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DISCRETION WITH REGARD TO DIFFERENT AGENCY AT PRE-TRIAL STAGE

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Abstract

In a criminal trial, the procedure is governed by the Code of Criminal Procedure, 1973. There are three basic stages of trial which are, *Investigation* (where evidence are to be collected), *Inquiry* (a judicial proceeding where the judge ensures for himself before going on trial, that there are reasonable grounds to believe the person to be guilty) and *Trial*. Here, investigation and inquiry fall under the pre-trial stages of a criminal proceeding. The principal object of criminal law is to protect the society by punishing the offenders. However, justice and fair play require that no one should be punished without a fair trial. A person might be under suspicion of guilt, might have been caught red handed, and yet he's not to be punished unless and until he is tried and adjudged to be guilty by a competent court. Here the researcher is focusing on the power of Public Prosecutor in pre-trial Stage.

Introduction

In the administration of justice, it is of prime importance that justice should not only be done but should seem to be done. Further, it is one of the cardinal principles of criminal law that everyone is presumed to be innocent unless his guilt is proved beyond reasonable doubt in a trial before an impartial and competent court. Therefore, it becomes absolutely necessary that every person accused of crime is brought before the court for trial and that all the evidence appearing against him is made available to the court for deciding as to his guilt or innocence.

Now the moot question here arises is that how and by whom would the accused person be brought before the court for trial? or how and by whom is the evidence concerning the alleged crime would be collected and presented before the court? Usually, the victims of the crime or the persons feeling offended or aggrieved by the crime would be most likely to be interested in setting the criminal law in motion. Justice suggests that such persons should be allowed and also be given all the facilities to move the machinery of

law against the alleged culprits. According to the Criminal Procedure Code, *any person* can approach a competent Police Officer/Judicial Magistrate and lodge a complaint with him regarding the commission of an offence.[1] The Magistrate may then get the matter further investigated by the police, or may have an enquiry made into the case with a view to ascertain whether there is sufficient ground for proceeding.[2] If in the opinion of the magistrate there is sufficient ground for proceeding into the case, he would issue summon/warrant for securing the attendance of the accused person for his trial.[3] A special State agency has been established exclusively devoted to the task of detection and prevention of crime. The State recruited the police personnel and especially trained them. The Criminal Procedure Code invested them with special powers of interrogation, arrest, search etc. so as to enable them to collect evidence and to bring the accused before the court expeditiously for trial.

1.1 Stages of Criminal Case before Trial:

Criminal prosecution develops in a series of stages, beginning with an arrest and ending at a point before, during or after trial. The majority of criminal cases terminate when a criminal accepts a plea bargain offered by the prosecution. In a plea bargain, the accused chooses to plead guilty before trial to the charged offences or to lesser charges in exchange for a more lenient sentence or the dismissal of related charges. However, criminal prosecution typically begins with an arrest by a police officer. A police officer may arrest a person if: (i) the officer finds the person committing a crime; (ii) the officer has probable cause to believe that a crime has been committed by that person; (iii) the officer makes the arrest under the authority of a valid arrest warrant. After the arrest, the suspected person is kept in police custody.

On receiving information about a cognizable offence police register FIR and commence investigation. They collect evidence, arrest the accused and produce him before Magistrate and secure orders for police custody or judicial remand. On completion of investigation, if the police feel that no prima facie case is made out final report will be filled before court. If the investigating agency feels that a prima facie case is made out, it will file a charge sheet before court. The Magistrate has to pass necessary orders on final reports and charge sheets. Depending on the order of Magistrate the case will be either dropped or put forwarded for charges and trial.

1.2 Role of Police in Pre-Trial Process:

The Police are the Chief Investigative Agency of the State. Police are governed by various State and Central laws. Administratively police is independent from Directorate of prosecution and the judiciary. As a

[1] Section 154, 190, CrPC, 1973.
[2]Section 201, CrPC, 1973.
[3]Section 204, CrPC, 1973.

principle, it is said that the court does not possess any supervisory jurisdiction over police and their investigation.[4] There is clear cut and well demarcated sphere of activity for the police in crime detection and that is the Executive power of the State.[5] During this investigative stage of pre-trial, discretionary powers have been exercised by the police officers. Police examines witnesses and record their statements, collect material objects, conduct searches and seizures, arrest the accused, record their statements and confessions, arrange for test identification parades, obtain scientific reports and opinions from experts and prepare a case diary of all of it for each of the cases investigated. Police also have to look after the safety and security of the public from the criminals.

Pre-trial discretionary power has been provided to the police officers under various laws in India. As Section 23, Police Act, 1861 provides that it shall be the duty of every police officer to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisance; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient grounds exist. On the other hand, Section 29, Police Act, 1861 provides for penalties for the neglect of such duties.

