



Procedure Established By Law Demands Fairness In Investigation And Trial

Dr. Kundan Singh

Principal

Unity law college Rudrapur of Kumaon University Nainital.

“A free and fair trial is a sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the minds of the petitioner,”¹

The true nature and scope of the function of the courts has since long been a matter of debate almost in all the countries regulated by written Constitutions. Austinian jurisprudence gives a very narrow view of the judicial function. Austin defined law as a command of the political sovereign and his sovereignty indivisible and absolute, only the legislature could make law. The function of the courts was merely to declare the pre-existing law or to interpret the statutory law. But on the other hand, the realist movement in the United States –the latest branch of sociological jurisprudence which concentrates on decisions of law courts, regards and contends that law is what courts say. For them, Judges are the law makers. The entire common law is the creation of the English courts but is posited on the myth that the judges merely found law. Even with such self-negating perception of their own role, the English judges not only made the law but

* Dr. Kundan Singh, Principal (M.A., LL.M., NET, Ph.D.), Unity Law College, Rudrapur, Kumaun University, Nainital.

¹ [(2004) 3 SSC 788]: (AIR 2004 SC 2753:2004 AIR SCW 1240).

also changed it to suit entirely new conditions created by the industrial revolution.²

In *Zahira Habibulla*³ free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial was held to be a good ground for transfer of case from Gujarat to Maharashtra further, the court said, the golden thread which runs said through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done.

The liberty of an accused cannot be interfered with except under due process of law. The expression ‘due process of law’ shall deem to include fairness in trial. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of fair investigation and trial. Every effort should be made by the print and electronic media to ensure that the distinctions between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled’ to the constitutional protections. Invasion of his rights is bound to be held as impermissible.⁴

In *Nupur Talwar v. Central Bureau of Investigation Anr.*⁵ a Division Bench of the Supreme Court consisting A.K. Patnaik and Jagdish Singh Khehar JJ. held that while dealing with issues as in the instant case, High Courts and this Court have repeatedly observed in their orders, that the trial court would determine the controversy uninfluenced by observations made. Yet, inferences and conclusions drawn by superior courts, on matters which are pending adjudication before trial courts (or other subordinate courts) cannot be easily brushed aside.

Fair trial includes open trial of an offender where the public, media, etc. have

² See, Dr. K.S. Rathore, “Role of Judicial Activism towards Protection and Promotion of Constitutional Rights” AIR, September 2010, Vol. 97, Part 1161.

³ *Zahira Habibulla H. Sheikh v State of Gujarat*, AIR 2004 SC 3114: 2004 AIR SCW 2325.

⁴ *Sidhartha Vashisht @ Manu Sharma v. State (N.C.T. of Delhi)*. AIR 2010 SC 2352.

⁵ AIR 2012 SC 1921.

full access which is also a requirement of section 327, Cr.P.C. A trial held inside jail premises cannot be considered to be unfair for this reason alone if the lawyers, media and public were free to watch the court procedures. In *Md. Shahabuddin v. State of Bihar*⁶ in exercise of its administrative powers under section 6(9), Cr. P.C., the Patna High Court had issued the impugned notification that for expeditious trial, all pending session cases against the appellant shall be tried inside the Siwan district jail premises. The court found nothing wrong in the impugned notification as the trial continues to be fair irrespective of the place where it is held provided all are allowed subject to security.

RIGHT TO SPEEDY INVESTIGATION AND TRIAL

The right to life and personal liberty guaranteed under article 21 of the Constitution includes not only right to fair trial but also the right to fair investigation.⁷ In *Vakil Prasad Singh v. State of Bihar*,⁸ the alleged offence of bribery committed by the appellant took place in April, 1981. After investigation, a charge-sheet was filed in February' 1982 and the offence in December, 1982. The court noted that no proper investigation by competent police officer was conducted in the case even for over seventeen years despite High Court's order made in December, 1990. The requisite sanction for prosecution of the appellant was not taken even till the disposal of the case by the Supreme Court in January 2009. The prosecution could not give any explanation whatsoever for delay in investigation. The appellant was in no way responsible for delay. The court held that the prosecution had failed to show any exceptional circumstance for condoning the callous and inordinate delay of more than two decades in investigation and trial which had violated the fundamental right of the appellant to have a speedy investigation and trial under article 21. The court, therefore, quashed the trial proceedings.

⁶ (2010) 4 SCC 653.

⁷ *Nirmal Singh v. State of Punjab*, AIR 2009 SC 984.

⁸ AIR 2009 SC 1822.

RIGHT TO FREE LEGAL AID

In India because of poverty and illiteracy the people are unable to protect and defend their rights. The right to legal aid was considered as an inalienable element of fair procedure.

