CHAPTER – III

RIGHTS OF THE ACCUSED UNDER THE CRIMINAL PROCEDURE CODE AND OTHER STATUTES

“The creation of constitutional government is a most significant mark of the distrust of human beings in human nature. It signalizes a profound conviction, born of experience, that human beings vested with authority must be restrained by something more potent than their own discretion.” -Raymond Moley

3.1 INTRODUCTION

J.Brennan "Nothing rankles more in the human heart than brooding sense of injustice. Illness we can put off with. But injustice makes us want to put things down. When only the rich can enjoy the law as a doubtful luxury and the poor, who need it most cannot have it because its expense puts it beyond their reach the threat to the continued existence of free democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness," In a democracy and under the Indian Constitution, the police as representative of a state who's sovereignty lies in the Indian people are public servants and the police station public property. The conduct within it needs to conform to law, needs to respect basic human freedoms to ensure a basic confidence between the people of a city, state or region and the wings of the state, the law and order machinery the police85.

CrPC deals with the arrest of the person and any police officers may without an order from a magistrate and without a warrant arrest any person in any cognizable offence which gives very wide power to the police. It is also settled that to, arrest person without justification is one of the most serious encroachments upon the liberty of a person concerned.

At the present stage of civilization, it has been universally accepted, as a human value that a person accused of any offence should not be punished in such trial. Fairness is a relative concept and therefore fairness in criminal trial could be measured only in relation to the gravity of the accusation, the time and resources which the society can reasonably afford to spend, the quality of available resources, the prevailing social values etc. Thus the letter of law recognizes the right of an accused to speedy trial, but the problem is how to make it a reality. Mere passing of a law is not enough. Justice Krishna Iyer while dealing with the bail petition "Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings86

The major attributes of criminal trial are enshrined in Article 10 and 11 of the Universal Declaration of Human Right These Articles provide "Every one is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations of any criminal charge against him." (Article. 10). " Every one charged with a penal offence has the right to be Presumed innocent until proved guilty according to law in a public trial at which he has had the entire guarantee necessary for his defence. (Article. 11)."

Our courts have recognized that the primary objects of Criminal Procedure is to ensure human treatment to arrested person, and the law commission has accepted the view that requirement of human treatment, speaking broadly, relate to the character of the court, the venue, the mode of conducting the trial, rights of the arrested person in relation to defence and other

86 www.criminalprocedurecode/speedytrial.in
right. The circumstances in which police officers, magistrates and private citizens are authorized to make arrest without warrant have been mentioned in Sections 41- 44. The manner in which the arrest can be affected by any such person is provided by Section.46. 87

Under sec-41 of CrPC. The Police officer may arrest without any order from the Magistrate and without any warrant ,any person even on the basis of reasonable suspicions. If this suspicion is subjected to objective determination by the magistrate at the time of granting remand it may not stand the scrutiny of law because suspicion is no evidence although it empowers a police officer to act under Sec-41 Of CrPC. The Legislation in wisdom has given the power to the police officer, which may likely to act as injustice upon the innocent people. When an arrested person is told that it is done under a particular authority and it turns out that authority is wanting, it cannot be validated by saying that the police had authority to arrest under section 41. If a police acts bona fide and wrongly arrests a person on reasonable suspicion he is protected88.

It is no " reasonable suspicion" merely because a police officer has been informed by another police officer that the latter thinks there is information of commission of a cognizable offence. Credible and reasonable must have reference to-the mind of the person receiving the information. It must be based on definite facts other than personal feelings of the police officer. The law requires that detainees be informed of the grounds for their arrest, be represented by legal counsel, and, unless held under a preventive detention law, arraigned within 24 hours of arrest, at which time the accused must either be remanded for further investigation or released. However, thousands of criminal suspects remained in detention without charge during the year, adding to already over-crowded prisons89.

87 www.aphighcourt/caselaws.ac.in
88 Dr. Ashutosh, Rights of Accused, Universal Law Publishing, 2009
89 VARSHNI'S, Criminal trial and Judgement, Eastern Book Company - Lucknow- 226001.
The law provides arrested persons the right to be released on bail, and prompt access to a lawyer; however, those arrested under special security legislation received neither bail nor prompt access to a lawyer in most cases. Court approval of a bail application is mandatory if police do not file charges within 60 to 90 days of arrest. In most cases, bail was set between $11 (Rs. 500) and $4,500 (Rs. 200 thousand).

Section 41 -When Police Officer may arrest without warrant. Any Police Officer may, without any order from a Magistrate and without a warrant, arrest. Any person who has been concerned in an offence punishable under section 121 or against whom reasonable complaint has been made or credible information has been received or a reasonable suspicion exists, of his having been concerned in such offence. Any person who contravenes a rule or order under clause (x) of sub-section (1) of section 33 or an order or notification under sections 36,37, 56, [57, 57A, or 63 AA;] (2A) any person who contravenes any order made under sub section (1) of section 63A. Any person who commits an offence punishable under section 122 or section 136.

According to section 47 an occupier of a house in under legal duty to afford to the police all the facilities to search the house for the purpose of making arrests. If such facilities are denied or obstructions are put in the way of the police officer, the section allows the officer to use for getting entry into the house for search and also for the purpose of liberating himself in case he is detained in the house. The section also puts reasonable restrictions on the police when the part of the house to be searched is occupied by a pardanashin woman. If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein\textsuperscript{90}.

If ingress to such place cannot be obtained under sub-section(l), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admitting duly made, he cannot otherwise obtain admittance.

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it. Any police officer or other person authorized to make an arrest may break open, any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein. We have seen above that the general rule is that the police are not entitled to stop and detain people unless they have decided to arrest them. One important exception to this rule is that the police have certain statutory powers to stop and search suspected persons to see if they have stolen or prohibited articles on them. Such searches undoubtedly provide a major means by which the police detect crime. However, every such stop and search violates the ordinary citizen's perception that he is entitled to go about his affairs without interference from anyone-including the police. Where such searches (as in the majority of cases) lead to no evidence being found, they breed resentment against the police. This seems particularly to
be the case among young people belonging to minority groups who feel they have been unfairly selected. The aim of the law is to provide a framework under which these powers will be exercised responsibly and with proper accountability; whether this aim is achieved depends in the ultimate on the desire of the police to operate the system properly\textsuperscript{91}.

A police officer has the right to stop and search a person (or a motor vehicle) in a public place or any place (such as a private car park) to which people have ready access if he has reasonable grounds for suspecting. Stolen articles. Articles intended to be used for burglary, theft, taking motor vehicles or obtaining property by deception. Offensive weapons. Controlled drugs.

Objectively analyzed the criminal jurisprudence adopted by India is a mere reflection of the Victorian legacy left behind by the Britishers. The passage of time has only seen a few amendments once in a while to satisfy pressure groups and vote banks. Probably no thought has been given whether these legislations, which have existed for almost seven decades, have taken into account the plight and the socio-economic conditions of 70% of the population of this country which lives in utter poverty. India being a poverty stricken developing country needed anything but a blind copy of the legislations prevalent in developed western countries. The concept of bail, which is an integral part of the criminal jurisprudence, also suffers from the above stated drawbacks. Bail is broadly used to refer to the release of a person charged with an offence, on his providing a security that will ensure his presence before the court\textsuperscript{92}.

