

investigating authorities to find truth. This leads to a high rate of conviction, instead of the 'adversarial system' followed in India where lawyers represent their parties' case.

The adversarial system aims to get to the truth through the open competition between the prosecution and the defence to make the most compelling argument for their case. Critics of the adversarial approach argue that the pursuit of winning often overshadows the search for truth. There is no responsibility on the judiciary/prosecution to find truth and there is no accountability for false or even for deliberate falsehood of judiciary or prosecution in civil or criminal matters. Even if there is any such it is sheer impossible to invoke the same. Ultimately the justice made mockery.

The inquisitorial system is generally described as a system that aims to get to the truth of the matter through extensive investigation and examination of all evidence. The Malimath Committee observed on the functioning of adversarial legal system thus :

"The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive

duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth". [Malimath Committee Report 2003]

Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore, truth should become the ideal to inspire the Courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we must regain the lost confidence of the people. Now there is total immunity to the Judges. Even corrupt Judges go scot free. Inefficiency, not following law, personal prejudices, likes and dislikes, helplessness due to lack of understanding of basics have become normal. Special Tribunals established are still worse. This is high time to consider switching over to inquisitorial system.

TO BAIL OR NOT TO BAIL: CAN TRIPOD TEST ALONE BE DETERMINING FACTOR IN USING DISCRETION BY THE COURTS IN INDIA?

By

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1. Introduction :

Justice *V. Krishna Iyer* more than four decades ago observed that 'Bail or jail ?- at the pre-trial or post-conviction stage- belongs to the blurred area of the criminal justice system and largely binges on the hunch of the bench, otherwise called judicial

discretion.¹ The situation has not changed yet. Judicial discretion in respect of bail is still a blurred area of Administration of Justice. The Code of Criminal Procedure (CrPC)² while granted limited discretion to the Magistrate Court but it empowers Superior Court much wider discretion to grant of bail.³

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1. *Gudikanti Narasimulu and others v. Public Prosecutor*, 1978 AIR 429.

2. Code of Criminal Procedure, 1973 (Act II of 1974).

3. See Sections 436 to 439 of the CrPC.

In some part of the world constitutional provision itself explicitly recognise the right to bail. For example, the Canadian Charter of Human Rights and Freedoms, which is part of the Canadian Constitution, incorporated rights of the accused in criminal proceedings including the Right to bail in Section 11 in the following words :

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial Tribunal;

(e) not to be denied reasonable bail without just cause.⁴

Three important aspects incorporated in aforesaid two clauses are: (a) presumption of innocence in favour of the accused till the time found guilty; (b) a right not to be denied bail which is reasonable; and (c) no denial of bail without just cause.⁵ Even though the Indian Constitution did not explicitly incorporate the right to bail or presumption of innocence, these rights are consistently interpreted as a part of right to life and/or right to freedom.⁶ In fact, long ago Calcutta High Court highlighted the need for the Court to be liberal in granting bail respecting the liberty of citizen by using following words, 'in a barbaric society you can hardly ask for bail; in a civilized society you can hardly refuse it'.⁷

The grant of bail is a discretionary power vested with the Court and the Court in

each case decide keeping in mind to diverse factors, the presumption in favour of innocence of the accused until proven guilty and larger need of the society as well as criminal justice administration to keep the accused under custody for effective investigation and prosecution. In recent past in the case of *P. Chidambaram v. Directorate of Enforcement*,⁸ *Abhishek Manu Singhvi* argues that for grant of bail a tripod test should be the determining factor namely : (a) flight risk and/or (b) non-cooperation and/or (c) tampering with evidence.⁹ Though the bail was granted, the Court refused to accept the argument of the tripod test. This paper tries to look into how viable is the argument of the tripod test and what should be the consideration for the grant of bail.

2. Laws Relating to Bail under CrPC

Chapter XXXIII of the CrPC¹⁰ incorporated the provision for bail and bail bond. Section 436 of the CrPC provides for bail in bailable offences while Section 436-A of the CrPC laid on the guidelines for release of under trial prisoners in case they were in custody for longer period of time and trial remain incomplete.¹¹ Section 437 of CrPC provides for the circumstances when bail can be given by Magistrate in non-bailable offences.¹² But it limited the power of the magistrate by using the words 'such person shall not be so released' in circumstances when it appears to the Magistrate that such person is 'guilty of an offence

4. The Canadian Charter of Human Rights and Freedoms. Available at: https://www.mcgill.ca/dise/files/dise/cdn_rights.pdf (Last Accessed 3rd August, 2020)

5. See for discussion on constitutional aspect of right to bail, *P. Puneeth*, Individual Freedom and Criminal Justice Administration: Constitutional Perspectives with Special Reference to Right to Bail, In, *Manoj Kr. Sinha and Anurag Deep, Bail: Law and Practice in India*, (ILI 2019) ISSN 9788192792668, Chapter 1.

