

HUSSAINARA KHATOON & ORS.

v.

HOME SECRETARY, STATE OF BIHAR, GOVT. OF

BIHAR, PATNA

February 12, 1979

[P. N. BHAGWATI, R. S. PATHAK AND A. D. KOSHAL, JJ.]

Administration of Justice—Pre-trial detention—Right of under-trial prisoner to have a speedy trial—Art. 21 of Constitution of India.

Pre-trial release—Concept of—Determinative factors in grant of bail and release of under-trial prisoner on personal bond without monetary obligation explained.

In their petition for the issue of a writ of habeas corpus the petitioners stated that a large number of men and women including children were in jails for years awaiting trial in courts of law and that the offences, even if proved, would not warrant punishment for more than a few months. Although sufficient opportunity was given, the State did not appear before the Court.

Directing the release of the undertrials on their executing a personal bond.

HELD :

(Per Bhagwati & Koshal, JJ.)

1. A procedure which keeps large number of people behind bars without trial for long, cannot possibly be regarded as "reasonable, just or fair" so as to be in conformity with the requirement of Art. 21. It is necessary, therefore, that the law as enacted by the Legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure 'reasonable, just and fair' procedure which has a creative connotation after the decision of the Supreme Court in *Maneka Gandhi's* case. [174 C-D]

2. Speedy trial is of the essence of criminal justice and, therefore, delay in trial by itself constitutes denial of justice. Though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Art. 21. Speedy trial which means reasonably expeditious trial, is an integral part of the fundamental right to life and liberty enshrined in Art. 21, [179 H, 180 C, F]

Art. 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Art. 21 and he would be entitled to enforce such fundamental right and secure his release. Any procedure prescribed by law for depriving a person of his liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. [180 D-E]

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Maneka Gandhi v. Union of India, [1978] 2 SCR 621; referred to.

3. Expeditious trial and freedom from detention are part of human rights and basic freedoms. The judicial system which permits incarceration of men and women for long periods of time without trial is denying human rights to such undertrials and withholding basic freedoms from them. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. [173 C-E, F]

B

4. One reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pretrial detention is the highly unsatisfactory bail system, which suffers from a property oriented approach. It proceeds on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. Even after its re-enactment, the Code of Criminal Procedure continues to adopt the same antiquated approach. Where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay the amount of bail in case the accused fails to appear to answer the charge. [174 E-G]

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This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the Court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail, and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. [174 G-175 D]

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The bail system, as it operates today, is thus a source of great hardship to the poor and if the civil effects of poverty are to be eliminated and a fair and just treatment assured to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre-trial release without jeopardizing the interest of justice. [177 C-D]

H

Risk of monetary loss is not the only deterrent against fleeing from justice. There are also other factors which act as equal deterrents against fleeing. Therefore, the courts, even under the law as it stands today, must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. If the court is satisfied, after taking into account, on the basis of

information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond.

[177 E, G, H]

5. To determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into account the following factors concerning the accused : (1) The length of his residence in the community, (2) his employment status, history and his financial condition, (3) his family ties and relationships, (4) his reputation, character and monetary conditions, (5) his prior criminal record including any record of prior release on recognizance or on bail, (6) the identity of responsible members of the community who would vouch for his reliability, (7) the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non appearance, and (8) any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear. [178 A-E]

If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond. If facts are brought to the notice of the court showing that, having regard to the condition and back-ground of the accused, his previous record and the nature and circumstances of the offence, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or a confirmed criminal or the offence is serious, the court may not release the accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the court in releasing the accused on his personal bond and particularly in cases where the offence is not grave and the accused is poor or belongs to a weaker section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond, it would be very harsh and oppressive if he is required to satisfy the court—and what is said in regard to the court must apply equally in relation to the police while granting bail—that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond. [178 F-179 D]

6. Necessary to provide by an amendment of the penal law that if an accused wilfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. [177 F]

7. High time that the State Government realised its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. [180 H]

A Pathak J. (*concurring*)