The aim of provision of bail is to restore to individual his liberty pending adjudication of his guilt by the court; it protects non-convicted persons from the

\textsuperscript{91} SERVALH. M, The constitutional law of India, 3\textsuperscript{rd} edition, 3 vols. Tripathi Bombay 1976.
\textsuperscript{92} www.manupatra.com.
hazards of incarceration by granting them the presumption of innocence. Courts have held that bail is a right of which to be arrested person should be informed and the same should be granted without imposing unreasonable conditions.

The release on bail is crucial to the accused as the consequences of pre-trial detention are grave. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the to preparation of his detention frequently falls heavily on the innocent members of his family. If a person accused of a bailable offence is arrested or detained without warrant, he has a right to be released on bail.

What is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court." Every human being has a natural right of freedom of his person, that is, a right to move about freely and without any restriction throughout the territory of the State of which he is a citizen, so long as this does not cause any interference with, or violation of, the rights of any other person, or is not abrogated or suspended or lost in accordance with the procedure established by the law of the country.

"19.(1). All citizens shall have the right d) to move freely throughout the Territory of India n Nothing in sub-clauses of (d), (e) and (f) of the said clause "(i.e., clause) (1) " shall affect the operation of any existing law in so far as far as it imposes, or prevent the state from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for protection of the interests of any Scheduled Tribe."

Impose law enacted after the Constitution came into force, either in the interest of the general public or for the protection of the interests of any Scheduled Tribe. The guarantee under Article 19 is consolidated by the provision in Article 21 that no person shall be deprived of his life or liberty except in accordance with procedure established by law and by the further direction as laid down in Article 22 for the production of an arrested person before the nearest magistrate within 24 hours of the arrest (excluding the time for journey from the place of arrest to the court of the magistrate) and banning any further detention beyond the period without authority of a magistrate. These provisions coupled with the direction for informing an arrested person, as soon as may be, of the grounds of his arrest are meant to ensure that a person may not be arrested or kept in custody due to the vagaries of the police or the executive by abuse of their powers. These protections are not available in case of persons arrested or detained under any law for preventive detention but such laws also ordinarily contain some safe-guards against abuse of the power of preventive detention. Thus the guarantee under Article 19 is consolidated by the provisions of Article 21 and 22 of the Constitution.

3.2 LEGAL POSITION IN INDIA

The Criminal Procedure Code, 1973 (CrPC. hereinafter), does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a) CrPC. as follows: "Bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being enforce, and non-bailable offence means any other offence". Further, ss. 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the CrPC.. Thus, it is the discretion of the court to put a monetary cap on the bond. Unfortunately, it has
been seen that courts have not been sensitive to the economic plight of the weaker sections of society. The unreasonable and exorbitant amounts demanded by the courts as bail bonds clearly show their callous attitude towards the poor.

According to the 78th report of the Law Commission as on April 1, 1977, of a total prison population of 1,84,169, as many as 1,01,083 (roughly 55%) were under-trials. For specific jails, some other reports show: Secunderabad Central Jail- 80 per cent under-trials; Surat-78 per cent under-trials; Assam, Tripura and Meghalaya-66 percent under-trials⁹⁴.

In State of Rajasthan v Balchandi⁹⁵ the accused was convicted by the trial court. When he went on appeal the High Court, it acquitted him. The State went on appeal to the Hon'ble Supreme Court under Art. 136 of the Constitution through a special leave petition. The accused was directed to surrender by the court. He then filed for bail. It was then for the first time that Justice Krishna lyer raised his voice against this unfair system of bail administration. He said that though while the system of pecuniary bail has a tradition behind it, a time for rethinking has come. It may well be that in most cases an undertaking would serve the purpose.

One of the reasons for this is, as already mentioned above, is the large scale poverty amongst the majority of the population in our country. Fragmentation of land holdings is a common phenomenon in rural India. A family consisting of around 8 to 10 members depends on a small piece of land for their subsistence, which also is a reason for disguised unemployment. When one of the members of such a family gets charged with an offence, the only way they can secure his release and paying the bail is by either selling off the land or giving it on mortgage. This would further push them more into the jaws of

⁹⁴ www.lawcommissionofindia
⁹⁵ AIR 1977 SC 2447
poverty. This is the precise reason why most of the under trials languish in jail instead of being out on bail.

Even though the courts in some cases have tried to intervene and also have laid down certain guidelines to be followed but unfortunately nothing has been done about it. There is also a strong need felt for a complete review of the bail system keeping in mind the socio-economic condition of the majority of our population. While granting bail the court must also look at the socio-economic condition. In the following circumstances where the accused is convicted he has right to appeal to higher Court: When an accused is convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction has right to appeal to Supreme Court. An accused has right to appeal to Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or has after withdrawing for trial before itself a case from a subordinate court, convicted and sentenced the accused to death or certifies that the case is a fit one for appeal to the Supreme Court.96

An accused has right to appeal to Supreme Court, if the High Court has on appeal reversed an order of acquittal and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more. An accused has right to appeal to High Court where he is convicted on a trial held by a sessions judge or an additional sessions judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed.

An accused has right to appeal to sessions judge, where the sentence awarded is below seven years. An accused has right to move to Session Court or High Court if he has failed to leave bail before Magistrate and after investigation

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96 Section 374 (1) Cr. P.C
has progressed throwing light on the evidence and circumstances implicating the accused the Court of Session of High Court has special powers in respect of bail.

As the investigation progresses the position naturally changes and more facts and circumstances come to light. Under this section there is no ban imposed against granting of bail to accused of an offence punishable with death or imprisonment for life. Even so the Court of Session or High Court will have to exercise its judicial discretion. In considering the question of granting of bail for exercise of discretion, the universally approved tests are whether if released on bail the accused person is likely to abscond and whether he is likely to misuse or abuse the privilege. Besides this the other factors are also to be looked into, such as the evidence, the probability of conviction and the possible sentence and whether the accused is likely to evade or avoid the process of law.\(^97\).

When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, (may, instead of taking bail) from such person, discharge him on his executing a bond without sureties for his appearance as herein provided. Notwithstanding anything contained in sub-section(l), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446.\(^98\).

\(^97\) Section 439 CrPC

\(^98\) The Code of Criminal Procedure (Amendment Act 2005).
In Section 436 of the principal Act, in sub-section(l). In the first proviso, for the words "may, instead of taking bail", the words "may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail" shall be substituted. After the first proviso, the following Explanation shall be inserted. Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this provision"

After Section 436 of the principal Act, the following section shall be inserted. “436-A- Maximum period for which an under trial prisoner can be detained. Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishments of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the court on his personal bond with or without sureties, provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the period or release him on bail instead of the personal bond with or without sureties, provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law. 99

In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall excluded. When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an office in charge of a police station or appears or is brought before a Court other than the

High Court or Court of Session, he may be released on bail, but such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm. Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason: Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

If it appears to such officer or Court at any stage of the investigation, inquiry or trail, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, (the accused shall subject to the provisions of Section 446-A and pending such inquiry, be released on bail), or at the discretion of such office or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an
offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, conspiracy or attempt to commit, any such offence, is released on bail under sub-section(1), the Court may impose any condition which the Court considers necessary. In order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter. In order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or Otherwise in the interests of Justice. An office or a Court releasing any person on bail under sub-section (1) or sub-Section (1) or sub-section (2), shall record in writing his or its [reasons or special reasons] for so doing. Any Court which has released a person on bail under sub-section (1) or sub-section(2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the period, be released on bail to the satisfaction of the Magistrate otherwise directs 101.

