HIGH COURT OF MADHYA PRADESH, JABALPUR

M.Cr.C. No.30933/2020

(Through Video Conferencing)

IN THE MATTER OF:-

Applicant ... **Zarina Begum**

Versus

Respondent ... **State of Madhya Pradesh through P.S. E.O.W**

Mr. Sankalp Kochar and Aman Dawra, learned counsel for the applicant.

Mr. A. Rajeshwar Rao learned Government Advocate for the respondent/State.

Present : Atul Sreedharan J.

ORDER
(13/05/2021)

This application has been preferred by the applicant under section 438 Cr.P.C, in Crime No.95/2020 registered at P.S E.O.W Bhopal, District Bhopal, for offences under sections 420,467,468,471,472,474 read with section 120B of IPC.

2. The investigating agency is the Economic Offences Wing, Bhopal (hereinafter referred to as the "EOW"). The applicant is around 58 years of age and is stated to be suffering from various medical ailments including sleep apnoea.

3. Briefly, the facts of this case are that one Rabiya Bi, the complainant along with others, registered the FIR against the applicant and other co-accused persons. The property in question is a piece of land admeasuring 93.37 acres situated in Village Singarcholi, Bhopal. The owner was one Faiz Mohammad who died leaving behind seven legal heirs. They are Mohammad Ayub,

Mohammad Yakub, Hanifa Sultan, Asma Sultan, Sikandar Khan, Qamar Khan and Anwar Khan. Out of the total area of 93.37 acres, 54 acres was demarcated for residential purpose while the remaining, approximately 39 acres was kept aside for agricultural purpose.

4. With the exception of Mohammad Yakub, the remaining six legal heirs of Faiz Mohammad jointly executed a power of attorney dated 17/01/1989 and transferred all their rights in the aforesaid property to the power of attorney holder Mohammad Sharif (the then President of Tilak Grah Nirman Society). Similarly, Mohammad Yakub also executed a power of attorney on 05/08/1989 transferring all his rights in the aforesaid property in favour of power of attorney holder Mohammad Sharif. Thus, Mohammad Sharif became the power of attorney holder for six of the legal heirs by way of power of attorney dated 17/01/1989 and also the power of attorney holder for Mohammad Yakub vide power of attorney dated 05/08/1989. On the basis of the combined power of attorney given by the six legal heirs, Mohammad Sharif sold 34 acres of agricultural land through 12 registered sale deeds, executed in favour of various individuals between 04/02/1989 and 26/06/1989. On the basis of the power of attorney executed by Mohammad Yakub, Mohammad Sharif sold the remaining agricultural land of five acres and 64 decimals to Tilak Grah Nirman Samity vide 11 registered sale deeds and the same was executed between 15/11/1994 and 23/11/1994. Besides the power of attorney mentioned hereinabove, all the 7 legal heirs of Faiz Mohammad executed 7 different power of attorneys in favour Mohammad Sharif between February and

March 1990 vesting the rights of remaining the 54 acres of land in favour of Mohammad Sharif, the power of attorney holder.

5. On the strength of the 7 power of attorneys executed between February and March 1990, the remaining land of 54 acres was also sold to Tilak Grah Nirman Samiti by 14 registered sale deeds executed in the year 1997 and Tilak Grah Nirman Samiti further sold the land to 1500 persons.

6. In the FIR dated 07/02/2020, it has been alleged by the complainants that Mohammad Sharif had executed the power of attorney dated 17/01/1989 without the knowledge of the 6 legal heirs or the ancestor of the complainants and altered the remaining paragraphs of the power of attorney and thereby committed forgery.

7. In the FIR, it was also alleged that Mohammad Sharif, in connivance with other accused persons, executed various sale deeds in favour of his family members and friends between 04/02/1989 to 26/06/1989. The applicant Zarina Begum was one of the beneficiaries. It is for this alleged offence that was committed thirty-one years ago, that the applicant is sought to be arrested today.

8. In a connected case arising from the same FIR, being M.Cr.C No. 26706/2020 (Colonel Bhupendra Singh Kharayat Vs. State of Madhya Pradesh), this court had granted the benefit of bail to the 78 year old retired Colonel who was picked up from his home by the investigating agency for the same offence for which the applicant herein is sought to be apprehended. In that case the

Colonel did not even get an opportunity to move either this Court of Sessions Court for an anticipatory bail. While passing that order, this court had elaborately discussed the judgement of the Supreme Court in Joginder Kumar versus State of Uttar Pradesh, a landmark judgement of the Supreme Court striking a balance between the personal liberty of an accused and the safety of the society. However, the order passed by this court in Col Bhupendra Singh Kharayat's case, though being available to the Ld. Court below it has unfortunately dismissed the application for anticipatory bail moved by the applicant only on the basis that the investigation was still in progress. Not even fleetingly has the learned court below even considered the necessity for a custodial interrogation of the applicant for an offence that was committed more than three decades ago.

