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Session -2

Arrest, Detention & the Guidelines of Hon'ble Supreme Court in Arnesh

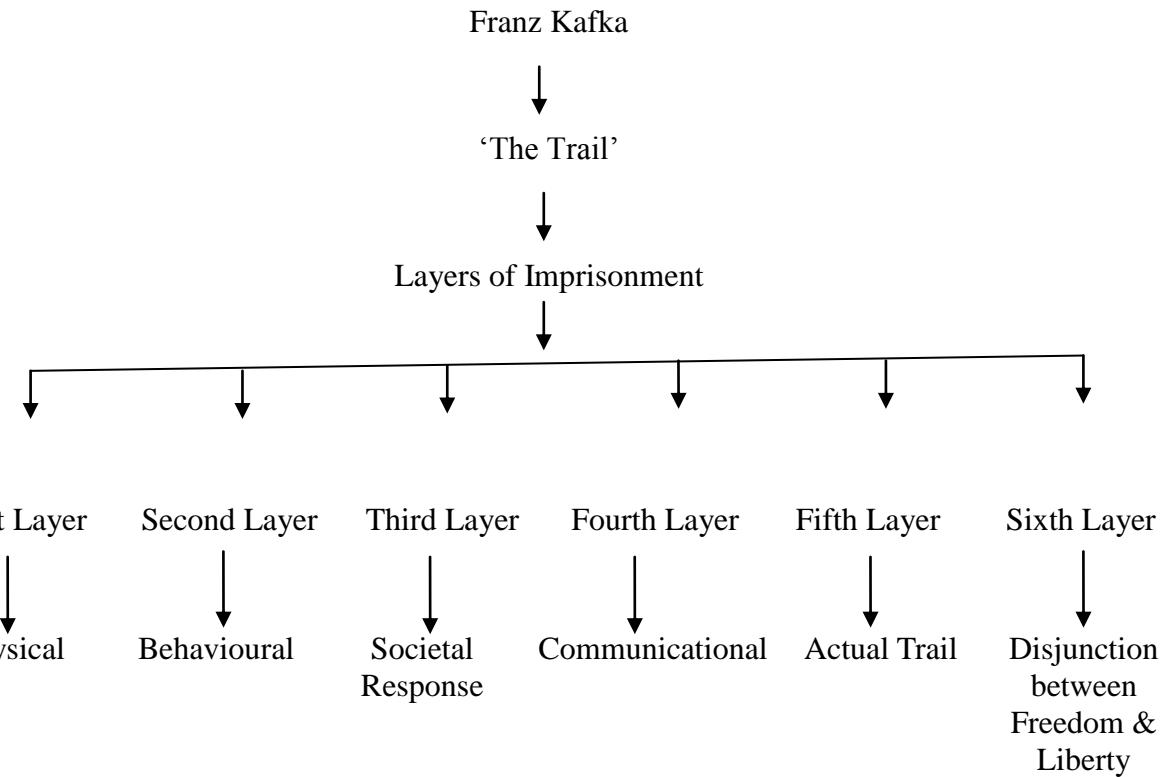
Kumar v. State of Bihar and another, (2014) 8 SCC 273

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I. INTRODUCTION

Right to life and personal liberty is a sacred and cherished right under the constitution. The right to life and personal liberty, have been held to include the right to live with human dignity and as such it would include a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Hon'ble Supreme Court held that “the quality of criminal justice system in a country, to a large extent depends upon the working of police force” (*Prakash Singh & others v. Union of India and others, 2006 (8) SCC 1*).

It is relevant to mention the work of 20th century Austro-Hungarian author Franz Kafka entitled ‘The Trail’, which is considered to be one of the most influential philosophical works of the 20th century. Although, it is written in a form of novel yet this work appears more as a philosophical treatise on important issues such as arrest, imprisonment, trial process, role of advocate and guilt. The novel opens with the chapter entitled ‘Arrest’ where one Joseph K. is arrested suddenly on one fine morning and then the author dwells deep into the impact of arrest on the arrestee and associated issue. The most important aspects of arrest and imprisonment discussed in this work may be placed briefly as under:



First Layer of Imprisonment

When we consider Law and Justice we tend, as readers to think immediately of physical manifestation of these things. Arrest, Physical Cage of the Jail and Trail Process itself has physical manifestations of their own kind for the person under Arrest and Trail.

Second Layer of Imprisonment

The second level concerns the way he is forced to change his behavior in response to the official demands. These demands may be obscure but recurring and may be made in view of the applicable rules. Whatever may be the reason but these demands have their own behavioural impact on the prisoner.

Third Layer of Imprisonment

Social approval and disapproval are powerful forces, and can be even more restrictive and judgmental than any Court of Law.

