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INCARCERATED UNTIL PROVEN INNOCENT: The State's Penchant for Imprisonment vis-à-vis the Right to Liberty of an Accused

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INCARCERATED UNTIL PROVEN INNOCENT: The State's Penchant for Imprisonment *vis-à-vis* the Right to Liberty of an Accused

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*[**Abstract**: One of the many maladies that plagues the Indian criminal justice system is the routine infringement of the right to liberty of the accused by law enforcement agencies by arbitrarily arresting accused persons and thereafter seeking their custody at bail hearings, in the name of 'conducting proper and efficient investigation'. This wrongful abuse of power directly hits at the nation's commitment to the Rule of Law, where right to liberty is considered to be a sacrosanct right which cannot be taken away casually. Such rampant arrests and pleas for custody on the part of investigating agencies make the system itself become the perpetrator of a direct assault on the highly cherished rights of personal liberty, freedom and dignity of the accused, making him a victim of harassment and trauma, much before he is actually declared guilty. The paper observes that often arrests are wholly avoidable and unwarranted, and draws attention to the fact that there exist various alternatives to arrest that the law enforcement agency may adopt to make the accused cooperate in investigation processes, without infringing his liberty. It is further argued that it is an erroneous understanding that the primary duty of upholding civil liberties rests with the courts. While the courts are often criticised or appreciated for denying or granting bail to the accused, not enough attention is given to the question of arbitrariness or genuineness of the arrest itself. It is argued that being the first line of responders in the criminal administration system, the law enforcement/investigation agencies have a special duty to ensure that no such sacrosanct rights of the accused are violated. It further emphasises upon a pressing need to sensitise the law enforcement and investigating agencies towards the personal liberties of an accused, so that they desist from seeking custody of the accused in a routine fashion.]*

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I

Introduction

> *In Measure for Measure the Duke complains (in the given situation): 'And liberty plucks justice by the nose'. The truth is that personal liberty cannot be compromised at the altar of what the State might perceive as justice – justice for one might be perceived as injustice for another.*
>
> — Justice Madan B. Lokur[1]

In this era of information inundation, where an innocent citizenry is bludgeoned with narratives that equate justice with arresting the accused, and media trials are being peddled as a crusade against corruption, one is bound to inspect the reality of such chicanery if he is to know the meaning of justice and the state of affairs of the country vis-à-vis corruption. (Of course, India's 85th rank in the Corruption Index, 2021 (down from Rank 80 in 2019) serves as *res ipsa loquitur* in this regard, the average rank being 78 since 1998).[2] There is an attempt to propagate a misplaced perception of justice having been served merely by promptly accusing and putting people behind bars. The Bollywood model of on-the-spot justice by pre-trial incarceration seems to be the more favoured mode, as against the protracted legal trials held in accordance with the rule of law. This erroneous perception is actively furthered by law enforcement and investigating agencies that seek custody of the accused in a routine manner, and by (a large section of) the media that does not question (rather, encourages) this wrongful use of power.

In a country which boasts of being Rule of Law adherent, a person is deemed innocent until proven guilty. When an offence is committed, it is the law enforcement agency, i.e. the police, that is the first responder to a crime. Thereafter, the role of the judiciary comes into play. Not only are these two institutions tasked with checking offenders, but also to act in alignment with the constitutional principles while doing so. The Hon'ble Supreme Court of India (as also the various High Courts and other lower courts across the country) have time and again upheld these constitutional principles in their pronouncements. Principles such as 'presumption of innocence',[3] 'bail is rule, jail an exception'[4], 'speedy trial'[5], 'legal aid'[6] and rights such as the right against self-

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1 Madan B. Lokur quoting William Shakespeare's 'Measure for Measure, Act 1 Scene III line 20-32' in *Rakesh Kumar Paul* v. *State of Assam*, Special Leave to Appeal (Crl.) No. 2009 of 2017.

2 Transparency International, *Corruption Perception Index*, India, *available at* – https://www.transparency.org/en/cpi/2021/index/ind (Last visited Jan. 05, 2023).

3 *Dataram* v. *State of Uttar Pradesh*, (2018) 3 S.C.C. 22.

4 *State of Rajasthan* v. *Balchand @ Baliay*, A.I.R. 1977 S.C. 2447.

5 *Hussainara Khatoon & Ors.* v. *Home Secretary, State of Bihar*, A.I.R. 1979 S.C. 1360.

6 *Id.*; *Khatri & Ors. etc* v. *State of Bihar & Ors.*, A.I.R. 1981 S.C. 1068.

incrimination[7], rights of arrestees[8], rights of undertrials[9], etc. have been held to be sacrosanct and fundamental to the administration of justice.

The law enforcement agencies (the police) are the most visible representations of the state in any society, and are entrusted with a duty to uphold as well as implement the law in an impartial manner, and protect the life, liberty and dignity of the people. Therefore, the police officers are obligated to discharge their duties in consonance with the Constitution and ensure the preservation, protection and promotion of the Rule of Law. This would enable the public to entrust its faith in the police without fear.