The Criminal Procedure Code, however, does not contemplate the use of the police in respect of investigation into each and every offence. The Code has classified all offences into two categories, viz., *cognizable*[6] and *non-cognizable*.[7] A police officer is competent to investigate and apply his discretionary powers only in case of cognizable offences. Non-cognizable offences cannot be investigated by the police without obtaining prior orders from the court. In case of cognizable offence, it is the responsibility of the State and the police to bring the offender to justice. Exceptions apart, the non-cognizable offences are considered more in the nature of private wrongs and therefore, the collection of evidence and prosecution of the offender are left to the initiative and efforts of private citizens. However, if a Judicial Magistrate considers it desirable that a non-cognizable case should be investigated into by the police, he can order the police to do so. Here the police officer will have all the powers in respect of investigation, except the power to arrest without warrant, as he would have exercised if the case were a cognizable one.[8]

Gathering and collecting evidence may span a number of days or weeks, yet law requires the accused to be brought before a court within 24 hours of arrest.[9] The power to arrest and the discretion whether to arrest or not is always vested with the police.[10] The police arrest on the basis of probable cause to believe

[4]*T. T. Anthony v. State of Kerala*, 2001 (2) ALD (Crl) 276 (SC)
[5]*State of Bihar v. J.A.C. Saldamna*, AIR 1980 SC 326
[6]*Section 2 (c), CrPC, 1973: "cognizable offence"* means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant
[7]*Section 2 (l), CrPC, 1973: "non- cognizable offence"* means an offence for which, and "non- cognizable case" means a case in which, a police officer has no authority to arrest without warrant
[8]Section 155 (2), (3), CrPC, 1973
[9]Section 53, CrPC, 1973
[10]Section 41 A, CrPC, 1973

that an individual has broken the law. When the police feel there are grounds for believing that the accusation is well founded they transmit the accused and case diary to the Magistrate for remand orders.[11]

The power to grant bail also gives a discretionary power in the hands of police. However, bail is a matter of right if the offence is bailable. But bail can only be a matter of discretion if the offence is non-bailable. This scope of discretion depends upon various considerations:

i. It varies in inverse proportion to the gravity of crime. As the gravity of the offence increases, the discretion to release the offender on bail gets narrowed down.

ii. As between the police officers and the judicial officers, wider discretion to grant bail has been given to judicial officers.

iii. Amongst the judicial officers and the courts, a High Court or a court of session has far wider discretion than that given to other courts and judicial officers.

While considering the scope of discretion, one important thing should always be kept in mind, i.e., whether the discretion in granting bail is narrow or wide, it is not to be used in an arbitrary manner. Here, 'discretion' means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful but legal and regular. The discretion to grant bail in non-bailable offences has to be exercised according to certain rules and principles as laid down by the Code. When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, other than High Court or Court of Session, he *may* be released on bail.[12] The word *may* here clearly indicate that the police officer or the court has got discretion in granting the bail to the accused person. However, there are certain principles which should guide the police officers or the court in the exercise of discretion. It should be noted that the object of detention pending the criminal proceedings, is not punishment and that the law favours allowance of bail, which is the rule and refusal an exception.[13]

The object of this provision appears to be to put pressure on the investigating agency to complete the investigation expeditiously and within a reasonable time. This rigid, mandatory provision, however, appears to be somewhat in direct conflict with the basic policies underlying the law of bail.

It may be noted here that once the bail is granted under Section 167 (2), the provisions of Chapter XXXIII of the Code have been made applicable for subsequent dealing with bail matters. For instance, the court can cancel the bail under Section 437 (5) as if the bail was originally granted under Chapter XXXIII of the Code. This legal fiction may enable the court to exercise judicial discretion in cancelling the bail in the

[11]Section 167 (1), CrPC, 1973
[12]Section 437 (1), CrPC, 1973
[13]*Gurucharan Singh v. State (Delhi Administration),* (1978) 1 SCC 118

granting of which it had no discretion whatsoever. In a case where it is found that the person released on bail under the mandatory provision of proviso (a) to Section 167 (2) is misusing his freedom by tampering with the prosecution witnesses or by attempting to flee from justice by absconding, the bail may rightly be cancelled in view of this legal fiction. Staying the operation of bail order has been resorted to. The power to do this has been located under Section 482. Holding power under Section 439 (2) to cancel bail independently of Section 397, it is argued by the researcher that the power to suspend which is ancillary to power to cancel is inherent in the High Court under Section 482 of the Code.

While computing the total period of 60 or 90 days, the period of detention under Section 57 has to be excluded. Where the magistrate grants remand under Section 167, the custody thereafter is under the orders of the magistrate. Therefore, while computing the abovementioned period of 60 or 90 days, the day on which custody is granted by the magistrate cannot be excluded.[14]

However, there has been differing views with regard to the computation of the period of 60 or 90 days as the case may be. While one view preferred is to count the period from the day of arrest, the other view is that it should be counted from the day of remand by the Magistrate.[15] In such computing, the day of judicial custody or the date of submission of challan has to be excluded as required under Section 9 and 10 of General Clauses Act, 1897 and clear 90 days have to expire before the right to bail begins.

It has also been held that it is only the police custody which will be taken into consideration when an accused is held in custody by the authorities. In *Directorate of enforcement v. Deepak Mahajan,*[16]the Supreme Court held that a person accused of an offence under FERA or Customs Act shall be entitled to remand under Section 167 (2) of CrPC. The magistrate can take the accused into custody on his being satisfied of three preliminary conditions, namely, (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the arrest or the accusation for which the person is arrested or other grounds for such arrests do exist and are well founded; and (3) that the provision of the arrestee serves the purpose of Section 167 (1).

Until this stage, Public Prosecutor is not notified about these events. Even at the time of remand decision on part of Magistrate, there is no power or duty or discretion for the Public Prosecutor to state about the case to court. It is the court's responsibility and power whether the accused is to be remanded to further Custody or granted bail or released altogether. It is the Magistrate who has ultimate control over police investigation.[17] Thus, the arrest decisions of police are not supervised by prosecutors and the courts alone are empowered to review arrest decisions of police.