6. Ibid

7. *Superintendent and Remembrances of Legal Affairs v. Amiya Kumar Roy Choudhury*, 78 C.W.N. 320 at 325-26 (1974).

8. *P. Chidambaram v. Directed of Enforcement*, Criminal Appeal No.1831/2019, decided on 4th December, 2019.

9. Ibid, Para 11.

10. CrPC (n 2), Sections 436-450.

11. Section 436(1) recognise the right of the accused to get bail in bailable offences in clause (2) makes bail discretionary in cases when accused was first released on bail and later on again arrested for violation of bail condition. Section 437 mandated to release the under trial prisoner, with or without surety, if such prisoner is in custody for more than half of the period prescribed for the offence they charged.

12. CrPC, Section 437.

punishable with death or imprisonment for life' or previously convicted for an offence punishable with more than seven years.¹³ Relaxation has been given in respect of women, children, sick or infirm.¹⁴

Sections 438 and 439 CrPC empower the superior Court namely Session Court and High Court to grant bail in non-bailable offences with much wider discretionary power. Section 438 CrPC allowed both the Courts to issue direction for grant of bail after taking into consideration the following factors, namely :

- (i) the nature and gravity of the accusation;
- (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) the possibility of the applicant to flee from justice; and
- (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.¹⁵

Section 439 gives special powers to the High Court or Court of Session to grant bail with or without condition depending on the gravity of the offence.¹⁶ The power to grant bail by the Court of Session and High Court is not fettered with such restriction as we have seen in Section 437, *albeit* the power is discretionary in nature.

The following are the other circumstances when the accused person has a right to be released on bail:¹⁷

- (a) when the investigation is not completed within 60 days in respect of offences punishable with imprisonment of less than 10 years;¹⁸
- (b) when the investigation is not completed within 90 days in respect of the offences punishable with imprisonment 10 years or more or with life imprisonment or with a penalty;¹⁹
- (c) person detained as preventive measures for prevention of breach of peace or disturbances the public tranquillity;²⁰
- (d) when accused was in custody during the trial before Magistrate and trial did not complete within 60 days;²¹
- (e) after completion of trial before the Magistrate and prior to the pronouncement of judgment if the Court considers that the accused is not guilty.²²

Apart from the above circumstances when an accused person shall be released as a matter of right, in all other cases, bail is granted based on the discretion of the Court. The most challenging aspects in the bail jurisprudence are how such discretion shall be used and on what grounds. The Court has to balance between fundamental rights of life and liberty as well as freedom coupled with presumption of innocence in favour of accused and on other hand custodial need of the accused person for effective investigation and prosecution and the societal need.

13. Section 437(1)(i) & (ii) of CrPC.

14. Proviso to Section 437(1)(i) & (ii) of CrPC. The provision uses the word children below 16 years which is for all practical purposes redundant because after enforcement of juvenile justice legislation it has no use.

15. Section 438(1) CrPC.

16. Clause (1) of Section 439 provides that in case of offences covered by sub-section (3) of Section 437, the Court may impose any conditions at the time of granting bail.

17. See for discussion, *G. Kameswari Gada & Dīpa Dube*, Law Relating to Bail in India, In, *Manoj Kr. Sinha and Anurag Deep*, Bail: Law and Practice in India, (ILI 2019) ISSN 9788192792668, Chapter 2, P.39.

18. Section 167(2) CrPC.

19. Section 167(2) CrPC. See also, *Uday Mohanlal Acharya v. State of Maharashtra* (2001) 5 SCC 40.

20. Section 116(3) CrPC.

21. Section 437(6) CrPC.

22. Section 437(7) CrPC.

3. The Constitutional Perspective of the Right to Bail

Despite the absence of the explicit provision for the right to bail in Constitution, Articles 19 to 22 provides for constitutional safeguards, both procedural and substantive, concerning criminal cases.²³ There are many cases where the Court makes it clear that acts of the functionaries of criminal or Legislature can be scrutinised on the touchstone of the constitutional standard.²⁴ Supreme Court in *Gudikanti Narasimulu v. Public Prosecutor*,²⁵ observed that

“Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.”

Court further observed that ‘the significance and sweep of Article 21 make the deprivation of liberty ‘a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19.’²⁶ The judicial interpretation seems to be, by a large, in favour of bail and not jail.²⁷

23. Article 19 of the Constitution provides for right to freedom of the citizen while Article 20 incorporate the provision of double jeopardy. Similarly, Article 21 incorporate right to life and liberty while Article 22 guarantees certain rights with regard to arrest.

