Pre-trial procedures involving arrest and investigation assume much importance under both the systems. In fact it is at this stage that the systems, reflect their differences, more prominently.

Pre-trial Procedures under the French System

Under the French Criminal Procedure the pre-trial inquiries play a predominant role. In Pondicherry under the French administration there were three types of pre-trial inquiries. They were 'l' enquete flagrante', 'l' enquete preliminaire' and 'l' information judiciare'. Out of these three pre-trial inquiries the first two were conducted by the police and the procureur de la Republique and the third was conducted by a juge d' instruction.

The type of inquiry known as 'l' enquete' was done when the offence was a 'crime' or 'delit' and was either been detected while actually being committed, or which was committed then recently. The procureur would not treat an offence as 'flagrant' unless it was reported to the authorities immediately on discovery. If no accused was arrested within 15 or 21 days, the procureur would decide it and instruct
the police to continue their inquiries. It was thereafter known as 'Preliminaire' and not 'flagrant'. The Role of the procureur in 'l' enquete flagrant' thus depended upon the timing of request for intervention by a juge d' instruction.¹

**Arrest and Remand**

Under the French system the police could prohibit any person from leaving the scene of crime till the termination of their initial inquiries.² The police could request any person to attend a police station, the procure could authorise the police to use force to compel his attendance. Apart from this, the police might, without the procureur's authority, take into custody any person whose identity they wanted to verify, or against whom substantial incriminating evidence existed. This type of custody was called 'garde a vue'. A person detained under 'garde a vue' was not entitled to legal advice or legal representation during his detention and he could be questioned by the police freely.³

1. It is sometimes suggested that one of the reasons why the procureur delays the intervention of the judge d' instruction is that the latter is frequently encumbered with too much work. By retaining control of the inquiry, the procureur can be more selective as to which cases he wishes the judge d' instruction to investigate. Since however, all 'crimes' must be investigated by a juge d' instruction, this reasoning could only apply to 'delits'.

2. In cases of extreme urgency, such as if the witness is dying, an 'officer' of the police judiciaire may put the witness on oath before taking his statement.

3. It should be remembered that 'l' enquete flagrante' and therefore the power to detain 'garde a vue', only applies to offences classed as 'crimes' or delits.
An 'officer' of police judiciaire alone could order for the detention of 'garde a vue'. A person arrested could be detained for twenty four hours only. However, the procureur could authorise further detention of twenty four hours, if there was substantial incriminating evidence against the said person. Without such written authorisation by the procure, the period of detention was strictly limited to twenty four hours only. If several offences were being investigated simultaneously all involving the same person, he might still be detained for one period of 'garde a vue'.

A record of each 'garde a vue' giving its time of its commencement, total duration, the duration of any examinations and details of what took place, threat and the reasons why the person was detained etc., should be kept by the police. Apart from that individual records, the police must have maintained a composite register giving details of 'garde a vue' detentions. The Register must have contained the name and personal particulars of the detainee, the exact time of the commencement and termination of the detention, of offence being investigated, and the timings of any examination of the detainee.  

4. It was noted that in Paris, the average time for the examination of the accused was 15-30 minutes. A possible explanation may be that this was the time taken to dictate any statement made by the Accused, exclusive of any prior 'conversations', etc.
individual record and the register was to be signed by the person detained. Any refusal to sign the same was to be noted. Each year, the procureur examined the registers so as to ensure the strict observance of the provisions concerning ‘garde a vue’.

Detentions beyond twenty four hours would be dealt with seriously. The officer responsible for the same was liable to be disciplined. As the illegal detention was a criminal offence, the ‘officer’ concerned was liable for criminal prosecution. The procureur, except in the cases of flagrant breaches, would not normally institute such proceedings unless he received complaints from the illegally detained persons. It was the duty of the procureur to notify the ‘officer’s superior in the police force the death of suspects by ‘garde a vue’, as this allowed the police to question the suspects in the absence of counsel. If a juge d’ instruction was in-charge of the inquiry, the police did not have the power to question the suspect in the absence of lawyer. In such cases the police could arrest the suspect only on the instructions of the juge d’ Instruction. The effect of the question and the answers thereto might well be more restricted if the accused’s lawyer was present, as was accused’s right when appearing before a juge d’
Unless substantial incriminating evidence already existed against a suspect, it would be pointless for the police to arrest him in the hope of gaining a confession, since failure to do so would only result in the accused's release at the end of the period of detention.

The power to arrest and detain under 'garde a vue' was also much more limited than under 'l' enquete flagrant'. Since the police was not present at the scene of the offence at the time of its discovery, they could detain anyone there. They could only use detention 'garde a vue' if such detention was 'necessary for the inquiry' and could not force to effect such detention. There were various rules concerning the operation of 'garde a vue' which must be strictly observed. Only an 'officer' of police Judiciarie could order such detention. If several offences were being investigated, simultaneously all involving the same person might still only be detained for one period of 'garde a vue'. The period commenced when the person was first taken into custody. So he could not 'willingly' attend a police station for several hours and only technically and formally be detained 'garde a vue' at the end of that period. The procureur might order that any person detained 'garde a vue' be medically examined, and in any case where the 'garde

---

5. Except for his first formal appearance.
a vue' had been extended beyond twenty four hours, the persons
detained might make a similar request. The purpose of such
examination was not to obtain evidence, but rather to ensure that the
person was medically fit to be detained, or as a safeguard against
police brutality. Detention by 'garde a vue' would be terminated when
the purpose for detention had been accomplished, or the maximum
period had expired, which - ever was earlier.

L' Enquete preliminaire type of enquiry was aged where the
offence was not 'flagrant' (thus not permitting the use of 'l' enquete
flagrante) and as an alternative to investigation by a juge d'instruction
(although such an investigation may follow on an (enquete
preliminaire). It was used in all 'contraventions' and in all cases where
the offence was not reported as soon as it came to light, obvious
example, of which were frauds. The person detained must have been
found in a public place, unless the police had the occupier's consent to
enter a building. In other words, if the suspect was in his house, he
could refuse police entry, and if he was in the street, he could refuse to
accompany the police. The police could only request a witness or
suspect to attend the police station and that person had the right to
refuse. If a suspect agreed to come to the police station and was
detained 'garde a vue' the police could not bring him before the procureur at the end of the period of 'garde a vue'.

If the police wish the accused to be detained, they will have to make a request to the procureur to ask a juge d'instruction to take over the inquiry in the hope that the juge d'instruction will order that the accused be detained. All the steps had to be taken before the end of the period of 'garde a vue'. The 'enquete preliminaire' would come to an end when the procureur ordered no further proceedings, cited the accused to court, or request a judge d'instruction to take over the inquiry.

Warrants of Arrest

The juge d'instruction had the powers to issue a warrant of arrest for the arrest of the Accused who had not already been arrested by the provisions of the police powers of 'garde a vue'. There were three types of warrants - the 'mandat de comparution', the 'mandat d'amener and the 'mandat d'arrest.

The 'mandat de comparution' was not so much a warrant as a request by the juge to the accused to appear before him. Normally, it would not be used in serious cases, or if the juge thought the accused
was liable to ignore it. It was only a form of request made to accused for requiring his appearance, before the Juge d' instruction, for hearing him about the accusation. But, in view of the less serious nature of the offence mentioned in it, it might be ignored by the accused. If the Accused failed to appear, the juge would then issue a 'mandat d'amener', having first invited the procureur to give his views on the issue of such a warrant.

A 'mandat d'amener' might only be issued if the offence was at least a 'delit' punishable by imprisonment. The warrant authorised the police to arrest the accused, using force if necessary, but such an arrest might not be effected in a private house between the hours of 8 p.m, and 6 p.m. As soon as the accused was arrested, he was brought before the juge d' instruction, or if that was impossible, was detained in a police station in the interim. If the juge d' instruction did not examine the accused within twenty four hours of his arrest, the procureur might request the president of the court or judge nominated by him to conduct such an examination. If no examination was made or if no such request was made, the accused must be freed from custody.

In the event of an accused being arrested more than 200 kilometers away from the juge's office, the accused would be brought
before the nearest procureur. After verifying the identity of the accused
the procureur would tell him about his rights either to make or to not to
make a declaration.

If the accused makes a declaration, the procureur would note it,
and then ask the accused if he wished to be transferred before juge d’
instruction who issued the warrant, or preferred to remain in custody
where he was until the juge’s decision was known. If the accused
agreed to be transferred, this was done immediately. However, if he
wanted to stay in custody where he was, the procureur would send all
the available information, including any declaration made by the
accused, to the juge who issued the warrant. The juge on receipt of
this information might then order that the accused be brought before
him, or might order his release. The release would be ordered if the
juge thought that the wrong person had been arrested or the accused’s
explanation clearly proved his innocence.

The warrant of ‘mandat d’ arrest’ was basically the same as a
‘mandat d’ amener’, but was used where the accused had fled or gone
abroad. The main difference was that the accused must be brought
before the juge within forty eight hours of his arrest and not within
twenty four hours as in the case of ‘mandat d’ amener’.
To sum up, under the French Law a warrant of arrest was issued only against an absconding person and carried with it an order of remand. Such a warrant was issued by an investigating judge. Warrant was issued only when summonses to appear were found not effective in the circumstances of the case.

In cases of offences committed in their presence, the prosecutor or the investigating police officers were entitled to remand the accused persons. In such cases the accused persons should be produced directly before the trial court expeditiously. Otherwise, only the investigating judge could pass an order of remand. Such an order of remand was passed upon the demand of the prosecutor and the latter could appeal against an order refusing remand. The accused person had no right of appeal against an order of remand; he could only apply for being released on bail.

The maximum period of remand is four months, the period after the order of committal is not included in that period of four months. This period of four months may be extended by an order with reasons.

The release on bail is a matter of right after a period of five days in all offences punishable with imprisonment of less than 2 years,
unless the concerned person was already sentenced to imprisonment for more than three months. Such order was issued without any application by the accused on the request of the prosecutor or suo motu by the investigating judge, provided the accused person undertook to appear at the appointed date and to keep the investigating judge informed of his change of abode. If no order was passed as described above, the person on remand might apply for it. His application was communicated to the procurateur and order passed thereupon by him within five days. Release of the accused in such a case was granted with or without surety. A surety might be required to be given not only in respect of the undertaking to appear whenever required but also for the eventual payment of costs, fine, compensation and restitution. An order of release might be revoked not only for failure to appear but also on discovery of new incriminating facts and circumstances. An order of remand would continue to be valid after the end of the investigation and in such a case it was the court which decided upon the application for release on bail. If the matter was before the court of Cassation the Court which decided last on the matter on merits would be competent.
Medical examination of the arrested person - by the order of the Procureur

The procureur might order that any person detained 'garde a vue' be medically examined, and in any case where the 'garde a vue' had been extant beyond the twenty four hours, the person detained might make a request for medical examination. The purpose of the medical examination was to ensure that the person was medically fit to be detained. It was also for the safeguard against the Third - Degree methods by the police. The procureur was also having the power to order for expert medical examination at any time, without the consent of the accused. A person detained by 'garde a vue' must be treated properly, both mentally and physically and must have an opportunity for proper rest between Medical examinations and questioning.