Unfortunately, reality presents a different picture altogether.[10] Arbitrary arrests are rampant. Little heed is paid to the rights of the arrestee, especially where the accused is illiterate or economically weak and is unaware of his legal rights.[11] The wide discretionary power vested in the police is sometimes wrongfully exercised to extort money/property either by themselves or at the instance of the arrestee's enemy.[12] The accused, who are ideally to be presumed innocent, are being made to languish in jails without a conviction. Bail pleas are being listed for hearing after long periods of time, making the entire process effectively infructuous. The latest data suggests that a staggering 69% of prisoners in Indian jails are undertrials.[13] Juxtaposing these figures with the abysmal conviction rates,[14] it becomes evident how the investigating agencies

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7 *Selvi and Ors.* v. *State of Karnataka*, A.I.R. 2010 S.C. 1974.

8 *Nilabati Behera* v. *State of Orissa and Ors*., (1993) 2 S.C.C. 746.

9 *Bhim Singh* v. *Union of India*, (2015) 13 S.C.C. 603.

10 It is pertinent to mention here that the researcher does not intend, in any manner, to make generalised sweeping statements with regard to the attitude of the police force. It is duly acknowledged that the police forces risk their lives to ensure law and order, and often find themselves in the face of grave danger in their call of duty. However, it is an unfortunate and oft-recognised fact that instances of police excesses are rampant in India and is a malady that needs urgent redressal.

11 Law Commission of India, *Law Relating to Arrest*, Report No. 177, Annexure III (December, 2001). *available at:* https://lawcommissionofindia.nic.in/reports/177rptp2.pdf (last visited Jun. 15, 2021).

12 *Id.*

13 3,30,487 prisoners out of the total 4,78,600 prisoners across various jails in India are undertrials. National Crime Records Bureau, *Prison Statistics India 2019*, xi (2020). *Available at*: https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf (Last visited on Jun. 15, 2021).

14 A total of 31,12,639 persons were arrested under 32,25,701 cases of crimes under the Indian Penal Code, 1860. A total of 35,56,801 persons were charge-sheeted, 8,37,075 persons were convicted, 10,26,906 persons were acquitted and 1,22,033 persons were discharged. [Table – 19A.6]. A total of 21,00,765 persons were arrested under 19,30,471 cases of crimes under Special and Local Laws (SLL). A total of 23,17,761 persons were charge-sheeted, 13,78,322 persons were convicted, 3,00,231 persons were acquitted and 46,983 persons were discharged. [Table – 19A.8]. National Crime Records Bureau, *Crimes in India 2019*, I, xvii (2020). *Available at*: https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf (Last visited on Jun. 15, 2021).

utterly fail in their constitutional duty of conducting a fair, transparent and judicious investigation[15].

It is beyond the scope of this paper to discuss all that plagues the Indian criminal justice administration system. However, the most recent and rampant issue that this paper seeks to deal with is the arbitrary denial of the right of personal liberty to the accused in a routine manner by law enforcement agencies, actively encouraged by the media in presenting an arrest as proof of justice having been served, even before the guilt of the accused has been established through trial. All of this is done under the garb of a 'fair and efficient investigation'. The reality, however, is that in effect, the system itself becomes the perpetrator of a direct assault on the rights of personal liberty, freedom and dignity of the accused, making him a victim of harassment and trauma, much before the accused is actually declared guilty.

The paper draws attention to the fact that there exist various alternatives to arrest that a law enforcement agency may adopt to make the accused cooperate with the investigation process without infringing his liberty, and often-times arrests are wholly avoidable and unwarranted. It is further argued that it is an erroneous understanding that the *primary* duty of upholding civil liberties rests with the courts. Being the first line of responders in the criminal administration system, the law enforcement/investigation agencies have a special duty to ensure that no such rights are violated. It further emphasises upon a pressing need to sensitise the law enforcement and investigating agencies towards the personal liberties of an accused, so that they desist from seeking custody of the accused *in a routine fashion*.

Part I of the paper lays out the contours of an investigation and the role of law enforcement and investigation agencies, as laid down under the Indian law. Part II provides an elaborate account of how agencies cite various grounds (which may or may not be genuine) to seek the custody of an accused, and the alternatives to custody available to agencies to seek cooperation of the accused in investigation, without impinging upon his liberty. The submissions of the researcher in this regard are substantiated by judicial pronouncements of various High Courts and the Supreme Court of India, delivered from time to time. Part III provides an overall understanding of the issue at hand, and elaborates upon the chief arguments and conclusions drawn. It is pertinent to note here that the researcher does not intend to say that the alternatives must be exercised across all cases uniformly. It is well understood that each case has to be decided on its own peculiar facts and circumstances. However, it must equally be ensured that the grounds available to the police to seek custody of the accused do not become a tool for abuse of his rights, leaving him bereft of his rights and a victim of the system that is ideally committed to seek the truth without bias.

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[15] *Hema* v. *State through Inspector of Police, Madras,* (2013) 10 S.C.C. 192.