3.3 SPEEDY TRIAL IN INDIAN COURTS

The trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered. In section 437 of the principal Act,-(i), In sub-section (1), In clause (ii), for the words "a non-bailable and cognizable offence' the words "a cognizable offence punishable with imprisonment for three years or more but not less than seven years" shall be

substituted. After the third proviso, the following proviso shall be inserted, namely, "Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor." In sub-section (3), for the portion beginning with the words "the Court may impose", and ending with the words "the interests of Justice", the following shall be substituted, namely, That such person shall attend in accordance with the conditions of the bond executed. That such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and That such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police office or tamper with the evidence.

Any may also impose, in the interests of justice, such other conditions as it considers necessary". Section 438. Direction for grant of bail to person apprehending arrest. When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. When the High Court or the Court of Session makes a direction under sub-section(l), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit. A condition that the person shall make himself available for interrogation by a police officer as and when required. A condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any
police officer. A condition that the person shall not leave India without the previous permission of the court. Such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section102.

If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate take cognizance of such offence decided that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). In section 438 of the principal Act, for sub-Section (1), the following sub-section shall be substituted, namely. " Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that the Court may, after taking into consideration, inter alia, the following factors, namely. The nature and gravity of the accusation. The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence. The possibility of the applicant to flee from justice. Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub section or has rejected the application for grant of anticipatory bail, it shall be open to an office in charge of a police station to arrest, without warrant, the applicant on the basis of

102 [www.indianpenalcode/section438/inindia](http://www.indianpenalcode/section438/inindia)
the accusation apprehended in such application. Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court. The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence - Necessary in the interest of justice.

Section 439- Special powers of High Court or Court of Session regarding Bail. A High Court or Court of Session, that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (B) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub section. That any condition imposed by a Magistrate when releasing any person on bail be set aside modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody. Custodial rape is a particularly important category of rape since it represents a flagrant abuse of the authority of the Indian government, the very same

institution which is bound to promote and protect the rights of women. The degree to which government authorities are willing to ensure that the perpetrators of this crime are brought to justice is likely to be a good indication of the esteem in which women's rights are held in the society as a whole\textsuperscript{104}.

Hundreds of cases of police rape have been reported in India in recent years, but convictions of police officers for raping women in their custody remain rare. Few cases of custodial rape reach the trial stage. In 1990 five police officers in West Bengal were suspended for allegedly raping Kankuli Santra in Singur police station. The police at first tried to avoid responsibility by claiming that she was mentally ill. Then they said that she was a bad woman. Public protests eventually forced charges to be brought against two of the officers, but the case was dismissed for lack of evidence. According to a recent report by the People's Union for Democratic Rights (PUDR) - an Indian human rights organization- police officers were charged in 10 cases of rape in New Delhi between 1989-1993. They reported that the courts tended to ignore the victim's vulnerability, and often subject the victim to so much emotional strain that the case is dropped completely.

Of the ten cases it is reported that six of the women wanted to withdraw the charges in order to end their ordeal; two of the women did not show up to complete proceedings; one of the remaining cases was still in progress, with all four defendants on bail. In the only remaining case, there was a failure to produce any of the accused in court. In another case which has been brought to the attention of Khalsa Human Rights, the wife of Kanwar Singh Dhami, a well-known advocate of an independent Sikh homeland (Khalistan) in Punjab, was arrested in Himachal Pradesh in 1993, following a seditious speech given by her husband at the Anandpur Sahib Gurdwara (Sikh Temple). Kanwar Singh Dhami

\textsuperscript{104} M.P.RAJU, P.O. Mathew “legal news and views”, vol.20-5, may, 2006.
claimed that he and his wife were tortured in front of each other by Punjab police during their detention. In Lahari Bai v. State of Rajasthan, that court held that even women accused are ordinarily entitled to bail. However this provision is not mandatory and the court has to consider the special facts of each case. In Simantini Samantaray v. State of Orissa, the court held that "Though the allegation against the petitioner to the effect that she had ill-treated the deceased cannot be rejected out of hand, the fact that she is a young girl aged about 20 years and as such is to be treated with compassion and mercy keeping in view of the spirit of Section 437(1) proviso, Code of Criminal Procedure, should not be lost sight of while considering her application under section 438".

Further in Chandrawati v. State of U.P., the court held that "even though the accused woman is old and there being no special circumstances made out to give benefit of the proviso to Section 437(1) which is discretionary and not mandatory, the accused would not be entitled to bail merely being a woman on account of proviso to Section 437(4). The provision of bail to woman, sick and old aged person is not mandatory and it is discretionary. It has been held that reasonable limitations in Section 437(1), Cr. P.C. which are founded on rule of prudence ought not be ordinarily departed from by the High Court or the Court of Session except in special case, there are no special circumstances to give the benefit of the proviso to Section 437(1), Cr. P. C. to the accused applicant. Considering the facts and circumstances the facts and circumstances of the case in which the daughter-in- law was murdered by the family members including the applicant who is the mother-in-law of the victim the applicant was not entitled to bail merely on account of proviso of Section 437(1), Cr. P.C. being a woman\(^{105}\).

S. (211-224) regarding the form of charge, and the joinder of charges. Fair trial requires that the accused person is given adequate opportunity to defend

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\(^{105}\) Dr.B.Hyder Vali book titled 'rights of accused in criminal trail published by Gogia law Agency, Hyderabad, (2004),
himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusation against him. The criminal procedure therefore provides in unambiguous terms that when an accused person is brought before the court trial, the particulars of offence of which he is accused shall be stated to him, in case of serious offences, requires to frame in writing a formal charge and then to read & explain the charge to the accused person. A criminal trial in the absence of the accused person is unthinkable. A trial and decision behind the back of the accused person is not contemplated by the Criminal Procedure Code. The general rule in criminal cases is that all inquiries and trials should be conducted in the presence of the accused, the underlying principle being that in a criminal trial the court should not proceed ex-parte against the accused person.106

Evidence given by witnesses may become more reliable if given an oath and tested by cross-examination. A criminal trial which denies the arrested person the right to cross-examine prosecution witnesses is based on weak foundation and cannot be considered as fair trial. Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case or to prove any special defence available to him, cannot by any standard be considered as just & fair. The Criminal Procedure has given through S (309) to the accused person to hear an expeditious trial. Justice delayed is Justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. If the accused is in detention and the trial is not completed within 60 days from the 1st date fixed for hearing, he shall be released on bail. A criminal trial, which drags on for

unreasonably long time, is not a fair trial. S. (309) of the Criminal Procedure Code give directions to the courts with view to have a speedy trials & quick disposals\textsuperscript{107}.

Detailed legal requirement prescribed under the code of criminal procedure including provision of supply of a copy of the F.I.R. to the person lodging the information ensures that right of individual are safeguarded. From the time F.I.R. is issued, the activities are under judicial scrutiny and all further steps in investigation must be as per prescribed legal procedures.