[14]*Jai Singh v. State of Haryana*, (1980) CrLJ 1229 (P & H)
[15]*Jagdish v. State of MP*, (1984) CrLJ 79 (MP)
[16](1994) 3 SCC 440
[17]*Ramesh Kumar Ravi alias Ram Prasad v. State of Bihar*, 1987 CrLJ 1489 (Patna HC)

But the personal liberty of the accused should be taken into consideration, as law also does not tolerate the detention of any person without legal sanction. This right of personal liberty is a basic human right and is also recognized by the General Assembly of the United Nations in its Universal Declaration of Human Rights. This is also included in the Convention on Civil and Political Rights to which India is now a party. Our India Constitution also recognizes it as a fundamental right under Article 21.[18] Further, the procedure contemplated by this article must be right, just and fair and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.[19] Thus, personal liberty being the cornerstone of our social structure, the legal provisions relating to arrests has special significance and importance.

Now when the accused person is arrested[20] by the police officer, post-arrest procedure is ensured and police officer applies his pre-trial discretionary power at this stage of investigation. *Investigation* is conducted by the police officer or by any person who is authorized by the magistrate (other than a magistrate).[21] The Supreme Court has viewed the investigation of an offence as generally consisting of –

1) Proceeding to the spot;
2) Ascertainment of facts and circumstances of the case;
3) Discovery and arrest of the suspected offender;
4) Collection of evidence relating to the commission of the offence which may consist of –
    a) Examination of various persons including the accused and the reduction of their statements into writing, if the officers think fit;
    b) The search of places or seizure of things considered necessary for the investigation or to be produced at the trial; and

[18]Article 21, Constitution of India: No person shall be deprived of his life or personal liberty except according to procedure established by law.

[19]*Maneka Gandhi v. Union of India*, AIR 1978 SC 597

[20]*Arrest How Made: Section 46, CrPC, 1973*: (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

[21]*Section 2 (h), CrPC: "Investigation*" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

5) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by filing of a charge-sheet under Section 173, CrPC.[22]

Two steps are important in the process of investigation, viz., discovery and arrest of the suspected offender and the search of places and seizure of things considered necessary for the investigation, inquiry or trial. The principal agency for carrying out the investigation of offences is the police; and to make this agency an effective and efficient instrument for criminal investigations, wide discretionary powers have been given to the police officers. Apart from the duty of the public to give information to the police in respect of certain serious offences,[23] an investigating police officer can require the attendance of persons acquainted with the facts and circumstances of the case under investigation.[24] He can examine the witnesses and can record their statements.[25] Sections 154 to 176, CrPC deal with "information to the police and their powers to investigate". These sections have made very elaborate provisions for securing that an investigation does take place into a reported offence and the investigation is carried out within the limits of the law without causing any harassment to the accused and is also completed without unnecessary or undue delay.

Section 51, CrPC empowers a police officer to make a search of the arrested person under certain circumstances, which may prove useful for proper investigation. If incriminating things or stolen articles are found in such search, the police officer can seize them under Section 102 and produce them in court. Section 51, CrPC is as follows: *Search of Arrested Person:*

> "(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and
>
> whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, and
>
> the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing- apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.
>
> (2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency."

Though this section does not require the search to be conducted in the presence of witnesses, the rules made under the Police Act direct that the search should be made in the presence of witnesses. The

[22] *H.N. Rishbud v. State of Delhi,* AIR 1955 SC 196
[23] Section 39, 40, CrPC, 1973
[24] Section 160, CrPC, 1973
[25] Section 161, CrPC, 1973

witnesses should be independent and respectable. It has been observed by the researcher that this power to search under Section 51 is available only if the arrested person is not released on bail. After the search, all the articles other than necessary wearing apparels found upon the arrested person are to be seized and it has been made obligatory to give to the accused a receipt showing the articles taken in possession by the police. This would ensure that the articles seized are properly accounted for. In case the arrested person is a *woman*, the search can be made only by a *female with strict regard to decency*. But simply because there was some irregularity in making such search that in itself will not make the search evidence inadmissible.[26]

Further, *Section 52* of the Code provides that the police officer or any other person, whoever is making an arrest under this Code, may take from the person of the arrested person, any offensive weapons which he has about his person and shall deliver all weapons so taken to the court or officer concerned before whom the person making the arrest is required to produce the arrested person. This section also gives wide discretionary powers to the police officers for search and seizure from the person of the accused.

Another important pre-trial point is medical examination of the accused after arrest. To facilitate effective investigation, provision has been made under the CrPC authorizing an examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or the circumstances under which it was alleged to have been committed, there is reasonable grounds for believing that an examination of the person of the accused will afford evidence.

The words "*there are reasonable grounds for believing that an examination of the person of the accused will afford evidence*" under Section 53 and 53 A, CrPC provides scope for discretion to be used by the police officer to get the accused medically examined if there are chances that it will adduce evidence regarding the concerned case.

Section 53, CrPC says examination of the accused by medical practitioner at the request of the police officer. When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose. And there is a female to be examined under this section the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

[26]*KamalabaiJethamal v. State of Maharashtra,* AIR 1962 SC 1189

On the other hand, *Section 53 A* of the Code, which was introduced by the Criminal law Amendment Act, 2013 provides for the examination of the accused of offence of rape by a medical practitioner. When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely,

(a) the name and address of the accused and of the person by whom he was brought,

(b) the age of the accused,

(c) marks of injury, if any, on the person of the accused,

(d) the description of material taken from the person of the accused for DNA profiling, and

(e) other material particulars in reasonable detail.

The medical examination report shall state precisely the reasons for each conclusion arrived at.The exact time of commencement and completion of the examination shall also be noted in the report.The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.