24. *Bachan Singh v. State of Punjab*, AIR 1980 SC 898; *Mithu v. State of Punjab*, AIR 1983 SC 473; *P. Rathinam v. UOI*, AIR 1994 SC 1844; *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1. See for more discussion, *P. Puneeth* (n 5).

25. *Gudikanti Narasimulu and others v. Public Prosecutor*, 1978 AIR 429, Para 1.

26. *Gudikanti Narasimulu and others v. Public Prosecutor*, 1978 AIR 429.

27. *State of Rajasthan v. Balchand*, (1977) 4 SCC 308; *Gudikanti Narasimulu v. Public Prosecutor*, High Court of Andhra Pradesh, (1978) 1 SCC 240; *Dataram Singh v. State of UP*, MANU/SC/0085/2015.

The dictum of the *Maneka Gandhi* case²⁸ that the term ‘procedures established by the law’ in Article 21 of the Constitution must mean ‘just, fair and reasonable procedure established by valid law’ provides further impetus in the interpretation of constitutional obligations within the criminal justice system. In *Hussainara Khatoon (I) v. Home Secretary*,²⁹ the Supreme Court observed that ‘bail system as prevalent is oppressive and discriminatory against the poor’ and directed for providing legal aid to the accused. In *Bhim Singh v. UOI*,³⁰ the Supreme Court directed to release all under trial prisoners who were in custody for more than the period provided in Section 436-A. In *Sanjay Chandra v. CBI*,³¹ case having a huge magnitude of economic offences, the Court granted bail giving reference to personal liberty granted in Constitution.

4. Consideration for Grant of Bail

Undoubtedly the constitutional protection of rights to life and liberty as well as freedom is of paramount importance and Court by and large tilted in favour of such freedom. It is important to remember the statement made by Justice *Krishna Iyer* in *State of Rajasthan v. Balchand*,³² that ‘bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating troubles in the shape of repeating offences or intimidating witnesses and the like.’ As the bail is an issue of discretion of the Court what will be the determining factor for using such discretion need deeper analysis. The Supreme Court in different cases attempted to explain such determining factors. Can tripod taste be a safe method for exercising discretion? Let us see a few cases where the Court explains the determining factors.

28. *Maneka Gandhi v. UOI*, AIR 1978 SC 620.

29. *Hussainara Khatoon (I) v. Home Secretary*, (1980) 1 SCC 81 = 1980 SCC (Cri) 23.

30. *Bhim Singh v. UOI*, (2015) 13 SCC 603.

31. *Sanjay Chandra v. CBI*, Criminal Appeal No.2178 of 2011.

32. *State of Rajasthan v. Balchand*, (1977) 4 SCC 308.

In *Prabhlad Singh Bhati v. NCT, Delhi*,³³ the Supreme Court observed that the following factors should be considered before exercising discretion on bail: '(a) the nature of accusation and the severity of the punishment in the case of conviction and the nature of materials relied upon by the prosecution; (b) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (c) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his absconding; (d) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; and (e) larger interest of the public or the State and similar other considerations.

In the *State of Maharashtra v. Sitaram Popat Vetal*,³⁴ the Supreme Court observed that while granting the bail the reason must be stated particularly when the offence is of serious in nature and must consider the following factors among others: '(a) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness; or (c) apprehension of threat to the complainant and (d) *prima-facie* satisfaction of the Court in support of the charge.' In *Sanbiab Pandian Rajkumar v. CBI*,³⁵ the Supreme Court referred to earlier decision including *Kalyan Chandra Sarkar v. Rajesh Rangan @ Pappu Yadav*³⁶ and reiterated the aforesaid factors for exercising discretion. In *Pappu Yadav* case could further observe that in case, bail was rejected earlier, and subsequent occasion Court must give reasons if grants bail.³⁷

In the case of *Shabzad Hasan Khan v. Ishtiaq Hasan Khan*³⁸ the Supreme Court brought in the consideration for victims interest and observed for protection of 'collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.' In *Masroor v. State of U.P.*,³⁹ the Supreme Court observed that public interest would overweight the interest of the accused. Could further held that at the time of deciding on the bail application is not necessary to move into detail analysis of evidence but *prima facie* satisfaction is required.⁴⁰ In *Anil Kumar Yadav v. State*,⁴¹ Supreme Court again brought in the concept of the larger interest of the society or the state. In fact 'larger interest of public' and 'the state' as one of the determining factor to exercise discretion in bail was laid down decades ago by the Supreme Court in *State v. Capt. Jagjit Singh*⁴².