The statement of the informant as recorded under S.154 is usually mentioned in practice as the first information report or popularly called as F.I.R. The principle object of F.I.R. from the point of the informant is to set the criminal law in motion. In certain cases the police office should use commonsense and record the statements of F.I.R. The section!54 of Criminal Procedure Code require F.I.R. is be recorded verbatim in the very language of the informant (as far as possible) to be read over and explained to him, and to be signed by the informant. The sections also make it obligatory that a copy of the F.I.R. is given to the informant. If the F.I.R. is given to the police by the accused himself, it cannot possibly be used either for corroboration or contradiction. The accused cannot be the prosecution witness, and he would very rarely offer himself to be defence witness under S.315 of the code. Moreover if the F.I.R. is of a confessional nature it cannot be proved against the accused informant, as it would be hit by S.25 of the Evidence Act\textsuperscript{108}.

"No confession made to a police officer shall be proved as against a person accused of any offence" S.161 (2) of Criminal Procedure Code Requires a person, including a accused person, to answer truly all questions put to him by

\textsuperscript{107} DAVIS, \textit{Administrative Law Text} (West Publishing Co., 3\textsuperscript{rd} Ed., 1972).
the investigating police officer that section as well as Art 20(3) of the constitution give protection to such person against questions and answers which would have a tendency to expose him to a criminal charge. The arrested person may remain silent or may refuse to answer when confronted with incriminating questions, Art 20(3) clearly provides as a fundamental principle that no person accused of any offence shall be compelled to be a witness against himself.

In Nandini Satpathy v. P.L.Dani\textsuperscript{109}, the Supreme Court made a view that arrested person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. "Compelled testimony" has been considered as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity overbearing and intimidatory methods and the like. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Art. 20(3) legal penalty by itself not amount to duress buy, the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

Having discussed the main principles, the Supreme Courts addressed itself to the further task of concretizing guidelines with a view to give full social relevance to its judgment. If an arrested person expresses the wish to have his lawyer by his side when the police interrogate him, this rights shall not be denied to him. The police must invariably warn and record the fact-about the right to silence against self-incrimination: and where the accused is literate take his

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\textsuperscript{109} AIR 1978 SC 1025
written acknowledgement. After an examination of the accused where the lawyer of his choice is not available, the police official must take him to a magistrate, doctor or other willing and responsible and allow a scheduled audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot reach him. The main concern of the Supreme Court in Nandini Case is to sensitize the police to humanism: and therefore it made it prudent for the police to humanism. For the protection of accused from miscarriage of Justice, there are cardinal principles of law of evidence. Evidence must be confined to the matters in issue or subject in question; Hearsay evidence is not to be admitted; In all cases the best evidence must be given.\(^{110}\)

In Criminal cases there are certain rules. That the accused is always presumed to be innocent until the prosecution proves him to be guilty. That the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor. That the evidence must be such as to exclude every reasonable doubt regarding the guilt of the accused. It means that the issues must be proved beyond any reasonable doubt. Thus principle is based on English Principle of Criminal Law that "it is better that ten guilty men should escape rather than that one innocent person should not suffer." In case of doubt regarding the guilt of accused it is safer to acquit him by giving him the benefit of doubt. The benefit of doubt is never given to the prosecution. There must be clear and unequivocal proof of the facts of crimes. Thus the admissibility of evidence in criminal justice administration are governed by the above mentioned rules which proves to be a great protection to an accused in criminal laws\(^{111}\).

\(^{110}\) Ibid
A statement either oral or written communicate or not admitting the guilt. Made to any person other than a police officer. Made for while in police custody. Except when it is made in immediate presence of Magistrate. Made voluntarily i.e. does not appear to the Court to have been caused by any inducement threat or promise, having reference to the charge against the accused persons, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

The system of criminal trial envisaged by the Code is the adversary system based on the accusatorial method. In this system the prosecutor representing the State (or the people) accuses the defendant (the accused person) of the commission of some crime; and the law requires him to prove his case beyond reasonable doubt. The law also provides fair opportunity to the accused person to defend himself. The judge, more or less, is to work as an umpire between the two contestants. Challenge constitutes the essence of adversary trial and truth is supposed to emerge from the controverted facts through effective and constant challenges. Experience has shown that adversary system is by and large dependable for the proper reconciliation of public and private interests i.e. public interest in punishing the criminals and private interest in preventing wrongful convictions. This system of criminal trial assumes that the state using its investigative resources and employing competent counsel will prosecute the accused, who in turn, will employ equally competent legal services to challenge the evidence of the prosecution.

Most of the accused person here are uneducated and poor. They do not afford to engage lawyers for their defence, neither have they any legal knowledge and professional skill to safeguard their interests themselves. Therefore, though
the adversary system envisages equal legal rights and opportunities to the parties to present their respective cases before the court, such legal rights and opportunities would in practice operate unequally and harshly, affecting adversely the poor indigent arrested people who are unable to engage competent lawyers for their defence. The system therefore departs from its strict theoretical passive stance and confers on the accused not only a right to be defended by a lawyer of his choice, but also confers on the indigent accused person, a right to get legal aid for his defence at state costs.

Explaining the proper function of the judge in an adversary system of trial, the Supreme Court has observed. Ramchander V. State of Haryana112. "The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a reference or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to altered the notions of judge-umpire. The judge is not to remain passive as an umpire; but he has to play a more positive and active role for protecting the public interests as well as seen later. The charge against the accused is to be framed not by the prosecution but by be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest.

Though the notion of adversary system of trial has undergone some transformation by legislative prescriptions and judicial gloss, it can still be reasonably considered as an essentially important component of the concept of fair trial. The principle that the accused person is presumed to be innocent unless his guilt is proves beyond reasonable doubt, is of cardinal importance in the

administration of criminal justice. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the framed that a criminal trial should begin with and be throughout governed by this essential presumption. However, a note of caution was struck by the Supreme Court Regarding the application of this principle. It's observed in Dharam Das V. State of UP\textsuperscript{113} every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men go out but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused.

The provisions regarding venue i.e. the place of inquiry or trial, are contained in Ss. 177 to 189. If the place of trial is highly inconvenient to the accused person and causes various impediments in defence preparation, the trial at such a place cannot be considered as fair trial. Apart from exceptional circumstances, it would be convenient both to the prosecution and to the defence if the trial is conducted by a court within whose local jurisdiction the crime was committed. Trial at any other distant place would generally mean hardship to the parties in the production of evidence. Fair trial requires that arrested person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an arrested person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him. In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the arrested person.\textsuperscript{131} Detailed provisions have been made in the Code in Ss.211-224 regarding the form of charge, and the joinder of charges.

\textsuperscript{113} AIR 1974 SCC 267
The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. This would facilitate in the making of the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the back of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the arrested person under certain circumstances. For instance, a magistrate issuing a summons may dispense with the personal attendance of the accused and permit him to appear by his pleader (S. 205). Similarly, S. 273 requires that the evidence is to be taken in the presence of the arrested person; however the section allows that same to be taken in the presence of the accused pleader if the personal attendance of the arrested person is dispensed with114.

