Chapter 3

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Chapter 3

PROCEDURAL LAW

3.1 Introduction:

The Indian Judicial System stands on three pillars i.e. Substantive law, Procedural law and Evidentiary law. The Procedural law lays down the procedure of arrest of an offender, the procedure of investigation, the procedure of bail provision, constitution of the various courts, the procedure of trial of an offender, etc. Such Procedural law is codified in the Code of Criminal Procedure, 1973.¹

3.2 Administration of justice:

Justice must not only be done but also must appear to be done. No citizen go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. If such a feeling is creating in the mind of a common man, who approaches the court for justice, he would certainly feel that the judge, who could not render justice, is biased. It is imperative that in order that people may not loose faith in the administration of criminal justice, no one should be allowed to subvert the legal process.²

3.3 Criminal Jurisprudence:

Under existing jurisprudence in a criminal matter, innocence of the accused is presumed; but the presumption is to be judged on the basis of conceptions of reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land. If arms and ammunities are recovered at the instance of or on disclosure by accused, it can be stated that presumption of innocence would not thereafter exist and the accused has to explain its possession or discovery and it would depend upon facts of each case which are to be on the scale of common sense of a prudent man.³

¹ Prof. Hasan Askari, Criminal Procedure and Police, 3rd Edn. 2011, Asia Law House, Hyderabad, p.3
3.4 **Objectives of the Code of Criminal Procedure:**

1) Accused to get fair trial according to natural justice.
2) Avoid delay in investigation and trial.
3) Procedure to be made simple ensuring fair deal to the poor.

3.5 **Constitution of criminal courts:**

Sections 6 to 23 and Sections 26 to 35 of Criminal Procedure Code, there are Criminal Courts and their powers:

- **Supreme Court**
- **High Court** (Death sentence, any imprisonment/fine)
- **Sessions Court** (Death sentence, any imprisonment/fine)
- **Additional Sessions Court** (Death sentence, any imprisonment/fine)
- **Assistant Sessions Court** (10 years imprisonment and fine)