II

Accused, The Investigation, and the Nuances

Investigation includes all the proceedings under the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') for collecting evidence '*conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf*'.[16] Article 21 of the Constitution of India lays down that no one shall be deprived of their life or liberty, except in accordance with procedure established by law. Chapter V of the Cr.P.C. deals with arrest (Sections 41 to 60) which contains provisions including, *inter alia*, when a police may arrest without warrant, procedure of arrest, rights of arrested person, procedure of arrest etc. Arrest takes away the liberty of a person and therefore, the Code provides that arrest is to be made strictly as per provision of Cr.P.C.[17] It is clear, therefore, that the law has put strict controls over the power to arrest.

The job of the investigation agencies is strictly to arrive at the truth of the matter. To this end, arrest, remand or bail of a person serve as aids to investigation. However, arrest cannot be made as a matter of routine. The discretion conferred on the police officer must be exercised prudently and judiciously, given the cost of personal liberty that it comes with for the accused (who shall be deemed innocent until proven guilty in a court of law). It is reasonable that arrest may have to be carried out in certain situation such as cases where the accused has committed a grave offence (such as murder, dacoity, robbery, rape, terrorist offences etc.), or the victim is likely to be threatened if the accused is not arrested, or in cases where the accused is a habitual offender prone to recidivism or where he is likely to threaten witnesses or tamper with evidence etc.

Yet, it is seen that investigation agencies routinely seek the custody of the accused for extended periods of time, having no regard for his rights for reasons best known to them, cloaking their demands for custody in arguments of necessity and reasonability. There are four oft-quoted parameters that investigation/law enforcement agencies cite before Courts to seek custody/oppose bail of an accused: *requirement of accused for further investigation; apprehension of the accused escaping the clutches of law; thwarting of justice by the accused by tampering with evidence or witnesses, and; the gravity and heinousness of the offence being of such preposterous proportion that does not justify bail in the interest of public*.[18]

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[16] The Code of Criminal Procedure, 1973, S. 2(h).

[17] The Code of Criminal Procedure, 1973, S. 60A. Police officers derive their powers of arrest without warrant from S.S. 41, 42, 43(2), 60, 129 and 151 of The Code of Criminal Procedure, 1973. S.S. 46, 47, 49, 50, 51, 56, 57, 167 and 169 of the Code deal with various procedures and precautions during and after arrest.

[18] S. 41 of The Code of Criminal Procedure, 1973 provides for when a police officer may arrest without warrant. Under this provision, the police officer before arresting the accused is to satisfy himself that the arrest is necessary for one or more purposes as provided under the section.

In the following sections, the researcher shall enunciate these four grounds, and bring to light the ways in which investigating agencies abuse/over-use the four aforementioned grounds in a callous and high-handed manner, thereby severely threatening and impinging upon the liberty of the accused. Through judicial pronouncements, the utility of these grounds in securing cooperation of the accused shall be assailed and the various alternatives available to the agency to meet the same object shall be elucidated.[19]

Requirement of the Accused for Further Investigation

Arrest is often justified on the grounds of seeking cooperation of the accused in investigation. This ground is undoubtedly unimpeachable. However, whether such need justifies languishing of accused in police/judicial custody has to be analysed in light of the principles laid down by the Hon'ble Supreme Court of India in the case of *Arnesh Kumar* v. *State of Bihar*.[20] The court in this case termed the attitude of the police to arrest first, and then to proceed to the rest as '*despicable*'. It stated that such arrests had become a '*handy tool*' for insensitive police officers, or those who act with an oblique motive. The Hon'ble Court laid down various guidelines for cases where the offence is punishable with up to seven years of imprisonment, with or without fine. It was held that all State Governments must instruct their police officers to not make automatic arrests under Section 498A of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.'), but to do so only after satisfying themselves that the arrest is necessary, based on the grounds given under Section 41 of the CrPC. Furthermore, it was also held that police officers should be provided with a checklist containing specified sub-clauses under Section 41(1)(b)(ii) of the CrPC, which is to be forwarded while forwarding/producing the accused before the Magistrate for further detention. The Magistrate too has been mandated to only allow detention if he has satisfied herself of its necessity. The Hon'ble Court stated that a failure to observe these guidelines by a police officer would make such officer liable to departmental action and punishment for contempt of court. Also, authorising detention without recording reasons for the same by a Judicial Magistrate shall make him liable for departmental action by the High Court.

While the law allows for incarceration of an accused on the satisfaction of the aforementioned conditions, it's duration cannot be unduly long in the ruse of investigation. Section 167 of the Cr.P.C.[21] grants protection against the same to the accused by allowing him default bail if the investigation is not completed within the stipulated days and chargesheet is not filed. This right to default bail has recently been highlighted to be a fundamental right in favour of the accused by the Apex Court,

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[19] This is not to say that such principles must be applied in all cases indiscriminately. Each case has to, and must be decided on its own footing, facts and circumstances.

[20] (2014) 8 S.C.C. 273.