Here, the moot question might arise that whether this provision is violative of the constitutional privilege against self-incrimination. The Law Commission in its 37th report after considering the decision of the Supreme Court in the case of *State of Bombay v. Kali KaluOghad*[27], has expressed the view that the decision has the effect of confining the privilege under Article 20 (3), Constitution of India to only testimony written or oral. Relying on this case, the researcher opine that Section 53 is not violative of Article 20 (3) and that a person cannot be said to have been compelled to be a witness against himself if he is merely required to undergo a medical examination in accordance with the provisions of Section 53.

[27]AIR 1961 SC 1808

The medical examination under this section may take various forms. It cannot be restrictively confined only to the examination of the skin or what is visible on the body itself. The examination of some organs inside the body for the purpose of collecting evidence may be necessary and such an examination cannot be held to be beyond the purview of this section. Examination by a medical practitioner can be examination by testing his blood, sputum, semen, urine etc. It may include X-ray examination or taking electro-cardiograph depending upon the nature of the case.[28]

The medical examination of the accused person contemplated under this section has been interpreted by the ratio decidendi of the Supreme Court case of *Selvi v. State of Karnataka*[29] wherein it held that no individual should be forcibly subjected to any of the techniques, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty of the accused person. The compulsory administration of the impugned techniques violates the right against self-incrimination. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20 (3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20 (3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the tests bear a testimonial character and they cannot be categorized as material evidence.

The then Chief Justice of India, Shri K.G. Balakrishnan opined that subjecting a person to the techniques to extract evidence in an involuntary manner violates the prescribed boundaries of privacy. He reiterated the proposition laid down in an earlier decision of *NandaniSathpathy v. PL Dani*[30] that the use of certain scientific tests during investigation or trial stage results into the "dilution of constitutional rights" and at the same time "comes into conflict with the right to fair trial".[31] To arrive at this conclusion, the Judge drew comfort from the rights enumerated or otherwise implicit in the Indian Constitution and also the procedural laws which form the basis of criminal justice system.

A police officer can examine witnesses under S.161, CrPC, 1973. However, the statements are not to be signed by the witnesses. Section 161 of the CrPC is titled "Examination of witnesses by Police"[32] and clause (2) provides that any person "supposed to be acquainted with the facts and circumstances of the case" shall be bound to "answer truly all questions put to him" other than questions which would "expose him to a criminal charge". On the other hand, Article 20 (3) of the Indian Constitution provides that "no person accused of an offence shall be compelled to be a witness against himself". The rule therefore, is to "answer

[28]*Neeraj Sharma v. State of UP*, 1993 CrLJ 2266 (All.)
[29]AIR 2010 SC 1974
[30](1978) 2 SCC 424
[31]Supra n.31 at 30
[32]Section 161 of CrPC reads that "any police officer making an investigation may examine orally any person supposed to be acquainted with the fact and circumstances of the case.

truly all questions" with only one exception: the questions put should not have a tendency to "self – incriminate". In contrast, under S.27 of the Indian Evidence Act (IEA), 1872[33] provides that if any information revealed by an "accused" in police custody whether as a "confession" or otherwise, subsequently leads to the discovery of a relevant fact or facts in issue, the fact so discovered will be admissible as evidence in the court. It is imperative to examine the meaning of "accused" in the present context. Does "accused" in Article 20 (3) and S.27 of the IEA restrictively mean persons facing "formal accusation" or extend also to potential candidates who are likely to get "exposed" to a criminal accusation? This was answered by the court in *Romesh Chandra Mehta v. State of West Bengal*,[34] where the court observed that normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence".[35] This observation was cited with approval in *Balkishan A Devidayal v. State of Maharashtra*[36] wherein court held that only a person against whom a formal accusation of the commission of an offence has been made can be a person "accused of an offence" within the meaning of Article 20 (3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court.[37]

Here Section 27 of the IEA will also have no application qua "suspects" and "witnesses" who although may or may not "expose" themselves to a "criminal charge", are certainly not "formally accused" at the time of making any statement in police custody. Thus, what is the relationship between Section 27 of the IEA and under Article 20 (3) could a person "accused of an offence" who is "supposed to be acquainted with the facts and circumstances of the case" be otherwise protected from the vices of Section 27 of the IEA? In other words, is Article 20 (3) a provision in itself, or does it impliedly take into consideration limitations of Section 27 of the IEA such that an "accused" making any statement in a police custody whether as a "confession" or otherwise, could be admissible to the extent that it can be proved by the subsequent discovery of facts? To this question, Justice Balakrishnan responded thus that Section 161 (2) of the CrPC and Article 20 (3) share the common purpose which is to prevent "forcible conveyance of personal knowledge that is relevant to the facts in issue".[38] "Reading conjunctively" Section 27 of the IEA and Article 20 (3) he added that "we have already explained…that if the fact of compulsion is proved, the test results

[33]Section 27, Indian Evidence Act, 1872 : "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."
[34](1969) 2 SCR 461
[35]Ibid. at 472
[36](1980) 4 SCC 600
[37]Ibid.
[38]Supra n.31 at 37

will not be admissible as evidence".[39] The Judge explained this conceptual distinction by reproducing an earlier precedent where it was observed that if the self-incriminatory information has been given by an accused person without any threat that will be admissible in evidence and that will not be hit by the provisions of Article 20 (3) of the Constitution for the reason that there has been no compulsion. It was thus held that the provisions of Section 27 of the IEA are not within the prohibition aforesaid, unless compulsion has been used in obtaining information.[40]