9. Case after case this court has observed that the District Judiciary is extremely tight-fisted when it comes to granting bail. Applications are routinely dismissed on cyclostyled grounds that the offence alleged is serious or that the investigation is still in progress or that the accused may influence the witnesses. Hardly ever does the court below examine the requirement for continued incarceration of the accused as an under trial, but for the routine reasons given above. Resultantly, the High Court suffers a deluge of bail cases and its precious time is lost in deciding bail applications instead of deciding civil and criminal appeals.

10. The figures given hereinbelow with regard to the pendency of bail applications before the three benches of the High Court and the number of Criminal Appeals that have been withdrawn by the

appellants (still undergoing their sentence and who have not got the benefit of suspension of sentence) is anything but desirable.

PENDENCY OF BAIL MATTERS AS ON 19/01/2021

HEADING	JABALPUR	INDORE	GWALIOR	TOTAL
U/s. 438 Cr.P.C	533	177	518	1228
U/s. 439 Cr.P.C	3457	1327	2172	6956
U/s. 14(A) of SC/ST Act	489	103	180	772
Total	4479	1607	2807	8956

In less than two months, the situation goes from bad to worse. The figures for pending bail applications in March 2021 is as herein below.

PENDENCY OF BAIL MATTERS AS ON 12/03/2021

HEADING	JABALPUR	INDORE	GWALIOR	TOTAL
U/s. 438 Cr.P.C	555	251	492	1298
U/s. 439 Cr.P.C	3422	2119	2322	7863
U/s. 14(A) of SC/ST Act	506	142	169	817
Total	4483	2512	2983	9978

The pressure of the pending bail applications is a major factor preventing this Court to spare time for deciding criminal appeals on account of which, several criminal appeals are withdrawn by the appellants on account of the same being rendered infructuous with the appellant having served the entire sentence during the pendency of the appeal or, in case of life imprisonment, the State offers remission to the appellants who have completed fourteen years or more of their sentence, subject to the withdrawal of the criminal appeal. The chart below shows the number of criminal appeals withdrawn from the High Court in the year 2020.

CRIMINAL APPEALS WITHDRAWN FROM THE HIGH COURT IN THE YEAR 2020

BENCH	NO. OF CASES
Principal Bench at Jabalpur	**44**
Bench at Indore	**32**
Bench at Gwalior	**13**
Total	**89**

The above figures have been received from the Registry of the High Court. The huge burden of bail matters that has been shifted to the High Court, is on account of the extremely negative view that is being adopted by the District Judiciary in bail matters for which they can hardly be held responsible on account of perception by the judges of the District Judiciary of professional hardships they may have to face, if they indeed start deciding bail applications applying the principle of "Bail and not Jail". For a majority of the Judges of the District Judiciary, it is a catchy phrase to be observed in breach rather than in compliance.

11. The attention of the District Judiciary must also be drawn to the overcrowding of jails in the State which is also directly associated with the reluctance of the lower courts to grant bail. The inmates occupying these jails are far in excess of the optimum capacity of these jails. A majority of them are undertrials. Even convicts and undertrials are entitled to basic human rights and overcrowded prisons with waning resources, result in the violation of that right. Convicts serving sentence or undertrials awaiting judgment cannot be held in inhuman conditions. The charts below give the figures, which paint a very dismal picture. It is almost as if, basic human rights are not available to undertrials while judgement after judgement laudably mentions that during trial, the presumption is of innocence and not of guilt.

PRISON INMATES AS ON 30/11/2020

S.No	Type of Jail	Number	Undergoing Sentence	Undertrials	Others	Total
1	Central Jails	11	11,182	10,107	96	21,385
2	District Jails	41	2290	13,164	47	15,501
3	Open Jails	06	2	0	0	2
4	Sub-Jails	73	271	7596	3	7870
5	Total	131	13,745 (30.71%)	30,867 (68.96%)	146 (0.33%)	

The figures disclose that 68.96% of the prison inmates in the State are undertrial while convicts constitute 30.71%.