[21] *Rakesh Kumar Paul* v. *State of Assam*, Special Leave to Appeal (Crl.) No. 2009 of 2017.

stating further that courts are obligated to inform the accused of such right *as and when* it accrues.[22] Apropos, when the Law Commission of India (hereinafter referred to as 'L.C.I.') had recommended for the extension in period for completion of investigation from 15 days provided earlier under The Code of Criminal Procedure, 1898 to 60 days, it had observed that such extension may lead to the maximum period becoming routine. However, it further noted that it was expected that *'proper supervision by the superior courts will prevent that*.'[23]

Though the period of investigation was recommended with a note of caution, circumvention of this already extended salutary provision is in practice in the form of filing ill-construed and half-baked chargesheets under Section 173(4), Cr.P.C. coupled with an application for further investigation,[24] which is the sole prerogative of the investigating agency. This is the stage where the bail application filed by the accused on grounds of completion of investigation and assurance of appearance for trial are thwarted on the ground of requirement of the accused for further investigation.

An example of the practical application of this tactic may be found in *Dr Shivinder Mohan Singh* v. *Directorate of Enforcement*, wherein the Enforcement Directorate had opposed the grant of bail to the accused on the grounds that '*more than INR 2000 crores has been siphoned-off inter alia by the applicant through a very complex and intricate web of corporate entities and transactions, both within and outside India, which will require a long time to trace in order to pin the blame on the accused persons. By reason thereof, such investigation by its very nature takes a long time*'[25]

It is such adventures of the investigating agencies to secure prolonged incarceration *sans* conviction that the Hon'ble High Court of Delhi deprecated in the aforementioned case. The Hon'ble Court rightly noted that the Enforcement Directorate has not provided any *'foreseeable timeline for completing investigation'* as regards the remaining amount of money and therefore '*to link the applicant's judicial custody to completion of that ongoing investigation, if at all, would leave the key to the applicant's custody with the ED, which is not acceptable to this court'*[26]

No court has inherent power to remand an accused to custody; such a power must be conferred by some statute. This power can be found in Sections 167 and 309 of the Cr.P.C. Remand during an ongoing investigation is permitted up to a certain period

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[22] *M. Ravindran* v. *The Intelligence Officer*, Cr. App. No. 699 of 2020. *Also see: Bikramjit Singh* v. *State of Punjab,* 2020 SCC OnLine SC 824.

[23] Law Commission of India, *The Code of Criminal Procedure,* 1898, Report No. 41, Volume I, p. 77 (September, 1969). *Available at*: https://lawcommissionofindia.nic.in/1-50/Report41.pdf (Last accessed on 25.06.2021).

[24] The Code of Criminal Procedure, 1973, S. 173(8), No. 2, Acts of Parliament, 1974 (India). Practice which has been deprecated in *M. Ravindran* v. *The Intelligence Officer*, Cr. App. No. 699 of 2020.

[25] Bail Application No. 1353/2020 (Delhi High Court), 17 (decided on 23.07.2020).

[26] *Id.* at 37.

under Section 167(2) of the Cr.P.C. Once the chargesheet/*challan* is filed and cognizance is taken, the accused can be remanded to custody under Section 309(2), Cr.P.C. The Court has also held[27] that a close reading of Section 309 Cr.P.C. makes it clear that before a remand order for the accused can be passed, the Magistrate must have at least taken cognizance of the offence alleged to have been committed. Moreover, the accused must already be 'in custody' when such an order is passed. Taking persons in custody after taking cognizance is an exception to this rule, on whom Section 167, Cr.P.C. would still be applicable.[28]

The court, in *Dr. Shivinder Singh's* case condemned the practice of seeking extension of custody for further investigation and fishing for evidence, relying on *Navendu Babbar* v. *State of NCT of Delhi*[29] wherein it was stated that, *'criminal investigation is not a metaphorical fishing-rod handed to an investigating agency, to indulge its penchant for 'fishing around' for evidence, at its own leisure and in the fullness of time.'* It was further observed that investigation must be a '*time-limited process'* which should be conducted *'strictly within the structure and framework of applicable law.*'[30] The Hon'ble Supreme Court has also stated that '*investigation into an offence deserves an early closure, one way or the other.'*[31]

Thus, persons who have been incarcerated under Section 167, Cr.P.C. or sent to jail in judicial custody under Section 309 Cr.P.C. have the remedy of regular bail under Section 439 Cr.P.C. on 'merits' wherein this ground of requirement for further investigation may be raised in objection to dislodge a meritorious bail application and hence, needs to be looked into with the aforementioned perspective provided by the Delhi High Court.

In the case of *Matchumari China Venkata Reddy & Ors*. v. *State of Andhra Pradesh represented by its P.P*[32], the Hon'ble Court has held that mere filing of a defective charge sheet by the police on the last day of the prescribed period does not really amount to filing of a chargesheet at all. The accused cannot be denied bail on the ground simply that the chargesheet has been filed in compliance with the Section 173(2) of Cr.P.C. *sans* compliance of Section 173(5) Cr.P.C. Compliance with Section 173(5) Cr.P.C. is equally mandatory.