(1) The primary principle of criminal law is that imprisonment may follow a judgment of guilt, but should not precede it. There is also another principle which makes it desirable to ensure that the accused is present to receive his sentence in the event of being found guilty. [181 E]

B (2) It is indisputable that an unnecessarily prolonged detention in prison of undertrials before being brought to trial is an affront to all civilized norms of human liberty and any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. [181 D]**C** (3) The Code of Criminal Procedure both the old Code and the new, include provisions for the release of a person on bail or on the execution of a bond without sureties for his appearance. There is an amplitude of judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance within the existing provisions of the Code of Criminal Procedure and it is for the Courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. It is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. [181 E, 182 B-C]**E** (4) The abuses attendant on the prevailing system of pre-trial release in India could be avoided or, in any event greatly reduced, if considerations like "nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings", are taken into consideration when determining pre-trial release and the amount of security or monetary obligation to be imposed. [182 G, E-F]

United States Bail Reforms Act, 1966 : 18 USS 3146 (b), *Moti Ram & Ors. v. State of M.P.* [1978] 4 SCC 47; referred to.

G (5) Urgent need for a clear and explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation. [183 B]

ORIGINAL JURISDICTION : Writ Petition No. 57 of 1979.

Mrs. K. Hingorani for the Petitioners

H *S. M. Jha* and *U. P. Singh* for the Respondent.

The Judgment of Bhagwati and Koshal, JJ. was delivered by Bhagwati, J. Pathak, J. gave a separate Opinion.

BHAGWATI, J.—This petition for a writ of *habeas corpus* discloses a shocking state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, are behind prison bars for years awaiting trial in courts of law. The offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity are in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from house tops about the protection and enforcement of human rights. We are talking passionately and eloquently about the maintenance and preservation of basic freedoms. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed? Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence. They have over the years ceased to be human beings they are mere ticket-numbers. It is high time that the public conscience is awakened and the Government as well as the judiciary begin to realise that in the dark cells of our prisons there are large numbers of men and women who are waiting patiently, impartially perhaps, but in vain, for justice—a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigures the fair and otherwise luminous face of our nascent democracy.

Though we issued notice to the State of Bihar two weeks ago, it is unfortunate that on the 5th February, 1979 no one has appeared on, behalf of the State and we must, therefore, at this stage proceed on the basis that the allegations contained in the issues of the Indian Express dated 8th and 9th January, 1979 which are incorporated in the writ petition are correct. The information contained in these newspaper cuttings is most distressing and it is sufficient to stir the consci-

- A** ence and disturb the equanimity of any socially motivated lawyer or judge. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Art. 21 in *Maneka Gandhi v. Union of India*⁽¹⁾ that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair' so as to be in conformity with the requirement of that Article. It is necessary, therefore, that the law as enacted by the Legislature and as administered by the courts must radically change its approach to pretrial detention and ensure 'reasonable, just and fair' procedure which has creative connotation after *Maneka Gandhi's* case supra.

- Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pretrial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so

(1) [1978] 2 S.C.R. 621.

unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor. The Legal Aid Committee appointed by the Government of Gujarat under the chairmanship of one of us, Mr. Justice Bhagwati, emphasised this glaring inequality in the following words :

"The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D. C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount

A of the bail is fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount."

B The Gujarat Committee also pointed out how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor :

C "The discriminatory nature of the bail system becomes all the more acute by reason of the mechanical way in which it is customarily operated. It is no doubt true that theoretically the Magistrate has broad discretion in fixing the amount of bail but in practice it seems that the amount of bail depends almost always on the seriousness of the offence. It is fixed according to a schedule related to the nature of the charge. Little weight is given either to the probability that the accused will attempt to flee before his trial or to his individual financial circumstances, the very factors which seem most relevant if the purpose of bail is to assure the appearance of the accused at the trial. The result of ignoring these factors and fixing the amount of bail mechanically having regard only to the seriousness of the offence is to discriminate against the poor who are not in the same position as the rich as regards capacity to furnish bail. The Courts by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally produce inequality between the rich and the poor : the rich who is charged with the same offence in the same circumstances is able to secure his release while the poor is unable to do so on account of his poverty. These are some of the major defects in the bail system as it is operated to-day."