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- **Special Court:** It may be noted that the State Government with the consultation of the High Court may establish one or more special courts for any particular class of cases. While such special courts exist, no other court shall try cases of their jurisdiction. If the area of jurisdiction of such court extends beyond the district within which it holds the court, then all appeal, revisions or applications of the jurisdiction of the extended area shall lie in the district where the special court sits.
- **Executive Magistrate** (Sections 20 to 23): The hierarchy of executive magistrate is as follows –

```
District Magistrate
↓
Additional District Magistrate
↓
Sub Divisional Magistrate
↓
Executive Magistrate     Special Executive Magistrate
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The State Government appoints them and their operational and disciplinary control vests in it. Their superiority is in accordance with the above hierarchy. The State Government can place any Executive Magistrate as Sub Divisional Magistrate and define the area of his operation.

3.6 **Public Prosecutor** (Sections 24 and 25):

All offences are dealt with as an invasion on the public peace. A Public Prosecutor stands for the state in whose name all prosecutions are conducted. The criminal trial is not to support the theory at all costs, but to investigate the offence and determine the guilt or innocence of the accused and the duty of the public prosecutor is to represent the state and not the police. He should discharge his duty fairly and fearlessly with full sense of responsibility. He is an agent of justice. These are the following clauses of Public Prosecutors under the sections, who shall conduct cases in District Courts.

1) Public Prosecutor appointed by the Central Government,
2) Public Prosecutor appointed by the State Government,
3) Additional Public Prosecutor appointed by the State Government,
4) Special Public Prosecutor appointed by the Central Government,
5) Special Public Prosecutor appointed by the State Government;
6) Public Prosecutor includes any person acting under the direction of the Public Prosecutor.4

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3.7 Criminal law:

The main object behind criminal law is to maintain law, public order, stability and also peace and progress in the society.\(^5\) Stages in the criminal trial are as follows –

\[
\text{Offence} \\
\downarrow \\
\text{Arrest} \\
\downarrow \\
\text{Remand} \\
\downarrow \\
\text{Investigation} \\
\downarrow \\
\text{Charge-sheet} \\
\downarrow \\
\text{Judicial Proceeding} \\
\uparrow \leftrightarrow \text{ (1) Inquiry and (2) Trial} \\
\downarrow \\
\text{Judgement} \\
\downarrow \\
\text{Punishment} \\
\downarrow \\
\text{Appeal}
\]

3.7.1 Offence (Sec. 2 of Cr.P.C.):

An offence is any act or omission made punishable by any law for time being in force. There are three types of offences viz – Cognizable and Non-cognizable, Bailable and Non-bailable; and Compoundable and Non-compoundable offences.

a) Cognizable and Non-cognizable offences: A cognizable offence means an offence for which a police officer may arrest without warrant [Section 2(a)].

A non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant [Section 2(l)].

\(^5\) S. P. Tyagi, Criminal Trial, 3\textsuperscript{rd} Edn. 2008, Vinod Publications (P) Ltd., p.8
b) Bailable and Non-bailable offences: A bailable offence is an offence for which the accused has a right to get himself released on bail. The court cannot order the accused to be put in police custody or jail custody if the offence is designed under Cr.P.C. as ‘Bailable’ and if the accused offers a surety that is acceptable to the court.

As against this, the court can not, as a rule, order the release of a man against whom there is prima facie evidence of serious offences are non-bailable offences.

Offences which are ‘Bailable’ and ‘Non-bailable’ have been laid down in the Schedule I, column 5 of Cr.P.C.

c) Compoundable and Non-compoundable offences (Section 320 of Cr.P.C.): Compounding means setting with the complainant or with the aggrieved party. Cases which can be settled between the rival parties are called compoundable cases. In other words, cases pertaining to offences which are compoundable are called compoundable cases. The compoundable offences are listed in section 320 of Cr.P.C. Offences which are not listed in section 320 of Cr.P.C. can not be settled under the four corners of the law and in the court.

3.7.2 Arrest:

The Criminal Procedure Code prescribes the mode of arrest.

- Meaning: Arrest means a physical restraint put on a person as a result of allegation of accusation that he has committed a crime or an offence of quasi-criminal nature. Arrest consists of the actual seizure or touching of a person’s body with a view to his detention.
There are three elements should be present in an arrest –
1) Intention to arrest under authority,
2) Detention in legal manner and
3) The arrested person understands his arrest.
An arrest can be made either under a warrant of arrest issued by any court or without by police or any other person under the authority vested in him by Cr.P.C. or any other law.\textsuperscript{6}

- **Arrest how made?**
  
  1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

  2) If such person forcibly resist the endavour (= an attempt) to arrest him, or attempt to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

  3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

  4) Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise; and where such exceptional circumstances exists, the women police officer shall, by making a written report, obtain the prior permission of the judicial magistrate of the first class within whose, local jurisdiction the offence is committed or the arrest is to be made.