Therefore, while the need of the accused for investigation is a genuine reason for seeking custody, law enforcement agencies cannot adopt dilatory tactics as aforementioned to subvert the rights of the accused provided by law. Long and protracted detentions under the garb of investigations cannot be justified, where the investigation is not reasonably concluded within reasonable time limits, and the courts must thoroughly guard against such practices.

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[27] *Sunil Kumar Sharma* v. *State (NCT of Delhi),* (Delhi High Court) (decided on 27.06.2005).

[28] *Central Bureau of Investigation* v. *Rathin Dandapath & Ors.,* A.I.R. 2015 S.C. 3285.

[29] Bail Application No. 913/2020 (Delhi High Court) (decided on 18.06.2020).

[30] *Id.*

[31] *Rakesh Kumar Paul* v. *State of Assam*, Special Leave to Appeal (Crl.) No. 2009 of 2017.

[32] 1994 Cri.L.J. 257

Apprehension of Accused Escaping the Clutches of Law

The purpose of arrest and custody of an accused is to secure his participation and appearance during investigation and trial respectively.[33] But if these purposes can be secured without arresting and putting a person in jail, then incarceration is unwarranted.[34] The conflicting assertions of the prosecution's apprehension of the accused escaping prosecution on the one hand, and assurances of the accused of due participation in investigation have to be analysed on certain parameters in the factual matrix of the case. For example, bail was granted in a case by the Hon'ble Supreme Court relying on the conduct of a 27 year old accused by stating[35] that the '*social circumstances'* of the accused are not unfavourable as he is not a *'desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up'*. The Court noted that he was a young man with a family to maintain, and therefore, his circumstances and social milieu warrant the grant of bail.

Appositely, anticipatory bail was denied[36] to an accused police officer relying on his conduct and the likelihood of the accused fleeing from justice. The Court noted that while the usual behaviour of an accused police officer would be to assist the investigating agency voluntarily and to prove to the public that he is an upright man, the accused in question in the said case has been absconding since the registration of the case, though he did apply for his release. In light of the above, the Hon'ble Court held that *'by his conduct the petitioner has shown that his release will enable him to flee from the clutches of law. If only he had cooperated, by this time the cause of death, location of the body and other things would have been detected.'*

Roots of the accused in the society and his involvement/dependency in the society is another such parameter laid down by the courts to gauge the possibility of the accused fleeing from justice, as held in *Suresh Kalmadi* v. *Central Bureau of Investigation*.[37] In this case, Hon'ble High Court of Delhi granted bail to the petitioner with certain conditions, on the ground, *inter* alia, that the petitioner was an influential person *'having deep roots in the society'* and therefore, there was no likelihood of his fleeing from justice. In contrast, the Hon'ble High Court of Delhi in another case[38] denied bail to the applicant on the ground that the fact that the petitioner will not influence witnesses directly or indirectly *'cannot be ruled out'* by reason of the fact that the petitioner is an influential person having deep roots in society. On appeal, Hon'ble Supreme Court set aside the impugned judgment of the Delhi High Court and granted bail to the petitioners. It

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33 *Anil Mahajan* v. *Commissioner of Customs & Anr.*, 2000 III A.D. (Delhi) 369.

34 *Court on its Own Motion* v. *Central Bureau of Investigation*, 109 (2003) D.L.T. 494.

35 *State of Rajasthan* v. *Balchand*, (1977) 4 S.C.C. 308.

36 *Prakash* v. *State of Karnataka*, I.L.R. 1993 Kar 768.

37 Bail Application No. 1692 of 2011 (Delhi High Court) (decided on 19.01.2012).

38 *P. Chidambaram* v. *Central Bureau of Investigation,* Bail Application No. 2270 of 2019 (Delhi High Court) (decided on 30.09.2019).

stated[39] that the High Court's observation that *'it cannot be ruled out that the petitioner will not influence the witnesses directly or indirectly'* was a mere generalised apprehension and speculation, and was not adequately substantiated by any material evidence. It noted that '*Mere averments that the appellant approached the witnesses and the assertion that the appellant would further pressurize the witnesses, without any material basis cannot be the reason to deny regular bail to the appellant; more so, when the appellant has been in custody for nearly two months, co-operated with the investigating agency and the charge sheet is also filed.'*

In another case[40], taking note of the financial assets situated in India of an individual who was accused of cheating in conspiracy with PNB London officials, the courts rejected the apprehension of his fleeing from justice, since the petitioner's assets were much more than his liabilities and that he had a huge financial involvement in India also. Therefore, the assumption that he would flee from justice was untenable and thearticle.

Prosecution's apprehensions of accused fleeing from justice may be laid to rest by courts in varying modes of impositions for appearance. Making it mandatory for the accused to report to the police station periodically[41] is one way to secure compliance. Another way may be to put stringent conditions on the bail petitioner[42]. In another case, the Himachal Pradesh High Court ordered that if the petitioner did not turn up before the trial Court, a non-bailable warrant may be issued against him and he may be sent to judicial custody for the period for which the petitioner's presence is required.[43] In cases where apprehension of an accused being a flight risk is raised, the courts have ordered surrender of passports to the authorities to remove such apprehensions.[44]

In a nutshell, it can be concluded that bail should not be denied to an accused on conjectural apprehension of fleeing from justice unless the same may be substantiated from facts before the court, and even then, bail must not be denied if his presence can be secured by alternative means as stated above, in addition to the provisions of bail bond and sureties which are statutorily mandated conditions meant to lend such assurance.[45]

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39 *P. Chidambaram* v. *Central Bureau of Investigation,* Criminal Appeal No. 1603 of 2019 (S.C.).