OVER CROWDING OF PRISONS AS ON 30/11/2020

S.No	Type of Jail	Number	Prison Capacity	Number of Prisoners	Excess	Percentage of Overcrowding
1	Central Jails	11	14,060	21,385	7325	52.10%
2	District Jails	41	9485	15,501	6016	63.43%
3	Open Jails	06	94	2	-92	
4	Sub-Jails	73	5020	7870	2850	56.77%
5	Total	131	28,659	44,758	16,099	56.17%

The chart above reveals that the total overcrowding in the four categories of jails in the State is 56.17%. Even convicts and under trails are entitled to basic human rights and if the figures are anything to go by, their condition as on date is no better than

livestock, herded together for lack of infrastructure and a "not so sensitive" judicial system

12. The *"grundnorm"* of bail jurisprudence i.e., *"bail and not jail"* [State of Rajasthan Vs. Balchand – (1977) 4 SCC 308] appears to have been forgotten. Bail should not be denied by the District Judiciary only for the purpose of ingratiating the raucous blood lust of a society existing on social media, or to pander to public perception. The courts must remember that the presumption is always of innocence and that the denial of bail must be for exceptional reasons, justifiable on the facts and circumstances of the case before it.

13. This Court feels it essential to refer to the judgement of the Supreme Court in **Joginder Kumar's** case where the Supreme Court has extensively discussed the power of the police to affect an arrest. The Supreme Court refers to the third National Police Commission report and extracts therefrom **"In India, *Third Report of the National Police Commission* at p. 32 also suggested: "An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances: (*i*) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims. (*ii*) The accused is likely to abscond and evade the processes of law. (*iii*) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint. (*iv*) The accused is a**

habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines ....”[1]. After reproducing the above from the NPC report, the Supreme Court holds **“The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to**

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[1] **Joginder Kumar v. State of U.P., (1994) 4 SCC 260, Paragraph 20.**

personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do"[2].

14. In recent times, if there has been a judgement of the Supreme Court which passionately desired the protection of the individual's liberty from arbitrary arrest, it is **Arnesh Kumar Vs. State of Bihar[3]**, the Supreme Court scathingly indicted the police for still bearing a colonial mindset and disdain for the liberty of the citizen. The Supreme Court referred to the power of arrest as a "tool of harassment". In paragraph 5 the Supreme Court observed **"Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so**

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[2] Joginder Kumar v. State of U.P., (1994) 4 SCC 260, Paragraph 20.
[3] (2014) 8 SCC 273.

also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive". The Supreme Court went on to hold that a person accused of an offence punishable with imprisonment up to seven years, cannot be arrested by the police on mere prima facie satisfaction of the person having committed such an offence and thereafter, adverting to s. 41 (1) (b) (ii) clause a to e, laid down the requirement under the law in the following words.

> **"7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.**

> **7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest**
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> **7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (*a*) to (*e*) of clause (1) of Section 41 CrPC."[4]**

The Supreme Court, in paragraph 7.3 has reiterated the spirit of *Joginder Kumar Vs. State of Uttar Pradesh*, when it says that the police officer before effecting an arrest must question himself with regard to the necessity of arrest and the objective such an arrest seeks to fulfil. In *Joginder Kumar*, the Supreme Court opined that "*The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so*". Having thus illumined the legal position on the power of the police to arrest without a warrant in cases punishable with imprisonment up to

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[4] Arnesh Kumar Vs. State of Bihar – (2014) 8 SCC 273, Paragraphs 7.1 to 7.3 at page 278 to 279.

seven years, the Supreme Court went on to lay down the duty of the Magistrate, to ascertain the necessity for further incarceration of the accused as an undertrial, in the following words.

> **"8.1. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 CrPC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.**
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> **8.2. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.**
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> **8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit**

of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused.

8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny"[5].

15. After imposing the checks on the power of the police to arrest, the Supreme Court, in paragraphs 8.1 to 8.4, diverts its attention to the duty of the Magistrate u/s. 167 Cr.P.C. It emphasises that further detention of the accused should not be resorted to in the exercise of remand powers, unless warranted. The Supreme Court has also given serious consideration to the power of remand referring to it as a *"solemn function"* which must be exercised with concern for liberty of the individual and has also

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[5] Arnesh Kumar Vs. State of Bihar – (2014) 8 SCC 273, Paragraphs 8.1 to 8.4 at page 279 to 280

observed that it is presently exercised in a *"routine, casual and cavalier manner"* in some cases.