Section 317 makes an exception to the above rule and empowers the court to dispense with the personal attendance of the accused person at his trial under certain circumstances. The general rule in criminal cases is that all inquiries and trials should be conducted in the presence of the accused, the underlying principle being that in a criminal trial the court should not proceed ex-parte against the arrested person. Although this rule if for the protection of the interests of the arrested person, this does not mean that the accused has a right to absent himself from court and that the court should necessarily grant his prayer for exemption from personal attendance. The court before dispensing with the personal attendance of the accused must be satisfied. Such attendance is not necessary in the interests of justice. That the accused persistently disturbs the proceedings in court. This power can be exercised only if the arrested person is represented by lawyer. The court is also required to record its reasons for such

114 Chandrawati v. state of UP, 1992 Cr. L.J. 3634
order. The salutary provisions permitting the accused to appear by his pleader are there in the code to help the accused and not to harass him, and the discretion of the judge or magistrate has in these matters is to be exercised judicially.

Fair trial requires that the particulars of the offence have to be explained to the arrested person and that the trial is to take place in his presence. Therefore, as a logical corollary, such a trial should also require the evidence and to be taken in the presence of the arrested person. Section 273 attempts to achieve this purpose when it provides as follows". "Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader." The section makes it imperative that all the evidence must be taken in the presence of the accused. Failure to do so would vitiate the trial, and the fact that no objection was taken by the accused is immaterial. This rule is of course subject to certain exceptions made by the provisions of the Code viz, Ss. 205, 293, 299, 317.

Thought the imperative rule contained in the section confers a right on the accused to be present in the course of the trial, it presupposes that the accused accepts it and does not render its fulfillment impossibility. This obligation or the right is not so absolute in character that its requirement cannot be dispensed with even in a case where the accused by his own conduct renders it impossible to comply with its requirements. To interpret the section to cast an obligation as would require the evidence to be taken in the presence of the accused even where the accused by his own conduct makes recording of evidence in his presence an impossibility, is to sanction a right in favour of the accused to frustrate the trial at his own option. This would not only mean negation of a fair trial but would mean end of all trial at the choice of the accused. Such a position can never be considered to be consonant with basic principles underlying the Code. 115

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Therefore, if the accused is obstructing the smooth conduct of the trial the court may expel him after appropriate warning and proceed with the trial in his absence. However, the accused person should be able to reclaim his right to be present at the trial if he expresses bonafide willingness to conduct himself in such a manner as to allow the court to proceed with the trial smoothly in his presence. The right created by the section if further supplemented by S.278. It, inter-alia, provides that wherever the law requires the evidence of witness to be read over to him after its completion, the reading shall be done in the presence of the accused, or of his pleader if the accused appears by pleader.

If any evidence is given in a language not understood by the arrested person, the bare compliance with S.273 will not serve its purpose unless the evidence is interpreted to the accused in a language understood by him. Therefore, S. 279 provide. Whenever any evidence is given in a language not understood why the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much. Thereof as appears necessary. Non-compliance with S.279(1) will be considered as a mere irregularity not vitiation the trial if there was no prejudice or injustice caused to the Arrested person. The accused is found incapable of understanding the proceedings by reason of unsoundness of mind, his case will be dealt with according to the provisions contained in Ss. 328-339. An arrested person, though not of unsound mind, may be deaf and dumb, may be foreigner not knowing the language of the country and no interpreter is available, and if such accused is unable to understand or cannot be made to understand the proceedings, there is a real difficulty in giving effect to S.273 in its proper spirit.  

The accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit. In order to acquaint the accused further with the prosecution case and to facilitate his preparations for the defence, it is obligatory to supply him with copies of police report, statements before the police and other documents on which the prosecution wants to rely, or with a copy of the complaint etc.

Evidence given by witness may become more reliable if given on oath and tested by cross-examination. A Criminal trial which denies the arrested person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial. Thought the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot by any standard be considered as just and fair. The refusal without any legal justification by a magistrate to issue processes to the witnesses named by the arrested person was held enough to vitiate the trial.

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and the trial is inordinately delayed. However the Code does not in so many words confer any such right on the accused to have his case decided expeditiously. If the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail. But this only mitigates the hardship of the arrested person but does not give him speedy trial and secondly
this rule is applicable only in case of proceedings before a magistrate. Witnesses named by the arrested person was held enough to vitiate the trial. Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and the trial is inordinately delayed. However the Code does not in so many words confer any such right on the accused to have his case decided expeditiously. If the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail. But this only mitigates the hardship of the arrested person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a magistrate.\textsuperscript{117}

"In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded." A criminal trial drags unreasonably long time is not a fair trial. Section 309(1) gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognized but the real problem is how to make it a reality in actual practice.

\textbf{3.4 ACCUSED RIGHTS}

Arrest means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. For instance, when a police officer apprehend a pick- pocket he is arresting the pickpocket; but when a dacoit is not arresting that person but wrongfully confining that person. Secondly, every compulsion or physical restraint is not arrest but when the restraint is total and

deprivation of liberty is complete, that would amount to arrest. If a person suppresses or overpowers that voluntary action of another and detains him in a particular place or compels him to go in a specific direction, he is said to imprison that other person. If such detention or imprisonment is in pursuance of any legal authority or apparent legal authority, it would amount to arrest. Preventing a person from willing his movements and from moving according to his will amount to arrest of such person\textsuperscript{118}.

In a free society like ours, law is quite jealous of the personal liberty of every individual and does not tolerate the detention of any person without legal sanction. The right of personal liberty is a basic human right recognized by the General Assembly of the United Nations in its Universal Declaration of Human Rights, This has also been prominently included in the convention on Civil and Political Rights to which India is now a party. Our Constitution recognizes it as a fundamental right. Article 21 Provides "No person shall be deprived of his life or personal liberty except according to procedure established by law." Further, the procedure contemplated by this article must be ‘right and just and fair' and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus the personal liberty being the corner-stone of our social structure, the legal provisions relating to arrests have special significance and importance.

Arrest being a restraint of the liberty of a person, it can be effected by actually contacting or touching the body of such person or by his submission to the custody of the person making arrest. An oral declaration of arrest without actual contact or submission to custody will not amount to an arrest. The submission to custody may be by express words or may be indicated by conduct. If a person makes a statement to a police officer, accusing himself of having

committed an offence, he would be considered to have submitted to the custody of the police officer. If the accused proceeds towards the police Station as directed by a police officer, he would be held to have submitted to the custody of the police officer. In case there is forcible resistance to or attempt to evade arrest, the person attempting to make arrest may use all necessary means for the same. Whether the means used for arrest were necessary or not would depend upon whether a reasonable person having no intention to cause any serious injury to the other would have used to effect his arrest. Further, resistance or obstruction to lawful arrest has been made punishable by the Penal Code<sup>119</sup>.

On the other hand Sub-Sec.(3) of S. 46 enjoins in clear terms that though persons making arrests can use all necessary means for the purpose, they have not been given any right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life. According to S.50 (1) every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest".

The right to be informed on the grounds of arrest is recognized by Ss. 50, 55 and 75 in cases where the arrest is made in execution of a warrant of arrest or where the arrest is made by a police officer without warrant. If the arrest is made by a magistrate without a warrant under S. 44, the case is covered neither by any of the Ss. 50, 55 and 75 nor by any other provision in the Code requiring the Magistrate to communicate the grounds of arrest to take arrested person. This lacuna in the Code, however, will not create any difficulty in practice, as the Magistrate would still be bound to state the grounds under Art. 22(1) of the constitution.