Investigation

The first step in the prosecution of an offender for most offences was investigation (information) conducted by an examining magistrate (juge d' instruction). Different procedures were provided for the

6. In Paris the procureur usually orders a few such examinations each year; about 5% of the persons detained make such request.

7. French code de procedure penal, article 79.

8. A juge d'instruction can not initiate an enquiry unless requested to do by the procureur de la Republique or by a 'partie civile'. The procureur requests the juge d'instruction to intervene by means of a written request known as a "requisitre introductif".
prosecution of each class of offences. Different procedures were designed to provide a measure of protection for the accused commensurate with the severity of the penalty that might be incurred should a conviction resulted.

Preliminary investigation conducted by the examining magistrate was an essential part of judicial process. Its function was the very important one of channelling cases to the trial court that had jurisdiction over the type of offence of which the accused could most reasonably be expected to be convicted. This function was not known in the common law as a separate step.

Under the French Criminal Justice System there were two ways in which a case might be initiated. If a complaint accompanied by a claim for civil damages was filed the magistrate had jurisdiction to proceed with this investigation. If a claim for damages was not filed with the complaint it must be forwarded to the local prosecutor. If he decided to pursue the matter he so notified the examining magistrate. It was upon his initial application (requisitoire introductif) that the jurisdiction for investigate was based. Once the investigation started, the magistrate was free to inquire into any offence related stated in the
complaint or application and might proceed to investigate any person who might appear to be involved. Persons who were ordered to appear and give evidence must do so, subject to a penalty for non-appearance, as for contempt. The accused was not put on his oath as were other witnesses, and he might have the assistance of counsel if he chose. Witnesses other than the civil claimant\(^9\) were not entitled to the assistance of counsel at these hearings unless they were advised that they were being investigated. The magistrate was required to warn them should that be the case. The proceedings were not open to the public. The proceedings were in writing or promptly reduced to writing, and were not adversary in form (sans contradictoire), except in a very limited sense.

Investigation by a judge was mandatory under the French criminal justice system, in cases specified by law. In other matters it was left to the discretion of the prosecutor or the investigating judge. The investigating judge was seized en rem of the act of offence. His duty was to ascertain the existence of the fact, its offending character

---

9. The 'Partie civile' - Any person who has sustained damage or loss as a result of a criminal offence had a choice of three courses of action under the French Criminal Systems - raising a separate civil action, or entering appearance in the criminal action action, or entering appearance in the criminal action (which will then settle the civil issues) or instituting criminal proceedings against the accused (the procureur subsequently taking responsibility for the prosecution, leaving the prosecution, leaving the victim to pursue his civil claim which would be decided in the course of criminal proceedings.
and to find out the culprit. He was not bound by the version of the prosecutor or that of the civil party. His endeavour was to find out the truth with all means at his disposal. He gathered evidence which incriminated the accused persons as well as that exonerated them, and he reached his conclusion after weighing the evidence.

The procedure of investigation in brief was summarily as follows:

At the first appearance the accused was informed of the act imputed to him. His plea, if any, was obtained after his being informed that he was not bound to make any declaration. The accused was then provided with a counsel, if he did not have one, unless he refused such assistance. The accused was then examined in the presence of his counsel who was entitled to peruse the record which was to be at his disposal on the date preceding the examination. So the accused was aware of what the examination was going to be about. The counsel could speak only if permitted by the judge. The examination was an essential step unless the investigating judge found the accused prima facie innocent or the accused had made complete, detailed and cogent admissions found convincing by the investigating judge.
The judge then took all necessary steps for the purpose of investigation; hearing of witnesses, visit to the place of occurrence, search etc. Neither, the accused nor the counsel would be present at this stage. From this stage started the period of confrontation. Whenever there was a substantial variation in the versions given by the accused and the witnesses and from one witness to another the investigating judge put the accused and the witness or witnesses found to be at variance in the presence of each other to bring home to the difference in their stand, in order to obtain their explanatory answers. This process of confrontation was very much used in French Criminal Justice System and was found to be an efficient tool in the discovery of truth. The presence of the counsel of the accused was not mandatory at this stage but he might be allowed to be present at the discretion of the investigating judge and it was usually granted.

The whole process of investigation was recorded by an officer attached to the investigating judge. The answers were signed by accused or the witnesses according to the case and the answers during the stage of confrontation were signed by both the persons confronted.

After the investigation the investigating judge passed provisional order communicating the records to the prosecutor for his final stand.
The counsel for the accused and the civil party had a right to formulate their remarks. Upon receiving the order of the prosecutor, the judge passed an order of acquittal when no case was made out and such an order operated as res judicata unless appealed against. Otherwise, he passes an order of committal to the court of petty matters or to the correctional court. If the offence was a crime he made an order of reference to the committal bench of the court of appeal which, in turn, would decide in camera, on records only, without hearing the parties, whether the case should be committed to the sessions Court or not and passed orders accordingly. Final orders of the investigating judge were appealable before the committal bench.

They are notified to the parties with notice to their Counsels. The order of the committal bench was subject to revision by the court of Cassation.

The investigation under the French system need not end in a formal charge against anyone. During his investigation, the magistrate might find that the statute of limitations had run (prescription penale) and that he had, therefore, no jurisdiction (ordonnance de refus d'informer). The magistrate might, in his order closing the investigation, find that there were no charges enough to justify prosecution, that the
facts as shown did not constitute an offence, or that it was not appropriate to prosecute (ordonnance de non-lieu).

Appeals might be taken from orders of the examining magistrate to the indicating chamber of the local court of appeal. The prosecutor might appeal from any order of the magistrate. The accused might appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release (bail). A civil party might appeal from an ordinance de non-lieu, orders refusing to investigate, and other orders that he could show as prejudicial to his civil interests.

If the magistrate found that it was an appropriate case for prosecution, he issued an order for transfer (ordonnance de renvoi). If the offense charged was a petty offence the case was transferred to a police court (tribunal d'instance, sitting for penal matters) for trial. If the offence was a misdemeanour, it was transferred for trial to the appropriate court of primary jurisdiction (tribunal de grande instance). If a felony was involved, it was the indicting chamber of the local court of appeal that dealt with it first.
The indicting chamber (chambre d’ accusation) of the court of appeal had exclusive jurisdiction to order the trial of felonies. The action of the indicting chamber was designed to be expeditious. The prosecutor general of the court of appeal was required to submit the case to the court within ten days, and the court was supposed to dispose of the case as promptly as possible. The Court considered only the report of the magistrate’s investigation, petitions of the prosecutor, and briefs submitted by the civil parties and the accused. Under the French Criminal Procedure counsel for the civil party and the accused might appear to argue their client’s positions, and the court might summon the accused. No other witnesses were heard, however.

ROLE OF THE PUBLIC PROSECUTOR IN INVESTIGATION UNDER THE FRENCH SYSTEM

During the fourteenth century, the kings of France began to employ ‘procureurs’ in the principal courts for the purpose of protecting the king’s interest, enforcing penalties and collecting fines (the money going to the Royal Treasury). As the King’s authority extended, the powers of the procureur correspondingly increased, so that the procureur had the responsibility of investigating criminal offences and instituting proceedings. It was at this time, by reason of the powers of investigation of the procureur du Roi, that the inquisitorial system
replaced the accusatorial system under which the responsibility for instituting proceedings lay with the victim of the offence. With this development, the procureur du Roi became known as the 'Ministere public'. The French Revolution did not abolish the 'Ministere public'. But dispossessed it of some of its powers which were given to another magistrate called 'l’ accusateur public'. This innovation proved to be undesirable and at the end of the Revolution, the 'Ministere public' was restored to its former status, which was virtually the same today. The right to investigate and prosecute was given to the 'procureur Imperial' today known as the procureur de la Republique. The 'ministere publice' was responsible for undertaking all prosecutions on behalf of the state; he must appear in all criminal courts and all decisions of a criminal court must be made in his presence. It was the prosecutor who ensured that the court's decisions were enforced.

The Police and the Public Prosecutor

The procureur de la Republique can not issue direct orders to the police, he merely gave advice, directions and instruction, but failure to follow such instructions would probably lead to disciplinary action against the officer or member concerned. The procureur was 'on call' permanently and would usually attend the locus of any serious crime of which he must be notified by the police as soon as it was discovered.
He normally supervised the police work closely, including checking of their records. While the attitude of individual procureurs might vary, most insisted that the police report all criminal offences to them, whether or not the person responsible could be identified or traced. The police were thus deprived of the power to decide that no proceedings should be taken because of lack of evidence. The procureur maintained a personal ‘dossier’ on each ‘officier’ of the ‘police judiciare’ in which he assessed the ‘officier’s ability and any other pertinent information.

The police were also subject to the control of their superior officers and through them the control of the ‘maire’, ‘prefet’ and government minister. The ‘prefet’ also maintained a dossier on each ‘officier’, which for promotion purposes, was probably more important than the dossier compiled by the procureur. This control by the administrative authorities had many critics, who would prefer that completed control should be given to the criminal authorities, and in particular to the procureur and the judge instruction. A further criticism was levelled against the multiplicity of police forces which could result in members from different forces all investigating the same affair at the same time independently of each other.
When the procureur is in charge of the investigation (either because he had not requested intervention by a juge d’instruction or because he was awaiting his arrival) he might visit the locus of the crime and give detailed instructions to the police judiciaire concerning the obtaining and preserving of evidence. Unofficially he might even suggest which police officer should be made responsible for certain duties; but this depended on his personal relationship with the police. He might give written observations and questions for the police to answer; such writings being known as 'Notes Dossier'. He might order an 'expertise' - i.e. use of experts - to examine aspects of the evidence. This would include ballistic, handwriting and analytical experts, usually it was the medical expert who were frequently, summoned and examined.