In post *Maneka Gandhi*⁹ period the Supreme Court interpreted the provisions of article 21 to review the procedural and substantive aspects of positive law. The right to free legal aid of an indigent and poor accused was first time considered by the Supreme Court in *Madhav Hayawadanrao Hoskot v. State of Maharashtra*.¹⁰ His Lordship Justice Krishna Iyer who delivered the judgment by referring *Maneka Gandhi's case* viewed that the procedural safeguards are the indispensable essence of right to life and personal liberty. A provision of free legal aid to a prisoner who is indigent, poor, or otherwise disabled from securing legal assistance, where the ends of justice call for such service, is the responsibility of state under article 21 of the Constitution.

The importance of right to free legal aid of the poor accused was considered and further discussed by His Lordship Justice P.N.Bhagwati in *Hussainara Khatoon(II) v. Home Secretary, State of Bihar*.¹¹ The court finds that there are several under – trial prisoners who are charged with offences which are bailable but who are still in jail because they are unable to furnish bail due to poverty indigence and illiteracy. The court pointed out inadequacy in legal services. The judgment emphasized that free legal aid is an unalienable element of ‘reasonable, fair and just’ procedure under article 21 of the Constitution. The denial of legal aid to such accused shall have effect of deprivation of his liberty without following the ‘reasonable, fair and just’ procedure.

In *Sheela Barse v. State of Maharashtra*,¹² the court directed the Maharashtra State

⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597: (1978) 1 SC 248.

¹⁰ AIR 1978 SC 1548.

¹¹ AIR 1979 SC 1369.

¹² AIR 1983 SC 378.

Board of Legal Aid and Advice to prepare a pamphlet setting out the legal rights including right to legal aid of an arrested person.

Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial cannot be regarded as reasonable, fair and just.¹³

In *Kulbhushan Jadhav case (India v. Pakistan)* International Court of Justice, Hague order dated 18th May, 2017. In its request for provisional measures, India stated that “international law recognises the sanctity of human life.”¹⁴ In cases in which a foreign national is arrested, convicted and sentenced to death, the right to consular access, and to seek the assistance of their home country “fulfills the aspiration of fair trial in a foreign state.”¹⁵ Justice Dalveer Bhandari was agree with this statement.

In *Mohammed Ajmal Mohammed Amir Kasab v. State of Maharashtra*,¹⁶ 2 Judges Bench consisting justices Aftab Alam and Chandramauli Kr. Prasad of the Supreme Court held that the right to be defended by a legal practitioner comes into force only on the commencement of trial as provided under S. 304 of the Cr. P.C. He needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage 3 of framing of charges against him and he would, of course, need a lawyer to defend him in trial. It is therefore, the duty and obligation of the Magistrate before whom a person accused of

¹³ Mohammed Husain alias Julfikar Ali v. State (Govt. of NCT), Delhi, 2012 Cri.L.J. SC 1069.

¹⁴ Request for provisional measures, para 17.

¹⁵ Ibid.

¹⁶ 2012 Cri. L. J. SC 4770.

committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice that one would be provided to him from legal aid at the expenses of the state. The right flows from Articles 21 and 22(1) of the Constitution and need to be strictly enforced. Supreme Court as such directed all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned Magistrate liable to departmental proceedings.

Thus, in *Union of India v. G.S. Bajwa*¹⁷, an Air Force officer claimed that he has been denied legal aid and thus his right to life has been infringed. There is no provision for such aid in the Air Force Act, 1950. The court held that where the statute does not provide for giving legal aid to the employee, it cannot be implied in Article 21. But, strictly speaking, a fundamental right cannot be controlled by a statute.

RIGHT TO SPEEDY TRIAL

A “speedy trial”, albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in “fair trial”, both being inalienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial.¹⁸

“if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this court is well within its powers under Article 32 to

¹⁷ AIR 2004 SC 808; *Confederation of Ex. Servicemen Association v. Union of India*, AIR 2006 SC 2945.

¹⁸ *Pooja Pal v. Union of India & ors.* AIR 2016 SC1345.

hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.....”.¹⁹

In *V. Sriharan v. Union of India*²⁰ The SC held that exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable. Further more, such imprisonment, occasioned by inordinate delay in disposal of mercy petitions is beyond the sentence accorded by the court and to that extent is extralegal and excessive. Therefore, the apex constitutional authorities must exercise the power u/a 72/161 within the bounds of constitutional discipline and should dispose of the mercy petitions filed before them in an expeditious manner.

The mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, resulting in impairing the capability and ability of the accused to defend himself, have persuaded the constitutional courts of the country to hold the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in article 21 of the Constitution. *Rudal Shah v. State of Bihar*,²¹ is a glaring example. In *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*,²² the Court held that though speedy trial is not specifically mentioned in our Constitution, it is implicit in the broad sweep and contents of Article 21 as interpreted in *Maneka Gandhi v. Union of India*.²³ The Court held that ‘procedure prescribed by law for depriving a person of his liberty cannot be ‘reasonable’, fair and just unless that procedure ensures a speedy trial for determination of the guilt of such person.²⁴ Similarly, when investigation commenced in November 1976 and the Court took cognizance after ten years in March 1986, the Supreme Court quashed the proceedings on the ground of

¹⁹ Shatrughan Chauhan & Anr. v. Union of India & Ors, AIR 2014 SCW 793.

²⁰ AIR 2014 SC 1368.

²¹ AIR 1983 SC 1086 : (1983) 4 SCC 141.

²² AIR 1979 SC 1360 : (1980) 1 SCC 81.

²³ AIR 1978 SC 597 : (1978) 1 SCC 248.

²⁴ Kadra Pehadiya v. State of Bihar, AIR 1981 SC 939.

delay in investigation and commencement trial.²⁵

Personal liberty is one of the cherished goals of the Indian Constitution and the deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under article 21 of the Constitution. The Supreme Court has settled the legal position²⁶ that to have speedy justice is a fundamental right, which flows from article 21 of the Constitution. Despite the clear pronouncements of the court on this point, cases involving delay in trial keep coming before the court.

The right to life and personal liberty guaranteed under article 21 includes right to speedy trial²⁷ but mere long delay in trial cannot be the ground for quashing a prosecution. In *P. Vijayan v. State of Kerala*,²⁸ a naxalite leader was arrested on 18.2.1970 for various offences. While being taken to the police station, he allegedly tried to escape and attacked the policemen which led to a clash in which police opened fire and the naxalite leader was killed. Till 1998, there was no allegation of killing in a fake encounter. When reports started appearing in the press in 1998 about fake encounter, a CBI investigation was ordered by the High Court of Kerala. CBI registered a case in 1999 and the charge-sheet naming three persons including the appellant was filed in 2002. The appellant filed an application for discharge under section 227, Cr. P.C. pointing out various reasons such as his meritorious Service and that nothing had been heard for a very long period but the same was rejected by the trial court without any detailed reasons which order was upheld by the High Court. In appeal before the Supreme Court, *P. Sathasivam J.* upheld the order of the courts below observing that while considering an application for discharge, the trial court had only to consider the application on the basis of documents and records as to whether there was “sufficient ground” for proceeding against the accused. In that case

²⁵ Srinivas Gopal v. U.T. of Arunachal Pradesh, AIR 1988 SC 1729 : (1988) 4 SCC 36.

²⁶ Abdul Rehman Antulay v. R.S.Nayak, (1992) 1 SCC 225; Common Cause, A Registered Society v. Union of India (1996) 4 SCC 33; and (1996) 6 SCC 775 and Raj Deo Sharma v. State of Bihar, (1998). 7 SCC 149.

²⁷ Vakil Prasad Singh v. State of Bihar, AIR 2009 SC 1822; Mohd. Maqbool Tantray v. State of J and K (2010) 12 SCC and 21.

²⁸ (2010) 2 SCC 398.

no arguments had been advanced about delay in prosecution resulting in violation of article 21.

In *Sajjan Kumar v. CBI*,²⁹ the appellant was accused of his involvement in anti-sikh riots which had taken place in October, 1984 and charges were framed against him in May 2010 by the trial judge under various sections of the Indian Penal Code, 1860. It was contended that the continuation of the prosecution after about 23 years was against the protection provided by article 21 of the Constitution. Sathasivam J, relying on his own decision in *P. Vijayan*, held that though delay was also a relevant factor and every accused was entitled to a speedy trial under article 21, it would depend on various factors/reasons and materials placed by the prosecution. The learned Judge further held that in the instant case, “though delay may be a relevant ground, in the light of the materials which are available before the court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay..... Those materials have to be tested in the context of prejudice to the accused only at the trial.

The Supreme Court in *Common Cause (I)*,³⁰ *Common Cause (II)*,³¹ *Raj Deo Sharma (I)*³² and *Raj Deo Sharma (II)*,³³ laid down bars of limitation beyond which the trial shall not proceed and the accused shall be acquitted. These decisions were either of two judge bench or three judge bench strength. But these directions fixing the time limit within which the trial should be completed were contrary to the observation of the Constitution bench in *Abdul Rehman Antulay v. R.S. Naik*,³⁴ wherein the Supreme Court had observed that “it is not possible to lay down any time schedules for conclusion of criminal proceedings” and it was further observed that “it is neither advisable nor feasible

²⁹ (2010) 9 SCC 368.