Does this imply that Section 27 of the IEA will have no force with respect to self-incriminatory information obtained as a result of *involuntary tests* conducted on accused persons against the mandate of Article 20 (3)? The answer is in the affirmative. But what about a situation when an accused is compelled to reveal information which in his personal knowledge although not self-incriminatory has a tendency to expose "any other person" to a criminal charge? In this light, the researcher analyzed Section 161 (2) of the CrPC which has similar legal implications. Can a person seek protection under this section against *forcefulquestions* put to him which tend to incriminate *any other person* who in his personal knowledge is willfully evading criminal accusation in that case? Here the commonality shared by Article 20 (3) and Section 161, CrPC is that of protection ensured is against *involuntary self-incrimination* and not *involuntary incrimination of any other person.* In other words, the right guaranteed is only against *forceful self-incrimination* and not *forceful incrimination* per se. The use of the words "witness against himself and "expose himself to a criminal charge" occurring in Article 20 (3) and Section 161 (2) of CrPC respectively, signify that the protection guaranteed is only against making a statement which is self-incriminatory and not a statement which incriminates any other person.[41] This is because Section 161 (2) read with Section 161 (1) of CrPC casts an obligation on a person *acquainted with the facts of the case* to *answer truly all questions relating to such case put to him.*

Another important provision regarding this issue is Section 179, IPC. This section criminalizes refusal to answer questions "demanded" by a public servant and provides for punishment which may extend to 6 months.[42] The use of the word "demanded" as opposed to "requested" suggests that a public servant can even go to the extent of "compelling" a person to state relevant information that is known to him. In other words, while Section 179, IPC should not be unsheathed too promiscuously and teasing to tense law people into vague anxiety and a transforming compulsion. It is otherwise perfectly within the constitutional limits of Article 20 (3). Section 179, IPC when read with Article 20 (3) and Section 161 (2), CrPC gives only one conclusion, ie., a public servant can "compel" any person to state information relevant to a particular case in

[39]Supra n.31 at 38
[40]*State of Bombay v. KathiKaluOghad,* AIR 1961 SC 1808
[41]Ibid.
[42]Section 179, IPC: "Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both".

order to "expose" all persons of criminal worthiness save only his accomplice, if any, and if such information is revealed in police custody by an accused, Section 27, IEA will be attracted. It follows that compulsion is justified to extract information, in or outside police custody, which incriminates "any other person" not being the subject himself or his accomplice.

Here the researcher would like to draw the attention that Justice Balakrishnan failed to observe that "compulsion" in the form of "involuntary" administration of tests to be a witness in a criminal case is not always against Article 20 (3) and Section 161 (2), CrPC. Involuntary administration of such tests can be lawful if administered to extract information from persons who are supposed to be acquainted with the facts and circumstances of the case but are not exposing themselves or their accomplices, if any, to a criminal charge.

Therefore, the conclusion drawn here by the researcher is that any person *acquainted* with the facts of a case can be *compelled* to be a witness, but such *compulsion* shall not be to expose him or his accomplices to a criminal charge, whether directly or indirectly. Even no police officer or other person in authority shall offer or make any such inducement, threat or promise as is mentioned under Section 24, IEA.[43] But no police officer or other person shall prevent, by way of caution or otherwise, any person from making any statement in the course of investigation, which he may be disposed to make of his own free will.[44] Secondly, any person other than a person facing formal accusation does not have a fundamental right against self-incrimination but only a statutory right against involuntary self-incrimination flowing from Section 161 (2), CrPC.

During investigation, the statements of witnesses should be recorded as promptly as possible. Unjustified and unexplained long delay on the part of the investigating officer in recording a statement of a material witness during the investigation may render the evidence of such witness unreliable. In the light of surrounding circumstances, the inordinate delay in the registration of the FIR and further delay in recording the statements of material witnesses, was held by the court to cast a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.[45] The investigating officer is required by Section 161 (3) to make a separate and true record of the statement of each person whose statement he records. Omission to do so would amount to an attempt to evade the law. In this context it should be noted that while using the case diary the court should keep in mind the restrictions under Section 162, CrPC and Section 145, IEA because what is proposed to be used is subject to restrictions on recorded material under Section 161 of the Code.

[43]Section 163 (1), CrPC, 1973.
[44]Section 163 (2), CrPC, 1973.
[45]*Ganesh Bhavan Patel v. State of Maharashtra,* (1978) 4 SCC 371

On the other hand, the documents and other material objects relevant for any investigation, inquiry or trial should be made available to the agencies conducting such proceedings. If any person in possession or control of any such relevant documents or things does not co-operate with these agencies and fails to produce the things required, the law will have to devise coercive methods for obtaining these material objects for the purposes of proper investigation, inquiry or trial. The Code therefore, provides initially for a summons to produce any documents or things. But if this method fails or is apprehended to fail, the court can issue orders to the police for the search and seizure of such documents or things. The Code also empowers the court to issue a warrant for a general search of any place for the purposes of any inquiry or trial or to issue warrants for the search of places suspected to contain stolen property. The exigencies of the investigation sometimes require the immediate search of a place and the Code in such cases empowers the police to make a search even without obtaining a warrant from a magistrate.

A coercive search of any place is an encroachment upon the rights of the occupant of the place. But even in a free society like ours, such encroachments will have to be tolerated in the larger interests of the society. The provisions in the Code strive to strike a balance between the interests of the individual and the society at large by providing certain safeguards in favour of the individual. Thus, the Code incorporates various provisions enabling the investigating authorities to procure evidence in respect of crimes committed in India. Section 91, CrPC provides for issuance of summons to the person in whose possession or power such document or thing is *believed to be*, to produce a document or other thing, if considered necessary by any Court or any officer in charge of a police station, if desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code. The expression *believed to be* would mean that there must be some justifiable ground for the court to for that opinion.[46]

A police officer also has the power to conduct *searches* in emergent situations without a warrant from the court under Section 165, CrPC. A police officer is competent to arrest an accused person suspected to be involved in a cognizable offence without an order from the court in circumstances specified under Section 41, CrPC.