Post Mortal examinations under the direction of Procureur

Post mortem examinations would usually be preceded by an X-ray of the whole body. Only one doctor would be employed if the cause of death seemed straightforward, regardless of the degree of foul play. For example, if it was obvious that death occurred by shooting, stabbing, etc. it was called straight-forward cause of death. On the other hand, if the cause of death seemed dubious or complex, the procureur would employ two doctors. Even if the accused had been
arrested prior to the post mortem, he might not be represented by a lawyer or a doctor at the post mortem itself. The procureur would however order that any relevant parts of the body should be retained for evidential purposes. As a general rule, the defence did not contest expert evidence, since the procureur would employ sufficient experts to give a result beyond all reasonable doubt. In one celebrated case, where a female died as a result of stab wounds in the back, the first expert suggested that the wounds could have been self inflicted. The procureur asked for the opinion of a second expert who disagreed with the first. Eventually the procureur instructed a total of seven experts to give their opinions, who while not agreeing in full, eventually gave as their consensus that the wounds might possibly had been self-inflicted. As a result it was decided that the accused should not be sent for trial on a charge of murder owing to lack of evidence.

Order of search and Seizure

The procureur could order an 'officier' of the police judiciaire to seize any weapons or tools apparently used in the commission of the offence and show them to any person who appeared to be responsible for the offence (if present at the locus) for identification purposes.\(^{10}\) If it

---

10. The 'officier' may do this on his own initiative if the procureur has not yet intervened to take charge of the inquiry.
seemed that evidence might be obtained by examining documents or other objects in the possession of any person who appeared to be responsible for the offence, the procureur might order the 'officier' to search that person or his domicile\(^{11}\) - For example if the police found someone in possession of explosives, they might search his house and any evidence they found might be used, even if it related to entirely different offences. There was a similar power for searching houses and any evidence collected there from might be used, even if it related to entirely different offences. There was similar power to search the house of any person who appeared to be in possession of documents or other evidence. Such searches must be carried out in the presence of the householder or his nominated representative, failing which in the presence of two witnesses chosen by the police it should be noted, that all that was required was the householder's presence (if possible) and not his consent. Such consent was only required if the search took place between 9 p.m and 6 a.m.\(^{12}\)

\(^{11}\) 'Domicile' includes any places where the person resides. The 'officier' may make such a search on his own initiative if the procureur has not yet intervened to take charge of the inquiry.

\(^{12}\) There are some minor exceptions to this rule concerning timing - notably offences concerned with prostitution. With regard to the general power of search, there are certain restrictions if the premises concerned are occupied by a person such as a lawyer or doctor who is bound by rules of professional secrecy.
Power of the Procureur to Question the Accused

When the accused appeared before the procureur, he had the right to question the accused if the procureur so desired. During such questioning the accused might not be legally represented. The purpose of this questioning was to ensure that there was evidence of a prima facie case and that if it was not there proceedings should not be taken against an innocent person. The accused had an opportunity to put forward any explanation, which, if accepted by the procureur, might lead the procureur to drop the proceedings and release the accused immediately. The examination was not intended as a means of extracting a confession or obtaining further evidence against the accused. The procureur would normally commence questioning by confirming the accused’s personal particulars. Thereafter he would ask him a few questions about the main facts of the case. If the accused denied the charge against him, the procureur would not normally cross-examine him at length, leaving the function to the trial judge or a juge d'instruction, depending on the disposal of the case. If the accused made a statement, or answered any question, the procureur would dictate this in narrative form to a clerk or typist and the accused would sign the statement, as will the procureur. This was done in the form of a 'proces verbal'. The procureur would then decide how to dispose of the case and would tell the accused of his decision. The choices of
action available to the procureur were (a) to take no further proceedings and release the accused, (b) to release the accused to be cited to court later, (c) if the offence was classed as a 'delit' and no further inquiries were necessary, place the accused before the court the same day or the following day. This last mentioned procedure was known as 'flagrant delit' (not to be confused with 'enquete flagrant'). The procureur would issue a warrant called a 'mandat depot' authorising the detention in custody of the accused until his court appearance. In addition to telling the accused that this would be done, the procureur would tell the accused that he would have a right to legal advice and that when he appeared in court, he would have the option to ask for an adjournment to allow him to prepare his defence. The accused would sign a note that he had been given this advice by the procureur.13 (d) the procureur may order that the accused be taken immediately before a juge d'instruction, while at the same time, the procureur would request the juge d'instruction to investigate the offence. This course would always be followed if the offence was a 'crime'. It would also be adopted if the offence was a 'delit' but further inquiries were necessary which the procureur estimates could best be made by a juge

13. For court proceedings dealing with 'flagrant delit'. The examination by the procureur takes place in private. The only persons present being the police escorting the accused, the procureur and his clerk. The public is not admitted.
d'instruction. If the offence was a 'delit', requiring further minor inquiries, it was desirable that the accused be detained in custody (e.g. because he had not fixed place of abode). The procureur would only place an accused before the court by means of 'flagrant delit' procedure if no further inquiries were necessary, and apart from such procedure, the procureur had no powers to order that an accused be detained in further custody, although a juge d'instruction might order such detention.  

If the suspect was brought before the procureur for examination, that terminated 'l' enquete flagrante' by one of the means above described. Should the suspect not be arrested and brought before the procureur, 'l' enquete flagrante' might be terminated by the procureur deciding that no further proceedings should be taken, or ordering that the police should continue their inquiries by means of 'l' enquete preliminaire'. If the offence was a 'crime', or serious offence, or if it was obvious that further inquiries were necessary, the procureur would

14. Very occasionally an accused person who is not in custody will come direct to the procureur rather than the police to 'give himself up', usually the case being a 'crime passionnel'. The procureur will question the accused, then dispose of the case in one of the ways above described. Since the accused is not of the ways above described. Since the accused is not in custody at the time of the questioning, he may be legally represented by the relatives.
terminate 'l' enquete flagrante' by requesting a juge d'instruction to take over the investigation.

**Powers of the Procureur in 'L' Enquete Preliminaire'**

The powers given to the procureur and the police were considerably restricted than in 'l' enquete flagrante'. The procureur, in general, had the same power to order examination by experts (on the fiction that such an examination could not be delayed), but the police did not have this right (which they had in 'l' enquete flagrante' prior to the intervention of the procureur). The powers to search premises and seize evidence were much more limited, the consent of the occupier in writing being essential. This written consent usually took the following form:

"Knowing that I could object to the visit to my house, I give you my express consent to go there, make a search, and take as productions anything you judge to be of use to the present inquiries".

If the occupier refused to give this consent, the police were powerless and could only report the matter to the procureur who might then request the intervention of a judge d'instruction who could order that the search be made.
Discretion of the Procureur to order ‘No further Proceedings’.

In all cases classed as ‘crimes’ the procureur must request an investigation by juge d'instruction, and in cases classed as ‘delits’ he had a discretionary right to request such an investigation. If the juge d'instruction had not made an investigation and if there were no legal bars to taking proceedings, the procureur had a discretion as to whether or not to institute criminal proceedings. The following factors might have a bearing on how he exercised this discretion. If the victim of the offence instituted the proceedings, the procureur had no discretion, except to comment at the trial, giving his views as to the desirability of the prosecution and its conduct by the ‘partie civile’. In cases where the victim did not institute proceedings, in certain instances, the procureur might only prosecute if he had the concurrence of the victim of the offence. Cases falling into this class usually involved matrimonial disputes. In certain other circumstances, the procureur, while not required to do so by law, would not normally institute proceedings unless he received a formal complaint from the victim, although such a practice depended on the attitude of the individual procureur. The cases covered by this practice usually included minor road traffic accidents, the issuing of cheques without sufficient funds to cover them where the amount was less than 100
francs or the victims was subsequently re-imbursed,15 and cases of relatively minor importance. The procureur, waiting to see if any complaint was made to him by the victim, would mark such cases 'classer en etat' and if such a complaint was received he would then decide whether or not to prosecute. If no such complaint was received, the case was treated in the same way as if it had been marked 'No proceedings'. While to this very limited extent the action of the procureur depended on the attitude of the victim, he was in no way bound by the victim's wishes unless the latter himself instituted criminal proceedings.

In some cases involving pornographic literature, the procureur was required to obtain the views of a commission before instituting proceedings. The commission consisted of former 'magistrats', a professor of law, and representatives from the Department of Education and associations designed to protect the rights of authors, public morality and family life. The commission whose deliberations were not open to the public must be consulted if the literature had not

15. The practice concerning 'bounced cheques' is particular to Paris, but illustrates the point. Approximately 160,000 such cases were marked 'no proceedings' in Paris in 1979. Under a law coming into effect in 1972, anyone issuing a cheque which is not met by the bank will be given an immunity from prosecution if he makes payment to the victim within 10 days and pays a sum equal to 10% of the amount involved.
illustrations, the author and editor were not identified and a copy had not been lodged with the 'depot legal' (which received copies of all printed matter for record purposes). All of these conditions must be present, otherwise whether or not the commission was consulted was left to the discretion of the procureur. The role of the commission was purely advisory and while giving its views on the nature of the literature and the desirability of a prosecution, it was not meant to exclude expert evidence at the trial, nor were its views binding on the procureur. In certain other types of offence, such as breach of peace control regulations and merchant marine offences, the procureur should notify the appropriate government department of his intention to prosecute, but this did not affect his decision as to whether or not to prosecute.

All the above cases only fractionally impinged on the wide discretion given to the procureur to decide whether or not to institute criminal proceedings. Even where there was no legal bar to proceedings, where the accused had been identified and there was sufficient evidence to justify proceedings (which was often a question of law or interpretation of the evidence), the procureur still had the discretion to refuse to prosecute ('classer sans suite'), and was not required to state the reasons for his decision. The most common
reasons underlying such a decision were that the offence was of a trivial nature (‘ne trouble pas suffisamment ;'ordre public’) or that the taking of criminal proceedings would be out of all proportion to the offence itself—such as a case involving a respectable middle-aged woman committing a minor shoplifting offence, or a road accident where the only person injured was the driver or his wife. The decision to mark a case ‘classer sans suits’ was not final and might be reviewed if further evidence came to light. It also did not found as a judicial decisions, and hence could not be founded on for a plea of ‘res judicata’. The procureur had no discretion to order ‘no further proceedings’ if proceedings were ordered by a juge d’instruction or the Chambre d’accusation, when the procureur must institute proceedings regardless of his views of the case.