40 *Rajendra Singh Sethia* v. *State*, 1988 Cri.L.J. 749.

41 *State of Rajasthan* v. *Balchand*, (1977) 4 S.C.C. 308.

42 *Ritesh* v. *State of Himachal Pradesh*, Cr. M.P. (M) No. 498 of 2020 (Himachal Pradesh High Court) (decided on 27.05.2020).

43 *Mohammad Junaid* v. *State of Himachal Pradesh*, Cr.M.P. (M) No. 62 of 2020 (decided on 28.02.2020).

44 *Rajendra Singh Sethia* v. *State*, 1988 Cri.L.J. 749; Also see *Dr Shivinder Mohan Singh* v. *Directorate of Enforcement*, Bail Application No. 1353/2020 (Delhi High Court) (decided on 23.07.2020).

45 The Code of Criminal Procedure, 1973, S.S. 440-450.

Thwarting Justice by Tampering with Evidence or Witnesses

The menace of thwarting justice by tampering with evidence/witnesses is well recognized by the Indian legal system.[46] Indeed, legitimacy of the accused impeding justice by tampering with evidence or terrorizing witnesses is well founded in certain cases wherein the courts have been alive to such apprehensions and have even transferred cases from one jurisdiction to another,[47] but so is the imputation of bias against investigative authorities which has led to the transfer of investigation from one agency to another[48] as well as court monitored investigations.[49] Hence, alleging witness or evidence tampering generally/lightly/often *sans* production of any fact to substantiate the same and merely to protest bail and prolong incarceration is unjustified and shall be rejected/avoided.

Various factors in a given factual matrix determine the conclusion of such apprehensions, e.g., the status of the accused and his consequential authority over the witnesses. If the witness is an employee/servant of the accused or if the character of the accused is such that his mere presence at large would intimidate the witnesses, it is a good ground to deny bail.[50]

The pre-incarceration conduct of the accused in the course of investigation is also a relevant factor, for if no such attempts at affecting witnesses were done at that time, then no conclusion of him affecting those witnesses post-bail could be reached in absence of any new fact raising such an apprehension.[51] Similarly, if no such allegation is made in previous remand applications then again it would be untenable in the absence of a new fact. This was observed in *P. Chidambaram case*[52] wherein it was stated that *'Statement of the prosecution that the appellant has influenced the witnesses and there is likelihood of his further influencing the witnesses cannot be the ground to deny bail to the appellant particularly, when there is no such whisper in the six remand applications filed by the prosecution.'*

Similarly, in the case of Dr Shivinder Mohan Singh[53] cited earlier, the Court had noted that 5 months had elapsed between recording of the ECIR and the arrest of the applicant. It further observed, '*Even if it be said that the applicant had already been arrested on 10.10.2019 in the FIR for the predicate offences, that only makes it worse since the applicant's arrest in the FIR was more than 6 months after the FIR was registered on 27.03.2019. Substantial time had*

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46 The Indian Penal Code, 1860, S. 195A.

47 *Central Bureau of Investigation* v. *Amitbhai Anil Chandra Shah and Anr.*, Criminal Appeal No. 1503 of 2012.

48 *Disha* v. *State of Gujarat & Ors.*, (2011) 13 S.C.C. 337.

49 *Sakiri Vasu* v. *State of Uttar Pradesh & Ors.*, (2008) 2 S.C.C. 409.

50 *Gurcharan Singh* v. *State (Delhi Administration)*, (1978) 1 S.C.C. 118; *Babu Singh* v. *State of Uttar Pradesh*, (1978) 1 S.C.C. 579; *State of Uttar Pradesh* v. *Amarmani Tripathi*, (2005) 8 S.C.C. 21.

51 *Dataram Singh* v. *State of Uttar Pradesh*, Criminal Appeal No. 227 of 2018 (arising out of S.L.P. (Crl.) No. 151 of 2018).

52 *P. Chidambaram* v. *Central Bureau of Investigation*, Criminal Appeal No. 1603 of 2019.