Fourth Layer of Imprisonment

- It concerns the way which language works, or rather, fails to work. The failure here concerns the failure of communication itself.

- Who are you?
- Who is accusing him?
- What is he on trial for?
- How might he defend himself?
- To whom should he speak?

Fifth Layer of Imprisonment

The assessment is made through a myriad of small events as he misjudges his performances, as he is defiant when he should comply, compliant when he should stand resolute. The situation shows and the story tell that we can't be sure that we ourselves would perform any better than he does in performance in actual trial itself.

Sixth Layer of Imprisonment

It concerns disjunction between freedom and liberty. Imprisonment of the protagonist being assessed of his acute failure to act in a personally principled way, and condemnation as a result of the fact that he does not exercise his liberty in a way deserving of freedom.

II. The Background

Making Balance

The quality of a Nation's Civilization can be largely measured by the methods it uses in the enforcement of criminal law. The horizon of rights is expanding but at the same time, the crime rate is also increasing. The court has been receiving complaints about violation of human rights because of indiscriminate arrests. The law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other. (*Joginder Kumar v. State of U.P., AIR 1994 SC 1349*)

The Perennial Problem of Statecraft

“To strike the balance between the needs of law enforcement on the one hand and the protection of citizens from oppression and injustice at the hands of law enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swing to the right (Lewis

Mayers)”. The above words of Lewis Mayers were quoted by Hon’ble Supreme Court in *Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025*.

Evolution of Law to control Colonial Attitude

1. Khatri v. State of Bihar (1981) 1 SCC 627
2. Joginder Kumar v. State of U.P., AIR 1994 SC 1349
3. D.K. Basu v. State of West Bengal, AIR 1997 SC 610
4. Lalita Kumari v. State of U.P. & Others, (2014) 2 SCC 1
5. Shaukin v. State of U.P. (Crl. Misc. Writ Petition No. 17410/2011)

A. Joginder Kumar v. State of U.P., AIR 1994 SC 1349

1. Arrest of a person should not be merely on suspicion about the person’s complicity in the crime and the Police Officer must be satisfied about the justification of such arrest on the basis of some investigation.
2. Arrest should normally be avoided except in cases of heinous crimes. Reasons for arrest must be recorded by police officer in his case diary.
3. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where he is being detained.
4. Police officer should inform the arrested person when he is brought to the police station of this right.
5. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) of the constitution and must be enforced strictly.

It should be the duty of the Magistrate before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

B. D.K. Basu v. State of W.B, AIR 1997 SC 610

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee.
2. To bear accurate, visible and clear identification and name tags with their designations.
3. Prepare a memo of arrest at the time of arrest to be attested by at least one witness.
4. To notify time, place of arrest and venue of custody of the arrestee to relative or friend.

5. To make the arrestee aware of this right to have someone informed of his arrest.
6. To make entry in the diary regarding the arrest and also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. At the request of the arrestee to examine at the time of his arrest and record major and minor injuries, if any at that time; and to prepare "inspection memo" in this regard to be signed both by the arrestee and the police officer.
8. Medical examination of arrestee by trained doctor every 48 hours.
9. Copies of all the documents including the memo of arrest to be sent to the illaqa magistrate.
10. Permission to meet his lawyer during interrogation.
11. Police control room to be informed at all district and state headquarters regarding the arrest and the place of custody.
12. There is a battle between the law makers and the police and it seems that the police has not learnt its lesson. The police has not come out of its colonial image. The need for caution in exercising the drastic power of arrest has been emphasized time and again by the court but has not yielded desired result.
13. S. 41 (1)(b)(ii) provides that arrest for any offence punishable less than or upto 07 years can be made only on the following satisfaction:
14. To prevent such person from committing any further offence;
15. For proper investigation;
16. To prevent disappearance or tampering of evidence;
17. To prevent inducement, threat or promise to the witness and thereby dissuading the person from disclosing the evidence to court or police;
18. To ensure the presence of the person in court;
19. Police Officer shall record such reasons in writing both for making an arrest or not arresting the person.

Legislative Mandate to Effectuate Judicial Directions

1. Amendments in Section. 41 Cr.P.C.
2. Section. 41A - Notice of Appearance before P.O.
3. Section. 41 B- Procedure of Arrest & Duties of Officer making arrest

4. Section. 41 C- Control Room at Districts
5. Section. 41 D- Right to meet an advocate of his choice during interrogation

C. Important Observations in *Arnesh Kumar v. State of Bihar & Another, (2014)*

8 SCC 273

1. Police officers should maintain a balance between individual liberty and societal order while exercising power of arrest under sections 41, 41 A and 57 of Cr.P.C.
2. Due to the rampant misuse of Sections 498A IPC and Section 4 of D.P. Act 1961, it would be prudent and wise for a Police Officer that no arrest is made without reasonable satisfaction reached after some investigation as to the genuineness of allegations.