EVIDENTIARY VALUE OF STATEMENT MADE BY THE ACCUSED TO THE POLICE AND THE PROCUREUR

Under the French criminal proceedings an accused had the privilege not to answer incriminating questions. On the other hand, a witness in the judicial phases of a criminal proceeding did not have this privilege. Besides, the privilege did not apply to interrogations conducted by the police on their own. It thus became important to
determine the status of the person who was subjected to an interrogation.

For the purposes of a criminal investigation, the police could legally take a person into custody (garde a vue) for periods totalling forty-eight hours without bringing him before a competent magistrate. During this period the judicial police officers were permitted to interrogate the person in custody, but in order to prevent abuses they were required by law to state in their report the duration of the interrogations and the duration of the intervals between them. In addition, the person detained might ask for a medical examination which must be granted if he was kept in custody for more than twenty-four hours. Nevertheless, a person so detained by the police was not considered an accused. On the other hand, he did not appear to be under a legally enforceable obligation to answer questions which were unrelated to his identity. Ordinarily, he would not refuse to answer questions asked to him by the police.

17. Under the Code of French Criminal Procedure judicial police officers (in case of a flagrant crime or misdemeanor) and agents could summon and question all person who were capable of furnishing information about the facts or about seized documents or objects and that persons so summoned were obligated to appear and answer questions. If they did not satisfy these obligations, notice thereof was given to the public prosecutor (procureur de la Republique) who could compel them to appear by using the police force. Thus, it could be seen that even in the situation envisaged by Article 62 the only sanction for refusing to answer police questions was to be forcibly brought before the procureur.
The police could legally compel a person to answer questions only when he was being questioned as a witness under oath by virtue of a rogatory commission from an investigating judge. Even then, they might not question a witness under oath the person who has been formally charged, that is, the accused, or a person who is strongly of being guilty. In proceedings involving serious or grievous crimes the judicial phase started with the preliminary judicial investigation (instruction preparatoire) conducted by the investigating judge (juge d'instruction) or by the judicial police by virtue of a commission from the judge.

If the preliminary judicial investigation was initiated by a complaint filed by a private party accompanied by a claim for damages, the guilty party expressly named in the complaint could refuse to answer as a witness, and insist on being formally charged. Once, of course, he was formally charged, it was clear that he was the accused.

If the preliminary judicial inquiry was initiated by a “requisitoire introductif” by the public prosecutor which expressly named a person as the allegedly guilty party, the party named in it was ordinarily considered the accused. Under exceptional circumstances, however, for example when the judge had convincing proof that the prosecutor
was mistaken with regard to the identity of the person named in the requisition, the judge might nevertheless question such person as a witness under oath.

Under the French Criminal Procedure all facts concerning both the offence and the person alleged to have committed should be placed before the court. This aim is achieved by making detailed pre-trial inquiries.\(^\text{18}\)

No accused person could plead guilty when the case was called in court, so it followed that all court proceedings were trials. A French court would only reach its decision after an examination of all facts regardless of the attitude of the accused.\(^\text{19}\) In practice the accused could always indicate that he did not dispute the evidence against him, and while the evidence would still be examined, the examination would be of a much more cursory nature, great use being made of leading questions and statements given by witnesses prior to the trial. The trial itself would be shorter, and there would be no sense

\(^{18}\) That a person expressly named in a complaint filed by a private party may consent to be interrogated as a witness under oath.

\(^{19}\) Although in the tribunal de police, when dealing with minor cases, the court merely asks the accused if he admits the facts, and if he do so, the court proceeds to penalty, without any examination of the evidence.
of animus or dispute. Since, the accused was not expected to plead
guiltiness as all accused persons were presumed innocent until found
guilty.\textsuperscript{20}

The onus of proving the guilt was on the prosecution; it was not
discharged by a confession by the accused. The police, the procureur,
the jude d'instruction and the court-all had the power to examine the
accused, who might not be legally represented when being questioned
by the police or the procureur.\textsuperscript{21} During such examinations it was
illegal to use threats, force, or other improper means to obtain a
confession. Furthermore, the accused was entitled to refuse to answer
any question put to him and could not be compelled to do so. Accused
persons frequently availed themselves of this right when being
examined by the police. Courts seem to regard confessions obtained
by the police with suspicion, especially if such confessions were
subsequently retracted. It was accepted that false confessions could
be obtained due to mental illness, the desire for notoriety, an attempt
to protect some other person, improper pressure by the police, or a

\textsuperscript{20} An exception to this rule is when the accused is charged with certain offences
classed as 'contraventions', when he will be assumed to be guilty until he
proves his innocence.

\textsuperscript{21} Nor on his first appearance before a juge d'instruction, when normally the
examination is of a formal nature, the facts of the case not being discussed.
simple misunderstanding of a question or answer. A confession was therefore regarded merely as part of the evidence, which might or might not be supported by other facts. The judge had complete freedom as to what value should be given to a confession—he might consider it enough by itself to convict the accused, or he might accept only part of it, or he might reject it in its entirety.

It appeared to be a novel procedure under the French Criminal Justice system that the investigation was done by the investigating magistrate who recorded the statements of the accused and the witnesses. The statement recorded were placed before the court for perusal of the presiding officer for arriving at a just and fair conclusion. It was also pertinent to note that any statement made to the procureur de la Republic could be placed before the court for assessment and it was also taken into consideration by the court.

Admissibility of evidence

The purpose of Criminal trial under the French system was to discover the truth by placing all the available information before the court. In consonance with this purpose French law allowed all types of evidence to be adduced before the court. There were few exceptions
to this rule. Hearsay evidence was not admissible. With regard to
evidence obtained irregularly, such as by the unlawful actions of a
police officer, there were no fixed rules, each case being decided on
the merits, but in general, the trend was to admit such evidence. If,
however, a judge were to act on information secretly disclosed to him
by a party to the case and not disclosed to the other parties, such
information would not be accepted. The court would not admit
evidence obtained unfairly or improperly. Evidence would not be
admitted if it had been obtained by hypnosis, truth drugs, impersonation
or other improper means. Tape recorded conversations would only be
admitted if the court was satisfied as to the accuracy of the recording
process.

The prosecution, defence and 'partie civile' all had rights to cite
witnesses, and all persons cited were competent to give evidence
(although not all do so under oath).22 All witnesses might be compelled
to give evidence. Accused and his spouse might refuse to answer
questions, the court however would be free to comment on their silence
and draw any conclusion therfrom.23 Another exception concerns

22. Juveniles, persons with an interest in the case, etc., do not take the oath.

23. The court may also consider earlier statements made by the accused to the
police or to a juge d'instruction.
witness such as doctors who were required by law to observe professional secrecy. On authority stated that even if a witness in this class agreed to give evidence in violation of the law of professional secrecy, such evidence would be inadmissible. The rule of secrecy did not apply to journalists who could be compelled to reveal their sources. Any witness refusing to give evidence was liable to be fined. A witness who had been specifically paid for giving evidence might only be heard if none of the parties to the case objected.

In theory all evidence should be given verbally at the trial, but in practice this rule only applied to the cour d’assises, and even there the rule was not always strictly enforced. In the tribunal de police and the tribunal correctional the court would hear any witness’ who had been cited, supplementing such evidence with information contained in the ‘dossier’ or the police report. In some trials in these courts there were no witnesses, and the accused was questioned and the evidence evaluated on the contents of the ‘dossier’, the relevant parts being read aloud by the presiding judge.
THE PRIVILEGE OF THE ACCUSED PERSONS AGAINST SELF-INCRIMINATION UNDER THE FRENCH CRIMINAL JUSTICE SYSTEM

Recognition of the Privilege

Under the French system an accused was considered to have the privilege against self-incrimination. The French criminal produce expressly recognised the privilege by article 114 although it pertained only to the investigation conducted by the investigation judge. The said article provided that at the time of first appearance, the investigating judge determined the identity of accused, told him that he was free not to make any statement. Though the article related only to the first appearance before the investigation judge, it seemed well understood (though not spelled out in the literature) that the accused’s privilege recognised by that article extended to all judicial phases of a criminal proceeding. Whether an accused who was in police custody had the privilege was not clear. In any case police had no legal means to compel anyone to answer questions which were unrelated to his identity.

24. Neither in France or Germany nor in the Netherlands is the privilege a constitutional right. In these countries, it is right included in their codes of Criminal Procedure. Vouin, "The Privilege under Foreign Law, France", 51 J.Crim. L., C. & P.S.169 (1960); Gorphe, "L'Appreciation des Preuves en Justice", 215 (France 1947); Vidal & Magnol, Cours de Droit Criminel et de science pénitentiaire II 1070 (France 1949).

The Privilege and its Scope

It was not the privilege which restrained the accused from making a sworn statement. Rather it was a related policy which sought to avoid putting the accused in the dilemma of committing perjury or incriminating himself because statement made under those circumstances were considered untrustworthy. Furthermore, in recognition of the fact that an accused who fought for his freedom would lie, an accused who did lie did not commit a crime. There was no question that the privilege afforded an accused at least the right to remain silent at the face of questioning by the police, by prosecuting officials, and by judges. However, unlike in common law systems the


28. See Meyes, "Scientific Criminal Investigation Techniques Under Dutch Law", 51 J. Crim.: C. & P.S.553, 653-657 91960), who claims that the unwritten prohibitions in Dutch law against regarded as deriving from the privilege against self-incrimination". (Emphasis Supplied); Clements, "Privilege against self-incrimination, Germany," 51 J. Crim. L., C. & P.S.172, 173 91960), to the effect that some German cases and legal writers "have stretched the protection of the suspect from self-incrimination beyond his privilege of silence, and have developed the principle that the suspect is under no obligation to make active contribution to his conviction (such as furnishing a handwriting sample, or surrendering objects of evidentiary value).
accused could not avoid submitting himself to judicial interrogations which were not only considered a means of arriving at the truth, but also an opportunity for the accused to exculpate himself.

Under the French system, everyone was under a legal obligation to disclose his identity to the police. Furthermore, several articles of the Code of Criminal Procedure provided that the accused be interrogated about his identity. For example, the code of French criminal procedure provided that in cases involving serious crimes (which would be tried in the Cour d' Assises) the investigating judge determined the identity of the accused at the accused's first appearance during the preliminary judicial investigation. It also provided for a similar determination by the public prosecutor (procureur de la Re'publique) in cases where the accused was arrested more than 200 kilometers from the official seat of the investigating judge who issued the arrest warrant. The French criminal procedure further provided that the presiding judge or one of his co-judges (assesseurs) interrogate the accused about his identity in advance of trial. There were also articles of the code which provided that the presiding judge of the "tribunal correctional" (the court having

jurisdiction over misdemeanors) and the judge of the "tribunal de police" (the police court which tried minor offense) to determine the identity of the accused. However, the Code did not seem to provide for a penalty should the accused refuse to identify himself. Nevertheless, it was not likely that an accused would refuse. Such action could only prejudice him, because it would be noted in his dossier and inevitably come to the attention of the court in the event he was tried. In fact, an accused under the French system would rarely refuse to answer question put to him by a judge.  