16. The Supreme Court, in paragraph 9 of the judgement examines s. 41A Cr.P.C in and observes **"Another provision i.e. Section 41-A CrPC aimed to avoid unnecessary arrest or threat of arrest looming large on the accused requires to be vitalized ..... The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid"**[6]. This observation reveals the unequivocal premium that the Supreme Court attaches to an individual's liberty. It has held that section 41 of the CRPC, prohibits the police from effecting an arrest for an offence where the punishment is not more than seven years imprisonment except for exceptional reasons to be recorded. It has interpreted section 41A CRPC and held that the police shall refrain from making an arrest where the accused, in response to a notice under section 41A appears before the police and joins

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[6] Arnesh Kumar Vs. State of Bihar – (2014) 8 SCC 273, Paragraph 9 at page 280

the investigation, except in exceptional circumstances to be recorded by police.

17. Thereafter, in paragraph 11 of the judgement, the Supreme Court issue directions which is law under article 141 of the Constitution. The same are reproduced hereinbelow.

> **"11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:**
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> **11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;**
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> **11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(*b*)(*ii*);**
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> **11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;**
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> **11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;**
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> **11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by**

the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court."[7]

the directions given by the Supreme Court in Arnesh Kumar's case are extremely elaborate and has taken into consideration, the liberty of the individual accused of offences where the punishment is not more than seven years imprisonment.

18. This judgement was passed by the Supreme Court in the year 2014. Yet, after the passage of nearly 7 years, the directions passed are observed more in breach than in compliance. In order to ensure that the benevolent effect of the judgement is not restricted only to those offences arising from matrimonial cases u/s. 498-A and s. 406 IPC, the Supreme Court laid down in the following words that **"We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-**

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[7] Arnesh Kumar Vs. State of Bihar – (2014) 8 SCC 273, Paragraph 11 to 11.8 at page 281

A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine"[8].

19. The underlying concern of the Supreme Court regarding the approach of the Courts below in bail matters was reflected yet again in **Dataram Singh Vs. State of Uttar Pradesh and Another[9]**, where a two-judge bench of the Supreme Court, in the very first paragraph observed, **".....A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for**

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[8] Arnesh Kumar Vs. State of Bihar – (2014) 8 SCC 273, Paragraph 12 at page 281

[9] (2018) 3 SCC 22

longer periods. This does not do any good to our criminal jurisprudence or to our society"[10].

20. More recently, in **Arnab Goswami's** case, the Supreme Court once again focussed its attention on liberty of the individual. The Supreme Court emphasised on the role of the District Judiciary and the High Court to be more proactive when it comes to dealing with cases of personal liberty rather than dealing with it in a mundane manner. Paragraph 70 of the judgement deserves to be reproduced in full in which the Supreme Court observes, **"More than four decades ago, in a celebrated judgment in *State of Rajasthan* v. *Balchand* [*State of Rajasthan* v. *Balchand*, (1977) 4 SCC 308 : 1977 SCC (Cri) 594], Krishna Iyer, J. pithily reminded us that the basic rule of our criminal justice system is "bail, not jail" [These words of Krishna Iyer, J. are not isolated silos in our jurisprudence, but have been consistently followed in judgments of this Court for decades. Some of these judgments are : *State of U.P.* v. *Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2) and *Sanjay Chandra* v. *CBI*, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] . The High Courts and courts in the district judiciary of India must enforce this principle in practice, and not forego that duty, leaving this Court to intervene at all times. <u>We must in particular also emphasise the role of the district judiciary, which provides the first point of interface to the citizen. Our district judiciary is wrongly referred to as the "subordinate</u>**

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[10] **Dataram Singh Vs. State of UP and Another – (2018) 3 SCC 22, at paragraph 1, page 22.**

judiciary". It may be subordinate in hierarchy but it is not subordinate in terms of its importance in the lives of citizens or in terms of the duty to render justice to them. High Courts get burdened when courts of first instance decline to grant anticipatory bail or bail in deserving cases. This continues in the Supreme Court as well, when High Courts do not grant bail or anticipatory bail in cases falling within the parameters of the law. The consequence for those who suffer incarceration are serious. Common citizens without the means or resources to move the High Courts or this Court languish as undertrials. Courts must be alive to the situation as it prevails on the ground—in the jails and police stations where human dignity has no protector. As Judges, we would do well to remind ourselves that it is through the instrumentality of bail that our criminal justice system's primordial interest in preserving the presumption of innocence finds its most eloquent expression. The remedy of bail is the "solemn expression of the humaneness of the justice system" [Arghya Sengupta and Ritvika Sharma, 'Saharashri and the Supremes', (The Wire, 23-6-2015) available at <https://thewire.in/economy/saharashri-and-the-supremes>] . Tasked as we are with the primary responsibility of preserving the liberty of all citizens, we cannot countenance an approach that has the consequence of applying this basic rule in an inverted form. We have given expression to our anguish in a case where a citizen has approached this Court. We have done so in order to reiterate principles which must govern countless other faces whose

voices should not go unheard"[11] (emphasis added). The portions bearing added emphasis, reveals the importance given by the Supreme Court to the District Judiciary in bail matters. It gently disapproves of the District Judiciary being referred to as the Subordinate Judiciary and goes on the say that the District Judiciary is only administratively subordinate to the High Court but on the judicial side, it is just as responsible for upholding the liberty of the average citizen as is the High Court and the Supreme Court.