### 3.7.3 Remand:

The word 'Remand' does not occur any where in Criminal Procedure Code. When police arrest a person in cognizable offence and investigation can not be completed within 24 hours, they make a written application to the magistrate and request the magistrate to permit them to keep the accused in police custody for a further period. This request is called 'Request for remand'. 'Remand' means that the police custody of the accused is extended by days not exceeding 14 days.

\textsuperscript{6} S. P. Tyagi, p.170
• **Remanded to Jail Custody**: The accused can be sent in jail custody and this remand in jail custody can exceed 60 or 90 days, depending upon the offence. At the end of this period, if the charge-sheet is not filed, the accused is entitled for bail.

3.7.4 **Investigation**:

The criminal justice system in India is based on two agencies –

1) Police which investigate the offence and

2) Judiciary sits to give judgement.

Both have their statutory existence and are independent in their sphere of activity but are interdependent in administering justice.¹

• **Meaning of investigation**: All cognizable offences are considered as invasion of the state’s power of protecting citizens. The state therefore acts through police which conducts all proceedings under this code for collection of evidence against the accused person within the stipulated period. When information about a cognizable offence is received, the police officer proceeds to the place of occurrence and ascertains all the facts and circumstances of the case. He discovers and arrests the suspect and collects evidence relating to the commission of offence. Investigation is conducted by police or by any other person authorized by law. It relates to an offence. It results in either charge-sheet or final report. It is a non-judicial proceeding. It generally starts either on FIR or on order of magistrate.

• **Police investigation**: The police investigate cognizable offences under section 156 of Criminal Procedure Code without an order from the magistrate. It also investigate non-cognizable offences under order of the magistrate under section 155 of Cr.P.C. Besides this, the magistrate may order the police to investigate any offence under section 156(3) and 202 of Cr.P.C.

¹ Hasan Askari, p.195-210
• **Investigation by Non-police agency**: Various Acts have conferred powers of investigation on non-police agencies. The magistrate has been empowered under section 202 of Cr.P.C. to get a case investigated by a person other than police. Investigation includes all the proceeding under Cr.P.C. for the collection of evidence conducted by a police officer or any person authorized by a magistrate [Section 2(h) of Cr.P.C.]. The following are the common items for the investigation –

a) **FIR (First Information Report)**: Investigation begins with or without FIR. FIR means the information, given to the police, that person known or unknown has committed an offence which is listed as cognizable offence in Schedule-I of Cr.P.C. It is necessary signed by the informant. A copy of the FIR has to be given to the informant. The second copy of the FIR has to be sent to the magistrate for his perusal and record (Section 154 of Cr.P.C.). This is one of the crucial statements to the police at the stage of investigation because it is first in sequence and is generally regarded as the foundation to the prosecution case. Courts have believed that FIR is the first, untainted, unguided version of the offence and, generally, cannot be false.⁸

b) **Send a report to the magistrate**: When the officer-in-charge receives a report about cognizable offence (FIR), he should first of all communicate the same information to the competent magistrate and then either himself or depute his subordinate officer to proceed to the place of occurrence.⁹

c) **To investigate, discover and arrest**: The police officer proceeds to the spot, arrests the suspect, ascertains facts and circumstances of the case.

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⁹ Hasan Askari, p.198
d) **Statement of witnesses**: By examining of persons including accused and reducing their statements into writing.

e) **Panchanama**: Panchanama refers to what an independent witness has seen at the scene of offence or during investigation. In their presence, the police record the joint statement of two witnesses and conditions observed by the panchas. The two witnesses are known as panchas. The word ‘Panchas’ is an ancient word and would historically indicate five people who would impartially decide the disputes in a village. But today panchas does not mean five persons. Panchanama is mandatory in most of the cases.

- **Search of the house (Section 165 of Cr.P.C. r/w section 100(4) of Cr.P.C.)**: Whenever police search the house without warrant from a magistrate where any person is residing or any enclosed place, the police must carry with them “two or more independent respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitants of the said locality is available or is willing to be a witness to the search”.

The police can issue an order in writing to any person to be such a witness. No panchanama is required by law to be done when police discover an article or thing in pursuance to a statement made by an accused who is in their custody (Section 27 of Evidence Act). The practice of the police under a wrong interpretation of law is to make a panchanama of discovery of an article or thing when police act under section 27 of the Indian Evidence Act. The police follow this practice, because the courts many times do not believe the police about their evidence, about their discovery of an incriminating article unless it is corroborated by an independent witness. However, it is a matter of the courts

\[10\] Shrikant Bhat, p.80

\[11\] Shrikant Bhat, p.81
believing a particular police officer and the law does not mandate the police officer to make a panchanama.

Many times, in cases of Narcotics and other contraband, the statement of the police that they recovered the contraband from the person of the accused in presence of the pancha witness is not truthful. What often happens is that the police first discover the contraband and then call the panchas. Section 50-A of the Narcotic Drugs and Psychotropic Substances Act 1985 stipulates that provisions of Cr.P.C. would be applicable to all arrests, searches and seizures under this Act. This section would therefore mandate panchanama of searches and seizures.