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G The same anguish was expressed by President Lyndon B. Johnson at the time of signing the Bail Reforms Act, 1966 :

"Today, we join to recognize a major development in our system of criminal justice : the reform of the bail system.

H This system has endured—archaic, unjust and virtually unexamined—since the Judiciary Act of 1789.

The principal purpose of bail is to insure that an accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? The defendant with means can afford to pay bail. He can afford to buy his freedom. But poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only—because he is poor.”

The bail system, as it operates today, is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich to obtain pretrial release without jeopardizing the interest of justice.

It is high time that our Parliament realises that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the accused should be in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the accused wilfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pretrial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our Courts in regard to pretrial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused

A on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused :

1. The length of his residence in the community.
- B** 2. his employment status, history and his financial condition,
3. his family ties and relationships,
4. his reputation, character and monetary condition,
- C** 5. his prior criminal record including any record or prior release on recognizance or on bail,
6. the identity of responsible members of the community who would vouch for his reliability.
7. the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non appearance, and
- D** 8. any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.
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If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond. Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused his previous record and the nature and circumstances of the offence, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or a confirmed criminal or the offence is serious (these examples are only by way of illustration), the court may not release the accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the court in releasing the accused on his personal bond and particularly in cases where the offence is not grave and the accused is poor or belongs to a weaker section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it

fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond. Moreover, when the accused is released on his personal bond, it would be very harsh and oppressive if he is required to satisfy the court—and what we have said here in regard to the court must apply equally in relation to the police while granting bail—that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond. We have no doubt that if the system of bail, even under the existing law, is administered in the manner we have indicated in this judgment, it would go a long way towards relieving hardship of the poor and help them to secure pretrial release from incarceration. It is for this reason we have directed the undertrial prisoners whose names are given in the two issues of the Indian Express should be released forthwith on their personal bond. We should have ordinarily said that personal bond to be executed by them should be with monetary obligation, but we directed as an exceptional measure that there need be no monetary obligation in the personal bond because we found that all these persons have been in jail without trial for several years, and in some cases for offences for which the punishment would in all probability be less than the period of their detention and moreover, the order we were making was merely an interim order. The peculiar facts and circumstances of the case dictated such an unusual course.

There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a bad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial

A of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” So also Article 3 of the European Convention on Human Rights provides that :

“every one arrested or detained—shall be entitled to trial within a reasonable time or to release pending trial.”

B We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in *Maneka Gandhi v. Union of India*. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be “reasonable, fair and just”. If a person is deprived of his liberty under a procedure which is not “reasonable, fair or just”, such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be ‘reasonable, fair or just’ unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonable quick trial can be regarded as ‘reasonable, fair or just’ and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21? That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain and we cannot impress it too strongly on the State Government that it is high time that the State Government realised its responsibility to the people in the matter of admini-

stration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but the State Government would also have to man them by competent judges and whatever is necessary for the purpose of recruiting competent judges, such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is to-day a meaningless and empty word.

These are the reasons for which we made our order dated 5th February, 1979. We shall now proceed to hear the writ petition on 19th February, 1979.