The police officer is required to maintain a day to day account of the investigation conducted by him as provided under Section 172. After completion of the investigation, he is required to submit a final report to the court under Section 173. If a prima facie case is made out, the final report is filed in the shape of a charge-sheet. The accused has, thereafter, to face the trial. If upon investigation it appears to the police officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused person to a magistrate for trial, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as he may direct the accused to appear, as and when required, before a magistrate empowered to take cognizance of the offence on a police

[46]*BimalKanti v. M. Chandrasekhar Rao,* 1986 CrLJ 689 (Ori)

report and to try the accused or commit him for trial.[47] On completion of the investigation, the police officer is required to send a report to a competent magistrate under Section 173, CrPC. In case the magistrate disagrees with the police and considers the evidence adequate to put the accused person on trial, the bond taken under Section 169 for his appearance before the magistrate would be quite relevant and useful. The police can carry on the investigation even after the release of the accused person under Section 169 and if sufficient evidence against him is found submit a report under Section 173 and get him re-arrested. A supplementary report can also be filed by the police officer, if he finds additional evidence so as to the guilt or innocence of the accused person and it would be in the interests of justice to allow such officer to make further investigation and to send supplementary report(s) to the concerned magistrate.[48]

Now once the accused is arrested he may apply for bail, as the object of arrest and detention is primarily to secure his appearance at the time of trial and to ensure that in case he is found guilty he is available to receive the sentence. If his presence at the trial could be reasonably ensured otherwise than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceedings against him.

The release of the accused on bail is crucial as far as the consequences of pre-trial detention are concerned. If release on bail is denied, it would mean that though he is presumed innocent till proven guilty beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important is the burden of his detention which frequently falls heavily on the innocent members of his family.[49]

Where a person accused of a serious offence is likely to be convicted and punished severely for such a crime, he would be prone to abscond or jump bail in order to avoid the trial and consequential sentence. If such a person is under arrest, it would be unwise to grant him bail and restore his liberty. Further, where the arrested person, if released on bail, is likely to put obstructions in having a fair trial by destroying evidence or by tampering with the prosecution witnesses, or is likely to commit more offences during the period of his release on bail, it would be improper to release such a person on bail. On the other hand, where there are no such risks involved in the release of the arrested person, it would be cruel, unjust and inhumane to deny him bail.

Thus, the police officer while applying his discretion for grant of bail to the accused person should keep in mind two conflicting interests, one of the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and second,

[47]Section 169, CrPC, 1973.
[48]Section 173 (8), CrPC, 1973.
[49]*Moti Ram v. State of MP*, (1978) 4 SCC 47

the fundamental canon of criminal jurisprudence, viz., the presumption of innocence of an accused till he is found guilty. In this regard, the legislature has provided with some precise directions for granting or not granting of bail. Where the legislature allows discretion in the grant of bail, the discretion is to be exercised according to the guidelines provided by law. In addition to this, the courts have evolved certain norms for the proper exercise of such discretion.

As every law person knows that there are two types of offences, viz., bailable and non-bailable.[50] In bailable offences, accused can claim bail as a matter of right. But bail can be granted only as a matter of discretion if the offence is non-bailable. The scope of this discretion depends upon various considerations: (i) it varies in inverse proportion to the gravity of the crime. As the gravity of offence increases, the discretion to release the offender on bail gets narrowed down; (ii) as between the police and the judicial officers, wider discretion to grant bail has been given to the judicial officers; (iii) amongst the judicial officers and the courts, a High Court or a Court of Session has far wider discretion than that given to other courts and judicial officers.

While considering the scope of discretion, one important thing should always be kept in mind that is whether the discretion in granting bail is wide or narrow, it is not to be used in an arbitrary manner. Discretion when applied by a court of law means discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful but legal and regular. The discretion to grant bail in case of non-bailable offences has to be exercised according to certain rules and principles as laid down by the Code and judicial precedents. Section 437 (1) of the Code provides for the discretion exercised by the courts of law (other than High Court or Court of Session) in granting bail in case of a non-bailable offence.[51]

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[50]Section 2 (a), CrPC, 1973

[51]*Section 437, CrPC, 1973*: When Bail may be taken in case of non-bailable offence:

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but —

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years;

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct "that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason;

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that the shall comply with such directions as may be given by the Court.

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this Sub-Section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

The phrase "he may be released on bail" clearly indicates that the police officer or the court has got discretion in granting bail. However, there are certain principles which should guide the police officers and the courts in the exercise of this discretion. It should be noted at the onset that the object of detention pending the criminal proceedings, is not punishment and that the law favours allowance of bail, which is the rule and refusal an exception.[52] While considering the question of bail in case of non-bailable offences, there cannot be very rigid and flexible rules. However, the police officers/courts can for their guidance look into the following circumstances: -

i. The enormity of the charge;

ii. The nature of the accusation;

iii. The severity of the punishment which the conviction will entail;

iv. The nature of the evidence in support of the accusation;

v. The danger of the accused person's absconding if he is released on bail;

vi. The danger of witnesses being tampered with;

vii. The protracted nature of the trial;

viii. Opportunity to the applicant for preparation of his defence and access to his counsel;

ix. The health, age and sex of the accused;

x. The nature and gravity of the circumstances in which the offence is committed;