However, the privilege did not provide the accused with immunity from being searched, photographed, finger printed, physically and mentally examined, shaved, measured, and subjected to like procedures. In France, Germany, or Netherlands, the accused might not be forced to submit to nacre-analysis or to lie detector tests. In Germany, statements obtained by virtue of such tests may not be used even if they were administered with the consent of the accused. This was the practice in Pondicherry also.

At the end of the eighteenth and the beginning of the nineteenth century, French criminal procedure underwent a series of reforms which culminated in the Code d'Instruction Criminelle of 1808. The original impetus which led to these reforms came from the eighteenth century philosophers led by Voltaire, Montesquieu, and Beccaria. They protested against the brutalities of the criminal procedure which were oriented to extracting the accused's confessions. Although torture was abolished in the French system in 1788, the first wholesale reform did not take place until 1791. This reform not only relied heavily on English procedure, but drew also inspiration from American ideas. Shortly thereafter many of the reforms were abolished, and in 1808 the original version of the Code d'Instruction Criminelle was enacted. The Code represented a compromise between the pre-revolutionary inquisitorial procedure and the accusatory procedure adopted from England. Pre-trial procedure with the exception of the legalized torture was essentially that of the Ordonnance Criminelle of 1670 which, with some exceptions, had continued in effect. The procedure at the trial,

31. See Ploscowe, "The Development of present-Day Criminal Procedures in Europe and America", 48 Harv. L.Rev.433, 453-482 (1935). Note that although the code d'Instruction Criminelle was recently renamed "Code de Procedure Penale", with some exceptions its basic structure has not been changed.
however, was modelled along the English lines. The Code abolished the accused's obligations to take the oath and to answer questions, and, since there were no longer any legal means to force an accused to answer, it, in effect, created the privilege. The reforms which survived to be incorporated in the Code had their roots in the desire to abolish the brutalities of the old procedure, especially interrogation under torture, for the purpose of extracting a confession. It had become evident that confessions obtained by the threat or use of force were not freely made and it tended to be lacking in trustworthiness. But despite the privilege, in effect, contributing to possibility of the trustworthy statements from the accused, the policy of the privilege in French system is not to ensure trustworthiness, but to prevent the accused from being subjected to undue psychological pressure or to physical abuse. That the policy of the privilege is thus limited is evident from the fact that an accused who lied during interrogations did not incur separate criminal liability.  

32. Note, if the accused's lying comes to the attention of the court, the Court in determining sentence is likely to take it into consideration.
The Privilege is only for the Accused

The accused formally charged (inculpe) alone had this privilege. Also, a witness in the judicial phase of a criminal proceeding did not have the privilege. Besides, the privilege did not apply to interrogation conducted by the police on their own behalf. It thus became important to determine the status of the person who was subjected to interrogation.

The police, for criminal investigation, could legally take person into custody (garde a vue) for periods totalling forty-eight hours without bringing him before a competent magistrate. During this period the judicial police officers were permitted to interrogate the person in custody, but in order to prevent abuses they were required by law to state in their report the duration of the interrogations and the duration of the intervals between them. Apart from this, the person detained might ask for medical examination which must be granted if he was kept in custody for more than twenty-four hours. Nevertheless, a person so detained by the police was not appear to be under a legally enforceable obligation to answer questions which were unrelated to his identity. Ordinarily, of course, he would not refuse to answer questions asked him by the police.
In proceedings involving serious or grievous crimes the judicial phase started with the preliminary judicial investigation (instruction preparatoire) conducted by the investigating judge (Juge d'instruction) or by the judicial police by virtue of a commission from the judge. The police might legally compel a person to answer their questions only when questioning a person as a witness under oath by virtue of a rogatory commission from an investigating judge.

If the preliminary judicial inquiry was initiated by a requisitoire introductif by the public prosecutor which expressly named a person as the allegedly guilty party, the party named in it was ordinarily considered the accused. Under exceptional circumstances, however, for example when the judge had convincing proof that the prosecutor was mistaken with regard to the identity of the person made in the requisition, the judge might nevertheless question such person as a witness under oath. In the preliminary judicial investigation initiated by a complaint by a private party accompanied by a claim for damages, the guilty party expressly named in the complaint might refuse to answer as a witness, and insist on being formally charged. Once, he was formally charged, he was considered the accused.
The French criminal procedure provided for the preliminary judicial inquiry (whether initiated by the prosecutor or by a private party) directed against an unknown person.

"The investigating judge in charge of an investigation, the magistrates and judicial police officers acting by virtue of a rogatory commission (from the investigating judge) might not, for the purpose of defeating the rights of the defense, question a person concerning whom there was evidence which was serious and consistent with guilt".

In cases not proceeded by a preliminary judicial investigation, the judicial proceedings were begun by petitioning the court to issue an order directing the accused to appear (citation directe). This order was served on the accused or at his domicile. In these cases there was no question who the accused was. In conclusion, notwithstanding the privilege it often happened that between the time suspicion falls on a person and his formal accusation he was interrogated by the police or judicial officials as a witness under oath; this is so as not to run afoul of the rule that an accused may only be interrogated by the investigating judge after having been notified by the judge that he is free not to make any statement and of his right to choose counsel.
Notification of the Privilege to the Accused

French Code of Criminal Procedure as applicable to Pondicherry required that the accused be notified of the privilege. This notification was only required at the first appearance of the accused (as the accused) before the investigating judge. At this time the accused might have been, and often had been, already interrogated by the police, and by the prosecuting and judicial authorise in another capacity without the benefit of counsel and without having been notified that he would not legally be compelled to make any statements. Thus, in many cases the notification requirement had not have practical value, especially to those ignorant of the law. The fact that in practice the person who really was the accused was not notified of his right to claim the privilege seemed consistent with the French view that the interrogation was a device to provoke statements which might incriminate as well as exculpate. However, once a person was

35. See Steven & Levasseur, Note that failure to give the required notification not only invalidates the accused's deposition at his first appearance, but also all subsequent proceedings in the case. Apparently, it does not prevent the institution of a new proceeding against the accused.

36. Article 71 of the code of Criminal Procedure which in the case of a flagrant misdemeanour (delit flagrant) punishable by imprisonment provides for the interrogation of the accused by the public prosecutor without notification that he is free not toArticle 70 of the Code of Criminal Procedure provides that in the case of a flagrant felony (crime flagrant), where the investigating judge has not yet taken charge of the matter, the public of having participated in the crime, and immediately interrogates the person so brought before him. If such person appears of his own free will accompanied by his defence counsel. This appears to be the only situation in advance of the judicial phase of a criminal proceeding where a person is entitled to the benefit of counsel. See Vouin, "police interrogation Privileges and Limitations, France.; 52 J.Crim. L., C. & P.S., 57, 58 (1961).
formally considered the accused, he had the right not to be interrogated until he had consulted with counsel. This was often an empty formality in practice however.

An accused who remained silent generally would run the risk of being taken into custody to await trial (detention preventive). Investigating judges, who is any event were quite unsparing in imposing this type of custody, would be even more so inclined when they were confronted with a recalcitrant accused. Although the prosecution had the burden of proof and the accused was presumed innocent till proven guilty, under French law, all evidence—including the demeanour and attitude of the accused, was subject to the uncontrolled evaluation of the court. This, in effect, imposed an obligation on the accused to furnish an explanation. Accordingly, although his silence itself did not legally amount to a tacit confession or admission of guilt, it would not only result in the court drawing an inference adverse to the accused but also reinforce the evidence introduced by the prosecution. In any event, the prosecution at the trial would make most of the accused’s silence.
Witnesses under the French criminal cases did not have privilege against self incrimination, and thus there was no problem of waiving it. The witness did not waive the privilege by answering a particular question, incriminating or otherwise. He might at any time refuse to answer all or some questions, even if he answered the very same question during an earlier stage of the proceedings. The questions previously answered by the accused found their way to the trial court through reports included in the dossier.

In practice the privilege does not afford a great deal of protection to the accused, and it was generally not claimed. The average accused did not know that he was not obliged to answer when interrogated by police or judicial officials.

The privilege amounted to little more than a check on the excesses which could be sometimes committed during the interrogations of an accused. The reason for the privilege’s ineffectiveness seemed to lie in the fact that continental criminal procedure did not emphasise an independent investigation, but was still essentially inquisitorial in its orientation, despite the abolition of legalised torture and the introduction of safeguards for the accused. In short, its emphasis was on obtaining the accused’s confession from his own mouth. It was this orientation which explained why the privilege never achieved the stature it achieved in the common law world.

37. Note that in France an accused fearing the danger of adverse consequence from total silence will in practice often evade or leave unanswered a particular question. He may even lie. See Hammelman, the evidence of the prisoner at his trial; A comparative Analysis, 27 Can. B.Rev. 652 (1949).
PART - II

PRE-TRIAL PROCEDURES UNDER THE
PRESENT INDIAN SYSTEM

The pre-trial procedures under the CPC, 1973 could be considered to be under the control of the police force. Investigation is the main task assigned to the police. Though the judiciary has been assigned supervisory role, it cannot take over the investigation process.¹ A magistrate is kept in the picture at all stages of police investigation, but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted.²

ARREST

Arrest means physical restraint put on a person as a result of allegation of accusation that he has committed a crime or an offence of quasi-criminal nature. A ordinary and natural sense, arrest means the apprehension or restraint on the deprivation of one's personal liberty. The question whether one is under arrest or not does not depend upon the legality of the arrest but upon whether he has been deprived of his personal liberty to go wherever he pleases. The essential elements to constitute arrest are that there must be an intent to arrest under the authority, accompanied by seizure or detention of the person in the manner known to law, and that the restraint is so understood by the person arrested. In order to effect arrest actual seizure or touching of the body is not necessary but at the same time mere utterance of a strong word or sound, a gesture of the index finger or the hand, the sway of the hand or even the flicker of an eye are enough to effect arrest, unless of course the person concerned submits to the custody of the arrester.