PATHAK, J.—It is indisputable that an unnecessarily prolonged detention in prison of undertrials before being brought to trial is an affront to all civilized norms of human liberty. Any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. The primary principle of criminal law is that imprisonment may follow a judgment of guilt. But should not precede it. But there is another principle which makes it desirable to ensure that the accused is present to receive his sentence in the event of being found guilty. Now, the Code of Criminal Procedure, both the old Code and the new, include provision for the release of a person on bail or on the execution of a bond without sureties for his appearance. Nonetheless, as appears *prima facie* from the record before us, a large number of persons whose names, find mention in copies of the Indian Express of January 8 and 9, 1979, have been in prison for long year without even being brought to trial. Although sufficient opportunity was given to the State of Bihar to meet the allegations made, it is unfortunate that no one has appeared on behalf of the State. In view of the importance of the questions arising on the habeas corpus petition, we have provided further opportunity to the State to appear and accordingly have posted the petition for final hearing on February 19, 1979. But at the same time we see no reason why interim relief should be denied to these undertrials. After carefully considering what has been said in respect of each individual undertrial, we have considered it appropriate, in the interests of justice, to make the order of February 5, 1979 directing the release of the persons mentioned in that order on their executing a personal bond. The order is somewhat unusual in that it directs that the personal bond to be taken in each

- A case should not be based on any monetary obligation. The condition has been included as an exceptional measure, under the persuasive pressure of the particular facts and circumstance of the case.

- B In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the Courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account.⁽¹⁾
- C A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966 :

- E "In determining which conditions of releases will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.⁽²⁾
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- G These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pre-trial release in India could be avoided or, in any event, greatly reduced See *Moti Ram and Others v. State of Madhya Pradesh*.⁽³⁾

I consider it desirable to refrain from making any final comment or observation on the legality and propriety of the continued detention of the undertrial prisoners whether on the ground of infringement

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- (1) Section 440, Code of Criminal Procedure.
 (2) 18 U. S. S. 3146 (b)
 (3) [1978] 4 S.C.C. 47.

of Article 21 of the Constitution or on other grounds. That, I think, should await the final determination of the habeas corpus petition. A

These are the reasons which have influenced me in making the order dated February 5, 1979.

While concluding, it seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of undertrial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance. Where that is the only reason for their continued incarceration, there may be good ground for complaining of invidious discrimination. The more so under a constitutional system which promises social equality and social justice to all of its citizens. The deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our law-makers would take an important step in defence of individual liberty if appropriate provision was made in the statute for non-financial releases. B
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D
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N.V.K.

HUSSAINARA KHATOON & ORS.

v.

HOME SECRETARY, STATE OF BIHAR, PATNA

March 9, 1979

[P. N. BHAGWATI & D. A. DESAI, JJ.]

Administration of Justice—Speedy trial—Fundamental right of accused—Constitutional obligation of State.

Constitution of India 1950—Arts. 21 and 39A—Free legal services to poor—essential element of 'reasonable fair and just' procedure.

At the resumed hearing of the petition for release of under-trials in the State of Bihar.

HELD : (1) The procedure under which a person may be deprived of his life or liberty should be 'reasonable fair and just.' Free legal services to the poor and the needy is an essential element of any 'reasonable fair and just' procedure. A prisoner who is to seek his liberation through the court's process should have legal services available to him. [537 C, D]

Maneka Gandhi v. Union of India, [1978] 1 SCC 248; *M. H. Hoskot v. State of Maharashtra*, [1978] 3 SCC 544; *Gideon v. Wainwright*, 372 US 335; 9 L. ed. at 799; *John Richard Argersinger v. Raymond Hamlin*, 407 U.S. 25 : 35 L. ed. 2d 530 at 535-36; referred to.

(2) Article 39A also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of, an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. [539 F—540 A]

(3) The poor in their contact with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the socio economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary to inject equal justice into legality and that can be done only by a dynamic and activist scheme of legal services. [541 E—F]

4. The urgent necessity of introducing a dynamic and comprehensive legal services programme impressed upon the Government of India as also the State Governments. That is not only a mandate of equal justice implicit in Art. 14 and right to life and liberty conferred by Art. 21 but also the compulsion of the constitutional directive embodied in Art. 39A. [542 D]

5. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the *qui-vive*, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, appointment of additional judges and other measures calculated to ensure speedy trial. [543 D—E]

(6) The courts in the United States have adopted a dynamic and constructive role in regard to prison reform by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through its decisions. [543 F]

Rhem v. Malchin, 377 F. Supp. 995, *Jackson v. Bishop*, 404 F. Supp. 2d. 571, *Holl v. Sarver*, 309 F. Supp. 362; *Jones v. Wittenberg*, 330 F. Supp. 707; *Newman v. Alabama*, 349 F. Supp. 278; *Gates v. Collier*, 349 F. Suppl. 881; referred to.