Urgent Need for Police officers to change Attitude

1. Arrest brings humiliation, curtails freedom and casts scares forever.
2. Lawmakers know it so also the police.
3. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson; the lesson implicit and embodied in Cr.P.C.
4. It has not come out of its colonial image despite six decades of independence.
5. It is largely considered as a tool of harassment, oppression and surely not considered a friend of public.
6. The need for caution in exercising the drastic power of arrest has been emphasized time and again by the courts but has not yielded desired result.
7. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it.
8. No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so.
9. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another.
10. Apart from the power to arrest, the police officers must be able to justify the reasons thereof.
11. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person.

The ‘WIWW’ Test

In pith and core, the Police Officer before Arrest must put the following Questions to himself;

- W - Why Arrest?
- I – Is it really required?
- W – What Purpose it will serve?
- W – What Object it will achieve?

Strict compliance of the Directions issued by Hon’ble Supreme Court of India in Suo Motu Writ Petition (Civil) No. 01/2020 - In Re : Contagion of COVID-19 Virus in Prisons in view of the Second Wave of COVID-19 Pandemic vide order dated 07.05.2021 directing strict compliance of the guidelines in *Arnesh Kumar v. State of Bihar and another, (2014) 8 SCC 273*

When the first wave of COVID-19 Pandemic hit out our country in the month of March, 2020 the Hon’ble Supreme Court issued directions with regard to prison inmates so as to contain the spread of contagion of COVID-19 virus inside the prisons in India. The Hon’ble Supreme Court observed in its order in **Suo Motu Writ Petition (Civil) No. 01/2020 - In Re: Contagion of COVID-19 Virus in Prisons** dated: 16.03.2020 that while the Government of India advises that social distancing must be maintained to prevent the spread of COVID-19 virus, the bitter truth is that our prisons are overcrowded, making it difficult to maintain social distancing. The Hon’ble Supreme Court showed a serious concern and an imminent means to take steps on an urgent basis to prevent the contagion of COVID-19 virus in our prisons. Thereafter, several directions were issued by the Hon’ble Supreme Court vide order dated 13.04.2020 in this regard.

When the second wave of COVID-19 started in April, 2021, an **I.A. No. 55273 and 55276 of 2021 was moved in Suo Motu Writ Petition (Civil) No. 01/2020 (In Re : Contagion of COVID-19 Virus in Prisons)** in which the Hon’ble Supreme Court issued strict directions on 07.05.2021. The Hon’ble Supreme Court observed that an unprecedented surge of COVID-19 during the last few weeks has resulted in a steep spike in the number of people who are affected by COVID-19. In the present situation there is a serious concern about the spread of COVID-19 in overcrowded prisons where there is lack of proper sanitization, hygiene and medical facilities.

Hon'ble Supreme Court further observed that India has more than 4 lakhs prison inmates. Some of the prisons in India are over burdened and are housing inmates beyond optimal capacity. In this regard, we may notice that the requirement of decongestion is a matter concerning health and right to life of both the prison inmates and police personnel working. Reduction of impact of COVID-19 requires this court to effectively calibrate concerns of criminal justice system, health hazards and rights of the accused. From limiting arrests to taking care of COVID-19 patients, there is a requirement for effective management of pandemic from within the prison walls so as to defeat this deadly virus.

- Furthermore, the Hon'ble Supreme Court observed that as a first measure, this court, being the sentinel on the *qui vive* of the fundamental rights, needs to strictly control and limit the authorities from arresting accused in contravention of guidelines laid down by this court in **Arnesh Kumar v. State of Bihar and another (2014) 8 SCC 273** during pandemic. It may be relevant to quote the same :

Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate does not authorize detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

- (i) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;
- (ii) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- (iii) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
- (iv) The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;
- (v) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

- (vi) Notice of appearance in terms of Section 41A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;
- (vii) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.
- (viii) Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

We hasten to add that the **directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.**

The Hon'ble Supreme Court also observed that the rapid proliferation of the virus amongst the inmates of congested prisons is a matter of serious concern. The High Powered Committees constituted by the State Governments/Union Territories shall consider release of prisoners by adopting the guidelines followed by them last year at the earliest. The court further directed at those inmates who were granted a parole, pursuant to our earlier orders, should be again granted a parole for a period of 90 days to tide over the pandemic. The fight against the pandemic is greatly benefited by transparent administration. In this regard the example of Delhi was given wherein the prison occupancy is updated on websites. Such measures are required to be considered by other states and should be adopted as good practice.