Section 41(1) of the criminal procedure code confined only to the power to arrest and extends to both cognizable and non-cognizable

4. Roshan Beevi V. Jt. Secretary, Govt. of Tamil Nadu, 1984, Cr.LJ, 134.
offences; but it would not empower the police officer to investigate into the case if the offence involved is non-congnizable, without the order of a competent magistrate under S.155(2) of CrPc.\(^5\) Thus preventing a person's movements and from moving according to his will amount to arrest of such person.\(^6\)

Arrest may be necessary not only for the purpose of securing the attendance of the accused at the time of trial, but it may become necessary as a preventive or precautionary measure in respect of a person intending to commit a cognizable offence, or a habitual offender or an ex-convict, or a person found under suspicious circumstances. Arrest may sometimes become necessary for obtaining the correct name and address of a person committing a non-cognizable offence. A person obstructing a police officer in discharge of his duties is also liable to be arrested to put a stop to such obstructions. Likewise a person escaping from lawful custody is liable to be arrested and re-taken into custody.

---


The code of criminal procedure contemplates two types of arrests: (a) arrest made in pursuance of a warrant issued by a magistrate; and (b) arrest made without such warrant but made in accordance with some legal provision permitting such arrest.

**Arrest -how Made:**

Arrest is a mode of formally taking a person in police custody, but a man may be in custody in other ways, e.g. Surveillance or restrictions on the movement of a person.\(^7\) Arrest is complete where there is submission to custody by word or action. Actual touching of the body of the person to be arrested is not necessary.\(^8\)

Section 46 of the Cr.P.C. explain how arrest could be made. Arrest being a restraint of the liberty of a person, it can be effected by actually 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.\(^9\) The submission to custody may be by express words or may

---

be indicated by conduct.\textsuperscript{10} If a person makes a statement to police officer, accusing himself having committed an offence, he would be considered to have submitted to the custody of the police officer.\textsuperscript{11} 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.\textsuperscript{12}

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. Any resistance or obstruction to lawful arrest has been made punishable under sections 224, 225, 225-B of IPC.

Though persons making arrests can use all necessary means for the purpose, they have not been given any right to cause the death of

\begin{itemize}
\item[10.] Paramhansa V. State, AIR 1984 Ori 144.
\item[11.] Santokhi Beldar V. Emperor, 34 Cri. LJ 349, 351 (Pat H.C).
\item[12.] Roshan Beevi V. Secretary to Govt. of Tamil Nadu, 1984 Cri.LJ 134 (FB) (Mad HC).
\end{itemize}
a person who is not accused of an offence punishable with death or imprisonment for life.\textsuperscript{13} Persons arrested shall not be subjected to more restraint than is necessary to prevent his escape.\textsuperscript{14}

**ARREST WITH WARRANT**

A magistrate taking cognizance of an offence can issue a warrant for the arrest of the accused as provided under S.204 of Cr.P.C. read with S.87 of Cr.Pc. A warrant of arrest is a written order issued and signed by a magistrate and addressed to a police officer or some other person specially named, and commanding him to arrest the body of the accused person named in it.

When a warrant is directed to police officer for execution outside jurisdiction, he cannot endorse it to another police officer outside jurisdiction of the court which issued the warrant.\textsuperscript{15}

\begin{itemize}
\item[13.] Section 46(3) of Cr.P.C.
\item[14.] Section 49 of Cr.P.C. and See Aftimesh Rein V. Union of India, 1988; SCC (Cri) 900, D.K.Basu v. State of W.B. (1987). SCC Wherein the Supreme Court has issued detailed instances citing various decisions; Also see Citizens for Democracy represented by its President v. State of Assam (1996). SCC.
\item[15.] Kunwar Sen v. State of U.P. 1968 All Cr. 409.
\end{itemize}
Warrant to arrest is to be issued strictly according to law because it effects deprivation of the personal liberty.\textsuperscript{16} The warrant of arrest must bear the signature of the magistrate, else it will be invalid.

A warrant of arrest remains in force till it is executed, or cancelled by the court issuing it. Accordingly it has been held that it would not be invalid simply on the expiry of the date fixed by the court for the return of the warrant.\textsuperscript{17} A ‘Bailable’ warrant can be issued both in case of bailable and non-bailable offences. If the non-bailable offence is only of a technical nature, then in case of such an offence it would be appropriate to issue ‘a bailable warrant’.\textsuperscript{18}

A warrant directed to any police officer can also be executed by any other police officer whose name is endorsed upon warrant by the officer to whom it is directed or endorsed.\textsuperscript{19} However, this rule will not control the special procedure provided by SS,78-81 for the execution of warrants outside that local jurisdiction of the court issuing the same. A

\textsuperscript{17} Emperor v. Binda Ahir, 29, Cri.LJ, 1008 (Pat HC).
\textsuperscript{18} Marula Sidda v. Emperor, 12. Cr.1.LJ.30.
\textsuperscript{19} Section 74 of the Cr.P.C.
warrant of arrest can be executed at any place in India. When a warrant of arrest is to be executed outside the local jurisdiction of the court issuing it, the procedure laid in SS 78-81 shall be followed.

Every person is bound to assist a police officer reasonably demanding his aid in arresting or preventing the escape of any other person whom such police officer is authorised to arrest. Section 38 of the Cr.P.C. empowers a private citizen to assist a person other than a police officer in the execution of a warrant directed to such person.

ARREST WITHOUT WARRANT:

The exigencies of the circumstances may require a person to be arrested without warrant if such person is reasonably suspected to have committed a serious cognizable offence. Arrest without warrant could also be possible even in less serious offences if the accused does not give his correct address. At time without warrant arrests could be made by police. In certain exigencies private citizens can also effect arrest without warrant. Section 41 and 42 of Cr.P.C. confer wide powers on the police for making arrests without warrant under special circumstances.
Section 41 of the Cr.P.C. reads as follows:

41(1) Any police officer may, without an order from a Magistrate and without a warrant, arrest any person.

(a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) Who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking; or

(c) Who has been proclaimed as an offender either under this code or by order of the State Government; or

(d) In whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) Who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape; from lawful custody; or

(f) Who is reasonably suspected of being a deserter from any of the Armed forces of the Union: or
(g) Who has been concerned in or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exist, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in India; or

(h) Who, being a released convict, commits a breach of any rule made under sub section (5) of section 356; or

(i) For whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specified the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(e) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110 of Cr.P.C.

Section 42 of Cr.P.C. lays down:

42(1) when any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable
offence refuses, on demand of such officer to give his name and
residence or gives a name or residence which such officer has reason
to believe to be false, he may be arrested by such officer in order that
his name or residence may be ascertained.

(2) When the true name and residence of such person have
been ascertained, he shall be released on his executing a bond, with or
without sureties, to appear before a magistrate if so required.

Provided that, if such person is not resident in India, the bond
shall be secured by a surety or sureties resident in India.

(3) Should the true name and residence of such person not
be ascertained within twenty four hours from the time of arrest or
should he fail to execute the bond, or, if so required, to furnish sufficient
sureties, he shall forthwith be forwarded to the nearest magistrate
having jurisdiction.

The Supreme court also recently issued the following instructions
in D.K.Basu v. State of W.B.\textsuperscript{19a}

\textsuperscript{19a} (1997) 1 SCC 416; 1997 SCC (Cr 1) 92.
(1) The police personnel carrying out the arrest and handling the interrogation of the arrested should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrested must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a menu of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall be also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) The time, place of arrest and venue of custody of an arrestee must be modified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(4) The arrest should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any
present on his/her body must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(5) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the State or Union Territory concerned. The Director, Health Services should prepare such a panel for all tehsils and districts as well.

(6) Copies of all the documents including the memo of arrest referred above should be sent to the Illaqa Magistrate for his record.

(7) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout interrogation.

(8) A police control room should be provided at all districts state head quarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest, within 12
hours of effecting the arrest and at the police control room it should be displayed on a conspicuous Notice Board.

Failure to comply with the requirements herein above-mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country having territorial jurisdiction over the matter.

INVESTIGATION

Investigation means collection of evidence and starts the police officer initiate steps after having come to know about the commission of a cognizable offence.\textsuperscript{20} It involves ascertainment of facts, shifting of materials and search for relevant data.\textsuperscript{21}

Once the police officer forms an opinion that there are grounds for investigation it stands. The other subsequent acts are deemed to have been taken during investigation.\textsuperscript{22} The writing of F.I.R. may be done subsequently.\textsuperscript{23}

\textsuperscript{20} Radhey Sham V. State (1972) 74 Punj LR (D) 228.
\textsuperscript{21} State V. Paraswar AIR 1968 Ori.20.
\textsuperscript{22} D.Sirajuddin V. Govt. of Madras, AIR 1968 Mad. 117.
\textsuperscript{23} V.Rugmini V. State of Kerala, 1987, Cr.LJ, 200 (Ker).
(i) Proceeding to the spot;
(ii) Ascertainment of the facts and the circumstances of the case;
(iii) Discovery and arrest of the suspected person.
(iv) Collection of evidence relating to the commission of the offence which involves

(a) An examination of various persons (including) the accused and recording to their statements, if the I.O thinks it necessary.
(b) The search of places, seizure of things considered necessary for the investigation and to be produced at the time of the trial: and
(c) Formation of opinion as to whether it is a fit case for the accused to be sent up for the trial and, if so, taking steps to file charge sheet.  

Thus investigation includes discovery and arrest of the suspected offender and the search of places and seizure of things considered necessary for the preparation of the case, inquiry or trial.

The police is the principal agency for carrying out the investigations of offences. To make this agency an effective and efficient instrument for criminal investigations, wide powers have been

given to the police officers. Apart from the duty of the public to give information to the police in respect of certain serious offences, an investigating police can require the attendance of persons acquainted with the facts and circumstances of the case under investigation. He can examine witnesses and record their statements.

The Apex court has extensively considered the parameters of S.161(2) Cr.P.C. and the scope and ambit of Art.20(3) of the constitution in Nandini Satpathy case.

According to the Apex court, the accused 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.

Tendency to expose to a criminal charge is wider than actual exposure to such charge. In determining the incriminatory character of

---

an answer the accused is entitled to consider - and the court while adjudging will take more of - the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effective guilty in import. However factful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.

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 but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

Apart from these main principles, the Apex court also addressed itself to the further task of concretising guidelines with a view to give full social relevance to this judgement.
(1) If an accused person expresses the wish to have his lawyer by his side when the police interrogate him, this facility shall not be denied to him. However the police need not wait more than for a reasonable while for the arrival of the accused's advocate. This requirement will obviate the overreaching of Art.20(3) and S.161(2).

(2) The police must invariably warn - and record that fact - about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgement.