(7) The powers of this Court in protection of the Constitutional rights are of the widest amplitude and this Court should adopt an activist approach and issue to the State, directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. But in order to enable the court to discharge this constitutional obligation, it is necessary that the court should have the requisite information bearing on the problem. [543 H—544 A]

Directed that :

(a) On the next remand dates when the under-trials are produced before the Magistrates or the Sessions Courts the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail and opposing remand provided that no objection is raised to such a lawyer on their behalf. [540 B]

(b) The State Government and High Court to furnish particulars as to the location of the courts of magistrates and courts of sessions in the State of Bihar together with the total number of cases pending in each of these courts as on 31st December, 1978 giving year-wise break up of such pending cases and also explaining why it has not been possible to dispose of such of those cases as have been pending for more than six months. [544 D]

ORIGINAL JURISDICTION : Writ Petition No. 57 of 1979.

K. Hingorani for the Petitioners.

U. P. Singh for the Respondent.

A The Order of the Court was delivered by

BHAGWATI, J.—This writ petition again comes up for hearing before us pursuant to the directions given by us on 26th February, 1979⁽¹⁾ and today three additional counter-affidavits have been filed on behalf of the respondents: one by Mrinmaya Choudhri, Assistant Inspector General of Prisons; the other by Bageshwari Prasad Pande, Superintendent of the Patna Central Jail and the third by Pradip Kumar Ganguly, Superintendent of the Muzafferpur Central Jail. Mrinmaya Choudhri has in his affidavit given particulars of the under-trial prisoners in 48 jails in the State of Bihar in addition to the particulars of the undertrial prisoners in 17 jails already submitted on 26th February, 1979. We directed the State of Bihar by our order dated 26th February, 1979 to file a revised chart showing a year-wise break-up of the under-trial prisoners after making a division into two broad categories viz. minor offences and major offences but this direction has not yet been carried out by the State of Bihar. Mrinmaya Choudhri has, however, assured us in his affidavit that several steps regarding the different directions given by the Court are being promptly implemented but due to shortage of time it has not been possible to complete the same by 3rd March, 1979. We direct that the State of Bihar will file within three weeks from to-day a revised chart in regard to the under-trial prisoners in all the 65 jails in a manner which would clearly show year-wise as to what is the date from which each of them is in jail after making a broad division into two categories of minor offences and major offences. We are glad to note that so far as women under 'protective custody' are concerned, the State has assured us in the affidavit of Mrinmaya Choudhri that necessary steps for transferring women under "protective custody" in jails to the institutions run by the welfare department have been taken and directions to that effect are issued by the Government. We hope and trust that this direction given by us in our earlier order dated 26th February, 1979 will be carried out by Government and compliance report submitted to us within the prescribed time.

G Though we directed the State of Bihar by our order dated 26th February, 1979 to intimate to the court by a proper affidavit to be filed on or before 3rd March, 1979 whether the under-trial prisoners whose particulars were given in the counter-affidavit filed on 26th February, 1979 were periodically produced before the Magistrates in compliance with the proviso to section 167(2), we find that the only averment made by Bageshwari Prasad Pande in his affidavit in response to this direction is that petitioners Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 confined in the Patna Central Jail prior to their release were

(1) See PP. 393—398 of this volume.

regularly produced before the courts "as and when required by the courts". This averment does not at all constitute compliance with the direction given by us. We would like to know from the State of Bihar in a proper affidavit to be filed within two weeks from today whether the under-trial prisoners who were directed to be released by us on their personal bond were periodically produced before the Magistrates in compliance with requirement of the proviso to section 167(2). We would suggest that the State should furnish to this Court the dates on which these under-trial prisoners were remanded to judicial custody from time to time by the Magistrates, so that we can satisfy ourselves that the requirement of the proviso was complied with.