<sup>119</sup>www.indianpenalcodeanalysis/explanation.in
Thus, right of information on ground of arrest is provided in S. 50, 55 & 73 the right against unnecessary restraint of arrested person is provided in S.(49). Furthermore, a large variety as rights are provided to every arrested person during the trial intended to guarantee a fair trial and to avoid innocent person being punished by the systems. In respect of woman, special provisions are made to ensure decency and respect for the dignity of woman. "Where a police officer arrests without warrant any person other than a person accused of an non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf”. This section provides that any person arrested without warrant shall immediately be informed of the grounds of his arrest and if the arrest is made in a bailable offence the person shall be informed of his rights to be released on bail.

Section 75 also states that when a person is arrested he must be informed of his right to be released on bail. It is the duty of the police officer that a person who is arrested must be informed about his rights. Whether the arrest is made without warrant by police officer, or whether the arrest is made under a warrant by any person, the person making the arrest must bring the arrested person before a judicial officer without unnecessary delay. Its is also provided that the arrested person should not be confined in any place other than a police station before he is taken to the magistrate120.

A police officer making an arrest without warrant shall, without unnecessary Delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station. (S. 56). The police officer or other person executing a warrant of arrest shall (subject to the provisions of S71 as to security) without unnecessary delay bring the person arrested before the Court

120 www.manupatra.com
before which he is required by law to produce such person: Provided that such
delay shall not in any case, exceed 24 hours exclusive of the time necessary for
the journey from the place of arrest to the Magistrate's Court.

Without judicial scrutiny-Here again, whether the arrest is without warrant
or under a warrant, the arrested person must be brought before the magistrate or
court within 24 hours. Section 57 provides: No police officer shall detain in
custody of person arrested without warrant for a longer period than under all the
circumstances of the case is reasonable, and such period shall not, in the absence
of a special order of a Magistrate under S. 167, exceed twenty-four hours
exclusive of the time necessary for the journey from the place of arrest to the
Magistrate's Court." The right to be brought before a magistrate within a period
of not more than 24 hours of arrest has been created with a view (i) to prevent
arrest and detention for the purpose of extracting confessions, or as a means of
compelling people to give information; (ii) To prevent police stations being used
as though they were prisons - a purpose for which they are unsuitable; (Hi) to
afford an early recourse to a judicial officer independent of the police on all
questions of bail or discharge. The precautions laid down in S.57 seem to be
designed to secure that within not more than 24 hours some magistrate shall have
seisin of what is going on and some knowledge of the nature of the charge
against the accused, however incomplete the information may be. 24 hours of the
arrest must be scrupulously observed. This healthy provision enables the
magistrates to keep check over the police investigation an it is necessary that the
magistrate should try to enforce this requirement and where it is found disobeyed,
come down heavily upon the police. If a police officer fails to produce an
arrested person before a magistrate within 24 hours of the arrest, he shall be held
guilt of wrongful detention. In Sec57, the words " special order of a magistrate
under sec167" refer to the Power of the Magistrate to Order detention in police

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custody for a limited Period in order to facilitate police investigations. The Magistrate before passing any such order under section 167 has to satisfy himself as to Article 22(2), on the face of it, appears to apply cases of arrests without the necessity of remanding the accused to police custody.

Warrant as well as of arrests under a warrant. However in State of Punjab V. Ajaib Singh\textsuperscript{121}, the Supreme Court has observed that the article relates to arrests without warrant only. The court felt that in case of an arrest on a warrant the judicial mind had already been applied to the need for arrest and that there was no need to provide any safeguard in absolute terms. This view has been criticized to be unreasonable and wrong. Be that as it may, the provision to section. 76 unmistakably extend the right of the arrested person to be produced before a Magistrate to the cases of arrests on a warrant.

Article 22(1) of the Constitution provides that no person who is arrested shall be denied the right to consult a legal practitioner of his choice. Further, as has been held by the Supreme Court, the State is under a Constitutional mandate (implicit in Article. 21) to provide free legal aid to an indigent arrested person, and this constitutional obligation to provide legal aid does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate as also when he is remanded from time to time Section 303 also provides that any person against who proceedings are instituted under the Code may of right be defended by a pleader of his choice. The right of the arrested person to consult his lawyer may be in the presence of police officer but not within his hearing\textsuperscript{122}. Reference may also be given at this point to sec-126 of the evidence Act which makes all communication between professional advisors like barrister, attorney, etc and their clients confidential communication,

\textsuperscript{121} AIR 1953 SC 10.
\textsuperscript{122} REYNOLDS, Judicial Process (West Publishing Co., 1980).
and it is only when the clients made to him in the course and for the purpose of his employment. The provision of this section rightly provide however that the protection of the section will not extend to any fact showing that a crime or fraud has been committed since the commencement of an employment. "When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless is made for the purpose of vexation or delay or for defeating the ends of justice."

This section is counterpart of Section 53 while section 53 enables a police officer to compel an arrested person to undergo a medical examination with a view to facilitate investigation, Section 54 gives the accused the right to have him medically examined to enable him to defend and protect himself properly. It is considered desirable and necessary "that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury”

The salutary principle that the medical examination of a female should be made by a female medical practitioner has been embodied in Section 53(2). Similar provision has not been expressly made in this section 54. The expression "registered medical practitioner" shall have the same meaning as has been mentioned in the Explanations to Section 53. Whether the medical examination shall be by a medical practitioner of the choice of the arrested person or whether
he would be one appointed by the Magistrate in his discretion, is not clear from the section. Also the section is silent as to who would bear the expenses of such medical examination\(^{123}\).

Sections 162, 173(4) and 207A(3) provide for the right of the accused person to obtain copies of all relevant documents so that he can come to know the detain and particulars of the case against him. But failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial completely. Section 162, Cr. P.C. provides a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The provisions relating to the recording of the statements of the witnesses and supply of the copies to the accused so that they may be utilized at the trial for effectively defending himself, cannot normally be permitted to be whittled down and where the circumstances are such that the court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded, the court can set aside the conviction. In other cases, the court may direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect that no prejudice has resulted to the accused that the court would, notwithstanding the breach of the statutory provision, be justified in maintaining the convictional. Thus it is clear that the statutory right of the accused to be furnished with copies of all the documents on which the case of the prosecution rests and the proof of his guilt depends, is a valuable right. The denial of the same or omission to supply copies of any of these documents will certainly prejudice his case in as much as he will not be able to effectively meet all the circumstances that are sought to be brought against him. Such a procedural lapse

\(^{123}\) Mathew, J.C. criminology and penology, Eastern India Publications, 1987
may prove critical to the cause of the accused. Any defect in compliance with the same is likely not only to mislead him about his case but may lead to failure in delivering justice. Such a provision having regard to the language in which it is couched and the incapable value that it has for the accused cannot but be regarded as basic and mandatory. Even before the stage of trial, the accused has a right to have a copy of FIR form the police station.\textsuperscript{124}