(3) After an examination of the accused, where lawyer of his choice is not available, the police official must take him to a magistrate, doctor or other willing and responsible non-partisan official or non-official and allow a secluded 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. That collocutor may briefly record the relevant conversation and communicate it to the nearest magistrate.

While the police officers have the power and also the duty to investigate into all cognizable offences, they are enjoined not to investigate the non-cognizable offences without the order of a
competent magistrate. It is pertinent to note that the power to investigate is not conferred on every police officer. Only an officer in charge of a police station or other officer of a higher rank has been empowered by the code to investigate. 29

INVESTIGATION BY AN AUTHORISED PRIVATE CITIZEN

Any person aggrieved by the commission of any cognizable offence need not necessarily go to the police for taking action. He can, directly submit a complaint to a magistrate. The magistrate may thereupon take cognizance of the offence and proceed to take steps for the investigation of the complaint against the accused person. This alternative procedure is useful, particularly when the police officers, for one reason or other, are indifferent or likely to be indifferent towards the investigations; or are colluding with or shielding the offender. In such circumstances the magistrate taking cognizance has power to direct an investigation to be made by a person other than a police officer. 30 Such person shall have for that investigation all the powers conferred by the


criminal procedure code on an officer in charge of a police station except the power to arrest without warrant.\textsuperscript{31}

The system of filing private complaints are available under the present system. The private complaints directly made to the magistrates are attended to immediately and the criminal is booked to face the charges made by the magistrate.

Under the Indian System of Investigation the police after receipt of the information about the commission of a cognizable crime starts investigation by visiting the scence of crime, arresting the suspects, examining the witnesses collecting the case properties and material objects, preparing Mahazar and seizure memos to send the same to the trial magistrate for preserving for obtaining experts opinion. But in non-cognizable cases the investigation is done only after obtaining of permission from the having jurisdiction.

For the purpose of investigation the police officer can require the attendance of the witnesses, examine them and record their statements

\textsuperscript{31} Section 202 (3) of Cr.P.C. 1973.
under the French system an examining Magistrate carries out all these
duties. There is no scope for statement being recorded by the police
under the French model. Since under the French system it is the
magistrate to records the statements, they are made admissible in
evidence.

During investigation the police are empowered to do search and
seizure of the case properties and material objects involved in the case.
Since the police commits mistakes a number of cases in which the
accused are acquitted. Police quite often connects improper search
and seizure and the trials get vitiated.

There are also lot of criticisms about the recording of statements
by the police as it is seldom recorded by examining the witnesses. It is
found that these statements of witnesses are recorded by the police
themselves without even examining the witnesses. It is often found that
gallons of writer’s ink is wasted by the desk work for nothing.

Though S.161 (2) of Cr.P.C. requires a person, to answer truly
all questions (relating to the case under investigation) put to him by the
investigating police officer, that section as Well as Art.20(3) of the
constitution of India gives protection to such person against questions
which would have a tendency to expose him to a criminal charge. The accused person may remain silent or may refuse to answer when confronted with incriminating questions. It is clearly provided under Article 20(3) of the constitution that no person accused of any offence shall be compelled to be a witness against himself. In this connection the Supreme Court has held that the area covered by Art.20(3) and S.161(2) is substantially the same and S.161(2) of the Cr.P.C. is parliamentary gloss on the constitutional clause.32

ROLE OF PROSECUTION IN INVESTIGATION

The Director of Public prosecutions in Pondicherry assisted by a Deputy Director of Public Prosecutions advises and helps the police with regard to investigations. As and when any difficulty arises with regard to a complicated issue of criminal investigations the Directorate of public prosecutions comes to the rescue of the police and set things right.

It is a matter of regret that the public prosecutors and the Assistant public prosecutors are not extending any advice or assistance to the police during investigation. It is also worth noting that no police

32. In nandini Satpathy case the Supreme Court has extensively considered the parameters of S.161(2) of the Cr.P.C. and the scope and ambit of Art.20(3) of the constitution.
officer seeks the advice and assistance of the public prosecutions. The public prosecutors are discharging the duties of conducting of cases alone in the criminal courts and they are not evincing any interest to teach and equip the police personnel to conduct the investigations in a proper manner so as to find out the real perpetrator of the alleged crime.

This practice of public prosecution totally differs from the French system, where the procureur de la republique played a predominant role in helping the investigating magistrate to have a fair and correct investigation.

MEDICAL EXAMINATION OF ACCUSED AT THE INSTANCE OF POLICE

Provisions have been made under S.53 of the criminal procedure code, 1973 for facilitating effective investigation by authorising an arrested person to be examined by a medical practitioner. It may afford evidence about circumstance under which the alleged offences have been committed. A person who has been arrested but later on enlarged on bail may also be medically examined
under this section. Such examination is not hit by Art.20(3), of the constitution of India.\textsuperscript{33}

The arrested persons suspected to have committed any offence are produced before Registered Medical Practitioners for medical examination. The examination of these persons upon the request of the police are made by the medical practitioners and the same will afford evidence as to the commission of an offence. The female offenders are being examined by or under the supervision of female medical practitioners. It is usually resorted to where the accused is alleged to have committed sexual offences. The clinical examination of victims of crime and treatments to their wounds are done by the Medical practitioners upon the request made by the police officers prior to their production before the magistrates for remand.

An empirical study conducted in Pondicherry reveals is that the police officers seldom make requests to have medical examination of the accused persons directly. But in cases and counter cases.\textsuperscript{34} Where both the parties sustain injuries they are produced before the Medical Officers for first aid and treatment which are ultimately treated

\textsuperscript{33} Ananth Kr. V. State of A.P., 1977 Cr.LJ, 1797.
\textsuperscript{34} Section 159 & 160 of I PE.
as an evidence to proceed further with the accused victims (Both the parties will be arrayed as accused and both might have sustained injuries during the alleged commission of affray by either or against other).

The power to compel an accused to submit to medical examination is hedged in various conditions. The object obviously is to balance the conflicting interests of the individuals and the society. It has been held that S.53 of Cr.P.C is not violative of Art.20(3) and that a person cannot be said to have been compelled "to be a witness" against himself if he is merely required to undergo a medical examination in accordance with the provisions of S.53 of Cr.P.C. In that pronouncement the principles laid down by the Supreme Court in Kathi Kalu case have been reiterated.

EXAMINATION OF ACCUSED BY MEDICAL PRACTITIONER AT THE BEHEST OF ACCUSED

As per section 54 of the Cr.P.C. whenever a person after being arrested is produced before a magistrate and alleges at any time during the period of his detention during custody that the examination of his

36. AIR, 1961, SC 1808.
body will afford evidence which will disprove his commission of offence then the Magistrate shall direct him to be examined by a medical practitioner unless the Magistrate considers the request is vexatious or made to the delay investigation etc. Even in cases where accused does not make any such prayer it is the duty of the magistrate to arrange particularly when he is not assisted by a lawyer. When an accused is produced by the police with a request to the Magistrate to medically examine him, it is the duty of the medical practitioner to examine the accused and to give a report upon the direction made by the magistrate.

It is considered necessary and desirable "that a person who is arrested should be given the right to have him 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 assault."


38. Mukesh Kumar V. State (Delhi Administration) 1990 Cr.LJ 1923 (Del); 1990 Rajdhani LR 41.

39. Joint Committee Report on Criminal Procedure, P.IX.
According to the Supreme Court, the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of S.54 of criminal procedure code, 1973.40

In Pondicherry the accused persons produced before the Magistrates for initial remand when enquired about their requirement for medical examination used to ask for medical examination on the plea that they were subjected to third-degree methods by the police. An empirical enquiry disclosed that the accused are manhandled and assaulted by police while attempting to extract confessions. Those injuries that are all sustained by the accused during investigation are shown by the police as injuries sustained during the course of commission of the alleged crime.

To put a full stop to these kind of police torture and assaults it is felt not to entrust police to record confessions of the accused which are normally used by the police to fix the suspect in the alleged crime under the weapon of section 24 of the evidence set.

40. Sheela Barse V. State of Maharashtra, 1983 SCC (Cri) 353.
EVIDENTIARY VALUE OF STATEMENTS GIVEN TO POLICE DURING INVESTIGATION

Every statement recorded by police officer during investigation is neither given on oath nor is tested by cross-examination. According to the law of evidence the facts stated therein are not considered as substantive evidence. But if the person making the statement is called as a witness at the time of trial, his former statements according to the normal rules of evidence could be used for corroborating his testimony in court or for showing how his former statement was inconsistent with his deposition in court with a view to discredit him.

Section 162 of the Cr.P.C. prohibits the use of the statements made to the police during the course of the investigation for the purpose of corroboration. It is based on the assumption that the police cannot be trusted for recording the statements correctly and that the statements cannot be relied upon by the prosecution for the corroboration of their witnesses as the statements recorded might be of self serving nature. There is not a total ban on the use of the statements made to police officers. The defence is not deprived of an

---

42. See Sections 157 and 145 of the Indian Evidence Act, 1872.
43. As would be seen from the proviso to S.162(1), and Sub-Sec.(2) of S.162 of Cr.P.C.
opportunity to discover what a particular witness said at the earliest opportunity. The object of the section 162 Cr.P.C is to protect the accused both against overzealous police officers and untruthfull witnesses.\textsuperscript{44}

It has been ruled by the Supreme Court that S.162 does not provide that evidence of a witness in the court becomes inadmissible if it is established that the statement of the witness recorded during investigation was signed by him at the instance of the police officer.\textsuperscript{45} The bar created by S.162 Cr.P.C. in respect of the use of any statement recorded by the police during the course of investigation is applicable only where such statement is sought to be used "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made".

If any such statement is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of S.162 would not be

\textsuperscript{44} Khatri (IV) V. State of Bihar, 1981 SC (Cri) 503, 508.

\textsuperscript{45} State of U.P. V. M.K.Anthony 1985, SCC (Cri) (105).
attracted. Section 162 of Cr.P.C is enacted for the protection of the accused. The bar created by S.162 has no application in a civil proceeding or in a proceeding under Art.32 or 226 of the constitution. It has also no application under S.452 of the code for disposal of property.

It is immaterial whether the statement recorded under S.161 Cr.P.C. amounted to a confession or admission. The statements falling under S.32(1) and S.27 of the Evidence Act are exceptions to this rule. A dying declaration recorded by a police officer during the course of investigation becomes relevant under S.32 of the Evidence Act in view of the exemption provided by S.162(2).  