We also find an averment in the affidavit of Pradeep Kumar Ganguly that Petitioners Nos. 10, 11, 12, 13, 15, 16 and 18 who were previously confined in the Muzaffarpur Central Jail prior to their release were regularly produced before the Court "as and when required by the courts". This averment, as we have pointed out, is wholly unsatisfactory and it does not inform the Court as to what were the dates on which these under-trial prisoners were remanded from time to time by the Magistrates. It is only if these particulars are furnished to us that we can satisfy ourselves in regard to compliance with the requirement of the proviso to section 167(2) and we would, therefore, direct the State of Bihar to furnish these particulars to us in an affidavit to be filed within two weeks from today.

We should also like to have the particulars in regard to the dates on which remand orders were made from time to time by the Magistrates in regard to under-trial prisoners at items Nos. 4, 5, 6, 7, 8, 13, 21, 22, 24, 28, 29, 30, 43, 56, 69, 71, 72, 79, 85, 92, 96, 97, 101, 129, 133, 136 to 142, 165 to 167, 170 to 174, 177, 191, 199, 210, and 236 in the list of under-trial prisoners in Ranchi Central Jail submitted on behalf of the respondents. These under-trial prisoners have been in jail for a period of over six to seven years and we would like to satisfy ourselves that the requirement of the proviso to section 167(2) was complied with in their case. The affidavit giving these particulars should be filed by the State Government within three weeks from today. There are quite a large number of under-trial prisoners who are languishing in jail for long periods of time and it is not possible for us to examine the individual cases of these under-trial prisoners for the purpose of satisfying ourselves in regard to compliance with the proviso to section 167(2), but we would request the High Court of Patna to pick out a few names from the lists of under-trial prisoners which have been filed before us by the State of Bihar on 26th February, 1979 and 5th March, 1979 and satisfy itself

- A** whether these under-trial prisoners have been periodically remanded from time to time by the Magistrates as required by the proviso to section 167(2). We would direct the State of Bihar to furnish copies of these lists of under-trial prisoners to the Chief Justice of the Patna High Court within ten days from today.
- B** We find from the lists of under-trial prisoners filed before us on behalf of the State of Bihar that the under-trial prisoners whose names are set out in the chart filed by Mrs. Hingorani to-day have been in jail for periods longer than the maximum term for which they could have been sentenced; if convicted. This discloses a shocking state of affairs and betrays complete lack of concern for human values. It
- C** exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty. It is indeed difficult for us to understand how the State Government could possibly remain oblivious to the continued incarceration of these under-trial prisoners for years without even their trial having commenced. The
- D** judiciary in the State of Bihar also cannot escape its share of blame because it could not have been unaware of the fact that thousands of under-trial prisoners are languishing in jail awaiting trial which never seems to commence. We fail to see how the continued detention of these under-trial prisoners mentioned in the list of Mrs. Hingorani can
- E** be justified when we find that they have already been in jail for a period longer than what they would have been sentenced to suffer, if convicted. They have in fact some jail term to their credit. We, therefore, direct that these under-trial prisoners whose names and particulars are given in the list filed by Mrs. Hingorani should be released forthwith as continuance of their detention is clearly illegal and in
- F** violation of their fundamental right under Article 21 of the Constitution.