21. It is all very well to reproduce the benevolent observations of the Supreme Court in Arnab Goswami's case while glossing over the reality that exists on the ground relating to the District Judiciary. The District Judiciary is the bulwark against executive excess. It is the first line of defence, and for a large number of the citizens, perhaps the last. The existence of the rule of law in the state is reflected by the responsiveness of the District Judiciary to matters relating to personal liberty and freedom of the individual. The hesitancy of the District Judiciary to adhere to the rule of 'bail and not jail' is understandable. There exists a widespread fear amongst judges of the District Judiciary that they may be questioned by the High Court, or complaints may be preferred against them by disgruntled lawyers or litigants whenever they pass orders granting bail which in turn, results in a vigilance enquiry against them.

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[11] Arnab Manoranjan Goswami Vs. State of Maharashtra – (2021) 2 SCC 427 – paragraph 70 at page 473.

22. Whenever a judge of the District Judiciary is proceeded against by the vigilance on account of a bail order or an acquittal in a high-profile case, it results in a domino effect where other judges of the District Judiciary feel intimidated and consider it practical to dismiss bail applications and enter convictions and remain safe from imputations of dishonesty and the associated enquiry that follows it. Even an inquiry by the High Court in which the Judge may eventually be exonerated, which may seem innocuous for those of us sitting in the High Court, has a debilitating effect on the psyche of the Judge in the District Judiciary. The fact that there has been an inquiry against a Judge for granting bail or an acquittal sees a fall in his image amongst his peers. Resultantly, they clam up and refuse bail in even the most trivial of offences. The High Court sees numerous cases coming up before it, concerned with the minor offences which are triable by the Court of the JMFC.

23. The combined effect of some members of the bar and disgruntled litigants, ever ready to complain against judges by anonymous communication coupled at times with an overzealous District Judge (Vigilance and Inspection), out to prove the worth of his existence, whose overbearing presence and attitude of selectively examining the orders passed by the Judges of the District Judiciary relating to anticipatory bail, regular bail and acquittals (especially in those cases relating to heinous offences or cases which acquire prominence in the print, electronic and social media), has a demoralising effect on the Judges of the District Judiciary for whom such action is the proverbial sword of

Damocles, perpetually hanging over their heads, always threatening to drop.

24. The office of the District Judge (Vigilance and Training) continues to have a debilitating effect on independence and individuality of the judges of the District Judiciary. The post is a surplus appendage, akin to a vestigial organ in the body of the Judiciary in the State of Madhya Pradesh. The post is occupied by a Judge, senior enough to occupy the post of the District Judge. His duties involve calling at random, the judgements and orders passed by the Judges of the District Judiciary and examine them for quality and integrity. A position of immense power and influence over the Judges of the District Judiciary. As it is, the District Judge constantly reviews the work of those under him and gives his or her assessment in the ACR's of the Judges who are working under him. Sometimes, the post can be occupied by an individual who to prove his preeminent importance to the High Court, as a conduit of information, can assess the orders of the Judges and comment upon the same being passed with a dishonest motive only because in his or her opinion, the order is bad in law. This demotivates the Judges of the District Judiciary, especially in criminal cases from doing justice and may convict in the absence or inadequacy of evidence and dismiss bail applications even in cases in which were fit to be granted bail. It would not render the District Judiciary less efficient if the post is done away for good. Instances of judges of the District Judiciary being proceeded against by the High Court on the administrative side for discretion exercised in bail matters would demoralise others who

would consider it safest to dismiss bail applications as proof of their integrity.

25. An adverse report from the District Judge (Vigilance and Inspection) can be sufficient to initiate an enquiry by this Court against the Judge in question. The post of the District Judge (Vigilance and Inspection) is a surplusage with potential to cow down Judges of the District Judiciary and gives a sublime message to them to dismiss bail applications and enjoy a career in the District Judiciary without facing any inquiry. The continued existence of the post of District Judge (Vigilance and Inspection) is questionable. It belies reason why the orders passed by a Judge of the District Judiciary must be scrutinised by his peer in a purely administrative capacity, for quality or otherwise, when the District Judge scrutinises them every year while preparing the ACR of the Judges. Besides, if a party is aggrieved by an order, it has the right to challenge the order before the Court higher in the judicial hierarchy.