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(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under Sub-Section (1) the Court shall impose the conditions—

a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under Sub-Section (1), or Sub-Section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under Sub-Section (1), or Sub-Section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

[52]*Gurucharan Singh v. State (Delhi Administration),* (1978) 1 SCC 118

xi. The position and status of the accused with reference to the victim and the witnesses;

xii. The probability of accused committing more offences if released on bail;

xiii. Interests of the society.[53]

There are also other considerations and the above is by no means an exhaustive catalogue of the factors which should weigh with the courts. The previous conviction and the criminal record of the accused person and also the likelihood of the repetition of the offences by the accused person if released on bail are also taken into account while deciding the question of bail. However, granting of the bail to the accused person merely on the concession made by the public prosecutor would amount to non-exercise of the judicial discretion in granting bail and would be improper and wrong.

1.3 Role of Prosecutor in Pre-Trial Process:

The prosecutor is the chief practitioner of the criminal law. He represents the interest of the State and thereby the interest of the public in creating and maintaining a lawful and orderly society. The laws are enacted by the legislature, enforced by the police, and interpreted by the courts. Neither the police nor the prosecution agency has any say in the formulation of laws. The number of criminal laws is increasing by the day, but the quality of drafting shows definite deterioration and bristles with avoidable vagueness in construction. It is felt that a representative each of the police department and the prosecution agency should be associated with the formulation/ drafting of laws. Their field experience would go a long way in improving the quality of laws enacted. Further, unlike the police, the prosecution agency does not have a national level body to watch its professional and service interests. This is due to the fact that prosecution agencies are organized at the state level and not at the national level. Such an apex should be constituted by the government.

Prosecutor is an important component of the criminal justice system. The prosecutor has also been provided with discretionary powers. Prosecution of an offender is the duty of the executive which is carried out through the institution of the Prosecutor/Public Prosecutor. While it is his responsibility to see that the trial results in conviction, he need not be overwhelmingly concerned with the outcome of the trial. He is an officer of the court and is required to present a truthful picture before the court. Even though he appears on behalf of the State, it is equally his duty to see that the accused does not suffer in an unfair and unethical manner. The public prosecutor, even though an executive officer, is an officer of the court and is duty bound to render assistance to the court. He represents the State and the State is committed to the administration of justice as against advancing the interest of one party at the cost of other. He has to be truthful and impartial

[53]*Rajesh Ranjan Yadav v.CBI*, (2007) 1 SCC (Cri) 254

so that even justice is rendered to the accused person. He plays a dominant role in the withdrawal of a case from prosecution. But he should do this in rare cases, lest the confidence of the public in the efficacy of the administration of justice be shaken. The Supreme Court has defined the role and functions of a public prosecutor in the case of *Shiv NandanPaswan v. State of Bihar*[54] as under:

a) The prosecution of an offender is the duty of the executive which is carried out through the institution of the Public Prosecutor.
b) Withdrawal from prosecution is an executive function of the Public Prosecutor.
c) Discretion to withdraw from prosecution is that of the Public Prosecutor and of none else and he cannot surrender this discretion to anyone.
d) The Government may suggest to the Public Prosecutor to withdraw a case, but it cannot compel him and ultimately the discretion and judgment of the Public Prosecutor would prevail.
e) The Public Prosecutor may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds in order to further the broad ends of public justice, public order and peace.
f) The Public Prosecutor is an officer of the court and is responsible to it.

Under the scheme of the Code, the prosecution of an offender for a serious offence is primarily the responsibility of the executive and withdrawal from the prosecution is an executive function of the Public Prosecutor. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else and so he cannot surrender it to someone else. The Government can suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so. He is an officer of the court and is responsible to the court itself.[55]

In *SheonandanPaswan v. State of Bihar*[56] the Supreme Court held that the Public Prosecutor is not an absolutely independent officer. He is appointed by the government, Central/State and is appointed for conducting in court any prosecution or other proceedings on behalf of the concerned Government. He cannot act without instructions of the Government. He cannot conduct a case absolutely on his own, or contrary to the instruction of his client. He wields discretion to withdraw prosecution, and the only limitation on this power is the requirement of court's consent. According to Justice Khalid all that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. Therefore, this power of the public prosecutor entrusted to him by Section 321, CrPC is a statutory discretion which is neither absolute nor unreviewable but is only subject to the court's supervisory functions.

[54]AIR 1983 SC 1994
[55]*Rajender Kumar Jain v. State*, (1980) 3 SCC 435
[56](1983) 1 SCC 438

The CrPC, however, does not specifically mention about the discretionary powers given to the prosecutor that are to be discharged by him. It does not speak of the attitude the prosecutor should adopt while conducting the prosecution. But the principles in this regard are well settled. The object of the criminal trial is to find out the truth and to determine the guilt or innocence of the accused. The duty of the prosecutor in such a trial is not merely to secure conviction but to place before the court whatever evidence is possessed by the prosecutor, whether it be in the favour of or against the accused, and to leave the court to decide upon all such evidence - whether the accused was or was not guilty of the offence alleged.

It is not the prosecutor's duty to obtain convictions by hook or by crook. The prosecutor plays an important role in the administration of justice. He should be personally indifferent to the result of the case. His duty should consist in placing all the available evidence, irrespective of the fact that whether it goes against the accused or helps him before the court, in order to aid the court in discovering the truth. It is thus seen that in the machinery of justice, a public prosecutor has a very responsible role and the impartiality of his conduct is as vital as the impartiality of the court itself.