Then there are several under-trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon

G to find that under-trial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that

H behalf. Sometimes the Magistrates also refuse to release the under-trial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty

the under-trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pretrial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in *Maneka Gandhi v. Union of India*⁽¹⁾ that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in *M. H. Hoskot v. State of Maharashtra*⁽²⁾ : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in *Gideon v. Wainwright*⁽³⁾ :

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious

(1) [1978] 1 S.C.C. 248

(2) [1978] 3 S.C.C. 544

(3) 372 U.S. 335 : 9 L. ed. 2d at 799

A truth. Governments, both State and Federal quite properly
spend vast sums of money to establish machinery to try
defendants accused of crime. Lawyers to prosecute are
every where deemed essential to protect the public's interest
in an orderly society. Similarly, there are few defendants
B charged with crime who fail to hire the best lawyers they
can get to prepare and present their defences. That gov-
ernment hires lawyers to prosecute and defendants who
have the money hire lawyers to defend are the strongest in-
dications of the widespread belief that lawyers in criminal
courts are necessities, not luxuries. The right of one charged
C with crime to counsel may not be deemed fundamental
and essential to fair trials in some countries, but is in ours.
From the very beginning, our state and national constitu-
tions and laws have laid great emphasis on procedural and
substantive safeguards designed to assure fair trials before
impartial tribunals in which every defendant stands equal
D before the law. This noble idea cannot be realised if the
poor man charged with crime has to face his accusers with-
out a lawyer to assist him."

The philosophy of free legal service as an essential element of
fair procedure is also to be found in the following passage from the
E judgment of Douglas, J. in *Jon Richard Argersinger v. Raymond
Hamlin*(1)

F "The right to be heard would be, in many cases of little
avail if it did not comprehend the right to be heard by
counsel. Even the intelligent and educated layman has
small and sometimes no skill in the science of law, if
charged with crime, he is incapable, generally of determin-
ing for himself whether the indictment is good or bad. He
is unfamiliar with the rules of evidence. Left without the
aid of counsel he may be put on trial without a proper charge
and convicted upon incompetent evidence, or evidence irrele-
G vant to the issue or otherwise inadmissible. He lacks both
the skill and knowledge adequately to prepare his defence,
even though he has a perfect one. He requires the guiding
hand of counsel at every step in the proceedings against
him. Without it, though he be not guilty, he faces the
danger of conviction because he does not know how to estab-
H lish his innocence. *If that be true of men of intelligence,*

(1) 407 U.S. 25=35 L. ed. ed 530 t 535-36.

how much more true is it of the ignorant and illiterate or those of feeble intellect.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

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The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed. . . . The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case. (emphasis added)"

We may also refer to Article 39A the fundamental constitutional directive which reads as follows:

"39A. Equal justice and free legal aid:—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (emphasis added)"

This Article also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the

- A** needs of justice so required, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the under-trial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such under-trial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated 12th February, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.

- C** There are also various under-trial prisoners who have been in jail for periods exceeding one-half of the maximum punishment that could be awarded to them if convicted, for the offences with which they are charged. To take an example, Budhu Mahli, who is at item No. 1 in the list of undertrial prisoners in Ranchi Central Jail has been in jail since 21st November, 1972 for offences under Section 395 of the Indian Penal Code and Section 25 of the Indian Arms Act. The maximum punishment for the offence under Section 395 of the Indian Penal Code is 10 years while that for the offence under Section 25 of the Indian Arms Act is much less. Yet Budhu Mahli has been in jail as an under-trial prisoner for over six years. So also Jairam Manjhi, Somra Manjhi, Jugal Munda and Gulam Munda at Item Nos. 2 to 7 in the list of under-trial prisoners confined in Ranchi Central Jail have been in jail as under-trial prisoners from 21st February, 1974 that is, for a period of over five years for the offence under Section 395 of the Indian Penal Code which is punishable with a maximum term of imprisonment of ten years. There are numerous other instances which can easily be gleaned from the lists of under-trial prisoners filed on behalf of the State of Bihar, where the under-trial prisoners have been in jail for more than half the maximum term of imprisonment for which they could be sentenced, if convicted. There is no reason why these under-trial prisoners should be allowed to continue to languish in jail, merely because the State is not in a position to try them within a reasonable period of time. It is possible that some of them, on trial may be acquitted of the offences charged against them and in that event, they would have spent several years in jail for offences which they are ultimately found not to have committed. What faith would these people have in our system of administration of justice? Would they not carry a sense of frustration and bitterness against a society which keeps them in jail for so many years for offences which they did not commit? It is, therefore, absolutely essential that persons accused of offences