26. Justice William O. Douglas, a former Judge of the U.S Supreme Court, in his dissenting opinion in **Stephen S. Chandler V. Judicial Council of the Tenth Circuit of the United States** observed **"No matter how strong an individual Judge's spine, the threat of punishment – <u>the greatest peril to judicial independence – would project as dark a shadow whether cast by political strangers or by judicial colleagues</u>. A federal Judge must be independent of every other Judge.... <u>Neither one alone nor any number banded together can act as censor</u>**

and place sanctions on him. It is vital to preserve the opportunities for judicial individualism"[12] (emphasis added).

27. In **Ramesh Chander Singh Vs. High Court of Allahabad[13]**, a judge of the District Judiciary in Uttar Pradesh was imposed the punishment of withholding of two increments with cumulative effect and being reduced in rank from Additional District and Sessions judge to Civil Judge (Senior Division). His alleged misconduct was passing a judicial order granting bail to an accused in a double murder case after taking illegal gratification from the accused. The Judge who conducted the enquiry against the Petitioner in this case disbelieved the allegation of illegal gratification and held the same to be not proved. However, observations were made that the order was passed with an oblique motive, insufficient grounds and extraneous consideration. The enquiry report does not reveal as to what these oblique motive, insufficient ground and extraneous considerations were. Two other co-accused persons were already granted bail by the High Court. He failed before the High Court in challenging the decision of the full Court. On appeal to the Supreme Court, it was held **"..... A Sessions Judge was competent to grant bail and if any disciplinary proceedings are initiated against the officer for passing such an order, it would adversely affect the morale of subordinate judiciary and no officer would be able to exercise this power freely and independently"[14]**. The Supreme Court further held **"This Court**

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[12] Extracted from C. Ravichandran Iyer Vs. Justice A.M. Bhattacharjee – (1995) 5 SCC 457 at page 469.
[13] (2007) 4 SCC 247
[14] Ramesh Chander Singh Vs. High Court of Allahabad – (2007) 4 SCC 247 – Paragraph 11 at page 254

on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts ..."[15]. Needless to state, the Supreme Court set aside the order of the full Court and reinstated the Petitioner on the post of AD&SJ with full consequential benefits.

28. More recently, in **Krishna Prasad Verma Vs. State of Bihar**[16], a judge of the District Judiciary was proceeded against for misconduct. The charge against him was of having granted bail to an accused in a case under the NDPS where an earlier application of another accused was dismissed by the High Court. The other charge against him was having closed the evidence of the prosecution and thereby preventing it from producing evidence against the accused which led to his acquittal. As regards the charge of having overlooked the previous order passed by the High Court, the Supreme Court held that it could at the most be held as an act of negligence on the part of the judge. As regards closing of the prosecution's evidence prematurely, the Supreme Court held from the record of the case that the prosecution was granted about 18 opportunities of producing the witnesses and it was only thereafter that the

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[15] **Ramesh Chander Singh Vs. High Court of Allahabad – (2007) 4 SCC 247 – Paragraph 12 at page 255**
[16] **(2019) 10 SCC 640**

evidence was closed. The Supreme Court, while setting aside the punishment imposed upon the petitioner, underscored the importance of the independence of the District Judiciary. In paragraph 1, the Supreme Court held **"In a country, which follows the Rule of Law, independence of the judiciary is sacrosanct. There can be no Rule of Law, there can be no democracy unless there is a strong, fearless and independent judiciary. This independence and fearlessness is not only expected at the level of the Superior Courts but also from the District Judiciary"**[17]. Emphasizing upon the importance of the District Judiciary as the first and perhaps the last resort for a large part of our population, which is unable to approach the High Court or the Supreme Court on account of their poverty or lack of resources, the Supreme Court held **"Most litigants only come in contact with the District Judiciary. They cannot afford to come to the High Court or the Supreme Court. For them the last word is the word of the Magistrate or at best the Sessions Judge. Therefore, it is equally important, if not more important, that the judiciary at the District level and at the Taluka level is absolutely honest, fearless and free from any pressure and is able to decide cases only on the basis of the facts on file, uninfluenced by any pressure from any quarters whatsoever"**[18]. It further held that where the order passed by a judge of the District Judiciary is incorrect or against the settled law, the same should not lead to administrative action

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[17] Krishna Prasad Verma Vs. State of Bihar – (2019) 10 SCC 640 – Paragraph 1 at page 640

[18] Krishna Prasad Verma Vs. State of Bihar – (2019) 10 SCC 640 – Paragraph 2 at page 640

against Judge, unless from the record of the case and based upon evidence, malice, misconduct and corrupt practice is evident.