Moreover, all the decisions of High Powered Committee need to be published on respective State Legal Services Authorities/State Governments/High Court's website in order to enable effective dissemination of information. In the end, the Hon'ble Court held that the authorities are directed to ensure that proper medical facilities are provided to all prisoners who are imprisoned. The spread of COVID-19 virus should be controlled in the prisons by regular testing being done of the prisoners and also the jail staff and immediate treatment should be made available to the inmates and the staff. It is necessary to maintain levels of daily hygiene and sanitation required to be improved. Suitable precautions shall be taken to prevent the transmission of deadly virus

amongst the inmates of prison. Appropriate steps shall be taken for transportation of the released inmates of the prisons, if necessary, in view of the curfews and lockdowns in some other states.

Directions issued by High Powered Committee of Uttar Pradesh on 10.05.2021 in pursuance and in compliance to the directions issued by Hon'ble Supreme Court on 07.05.2021 in Re : Contagion of COVID-19 virus in prisons (as mentioned above)

1. Release of all inmates released earlier (last year) in pursuance of the order of Hon'ble Supreme Court dated : 23.03.2020 In Re: Contagion of COVID Virus in Prisons

It is directed that all those Jail Inmates who were released on parole or interim bail in compliance of the earlier order of Hon'ble Supreme Court Dated: 23.03.2020, *In Re: Contagion of COVID Virus in Prisons in the year 2020* shall forthwith be released again by respective authorities, in compliance of this order for a period of 90 days on Parole or interim bail as is the case. However, such release on parole or interim bail shall be subject to appropriate conditions as imposed by the same respective authorities who exercised such jurisdiction at the time of their earlier release.

The Secretary State Monitoring Committee (SMC) shall ensure in co-ordination with other stake holders/authorities that the matter of such eligible inmates be placed before the respective authorities expeditiously for further orders in the matter of imposing appropriate conditions as per the discretion of those authorities. All the Chairmen of District Legal Services Authorities (DLSA's) shall ensure compliance of this order with promptitude and shall also make available required co-ordination and legal aid.

2. Decision of HPC, Prison Occupancy to be updated on the official websites of Hon'ble High Court/UPSLSA and State Authorities

It is, therefore, directed that Jail Authorities shall ensure display of prison occupancy on their websites. The decisions of this HPC are to be uploaded on the official websites of U.P. State Legal Services Authority, State Government and Hon'ble High Court of Judicature at Allahabad.

3. Honouring the wishes to Jail Inmates in respect to release and facilitating transportation on release if necessary

It is hereby directed in compliance of the order of Hon'ble Supreme Court that the Jail Superintendent of each Jail shall ascertain such unwillingness for release on the part of each Jail inmate, eligible for release under orders of this HPC in all sincerity and with empathy. The said unwillingness to release under the orders of HPC may either be due to fear of infection of virus or disappearance of social roots by passage of time or extreme old age or they having no place or relative to go or any other such reason. There shall not be forced release of Jail inmates under these orders of HPC. Jail Superintendent shall provide the details of all such prisoners requiring facility of transport to the DLSA and the District Magistrate. The Jail Authorities and District Magistrates of each district shall be responsible for the transportation of Jail inmates as required in any unforeseen contingency. The Jail Superintendent and District Magistrate shall co-ordinate and co-operate in this respect. District Legal Services Authority shall supervise these matters of unwillingness on part of inmates and transportation at local level.

This direction relating to the ascertainment of willingness to release and arrangements of transportation, if needed, shall also be applicable to the release on interim bail or parole of prison inmates in compliance of the earlier order of this HPC dated 26.04.2021 henceforth.

4. Additional directions in respect to Testing, Prison Hygiene, Sanitization/ Sanitation and treatment etc. in prison

In addition and in partial repetition of the earlier directions regarding Prevention, Containment and Treatment of COVID-19 in prisons, it is also directed that;

- (a) Regular testing of Jail inmates as well as Officials and staff and other stakeholder for COVID-19 shall be ensured for early Detection, Preventions, Containment and Treatment of COVID-19 in prison.
- (b) Proper Medical facilities including treatment shall be provided to ailing inmates, officials and staff and other stakeholders.
- (c) All suitable measures be taken to prevent the transmission of deadly virus amongst inmates of prisons.
- (d) All measures be taken to maintain required level of daily hygiene and sanitation in Jail premises.

5. Strict Compliance of the guidelines issued by Hon'ble Court in Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273, Judgment :

In compliance of this order, it is reiterated that the dictum of Arnesh Kumar (supra) as directed to be complied with and circulated with the earlier directions of this HPC issued in pursuance of meeting of HPC dated 26.04.2021 shall be strictly complied with by the Police and Judicial Authorities and the directions/guidelines issued in the judgment of Arnesh Kumar (supra) must be complied in letter and spirit.

These directions are directed/intended to be complied immediately by all the concerned.