Though the illegality or irregularity in making an arrest would not vitiate the trial of the arrested person, it would be quite material if such person is prosecuted on a charge of resistance to or escape from lawful custody. A trial will not be void simply because the provisions relating to arrest have not been fully complied with. If the court as jurisdiction to try an offence, any illegality or irregularity in arrested will not the jurisdiction of the court to try the offence. The question whether the police officer making the arrest was acting within or beyond his powers in effecting the arrest, does not affect the question whether the arrested person was guilty or not guilty of the offence with which he is charged. If a private person attempts to make an illegal arrest, the person against whom such attempt is made has every right to protect himself and to exercise his right of private defence in accordance with the provisions contained in Sections 96-106, I.P.C. If the person making an illegal arrest is a police officer or public servant, then the right of private defence against such police officer or public servant will not be as wide as it is against a private person, and would be subject to the restrictions contained in Section 99 of Indian Penal Code. If the arrest is illegal, it is a sort of false imprisonment and the person making such arrest expenses himself to a suit for damages in a civil court.\textsuperscript{140} If a public servant having authority to make arrests, knowingly exercises that authority in contravention of law and effects an illegal arrest he can be prosecuted for an

\textsuperscript{124} www.explanation of FIR in Indian Police Station.in
offence under Section 220 of the Penal Code. Apart from this special provision, any person who illegally arrests another is punishable under Section 342, I.P.C., for wrongful confinement.

It may be mentioned here that the provisions regarding arrest cannot be by-passed by alleging that there was no arrest but only informal detention. Informal detention or restraint of the police are not authorized by law. "It is intolerable that the police should pursue the investigation of crime, by defying all the provisions of the law for the protection of liberty of the subject under the colourable pretension that no actual arrest has been made when to all intents and purposes, a person has been in their custody."

Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21. Relief were being granted in writ petitions under Article 32 or 226 direction to set at liberty the person detained, if the complaint was one of illegal detention. direction to the concerned Government to hold an inquiry and take action against the officers responsible for the violation. If the enquiry or action taken by the concerned department was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the Law of Torts, was evolved in the last two and half decades.

Sujith Singh Vs, State Of Haryana And Ors. Compensation as a public law remedy: Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21, to Page 838 begin with, only the following relief were being granted in writ

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125 www.vokileno.1.com
126 Criminal writ petition no. 237 of 1998
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Union Of India V. Sunil Kumar Sarkar. In this case court held that it did not amount to double jeopardy. Under Article 20(2). The two proceeding operated in two different fields even though the crime or the misconduct might arise out of the same act. The two proceedings dealt with penal aspect of the misconduct while the proceedings under the Service Rules dealt with the disciplinary aspect of the misconduct.

V. C Mohan V. Union Of India the Supreme Court Emphasized that: "The accepted methodology of Governmental working should always be In tune with The concept of fairness and not dehors the same- a person is being placed under detention without trial and there is neither any scope for overzealous nor acting in a manner without due and proper application of mind - in either situation law courts should be able to protect the individual from the administrative ipse dixit." State of Andhra Pradesh V.Challa Ramakrishna Reddy. A prisoner, be he a convict or Under- trial or a detenue, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his

127 AIR 2001 SC 1092
128 JT 2002 (2) SC 365
Fundamental Rights including the right to life guaranteed to him under the constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.

Sunil Phul Chand Shah V. Union Of India. In Under Sec. 10 of the COFEPOSA Act, the maximum period of detention is fixed at one year although it may be increased to two years under S/9. The Supreme Court has now clarified that the period of detention is to be computed from the date of actual detention and not from the data of the order of detention. Kultej Singh Vs. Circle Inspector Of Police & Others In the above case the court while deciding the case referred sub section (1) of Section 46 of the CrPC from which it is clear that a police officer to be arrested, he can be said to have arrested the person. If a person is confined or kept in the police station or his movements are restricted within the precincts of a police station, it would undoubtedly be a case of arrest. In the instant case, the FIR specifically states that Hardeep Singh was kept in the police station from the morning of 27.09.1990. Section 57 of the CrPC provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court. Thus respondents 1 and 2 were required to produce Hardeep Singh within 24 hrs from the time he was kept in the police station as Savanur. Thus, all courts are courts of justice. The only statute that defines courts is the Indian Penal Code, which says Section 20: "The words, courts of Justice" denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially

129 AIR 2000 SC 1023
130 1992 Cr. L.J. 11733
as a body, when such judge or a body of judges is acting judicially'. It is not a mere court of law nor a judge is only to apply law. He has to act judicially in a court of justice. Justice is a basic concept.

When a judge takes Oath, it not simply to apply law, but it is to do justice according to law. Still it is justice. The concept of justice is universal. Justice is what justice does, be it the lowest court or the highest court. The content of justice does not vary according to the hierarchy of courts. It is the duty of every court to do complete justice. A judge must have the basic sensitivity to know human suffering, poverty, inequality and exploitation.

Every accused person is presumed to be innocent until guilt is proved beyond reasonable Doubt in a public trial at which he has the entire guarantee necessary for his defense. The adversary system envisages equal right and opportunities to the parties to present. Their respective cases before the Court. The system do not strict to a theoretical passive Stand and confers on the accused not only a right to be defended by a lawyer of his Choice but also confers on the indigent accused person a right to the legal aid for his Defence at the State cost. The bail is provided to the accused because the is presumed to be innocent till guilt is Proved and he would be subjected to the psychological, physical and social deprivations of jail life. Apart from this the accused person has also the right to know the charges of accusation also has right to be tried in the court in his presence, right to cross. Examine prosecution witness and to produce evidence in defence a right accused person That evidence should be taken in his presence but also has a right of expeditions trial, copy of the F.I.R. right to know the grounds of arrests, information regarding the right to be released on bail, right to be taken before a magistrate without delay right of arrested person to be taken before magistrate court or officer in change of police station without delay right

to consult & legal practitioner, right to be examined by a medical practitioner. Etc.

The burden of proving the guilt to the accused is upon the prosecution and the judge is Not to remain passive as an umpire but he has to play a positive and active role of Protecting the public interest as well as of the accused the must indispensable Condition for a fair Criminal trial is to have an independent, impartial and competent Judge to conduct the trial. In the Powell the American Supreme Court explored the scope of the right to counsel as ensured under the 6th Amendment to the American Constitution. In the Powell the Court by placing reliance more on the due process of the 14th Amendment declared that the State is under a Constitutional obligation to provide legal aid to indigent accused. On this premise the Court in Powell held that non availability of counsel to the accused vitiated the trial and thereby quashed the prosecution and conviction of the accused.

An arrest occurs where a person is forcibly detained; this may involve his physical restraint (for example, by the use of handcuffs) or a symbolic restraint (for example, by touching him and indicating that he is not free to go) or merely telling him that he is under legal compulsion to remain where he is or to accompany the person to arrest him. The law places such importance on the liberty of the subject that any such detention by whatever method achieved is both criminal and tortuous unless it can be justified by lawful authority made known to the person arrested at the time of his detention. Where a person is unlawfully detained the High Court will order his release on a motion for habeas corpus, and he is then free to prosecute or sue the persons responsible for his detention. Where the executive (including the police) are responsible, he may obtain exemplary damages against them. The law relating to arrest must be seen against this background, i.e. that any person wrongfully arresting another can be
brought before the courts to account for his actions. Perhaps as important in practice is the principle that a person unlawfully detained is entitled to resist and use reasonable force to secure his release; issues as to the validity of an arrest will frequently arise where a person is charged with assault on the police; it is a valid defence on such a charge for the defendant to show that he was using reasonable force to resist an unlawful arrest\textsuperscript{132}.