53 Bail Application No. 1353 of 2020 (Delhi High Court) (decided on 23.07.2020).

therefore elapsed before the ED considered it necessary to arrest the applicant in the ECIR. There is no allegation that during this phase, the applicant either tampered with evidence or influenced any witnesses or destroyed any records.' In fact, even in a case of pre-detention threatening by the accused, the courts have demanded fresh evidence of such apprehension post-bail and observed that the evidence on record that witnesses were intimidated in the past does not *prima facie* prove the likelihood of any threat to prosecution witnesses in future too.[54]

As far as apprehension of tampering with evidence is concerned, the same needs to be looked into from the prism of nature of evidence and control of the accused over it. Relying on the *Sanjay Chandra case*[55] and *P. Chidambaram* case,[56] the Hon'ble High Court of Delhi observed in *Dr Shivinder's*[57] case, observed that the records of the alleged offending transactions had already been seized by the Enforcement Directorate and were in its custody and control. It noted that in such a case as the present one, where the prosecution would mainly rely on the documentary evidence which has already been seized, there was no reason to keep the accused in custody. Similarly, in *Suresh Kalmadi's* case[58] the Delhi High Court considered that most of the evidence was documentary in nature besides a few witnesses, and treated this as a relevant factor in favour of granting bail to the accused. Further, dealing with control of accused over documentary evidence in case of apprehension of evidence tampering, the Court observed that since the allegedly offending transactions cannot be *'undone, reversed, modified or altered in any manner since they are recorded and reflected in several records, including those of complainant in the FIR viz. RFL, regulatory bodies such as the RBI, Securities & Exchange Board of India, Registrar of Companies and the banks and financial institutions that processed these transactions*'[59] there was no reason to keep the accused in custody.

In light of the aforementioned cases, it can be concluded that indeed the threat of tampering with evidence or witnesses is real, but the solution to the same may lie in providing adequate protection and incentives to witnesses for speaking up, as the protracted trial and the surrounding circumstances in itself may amount to intimidation for witnesses and dissuade them from participating in the quest of justice[60]. This would

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[54] *Suresh Kalmadi* v. *Central Bureau of Investigation*, Bail Application No. 1692 of 2011 (decided on 19.01.2012).

[55] *Sanjay Chandra* v. *Central Bureau of Investigation*, 7 (2012) 1 S.C.C. 40.

[56] *P. Chidambaram* v. *Central Bureau of Investigation,* Criminal Appeal No. 1603 of 2019.

[57] *Dr Shivinder Mohan Singh* v. *Directorate of Enforcement*, Bail Application No. 1353 of 2020 (Delhi High Court) (decided on 23.07.2020).

[58] *Suresh Kalmadi* v. *Central Bureau of Investigation*, Bail Application No. 1692 of 2011 (decided on 19.01.2012).

[59] *Dr Shivinder Mohan Singh* v. *Directorate of Enforcement*, Bail Application No. 1353 of 2020 (Delhi High Court) (decided on 23.07.2020).

[60] *Shielding witnesses: on protection scheme,* THE HINDU (Dec. 07,2018) *available at*: https://www.thehindu.com/opinion/editorial/shielding-witnesses/article25682716.ece (Last visited Oct. 13, 2020).

aid in balancing the need for a proper investigation without infringing upon the accused's rights in an unwarranted manner. The liberty of the accused cannot be snatched on mere conjectures of tampering in this disincentivised and threatening trial atmosphere and needs factual support for such apprehensions in order to hold ground in court.

Gravity and Heinousness of Offence being of such Preposterous Proportion that does not Justify Bail in the Interest of Public

Ordinarily, the gravity of offence may be determined by the sentence that may be imposed against it and correspondingly the period of investigation. As the Court has observed, the time period of investigation should relate to the gravity of an offence.[61] Hence, the distinction of 60 days and 90 days in the period of investigation under Section 167 of the Cr.P.C. on the basis of gravity of offence was brought to the statute books for the first time by the 1978 amendment, solely on the basis of sentence of imprisonment for an offence. The audacity of the State in its zeal for incarceration is manifest in a curious default bail case[62] where the confusion was created from interpretation of '*imprisonment for a term not less than ten years*' appearing in proviso (a) of Section 167(2)(i) of the Cr.P.C. for determination of stipulated period being 60 days or 90 days against an offence under Section 13 of the Prevention of Corruption Act, 1988 which stipulates a sentence of not less than 4 years extending up to 10 years. In this case, the Hon'ble Supreme Court went through lengthy arguments on history, object and intent of the legislation and relevant case laws to conclude against the State, holding the upper limit to be 60 days in such cases.

Similar are the cases of plundering money in huge proportions by conspiracy which amounts to offence of cheating which is liable for imprisonment of up to 7 years[63] wherein bail is opposed on the ground of gravity of offence, correlating it to the humongous amount involved and by claiming the same to be against public interest at large.[64] These submissions beg the question of determinants of gravity of offence.

Indeed, the gravity of offence is an important factor in adjudication of bail,[65] but the same is not the sole factor and has to be considered in addition to other relevant facts.[66]

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[61] *Rakesh Kumar Paul* v. *State of Assam*, Special Leave to Appeal (Crl.) No. 2009 of 2017.

[62] *Rakesh Kumar Paul* v. *State of Assam*, Special Leave to Appeal (Crl.) No. 2009 of 2017

[63] For example, corruption cases under S. 120B r/w S. 420 of the Indian Penal Code, 1860 and S.S. 8 and 13 (2) r/w S. 13(1)(d) of The Prevention of Corruption Act, 1988.