THE PONDICHERY EXPERIENCE

In the course of the study the police, prosecutors and the presiding officers of various criminals courts of Pondicherry were interviewed. It is advocated by the personnel who worked under French regime that the recording of statements by the police U/S 161 of Cr. P.C. is a total waste of time and energy of the police. They admit

46. V. Thomas V. State of Kerala, 1974, Cri.LJ 849, 854 (Ker HC).
that now the statements are prepared by the police themselves without examining the real and actual witnesses on whose name they are prepared. Mr. Ilango, a Retired Inspector of police who worked both under the French and Indian system wonders why the 161 Cr.P.C. statements are recorded by the police as the same is not admissible in evidence.

It is also experienced by the prosecutors that none of the statements recorded under section 161 by the police ever tallied with the depositions made by the prosecution witnesses. It is often found that lot of criminal cases are ending in acquittal upon a finding that the deposition of the witnesses of prosecution are totally different with the recorded statement by the police which indicates that the statements of the witnesses are simply prepared by the Head constable of the police station with their own imagination without going to the spot or examining the witnesses.

BAIL

Bail involves release of the arrested on somebody's surety or on his own after assuring that he shall be available in the court for trial.
Under the Cr.P.C. 1973 offences have been categorised into Bailable and non-bailable. They are put in the schedule.

Under the code of criminal procedure, 1973 the officer incharge of the police station is bound to release the person accused of a bailable offence. Thus bail is considered to be right of the accused in bailable offences whereas grant of bail to persons accused of non-bailable offences is at the discretion of the presiting officers.

As the pre-trial incarceration and under-trial incarceration are considered to be wasteful and expensive to the exchequer it is worthwhile to release the accused on bail the with an undertaking from the sureties to send or produce the accused for facing the trial at a later stage.

**POWER TO GRANT BAIL IN BAILABLE CASES**

The general conditions and principles to be considered to grant or refuse bail, includes nature of offence, circumstances of the cases

47. S.436 of the Cr.P.C.
48. AIR 1965, AP 444.
possibility of absconding by the accused, possibility of tampering with
the prosecution case and witnesses.\textsuperscript{50}

Bail can be granted by the presiding officers at any stage of the
proceedings provided that it must be assured that the presence of the
accused for facing the trial is assured.

Ordinarily bail granted under S.436 of Cr.P.C. cannot be
cancelled on a police report.\textsuperscript{51} However, the court has jurisdiction to
cancel the bail. The High Courts also have inherent power to cancel
the bail.\textsuperscript{52}

\textbf{WHEN BAIL BE TAKEN IN CASE OF NON BAILABLE OFFENCES}

As discussed above the criminal procedure code\textsuperscript{53} gives
discretion to the court to grant bail to the accused regarding non-
bailable offences subject to the restrictions under sub-sections (1), (2)
and (6) of Section 437 Cr.P.C.\textsuperscript{54} Section 437 of Cr.P.C. limits the

\textsuperscript{50} 1988(2) Crimes 581.
\textsuperscript{51} 1985 (1) Ori.L.R.586; AIR 1967 All, 393.
\textsuperscript{52} AIR 1958 SC 376.
\textsuperscript{53} S.437 of Cr.P.C.
\textsuperscript{54} 1980 Cr.L.J.588 (A.P).
jurisdiction of the Magistrate in case of offences punishable with death or imprisonment for life except in the case of children, women, sick or infirm persons.

Thus, when any person accused of or suspected of the commission of any 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, other than High Court or Court of session, he may be released on bail by imposing certain conditions.

It is pertinent to point out that the grant of bail in non-bailable cases is exclusively within the jurisdiction and discretion of the courts and the police are not empowered to entertain those non-bailable offers. It is also noteworthy note that the power to impose conditions has been given to the court and not to any police officer.

The power to impose conditions can only be exercised when the offence is punishable with imprisonment, which may extend to seven years or more; or where the offence is one under Chapter VI (Offences against the State), Chapter XVI (Offences against human body), or Chapter XVII (Offences against property) of the Indian penal code; or
where the offence is one of the abatement of, or conspiracy to, or attempt to commit any such offence as mentioned above:

Habitual offenders or persons previously convicted of serious offence are not released on bail ordinarily. But, persons under the age of sixteen years or women or sick or infirm may be released by recording special reasons for releasing them.

There is no principle analogous to res-judicata is applicable to bail applications and successive applications are maintainable. Thus an application for bail renewed for the subsequent time for fresh consideration is maintainable.

**CANCELLATION OF BAIL GRANTED IN NON-BAILABLE CASES**

On breach of the condition already imposed bail can be cancelled. However, generally, it would be cancelled on application and not by the court suo motu. Though the court is empowered to cancel the bail, such power must be exercised with great caution and in appropriate cases only. The courts should not cancel the bail unless

---

55. 1985(1) Guj. LR.127.
57. 1982 Cr.L.J.2148.
58. 1993 Cr.L.J.1550 (Bom).
59. AIR 1978 SC 961; 1978 Cr.LJ.701.
It is satisfied that the accused will tamper with the prosecution witnesses. 60

DIRECTION TO GRANT ANTICIPATORY BAIL TO THE PERSON APPREHENDING ARREST

The term anticipatory bail is a misnomer because S.438 Cr.P.C. Contemplates an order releasing in accused on bail in the event of his arrest and not in anticipation of arrest. 61 Thus an application for anticipatory bail could be moved only if arrest by police is anticipated. The distinction between an order of bail and order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. 62

The object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. That the intention of the legislature expressed in section 438 of Cr.P.C. is that when any person has a reason to believe that he may be arrested on an accusation of

having committed a non-bailable offence, he may apply to High court or court of session.\textsuperscript{63}

Anticipatory bail is not to be granted as a matter of rule. It is to be granted only when the court is convinced that the person is of such a status that he would not abscond or otherwise misuse his liberty.\textsuperscript{64}

The Law Commission considered the need for such a provision and observed:

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain imprisoned for some days and then apply for bail".\textsuperscript{65}

The Law Commission also expressed the view in its subsequent report that the power to grant anticipatory bail should be exercised in very exceptional cases. The commission also observed:

\begin{itemize}
\item \textsuperscript{63} De, Purna Chandra, 1975 Cr.LJ.1815.
\item \textsuperscript{64} Narsinglal Daga V. State of Bihar, 1977 Cr.LJ, 1776.
\item \textsuperscript{65} 41st Report, p.321, para 39.9.
\end{itemize}
“In order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.\(^{66}\)

Be that as it may it can not now be asserted that this provision is not abused to-day. Indeed, the case law signifies evidence to the contrary.

Section 438 of Cr.P.C. does not require that the offence for which the anticipatory bail is asked for has been registered with the police. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet made.\(^{67}\) That the filing of FIR is not a condition precedent to the exercise of power under S.438 of Cr.P.C.\(^{68}\) For the grant of Anticipatory Bail there must a disclosure of a reasonable belief that the applicant may be arrested for an allegation of commission of a non-bailable offence.

The legislature has conferred a wide discretionary power to the High Court and the court of session for the grant of Anticipatory bail.

---

68. Suresh Vasudeva V. State, 1978 Cri. LJ, 677 (Del HC).
However, the courts, while granting anticipatory bail should record reasons for doing so.\textsuperscript{69} Similarly, if the anticipatory bail is refused, reasons for doing so has also to be recorded.

About the parameters and the considerations that should weigh to grant of anticipatory bail the Supreme Court laid down criteria:

In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, the taking advantage of the order of anticipatory bail be will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala files; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerable or rejecting anticipatory bail. The nature

\textsuperscript{69} State of Maharashtra V. Vishwas Shripati Patil, 1978 Cri.LJ 1403 (Bom HC).
and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.70

The High Court or court of session may, while granting anticipatory bail, impose conditions as mentioned in 8.438(2) of Cr.P.C. There is also possibility to impose certain conditions not provided in the provision, if the same is required to safeguard the rights of the accused and the police investigating the case.

It is also noteworthy that there cannot be a 'blanket order' of anticipatory bail. 'If an order of direction is issued under S.438(1) of Cr.P.C. to the effect that the applicant shall be released on bail' whenever arrested for whichever offence whatsoever, such a direction would amount to a "blanket order" of anticipatory bail which could not give any concrete information to the police. It would be fair to give

notice to the prosecution for having an opportunity to oppose the application for anticipatory bail.\textsuperscript{71} However, there cannot be any anticipatory bail after the arrest of the accused. After arrest, the accused must seek his remedy for bail under Section 437 or 439 of I.P.C, if he wants to be released on bail from arrest effected.\textsuperscript{72}

The anticipatory bail granted for an accused shall be effective till the conclusion of trial unless it is cancelled by the competent courts.\textsuperscript{73}

Anticipatory bail is not granted in dowry death cases, socio-economic offences, FERA and TAPA cases etc. as they are all considered to be serious crimes affecting the public morals and the wealth of the nation.

\textbf{CANCELLATION OF ANTICIPATORY BAIL}

The court making an order of Anticipatory bail alone is entitled to cancell or recall the same.\textsuperscript{74} Thus the anticipatory bail granted by the

\textsuperscript{71} Balchand Jain V. State of M.P. (1976) 4 SCC 572.
\textsuperscript{72} 1980 SCC (Cri) 465 at 490.
\textsuperscript{73} Rama Sewak V. State of M.P, 1979 Cr.LJ 1485, 1490 (MPHC).
\textsuperscript{74} State of Maharashtra V. V.S.Patil, 1978 Cr.LJ. 1403.
High Court, can be cancelled only by the High Court under section 439 (2) of Cr.P.C.\textsuperscript{75} However, Supreme Court can impose conditions for the anticipatory bail granted by the High Court.

The anticipatory bail can also be cancelled where the investigations were not properly done and in granting the bail important events and allegations were ignored.\textsuperscript{76} The principles evolved for cancellation of post-arrest bail are equally applicable for the cancellation of anticipatory bail.

To sum up, it is pertinent to note that both under the French and the Indian system pre-trial procedures are very different. While the French system concentrates on the question of fact finding at the investigation stage itself with the office of the investigating magistrates the Indian systems postpones the determination of guilt to the trial stage on with the intention that the guilt should be decided judiciously. However the investigation by police under the Indian system is having its own drawbacks which presumably do not exist under the French system. The French seems to place confidence in the impartiality of

\textsuperscript{75} 1977 Cr.LJ 492.

\textsuperscript{76} 1991 Cr.LJ 33 (M.P).
their investigating magistrates who supervised the investigation corrected by the Judicial Police. Whereas the Indian system does not seem to place any faith in the impartiality of its police determination of 'prima facie' case should be done by its magistrates.