29. The importance of having a District Judiciary unfettered and fearless cannot be underscored enough. In a state like Madhya Pradesh with widespread poverty, illiteracy and lack of resources, it is only a free, independent and fearless District Judiciary that can ensure that the end user of the justice system is given justice at the very first level and does not have to move higher up the hierarchy of Courts to get justice.

30. The court hopes that the High Court may, on the administrative side, re-assess the necessity for the post of District Judge (vigilance and inspection). The existing system by which complaints against judges of the District Judiciary are dealt with are adequately sufficient in order to ensure that the demands of a person aggrieved by the conduct of a judge is suitably addressed and also ensures that the judge of the District Judiciary is adequately protected from frivolous complaints from disgruntled and maliciously motivated persons.

31. In order to ensure that the directions passed by the Supreme Court in Arnesh Kumar's case is scrupulously implemented and followed by the police and the Judicial Magistrates in Madhya Pradesh, this court considers it essential to pass certain directions.

DIRECTIONS TO THE POLICE

31.1 where for an offence, the maximum imprisonment provided is up to 7 years, the accused shall not be arrested by the police as an ordinary course of action. Unless it is a special statute mandating such an arrest.

31.2 Before effecting an arrest in such a case, the police would have to record its reasons that the arrest was essential to prevent such person from committing any further offence, or for a proper investigation of the case, or to prevent the accused from causing the disappearance of evidence or on the basis of credible apprehension that the accused would tamper with evidence or prevent a witness from disclosing such facts to the court or to the police which thereby necessitates the arrest of the accused.

31.3 The State Police is directed to format and prepare a check list of pre-conditions fulfilled by the police under section 41(1)(b)(ii) of the Cr.P.C, while arresting an accused for offences bearing a maximum punishment up to 7 years. It is mandatory to supply a copy of the check list along with the remand application, to the Magistrate authorised to further remand the accused to police or judicial custody.

31.4 Where decision is taken not to arrest the accused, the police shall forward an intimation to the Magistrate within two weeks of the registration of the FIR. This period may be extended by the Superintendent of Police of the district concerned with reasons to be recorded in writing.

31.5 Where interrogation of the accused is required, notice in terms of section 41A Cr.P.C or s. 160 Cr.P.C be served on the accused within two weeks from the date of registration of the FIR which may be extended by the Superintendent of Police of the district concerned for reasons to be recorded in writing.

31.6 Where the police does not arrest the accused and upon notice u/s. 41A or 160 Cr.P.C, the accused appears before the police and assists the police in the course of investigation, in such a situation, the police are not to arrest the accused unless, there exists compelling reasons which must be recorded, as given in paragraph 31.2.

31.7 If the police does not perform as required of them as hereinabove, it would constitute contempt of the order passed by this court in addition to such other action, which may be taken against the erring officer on the administrative side.

32. <u>DIRECTIONS TO THE JUDICIAL MAGISTRATES</u>:-

32.1 The Magistrate, while exercising powers of remand, shall ascertain if the arrest effected by the police satisfies the requirements of section 41 of the CRPC as provided in paragraph 11.2 of Arnesh Kumar's case (see paragraph 17 *supra*).

32.2 The Magistrate shall ascertain the availability of the check list as ordered by the Supreme Court in paragraph 11.3 of Arnesh Kumar's case.

32.3 If there is non-compliance of paragraph 11.2 and/or 11.3 of Arnesh Kumar's case, the Magistrate shall not authorise the further detention of the accused and shall release forthwith as the arrest itself is unlawful and therefore, his detention would also be rendered unlawful on account of the police not having fulfilled the requirements of section 41 of CRPC.

32.4 It is mandatory for the Magistrate authorising detention to record his independent satisfaction and also ensure in his order of remand that his satisfaction for further remand of the accused stands satisfied in compliance of paragraph 11.4 of Arnesh Kumar's judgement.

32.5 The Magistrate shall also satisfy himself whether specific reasons have been recorded for the arrest of the accused and whether those reasons are relevant, raising a reasonable conclusion that one of the conditions for further detention of the accused as an under trial is satisfied.

32.6 Failure on the part of the Magistrate to perform as directed hereinabove, my see the initiation of proceedings against such Magistrate on the administrative side.

