails to furnish bail bond and sureties the magistrate has no option but to send the accused to judicial custody. Power of the court to release an accused person on bail during the pendency of an investigation even if the aforesaid periods of 90 or 60 days depending on the nature of offence has not expired is not taken away. The court has discretion under section 437 or section 439 Cr.P.C. to release the accused on bail even during the pendency of investigation. Needless to say, that the discretion is to be exercised judicially on the basis of material on record. Till this stage i.e. the stage of investigation, no fundamental right of the accused is violated or infringed if he is kept in custody.

VII Impact of Article 22 (1) on Article 19(1)(g) of the Constitution of India

That the second stage starts after the filing of the charge sheet under section 173 Cr.P.C. In cases exclusively triable by a court of session, the matter is committed to the Court of Session by the magistrate concerned and after summons is issued by the session court and the accused appears pursuant to the summons, the stage of trial begins. At this stage the presumption of innocence in favour of the accused is activated and his right to be defended by a legal practitioner of his choice guaranteed under Article 22(1) of the Constitution of India comes into play. Whether any right of bail is recognized in the procedure established by law or not, the release of an accused on bail is necessitated by Article 22(1) of the Constitution of India which guarantees to every accused a right to consult and be defended

by a legal practitioner of his choice. This right carries with itself an inherent limitation i.e. an accused should be able to pay fees to the legal practitioner of his choice. While the accused is in jail custody he has no opportunity to work or earn and therefore right to be defended under Article 22(1) of the Constitution of India is severely restricted. Since the accused is presumed to be innocent he also has a right to carry out his trade, profession or occupation for his livelihood, this right is guaranteed under Article 19(1) (g) of the Constitution of India. Article 22(1) of the Constitution of India therefore reinforces the right of the accused under Article 19(1) (g) for the Constitution of India.

The interconnection between trial of an accused and his right to be defended by a legal practitioner of his choice is direct and relates to principles of natural justice. If the accused is deprived of the means of earning his right under Article 22(1) of the Constitution of India becomes an empty formality. The right to pursue any business trade profession or occupation is again a fundamental right guaranteed under Article 19(1) (g) of the Constitution of India. An eleven judge bench of Supreme Court in *R. C. Cooper v. Union of India*³ has held that “protection against impairment of the guarantee of Fundamental Rights is determined by the nature of the right, the interest of the aggrieved party and degree of harm resulting from state action. Impairment of the right of the individual and not the object of state in taking the impugned action, is the measure of protection..... the validity of state action must be adjudged in the light of its operation upon the rights of the individual and groups of individual in all their dimensions”.

VIII Conclusion

It is clear from a bare perusal of what has been held in *R. C. Cooper*'s case the necessity if any of the accused being detained in custody all through the trial for any reason can never come in the way of the court releasing the accused on bail on account of Article 22(1), Article 19(1) (g) and Article 21 of the constitution of India. The doctrine that the courts have discretion to release or not to release an accused on bail during the stage of trial is negated by the aforesaid articles of the Constitution of India. Thus, at the stage of trial the accused has a fundamental right to be released on bail to finance his defence and to prepare for his defence.

³ 1970(3) SCR 530 at 570