should be speedily tried, so that in cases where bail, in proper exercise of discretion, is refused, the accused persons have not to remain in jail longer than is absolutely necessary. Since there are several under-trial prisoners who have been in jail for periods longer than half the maximum term of imprisonment for which they could if convicted, be sentenced, we would direct that on the next remand dates when they are produced before the Magistrates or the Sessions Courts, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail and opposing remand provided that no objection is raised to such lawyer on their behalf and if any application for bail is made, the Magistrates or the Sessions Courts, as the case may be should dispose of the same in accordance with the broad guidelines indicated by us in our judgment dated 12th February, 1979. The State Government will comply with this direction as far as possible within a period of six weeks from today and submit report of compliance to the High Court of Patna.

We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the socio economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words of Mr. Justice Brennan

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because

A democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

And also recall what was said by Leeman Abbot years ago in relation to affluent America.

B "If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."

C We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39A.

D We find from the counter affidavit filed on behalf of the respondents that no reasons have been given by the State Government as to why there has been such enormous delay in bringing the under-trial prisoners to trial. Speedy trial is, as held by us in our earlier judgment dated 26th February, 1979, an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, as pointed out by the Court in *Rhem v. Malclm*⁽¹⁾: "The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty". It is also interesting to notice what Justice, then Judge, Blackmun said in *Jackson v. Bishop*⁽²⁾:

H "Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations...."

(1) 377 F. Supp. 995

(2) 404 F. Supp. 2d. 571.

So also in *Holt v. Sarver*(¹), affirmed in 442 F. Supp. 362, the Court, dealing with the obligation of the State to maintain a Penitentiary System which did not violate the Eighth Amendment aptly and eloquently said

"Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionallities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."

The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court as the guardian of the fundamental rights of the people, as a sentinel on the *qui vive*, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial. We find that in fact the courts in the United States have adopted this dynamic and constructive role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through decisions such as *Holt v. Sarver* (supra), *Jones v. Wittenberg*(²), *Newman v. Alabama*(³) and *Gates v. Collier*(⁴). The Court in the last mentioned case asserted that it "has the duty of fashioning a decree that will require defendants to eliminate the conditions and practices at Parchman here-in-above found to be violative of the United State's constitution" and in discharge of this duty gave various directions for improvement of the conditions of those confined in the State Penitentiary. The powers of this Court in protection of the Constitutional rights are of the widest amplitude and we do not see why this

[1] 309 F. Supp. 362.

[2] 330 F. Supp. 707.

[3] 349 F. Supp. 278.

[4] 349 F. Supp. 881.

- A** Court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. But in order to enable the Court to discharge this constitutional obligation, it is necessary that the Court should have the requisite information bearing on the problem. We, therefore, direct the State of
- B** Bihar to furnish to us within three weeks from today particulars as to the location of the courts of magistrates and courts of sessions in the State of Bihar together with the total number of cases pending in each of these courts as on 31st December, 1978 giving yearwise break-up of such pending cases and also explaining why it has not been
- C** possible to dispose of such of those cases as have been pending for more than six months. We would appreciate if the High Court of Patna also furnishes the above particulars to us within three weeks from today since the High Court on its administrative side must be having records from which these particulars can be easily gathered. We also direct the State of Bihar to furnish to us within three weeks
- D** from today particulars as to the number of cases where first information report have been lodged and the cases are pending investigation by the police in each sub-division of the State as on 31st December, 1978 and where such cases have been pending investigation for more than six months, the State of Bihar will furnish broadly the reasons why there has been such delay in the investigative process. The writ
- E** petition will now come up for hearing and final disposal on 4th April, 1979. We have already issued notice to the Supreme Court Bar Association to appear and make its submissions on the issue arising in the writ petition since they are of great importance. We hope and trust that the Supreme Court Bar Association will respond to the notice and appear to assist the Court at the hearing of the writ petition.
- F**

N.V.K.