[64] *Sanjay Chandra* v. *Central Bureau of Investigation*, 2012 1 S.C.C. 40.

[65] *State of Bihar & Anr.* v. *Amit Kumar*, (2017) 13 S.C.C. 751.

[66] *P. Chidambaram* v. *Directorate of Enforcement*, Criminal Appeal No. 1831 of 2019.

III

An Afterword: Liberty of Individual and Investigation Process

Human liberty is sacrosanct. This cherished value has also been incorporated and placed at the highest pedestal within the Constitution of India by our forefathers and foremothers. So also is the right to life, which encompasses within its folds not mere life in the animal sense, but rather a dignified wholesome life where humans can fulfil their highest potentials.

It is a known and lamentable fact that undertrial prisoners in India form the bulk of occupancy in prisons. As has been discussed in the preceding pages, pre-trial detention is unnecessary and avoidable in most cases. Pre-trial arrest of an accused and denial of bail on flimsy grounds leading to long periods of incarceration during investigation hits directly at the rights guaranteed to the accused under Article 21 of the Constitution of India. The right to life and liberty includes within its purview the right to a fair, unbiased and speedy trial. Moreover, as noted by the Delhi High Court in *Dr. Shivinder's* case,[67] it also impacts the ability of the accused to adequately defend himself in the matter due to the restrictions on movement and interactions imposed on him during incarceration. Denial of bail impinges upon some of the most cherished and fundamental principles of criminal justice administration - individual liberty and freedom, presumption of innocence and incarceration as an exception to the general rule of bail. Given the frenzy and sensationalism that has come to define the media's reporting of cases, and their mad rush for TRPs, it also disproportionately impacts the reputation of the accused, even when the person is still presumably innocent!

However, before the scrutiny shifts to the courts, and they are critiqued/applauded for granting or not granting bail to the accused, it is important to realise that it is the law enforcement agencies who are truly the first responders/point of contact between the public and the state machinery, and it is they who should be first put under the scanner. The accused is produced before the court only after he has had his tryst with the police. Therefore, the primary onus to uphold the rights of the accused must also, first rest with them. The question of whether or not to grant bail comes only after the accused has been apprehended by the police. It is therefore submitted that the police must be first held accountable to not make such arbitrary or high-handed arrests. The judgments cited in the preceding pages are all examples of the State's over-zealousness in trying to secure prolonged incarceration of the accused even on flimsy grounds, and the Courts response to such unwarranted requests for custody of the accused.

Carelessness, apathy, insensitivity, political pressures, presumptions and biases against the accused in the minds of the police officer lead to impingements of some of the most

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[67] *Dr Shivinder Mohan Singh* v. *Directorate of Enforcement*, Bail Application No. 1353 of 2020 (Delhi High Court) (decided on 23.07.2020).

fundamental entitlements of the accused. This scenario points towards the pressing need to sensitise the police and the investigation agencies towards the rights of the accused. Sensitisation interventions and a general attitudinal shift is required to instil a respect towards the civil rights of citizens, even when they are accused. Moreover, mechanisms need to be devised that ensure that the agencies work in a free and fair manner, free of all kinds of pressures and inducements.

Only when the issues at the very primary level are addressed can we shift our focus to the courts, who then have a role to check any high-handedness by the police in making arrests. It has been observed by the Apex Court that *'a person seeking justice, has the first exposure to the justice delivery system at the level of subordinate judiciary, and thus a sense of injustice can have serious repercussions not only on that individual but can have its fallout in the society as well.'*[68] The words indicate the recognition of the role of the subordinate judiciary in upholding the fundamental tenets of justice and freedom. Courts must ensure that bail remains the rule, and jail an exception. The principle must be stringently observed as the core guiding principle while deciding bail applications of accused persons. It is essential that the protections provided to the accused under the Code of Criminal Procedure are implemented in spirit, and his right to a fair and impartial trial is protected scrupulously by the courts.

In the situations discussed in Part II of this paper, the researcher has attempted to highlight how courts have lifted the veil and held seemingly innocent and genuine grounds of arrest to be completely unwarranted and unnecessary, especially in light of the fact that there exist multiple ways to secure cooperation of the accused even without putting him in custody. A free and fair justice administration system must give due opportunity to both the victim as well as the accused to present their case before an impartial judge, after a fair investigation. Unwarrantedly putting one party behind bars definitely hampers (if not obstructs) his right to defend himself ably, and thereby tarnishes the noble vision of justice having been served. Coupled with the state of the media in today's times, where journalism has become a profit-making enterprise rather than a calling to strengthen democracy, the path of the accused becomes riddled with even more unwarranted challenges. The courts need to be wary of such 'genuine' grounds of arrests, and adopt a more aggressive approach in ensuring that such grounds do not become a cloak to hide excesses and abuse of the wide-ranging powers by the State.

All elements of the criminal justice administration along with the media need to introspect their roles envisaged by the founders of this country, and scrupulously uphold the right of personal liberty - a defining right in a truly flourishing democracy.

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[68] *Ram Murti Yadav* v. *State of Uttar Pradesh*, C.A. No. 8875 of 2019.