33. As regards the grant of bail in offences involving punishment of more than seven years imprisonment, there can be no universal rule of thumb. It would defeat the very purpose of bail law, if bail were to be rejected only on account of the offence being heinous in nature. Weather an offence is heinous in nature is a matter of perception but, it would be reasonable to include in its ambit and scope such offences, which shock the conscience of a reasonable

person. Again, bail cannot be denied merely because the allegations relate to the commission of a heinous offence. The nature of the evidence, the antecedents of the offender, the circumstances in which the offence was committed etc., are also to be considered. However, what the Courts must consciously exclude is the cacophony of hyper opinionated and unmoderated voices on social, print and electronic media. Public perception must never be a factor while deciding a bail application. At the same time, prudent reasons ought to be briefly given to reflect the mind of the Court while deciding the application for bail.

34. While considering an application for bail, the following may be kept in mind;

34A. Whether, granting bail to the under-trial would result in him attempting to overawe and influence the witness or influence the course of investigation, either by threat of dire consequences or by monetary inducement?

34B. Whether, the probability of the under-trial, upon his release, committing another crime while on bail, would be germane while considering grant of bail to recidivists or repeat offenders?

34C. Whether, there is a probability upon the release of the accused on bail that he would fall victim of any vengeful action by the Complainant?

34D. Whether, the release of the accused on bail would raise a reasonable apprehension of breach of peace, and social or civil unrest, on account of the nature of the offence alleged against him?

34E. Whether, the accused would destroy the evidence yet to be collected during investigation, upon his release on bail?

34F. Whether, the overwhelming nature of prima facie evidence against the accused is such that he may be tempted to abscond and evade the process of justice all together if he is enlarged on bail?

35. The above considerations should be applied in a reasonable and judicious manner based upon the material on record. They, however, must not be applied in a pedantic manner only to deny the benefit of bail to the accused. Also, it must be borne in mind that the said considerations are not glossed over in order to grant the benefit of bail. Whichever way the application is decided, unless it is withdrawn, reasons ought to be given to reflect the prima facie appreciation of the material for or against the accused.

36. The above notwithstanding, no undertrial ought to be kept in judicial custody, inordinately. There may be several factors delaying the trial which may not be attributable to the accused. The production and examination of prosecution witnesses is where the delay is maximum. In such cases, even if there is a perceived handicap in releasing the accused on bail, it may still be considered by placing stringent condition like higher quantum of personal bond and surety, to appearing before the Police periodically and registering his presence and in extreme cases, even asking the under trial to remove himself from the municipal limits of the district where the trial is taking place and the witnesses are situated. Of course, no rule of thumb can ever be

laid down as an indelible proposition which must be followed in every case of bail and the discretion must be left to the Court.

37. The District Judiciary must create an environment where bail applications can be decided at the first tier of the justice system itself. There is no legislative provision that mandates the disposal of a bail application within a fixed period of time. However, the ends of justice do demand that it be so done in the shortest possible time. However, it must also be borne in mind that many a litigant may not have the wherewithal of approaching the next forum available within the shortest possible time. This Court has seen applications for bail in offences triable by the Court of Magistrate, coming for the first time after the accused has completed more than half the period of the total sentence.

38. Therefore, the District Judiciary must instil confidence in the bar and the litigants alike in bail matters. Where, the Court is unable to grant bail because the investigation is still in process, the applicant can be asked if he wants to withdraw the application with liberty to file afresh after the charge sheet is filed. In some cases, certain documents may be necessary to effectively decide the application, it may be better to adjourn the proceeding giving short dates, rather than dismiss the application on merits forcing the applicant approach the High Court for bail. In other words, the endeavour must be to see that justice is done at the level of the District Court itself. The applicant may only be too willing to try his luck a second time before the District Courts itself as along as his application is not dismissed on merits. Such an option must be given to the applicant.

39. The office is requested to send a copy of this order to the Director General of Police, who is further requested to circulate the same to all the districts and disseminate to the lowest functionary, the directions given by this Court in paragraph 31.1 to 31.7 are complied with and, if in any case where such compliance is found wanting after 01/07/2021, this court shall proceed to try the policemen acting in violation of this order for contempt of this Court's order.

40. The office is requested to send a copy of this order to all the District Judges, who are further requested to circulate the same to all the Judicial Magistrates under them to ensure compliance with the directions given by this Court in paragraph 32.1 to 32.6 and any case where such compliance is found wanting after 01/07/2021, they may be proceeded on the administrative side.

41. On the merits of this case, for what has been discussed and observed by this Court herein above, **the application is allowed,** and it is directed that the applicant shall be forthwith enlarged on bail upon arrest by the investigating officer, upon furnishing a personal bond in the sum of **Rs.10,000/- (Rupees ten Thousand only)** with one solvent surety in the like amount to the satisfaction of the arresting officer.

Certified copy as per rules.

(Atul Sreedharan)
Judge

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