Another aspect of pre-trial discretion is when the accused person applies for *bail* before a police officer or a court of law and the case is not a grave one, there is no legal requirement for the court to hear the prosecutor and bail would be granted to the accused invariably.[57] In such cases, the Public Prosecutor does not get to know about the case until the police completes the investigation and files a final report or charge-sheet before the court. If the offence is serious, the Public Prosecutor would be notified by the court about bail hearing.[58] This is the first occasion, in the present scheme of law, for the Public Prosecutor to become aware of the existence of a case. An efficient and effective process is one where all relevant information about the criminal and the case diary is automatically transmitted to the prosecutor by the police. It is very important to determine the strength of the evidence and the legality of the arrest at this process point. However, in law there is no provision for it and in practice there is no such prompt and automatic transmission of files from police to prosecutor. It is a common phenomenon that at bail hearings before Sessions Courts prosecutors would seek adjournments for more than a week days solely for the reason that they have no case record with them. Though police and prosecutors are on the same side in pursuing criminal prosecutions, lack of co-ordination between them is a disappointing feature in the present set up.

1.4 Co-operation between Police and Prosecutor:

Before 1973, the Assistant Public Prosecutors (some of whom were police officers) were under the direct control of the District Superintendent of Police. The Public Prosecutors appearing in the Sessions Courts were drawn from the open market on a tenure basis and they were responsible to the District Magistrates. After the amendment of the Code in 1973, the Assistant Public Prosecutors have been totally

[57]Section 436 and First Schedule, CrPC, 1973
[58]Section 437, 438, 439 and First Schedule, CrPC, 1973

detached from the police department. At present they report to the District Magistrate at the district level and to the Director of Prosecutions at the state level. The status of the public prosecutors appearing in the Sessions Courts remained unchanged. There is no institutionalized interaction or co-ordination between the investigating agency and the prosecuting agency. The police files are sent to the Assistant Public Prosecutors for their legal opinion at the pre-trial stage. As they are not responsible to the district police authorities, the legal advice is sometimes perfunctory and without depth.

Further, the district police are totally in the dark as to the fate of cases pending in the courts. Even though there is a district level law officer (called District Attorney in some states), to supervise the work of the Assistant Public Prosecutors, he does not have the status and stature that the District Superintendent Police has. Whatever the reasons, the conviction rate is falling over the years. Be that as it may, there is no immediate prospect of the Assistant Public Prosecutors being placed under the control of District Superintendent of Police. The Law Commission of India has also supported total separation between the police department and the prosecution agency.[59] Even so, it would be desirable to make some institutional arrangement for proper co-ordination between the two agencies.

1.5 Conclusion & Suggestions

The following suggestions are being made by the researcher in this regard:

1) The District Superintendent of Police should periodically review the work of the Assistant Public Prosecutors;
2) He should be authorized to call for information from the prosecution agency regarding the status of a particular case pending in the court;
3) The prosecution agency should send periodical returns to the District Superintendent of Police regarding disposal of cases in the courts;
4) The District Superintendent of Police should send a note annually to the District Magistrate regarding the performance of each Assistant Public Prosecutor working in his district, which should be placed in his confidential annual report/dossier; and
5) On its part, the police department should make available certain facilities to the prosecutors such as housing, transport, and telephones.

Gathering and collecting evidence may span a number of days or weeks, yet law requires the accused to be brought before a court within 24 hours of arrest.[60] The power to arrest and the discretion whether to arrest or not is always vested with the police.[61] The police arrest on the basis of probable cause to believe that an individual has broken the law. When the police feel there are grounds for believing that the

[59]Law Commission of India, 14th Report.
[60]Section 53, CrPC, 1973
[61]Section 41 A, CrPC, 1973

accusation is well founded they transmit the accused and case diary to the Magistrate for remand orders.[62] Until this stage, Public Prosecutor is not notified about these events. Even at the time of remand decision on part of Magistrate, there is no power or duty for the Public Prosecutor to state about the case to court. It is the court's responsibility and power whether the accused is to be remanded to further Custody or granted bail or released altogether. It is the Magistrate who has ultimate control over police investigation.[63] Thus, the arrest decisions of police are not supervised by prosecutors and the courts alone are empowered to review arrest decisions of police.

At a time when the accused person applies for bail before a police officer or a court of law and the case is not a grave one, there is no legal requirement for the court to hear the prosecutor and bail would be granted to the accused invariably.[64] In such cases, the Public Prosecutor does not get to know about the case until the police completes the investigation and files a final report or charge-sheet before the court. If the offence is serious, the Public Prosecutor would be notified by the court about bail hearing.[65] This is the first occasion, in the present scheme of law, for the Public Prosecutor to become aware of the existence of a case. An efficient and effective process is one where all relevant information about the criminal and the case diary is automatically transmitted to the prosecutor by the police. It is very important to determine the strength of the evidence and the legality of the arrest at this process point. However, in law there is no provision for it and in practice there is no such prompt and automatic transmission of files from police to prosecutor. It is a common phenomenon that at bail hearings before Sessions Courts prosecutors would seek adjournments for more than a week days solely for the reason that they have no case record with them. Though police and prosecutors are on the same side in pursuing criminal prosecutions, lack of co-ordination between them is a disappointing feature in the present set up.

[62]Section 167 (1), CrPC, 1973
[63]*Ramesh Kumar Ravi alias Ram Prasad v. State of Bihar*, 1987 CrLJ 1489 (Patna HC)
[64]Section 436 and First Schedule, CrPC, 1973
[65]Section 437, 438, 439 and First Schedule, CrPC, 1973