f) **Collection of experts’ opinion** : In most of the serious cases, the investigating officer has to collect experts’ opinion from or specially skilled persons.

g) **Medical certificate/opinion** : It may be noted that the experts’ evidence is never at the top but at the tap. The trial court shall always examine the ground of opinion in number of cases.

h) **Search and seizure** : Search of the house or place and seizure of property during investigation is of the greatest legal value.

i) **Disposal of the case property** : If the case property so seized is subject to speedy and natural delay or if it is otherwise necessary, the court may pass an order to be sold or otherwise disposed of.

j) **Report submitted** : After such investigation the investigator collects sufficient evidence, he shall submit charge-sheet in court through his superior officer.

k) **Speedy investigation** : Article 21 of the Constitution guarantees speedy investigation and trial to the accused person. If the investigation is unduly delayed, the trial would automatically be delayed violating Article 21. Such delayed investigations are liable
to be quashed by the courts.\textsuperscript{12} It may be noted that section 468 of Cr.P.C. has laid down the limitations of time for various kinds of offences within which the investigation should be completed. For examples –

1) Within 6 months, when the offence is punishable with fine only.

2) Within 1 year, when the offence is punishable with one year imprisonment.

3) Within 3 years, when the offence is punishable with 3 years imprisonment.

4) For heinous offences, no time limit is prescribed under section 468 of Cr.P.C. but Article 21 of the Constitution would be violated in such cases.

5) Section 167(5) of Cr.P.C. lays down that if an offence is punishable with 2 years imprisonment, triable by the magistrate as summons case, the magistrate shall stop further investigation if the investigation of such offence is not completed within 6 months.\textsuperscript{13}

\textbf{3.7.5 Charge-sheet (Section 173 of Cr.P.C.) :}

The word ‘Charge-sheet’ is not defined in Cr.P.C. However under Cr.P.C. section 173, when a police officer concludes an investigation, of a cognizable offence, he sends a report to the magistrate of that investigation in which the investigation officer finds that there is material to proceed against the accused.\textsuperscript{14} This report includes FIR, other statements recorded by the police and other data collected by the police, the names of the parties and the conclusion of the investigating officer that the offence has been committed and by whom. Also whether the accused has been arrested. The word ‘Charge-sheet’ is a common and popular expression connoting an

\begin{footnotesize}
\textsuperscript{12} Hussainara Khatoon Vs. Home Secretary, State of Bihar, 1979 Cr.L.J. 1052 SC, AIR 1979 SC 1377

\textsuperscript{13} Prof. Hasan Askari, Criminal Procedure and Police, 3rd Edn. 2011, Asia Law House, pp.207-208

\textsuperscript{14} Shrikant Bhat, p.83
\end{footnotesize}
abstract of all the statements and the material collected during investigation and which material the prosecution intends to use during the trial.

The persons who gave the statements are generally required to come to the court, take an oath and then give evidence in respect of what they have seen and stated before the police during investigation. Except the FIR and the panchanama, other statements to the police are not signed. This statement assumes significance during discussion of a hostile witness.

3.7.6 Judicial Proceedings:

- **Introduction**: It includes any proceeding in the course of which evidence is or may be legally taken on oath. Oath is also defined in the “Oaths Act”. An oath is an affirmation or oath given in the schedule to section 6 in the Oaths Act, 1969. thus, the hallmark of judicial proceedings is that the witnesses are examined on oath. It includes Inquiry and Trial.

A) **Inquiry**: Inquiry means every inquiry other than the trial conducted under Cr.P.C. by a magistrate or court [Section 2(g) of Cr.P.C.]. At the end of inquiry, the judge does not convict or acquit any one. The judge may reach preliminary finding and may leave it to the parties to make further action of initiate it himself. It is comparable to police investigation, except that witnesses may be given oath.

B) **Trial**: The word ‘Trial’ is not defined. The essence of a trial is that it is judicial proceeding per excellence. As said earlier, the hallmark of a judicial proceeding is that every witness who gives evidence is required to give evidence on oath. This needs to be contra distinguished immediately from the stage of investigation. During investigation, the police record, statements and gathered material, these statements are not on oath. The police have no authority to give oath. Only a judge or a magistrate has authority
to give oath. The word ‘Trial’ is generally applied in criminal law i.e. proceeding before a criminal court. In the context of criminal law, we may define a trial as adjudication of guilt or innocence of an accused in accordance with criminal law i.e. Criminal Procedure Code and the Indian Evidence Act.\textsuperscript{15}

- **Meaning of trial**: Though the word ‘Trial’ is not defined in the Code of Criminal Procedure, 1973, it means as commonly understand the proceeding taken in court from the stage of framing of a charge and ending with the conviction or acquittal. According to Stroud’s Judicial Dictionary, Trial means “The conclusion by a competent tribunal of question in issue the legal proceedings whether civil or criminal”. Trial may be said to be a judicial proceeding which ends in conviction or acquittal of the accused.\textsuperscript{16}

- **Different types of Trial**: On the basis of various provisions of Code of Criminal Procedure, 1973 and experience of working of Criminal Courts and conducting of criminal trials. The different classes of trials may be enumerated as under –
