

BAIL

■ **Dr. M.N. Buch**

In the high profile cases relating to the Commonwealth Game, allocation of spectrum and alleged attempted bribing of Members of Parliament, the special CBI court, which is a court of sessions, has steadfastly refused to grant bail to the accused. By and large the High Courts and Supreme Court have upheld denial of bail. Without in any way prejudicing the cases under trial or in any way appearing to criticize the judicial orders of the courts concerned, one needs to look at this whole question of bail in some detail. Denial of bail deprives a citizen of his liberty prior to his being convicted in a criminal trial and to that extent a citizen who might ultimately be acquitted has to undergo a period in which his fundamental right to personal liberty enshrined in Article 21 of the Constitution is denied to him. According to the Constitution the freedoms given in Article 19 and the right to personal liberty given in Article 21 are the norm to which every citizen has a fundamental entitlement. So much so that under Article 22 a person arrested must be produced before a Magistrate within twenty-four hours of arrest and may not be detained by the police in custody beyond that period without an order of a Magistrate permitting such detention.

The right to personal liberty is not unlimited and by law it may be curtailed. Under section 41 Cr. P.C., a police officer may arrest without warrant any person against whom there is reason to believe that he might be involved in the commission of a cognizable offence. Section 41 gives other circumstances under which a person may be arrested without a warrant, but still it does not give any arbitrary powers of arrest to the police.

The right of a citizen to personal liberty is further proved by section 57 Cr.P.C. which prohibits the police from detaining a person for more than twenty-four hours without a Magistrate's order and by section 58 which says that every arrest without a warrant must be reported forthwith to the District Magistrate or the Sub Divisional Magistrate who might be so empowered by the District Magistrate. Arrest then becomes an exception and is confined to persons against whom there is reason to believe that they have committed an offence or are in circumstances under which their arrest is justified.

Arrested persons are to be divided into two categories, those involved in a bailable offence and those involved in a non-bailable offence. In a bailable offence under section 436 Cr.P.C. bail must be granted, if asked for, by the officer incharge of a police station or by the court before whom the accused is produced. Under section 436 if the arrested person is indigent the officer incharge of a police station or a court is empowered to release him on a personal bond without sureties because he is unable to furnish surety.

Section 437 Cr.P.C. deals with nonbailable offence. Even in a nonbailable offence, except one which carries the death penalty or the penalty of imprisonment for life, the Magistrate may grant bail. Even in a case where bail may not ordinarily be granted the court may release on bail a person under the age of sixteen, a woman, an accused who is sick or one who is infirm. By and large, the scheme relating to bail is that where the offence is so heinous as to carry a death penalty or imprisonment for life the accused should be held in custody, because he may either abscond or he may terrorise witnesses. These two conditions would apply in other nonbailable cases also where the court has reasonable apprehension to believe that the accused may take illegal steps to either avoid a trial or to subvert the course of justice. In all other matters bail is a right.

No court should use its power of remanding an accused to custody as a means of demonstrating to the world that it is not influenced by the status of an accused person and can send the powerful to jail.

Indian trials are notorious for the period over which they drag on, which means that a person accused of an offence and held in custody will have a very long stay in jail before the outcome of the trial. Suppose the trial ends in acquittal? The period in custody cannot be restored because that part of the arrested person's life has already passed. Will anyone compensate such a person for loss of liberty? Can he be compensated for the humiliation suffered by him by being sent to jail, though subsequently he is acquitted because the case against him cannot be proved? India is governed by the Anglo Saxon Rules of Jurisprudence. One of the basic principles of this school of jurisprudence is that an accused is deemed to be innocent until proved guilty. Under section 101 of the Indian Evidence Act the burden to prove that a person has committed an offence lies on the person or authority accusing that person of having committed the offence. In other words, it is the prosecution which must prove beyond doubt that an accused person has committed the offence of which he is charged. The accused does not have to prove his innocence, though he would be required to rebut the evidence proving his offence so that he can be found not guilty by the court. When principles of law governing us and the Evidence Act both give a presumption of innocence, is it fair to hold a person almost indefinitely in custody and deny him bail?

My submission is that whereas courts should exercise caution in giving bail in cases where this can adversely affect the course of trial or presentation of a case by the prosecution, they must bear in mind that custody has to be the exception and bail must be given as a matter of right. Because of the high profile nature of some cases the courts seem to be leaning over backwards in the other direction. One submits that in all matters balance is desirable and courts should bear this in mind.