³⁰ ‘Common Cause’ –A Registered Society v. Union of India, (1996) 4 SCC 33.

³¹ ‘Common Cause’ –A Registered Society v. Union of India, (1996) 6 SCC 775.

³² *Raj Deo Sharma v. State of Bihar*, (1998) 7 SCC 507.

³³ *Raj Deo Sharma v. State of Bihar*, (1999) 7 SCC 604.

³⁴ (1992) 1 SCC 225.

to draw or prescribe an outer time limit for conclusion of all criminal proceedings.”³⁵

In *Mohd. Hussain Alias Julfikar Ali v. State (Govt. of NCT), Delhi*,³⁶ the Supreme Court held that ‘speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy trial have to be weighed *vis-a-vis* the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused by it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

CONCLUSION

The true nature and scope of the function of the courts has since long been a matter of

³⁵ Id. At 268-69.

³⁶ (2012) Cri. L. J. SC 4537.

debate almost in all the countries regulated by written Constitutions. *A.K. Gopalan*³⁷ was the initial example where the Supreme Court did not favour the due process principle except Justice Fazl ali in his dissenting opinion. Although the interpretation given by the Apex Court in *Gopalan* was very consistent with the intention of the framers of Constitution but the abrogation of individual's fundamental rights was a matter of debate. It is submitted that the liberal interpretation of the phrase 'procedure established by law' in *Maneka Gandhi*³⁸ the court seems to have taken into account the philosophy of law in interpreting the phrase 'procedure established by law' in term of not only what "it is" but also what "it ought to be" and thereby seems to have moved towards due process.³⁹

While it is true that fundamental rights of a citizen cannot be taken away even by an order of court except where a restriction is placed by statute such as remanding an accused to judicial custody, no right of appellants has been curtailed by Supreme Court by order which provides that any request for stay or impeding progress in investigation or trial of Coal Block Allocation cases can be made only to Supreme Court and no other Court shall entertain any such request. Supreme Court is undoubtedly obliged to protect fundamental rights of people in country in accordance with Constitution, but it is equally true that while doing so public interest cannot be flung out of window. It is now time for all including courts to balance right of an accused person vis-à-vis rights and interests of individual victims of a crime and society. Very often, public interest is lost sight of while dealing with an accused person and rights of an accused person are given far greater importance than societal interests and more often than not greater importance than rights of individual victims. This is a delicate balance to be struck and one does not see any curtailment of any fundamental right of appellants or any violation of any substantive law if there is a change in forum in exercise of rights of appellants given nature of allegations against them and wide impact on society. It is not as if appellants have

³⁷ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

³⁸ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597: (1978) 1 SC 248.

³⁹ Also see. Dr. K.S. Rathore, "Procedure Established by Law vis-à-vis due process: An Overview of Right to Personal Liberty in India", *Ujala – Judicial and Legal Review*, Vol. 2, issue no. 1.

been denuded of their rights. It is only that their rights have been placed in proper perspective and they have been enabled to exercise their rights before another forum.⁴⁰

Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time. Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of under trials in custody is one of the priority areas. There are obstructions at every level in enforcement of tight of speedy trial vested interests or unscrupulous elements try to delay the proceeding.⁴¹ Delay in criminal trial violative of right guaranteed under Art. 21 of Constitution.⁴²

The Supreme Court of India played a vital role in almost every part of the society through its self generated concept of judicial activism. Without judicial activism executive and legislature shall become unbridled horse.⁴³ Article 21 is one of the luminary provisions in the Constitution and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. With the defining of the word 'life' in a broad and expansive manner, the court in a very creative manner took a step to improve the quality of life and to imply them from a bundle of rights for the people.

It is submitted that political social and economic changes in the country entail the recognition of new rights. The frontiers of Art. 21 are still expanding and its new dimensions are still being explored by the courts. It is quite possible that, in course of time, the courts may possibly be able to imply some more rights for the people out of Art. 21 became the concept of a 'dignified life' guaranteed by Art. 21 seem to be inexhaustible in range and scope.

⁴⁰ Girish Kumar Suneja v. C.B.I., AIR 2017, Supreme Court 3620.

⁴¹ Hussain v. Union of India, AIR 2017, Supreme Court 1362.

⁴² Umarmia v. State of Gujarat, AIR 2017, Supreme Court 721.

⁴³ See Dr. K.S. Rathore, "Historical Overview of Judicial Activism in India", Indian Bar Review Vol. XXXIX (2) 2012.