  1) Trial of warrant cases by magistrate (Section 238 to 250 of Cr.P.C.)
  2) Trial of summons case by magistrate (Section 251 to 259 of Cr.P.C.)
  3) Trial started on cognizance taken on police report [Section 190(1)(b)].
  4) Trial started on cognizance taken on a complaint or upon information received by the court from any person other than police officer or upon his own knowledge about the commission of an offence [Section 190(1)(a) and (e)].
  5) Session’s Trial (Section 225 to 237 of Cr.P.C.)

\textsuperscript{15} Shrikant Bhat, p.86
\textsuperscript{16} S. P. Tyagi, pp.103-106
6) Trial of offences punishable under Indian Penal Code [Section 4(2) of Cr.P.C.]

7) Trial of offences punishable under special or local laws [Section 4(2) of Cr.P.C.].

8) Trial of juvenile offenders under Juvenile Justice Act, 1985

9) Trial before special courts enacted by special and specific Acts for conducting speedy trials of offences scheduled in such special acts.\(^\text{17}\)

Summons cases do not recognize separate, procedures for cases instituted on police report or on complaint. The Code of Criminal Procedure, 1973, in form of section 251 to 259 provides one and some procedure for all summons cases irrespective of the fact whether such cases are result of a complaint or police report. However, distinction in procedure is being maintained as to trial of warrant cases instituted on police report or on complaint.

- **Stages of criminal trial**: Very briefly and without reference to the procedure of a trial i.e. whether the trial is as per summons procedure or warrants procedure, the stages of a criminal trial are as under –

  1) Supplying to the accused copies of charge-sheet by the investigating agency (Sections 173, 207 and 208 of Cr.P.C.)
  2) Framing or explaining of the charge to the accused.
  3) Recording the plea of the accused i.e. whether the accused pleads guilty or not guilty by the court?
  4) Examination-in-chief of the witnesses i.e. examination of the witnesses by the party calling that witness.
  5) Cross-examination of the witness means the examination of that witness by the party which is adverse to that witness.
  6) Examination of witnesses summoned by the court if any and their cross-examination either by the defence or the

\(^{17}\) S. P. Tyagi, p.106
prosecution (Under section 165 of the Evidence Act, the court can, on its own, summon any person who is likely to throw some light upon the dispute, such persons are called court witnesses as distinguished from prosecution witnesses or defence witnesses. But even court witnesses are subject to cross-examination).

7) The examination of the accused by the court. This takes place after the prosecution closes its case. The examination of the accused is not on oath. Neither the prosecution lawyer (The prosecutor) nor the aggrieved party can cross-examine an accused (Section 313 of Cr.P.C.). The essence of examination of the accused by the court is that the court gives opportunity to the accused to explain circumstances appearing in evidence against him. The accused cannot be convicted for giving false answers to the court questions, even if the answers given to the court are proved to be false.

8) Examination of defence witnesses if any after the prosecution closes its case, the defence is given an opportunity by the court to summon any witness whom the defence may want to examine in its report.

9) Argument by the prosecutor and the defence lawyer (Section 314 of Cr.P.C.).

10) Judgement by court (Sections 355 of Cr.P.C.)

The judgement by the court must end in the final order which may be of acquittal or conviction or admonition or binding over for good conduct.

3.7.7 Judgement:

The judgement must contain points for determination, the decision on those points and the reasons for the decision.
3.7.8 Punishment:

Generally, by punishment, we mean suffering loss or serious damage caused to a person. In criminal law, punishments (Chapter 3 of IPC) are listed as follows -

1) Death
2) Imprisonment for life
3) Simple imprisonment
4) Rigorous imprisonment i.e. imprisonment with hard labour
5) Fine

3.7.9 Appeal:

An appeal is a creation of law where the correctness of the judgement of the lower court can be challenged in the higher courts. The constitution provides conditions where a judgement of the High Court can be challenged in the Supreme Court (Art. 132 and 136) while Cr.P.C. specifies the conditions where judgements of the lower courts can be appealed against in the Sessions Court and the High Court. An appeal can be filed on the questions of law and facts; and the appellate court has wide powers to reverse the order of the lower court direct further inquiry, order retrial, commute or enhance the sentence or order compensation to the aggrieved person.\(^{18}\)

3.8 Summary:

All the processes such as summons, warrants of arrest, proclamation and attachment and search warrant issued by the court are meant to facilitate the investigation by police. The police station is the unit where all powers as to investigation under the Code are concentrated, subject of course, to the supervision of the superior police officers and the court. The sole aim of the law is approximation of justice. A judge is looked upon as an embodiment of justice.\(^{19}\) Right of speedy trial is an integral part of fundamental right

\(^{18}\) Hasan Askari, p.401

\(^{19}\) S. P. Tyagi, p.1

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guaranteed by Article 21 of Constitution of India. The duty to be discharged by a criminal court in a trial is indeed difficult, especially when it has to see to the conflicting claims and has to strike a just balance. At the same time, to take care that no innocent person is punished, so that people do not lose faith in the rule of law. Our rules of criminal justice remind the courts or their solemn duty on one hand to punish a crime and on the other hand to find and punish the real offender so that no innocent life is extinguished or impaired.