In the last resort, the criminal law can only be enforced by the compulsory attendance of accused persons at court. To this end magistrates are empowered to issue warrants for the arrest and production before them of such persons. Any police officer who is authorized to arrest a person under a magistrates warrant is protected from civil and criminal liability. In practice, arrests under warrant occur in only a small proportion of cases; most arrests occurs where the police exercise their common law or statutory power of arrest without warrant. Where no warrant has been issued by a magistrate, then the police officer who effects the arrest and all who assist him must show a lawful justification for their actions, and are who effects the arrest and all who assist him must show a lawful justification for their actions, and are personally liable to an action for damages if they are unable to do so.

The law also permits a private person to carry out an arrest, but his powers are more limited than those granted to the police. A private person may arrest without warrant anyone he sees actually in the process of committing a breach of the peace or who is in the act of committing an arrestable offence. An arrestable offence is defined as an offence for which the sentence is fixed by law or for which the maximum term is five years imprisonment or more. Thus the law ensure that every citizen should have the right to detain persons caught in flagrante delicto committing serious offences or disturbing the peace. Where,

\textsuperscript{132} Bhashi P.M. Constitution Law of India, Asia Law House, 2011.
however, the offence has already been committed, the powers of private persons
to effect an arrest are more restricted. Thus a private citizen may only arrest for a
breach of the peace which has already occurred, if there are reasonable grounds
for apprehending its immediate renewal. So far as past arrestable offences are
concerned, a private person may arrest anyone whom he has reasonable ground
for suspecting committed the offence. The arrest however is only lawful if it
transpires that such an offence has in fact been committed, if it eventually turns
out that no offence has been committed, the person who made the arrest will be
liable for false imprisonment.

For example. A, a store detective, stops B who is leaving a department
store and asks whether he has paid for a certain item in his bag. B is wholly
unable to give an explanation. A arrests him. B, who is absent-minded,
subsequently remembers that he purchased the item in question in another store
and is liable to produce a receipt as proof of purchase. Although A had
reasonable cause to suspect B of having committed the arrestable offence of theft,
he will still be liable to B in tort for false imprisonment because the offence had
not in fact been committed.

Although an arrest may be justified in the sense described above (i.e.
under a specific statutory power), it will still be unlawful unless the arrested
person is informed of the reason for his detention. Thus, every warrant for arrest
must state the offence charged against the person named or described in the
warrant. Again, although a police officer need not have the warrant in his
possession when he effects an arrest, he must, on demand, show it to the arrested
person as soon as practicable. Whenever a private person, or a police officer,
makes an arrest without a warrant, he must at once inform the person arrested of
the ground upon which he seeks to justify his detention. In any subsequent

133 www.prisonreformrsanditsworkingconditionsofindia.com
proceedings, the arrest can only be supported by the reason given at the time. Whenever a private person arrests within a reasonable time\textsuperscript{162}. Where a police officer arrests a person he must take him to a police station as soon as practicable\textsuperscript{163}. The only exception to this is where the presence of the arrested person elsewhere is necessary in order to carry out immediate investigation\textsuperscript{134}.

In September 2004 the government repealed the Prevention of Terrorism Act (POTA) and replaced it with the Unlawful Activities Prevention Act (UAPA). Nonetheless, SAHRDC reported that more than 1,000 persons remained in detention awaiting prosecution under lapsed special terrorism legislation, and that cases opened under POTA and Terrorism and Disruptive Activities Act (TADA) continued through the judicial system. On November 8, the Supreme Court acquitted two men, Daljit Singh Bittoo and Gursharan Singh Gama, previously sentenced to life imprisonment under TADA in June 2004. The defense argued successfully that the deputy superintendent of police had a personal vendetta against the two men and used TADA to imprison them.

TADA courts curtailed many legal protections provided by other courts. For example, defense counsel was not permitted to see prosecution witnesses, who were kept behind screens while testifying in court, and confessions extracted under duress were admissible as evidence.

POTA contained a sunset feature, which gave the central POTA review committee one year to review all existing POTA cases. The government established three central review committees to review the cases registered under POTA. The committees were required to review all cases registered under POTA by September 20, but at year's end, numerous cases remained unreviewed. This clause also allowed the government to make new arrests under POTA, despite its

repeal, if the arrests were tied to an existing POTA case. The government could issue a new indictment on a case opened five years earlier under POTA, even if the government was never associated with the case. It can also extend the one-year limit for reviews; however, at year's end, it had not done so. The law provides that the review committees constituted by the government shall review all cases registered under POTA by September 20. In June the POTA review committee reported that there were 11,384 persons wrongfully charged under POTA who instead should be charged under the regular law\textsuperscript{135}.

During the year the media reported that 217 Muslims arrested in connection with the 2002 Tiffin bomb case, the 2003 killing of former Gujarat chief minister Haren Pandya, the 2003 Akshardham temple bombing, and the 2002 Godhra train arson case, remained in custody in Gujarat under POTA. On June 29, a special POTA court dismissed POTA charges related to the 2002 Tiffin Bomb case against Munawar Beg Mirza; however, he continued to be an accused in the same case under the penal code. In June the POTA review committee recommended that Godhra accused not be charged under POTA. The Gujarat government rejected the recommendation, contending that there was clear evidence of conspiracy in the train arson.

Throughout the year authorities in Jammu and Kashmir repeatedly detained Kashmiri separatist leaders such as Shabir Shah, Chairman of the Jammu and Kashmir Democratic Freedom Party, Yasin Malik, Chairman of the Jammu and Kashmir Liberation Front (JKLF), and Syed AM Shah Geelani, Chairman of the hardline faction of the All Parties Hurriyat Conference (APHC), for short periods of time ranging from several hours to one day, usually to prevent their participation in demonstrations, funerals, or other public events. For example in January, Mohammed Yasin Malik and Shabir Ahmed Shah were

\textsuperscript{135} www.potaact/analaysis/comparativestudy.in
among 30 people detained in Baramuula while participating in a demonstration against civic elections. They were released later in the day.

There were several incidents during the year in which Tamil Nadu police arrested activists and demonstrators without a proper warrant. In September according to media reports, Chennai police arrested over three thousand activists belonging to the Communist Party of India (Marxist), including a state unit secretary and other legislators. Section 66. Duties of Police Officers towards the arrested person:- It shall be the duty of every police officer. To afford every assistance within his power to disabled or helpless persons in the streets, and to take-charge of intoxicated persons and of lunatics at large who appear dangerous or incapable of taking care of themselves. To take prompt measures to procure necessary help for any person under arrest or in custody, who is wounded or sick and whilst guarding or conducting any such person, to have due regard to his condition. To arrange for the proper sustenance and shelter of every Person who is under arrest or in custody. In conducting searches, to refrain from needless rudeness and the causing of unnecessary annoyance. In dealing with women and Children to act with strict Regard to decency and with reasonable gentleness. To use his best endeavors to prevent any loss or damage by fire. To use his best endeavours to avert any accident or Danger to the public. The warrants of arrest can be issued only by a Competent person empowered so to do by virtue of his office.

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