Bail being the discretionary power exercised differently on many occasions because of the value judgment of the individual Judges.⁴³ For example, in the *State of Maharashtra v. Captain Buddhikota Subha Rao*,⁴⁴ issue was concerning a case where successive bail applications were rejected and just after two days of last rejection bail was granted by another Judge. The honourable Supreme Court cancelled the bail while making comments against such practice. These kinds of omission can be minimised if we have explicit determining factors, though it

33. *Prabhlad Singh Bhati v. NCT, Delhi and another* (2001) 4 SCC 280.

34. *State of Maharashtra v. Sitaram Popat Vetal and another*, 2004 SCC (Cri) 1971.

35. *Sanbiab Pandian Rajkumar v. CBI*, (2014) 12 SCC 23.

36. *Kalyan Chandra Sarkar v. Rajesh Rangan @ Pappu Yadav*, (2004) 7 SCC 525.

37. *Kalyan Chandra* (n 36) P.536.

38. *Shabzad Hasan Khan v. Ishtiaq Hasan Khan*, 1987 AIR 1613.

39. *Masroor v. State of U.P.*, (2009) 14 SCC 286.

40. *Masroor* (n 39) P.290.

41. *Anil Kumar Yadav v. State*, (2017) 2 SCC 178.

42. *State v. Capt. Jagjit Singh*, AIR 1962 SC 253.

43. See for further discussion, *Jyoti Dogra Sood*, Bail: Judicial Discretion, In, *Manoj Kr. Sinha and Anurag Deep*, Bail: Law and Practice in India, (ILI 2019) ISSN 9788192792668, Chapter 4, page 125. See also, *Vrinda Bhandari*, Inconsistent and Unclear: The Supreme Court of India on Bail, (2013) 6 NUJS L.Rev.

44. *State of Maharashtra v. Captain Buddhikota Subha Rao*, 1989 Supp (2) SCC 605.

is a too difficult task to have any straitjacket formula for all cases.

The aforesaid discussion made it amply clear the tripod test is not adequate to cover all requisite factors. It does not take into account the larger need of the society or victims perspective nor the gravity of the offence nor even *prima facie* satisfaction of the Court concerning the availability of evidence against accused. That may be the reason while the Supreme Court granted bail to Mr. *Chidambaram* but refuse to accept triple test or tripod test argument and observed as follows:

“One of the circumstances to consider the gravity of the offence is also the term of sentence..... Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case.....Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle.”

The Supreme Court does refer to the constitutional mandate as discussed earlier that the grant of bail is the rule and the refusal is the exception. Because of the opinion that we cannot have one single determining factors for the exercise of discretionary power and ‘ultimately the consideration will have to be on a case to case basis’ on the

facts and circumstances of each case and securing the presence of the accused to stand trial.⁴⁵ Thus broad-based determining factors as discussed above will help the Court in exercising discretion.

5. Conclusion

Incarceration during the trial without justifiable reasons amounted to punishing the accused while we are presuming their innocence.⁴⁶ The Court while exercising discretion needs to balance two diverse needs, societal need and accused right and while balance such apparently diverse aspiration Court need to assess the case based on broad parameter. In that context, the argument of triple or tripod test namely, (a) flight risk and/or (b) non-cooperation and/or (c) tampering with evidence seems inadequate for various reasons. First and foremost, the gravity of offence always remains one of the most important determining factors, with explicit reference in CrPC as well as through judicial interpretation. Secondly, it did not take into consideration the availability of convincing evidence to the extent of providing *prima facie* satisfaction. This is again an important factor which needs to taken into account while using discretion on bail. Thirdly, it also lacks in taking into account the rights of the victims to get satisfaction and Court duty to keep in mind the impact of the offence as well as Court decision on the life of the victim. Fourthly, it failed to take into consideration the need of the society as well as State. Thus, tripod test is not a safe test for determination for grant of bail and the Court has to look into holistically in each case based on its own merit.

45. *P. Chidambaram* (n 8) Para 21.

46. See for discussion on the issue in some other jurisdiction. *Marie Manikis & Jess De Santi*, Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences, 60 C. de D. 873 (2019); *Brendan McLeod*; *Ebeth R. Palafox*; *Rebecca Crooker*; *Jeffrey Chronister*; *Joshua Garry*; *Shaneka Malloy*; *Sara Schreiber*; *Shannon Zahm*, “To Bail or Not to Bail: Protecting the Presumption of Innocence in Nevada,” Nevada Law Journal Forum 3 (2019): 9-90.