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RESEARCH ARTICLE

Guardians of Justice: Tracing Powers of the State Machinery under the Bharatiya Nagarik Suraksha Sanhita (BNSS)

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Abstract

The passing of the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA) is undoubtedly a benchmark in the legal landscape of India. Procedural law lays down the means to attain justice envisaged by substantive law. Hence, it's more significant. This research paper provides a thorough examination of the key provisions of the BNSS that deal with the executive machinery that has to ensure that the administration of justice is met by working in the intersection of the protection of the objects of public law as well as executing judicial orders. This study offers a comprehensive analysis of the aspects relating to the collection of evidence, emphasizing the admissibility of evidence collected by retired and transferred police officers, police custody and its effects on bail, attachment of property, and other aspects of procedural law.

Keywords: Criminal Procedure; Executive; Police; Evidence; Magistrate; Custody

The penal laws in any state draw significance owing to their utility as an instrument of social control in the course of enforcing its objectives of imposing deterrence, promoting the reformation of an offender or compensating the victim depending on the jurisdiction and the application jurisprudence of criminal law. Considering that it is not the prerogative of the criminal to submit himself to an enforcement agency or the judicial process, a procedural law is required to enforce and process the rights of the accused and the aggrieved throughout the investigation process leading to the establishment of guilt or innocence. The law on criminal procedure is sine qua non to any criminal justice system and renders the substantive penal laws ineffective in case it is not applied or is misplaced. Broadly, it consists of matters relating to the apprehension and arrest of an accused, discovery and collection of evidence, and determination of guilt or innocence as well as provisions on penalty and sentencing. The erstwhile law applicable in this respect was the Code of Criminal Procedure, 1973² (“**CrPC, 1973**”). This law was the successor to the Code of Criminal Procedure, 1861³ (“**CrPC, 1861**”) which was originally introduced to unify the criminal legal system in India. The extant jurisprudence of criminal procedure applicable in the jurisdiction is one formulated out of joint efforts of the legislature- by way of various reforms brought through amendments over the years as well as the vigilance exercised by the judiciary such as in the landmark cases of *D.K. Basu*⁴ and *Hussainara Khatoon*⁵. In August 2023, the Bharatiya Nagarik Suraksha Sanhita⁶ (“**BNSS**”) was introduced to replace the CrPC, 1973 which has been notified to come into force from July 1, 2024. The law has been brought with the view of reforming the provisions on bail, attachment of property, and powers of investigation of the police, magistrate and other law enforcement machinery. Among other highlights and hindrances brought by the new legislation, this paper aims to outline the powers of investigation exercised by various authorized limbs of the executive and the changes in the mandate of the same and its implications moving forward.

Investigation into an offence and its facets is arguably the most important stage in the course of the administration of justice. Any default in the collection of material evidence, tampering with evidence or destruction of evidence could have far-reaching adverse implications including but not limited to delay in proceedings, incorrect findings from the investigation, transfer of case from one executive machinery to another and in most cases acquittal of the accused when the prosecution is unable to prove the guilt beyond a reasonable doubt due to the destruction or the absence of crucial pieces of evidence. In Indian jurisdiction, we have been witness to several of these cases such as the *Aarushi Talwar*⁷ case, the *Abhaya*⁸ case and the *Manu Sharma*⁹ case to name a few.

It is also crucial to note that the credibility of the outcome of the evidence is largely based on the credibility of the investigation agency itself. The Apex Court has time and again stressed the sacrosanct role of investigation agencies and reprimanded them for inflicting third-degree treatment on the accused and witnesses to doctor their accounts, tutoring witnesses and tampering with evidence¹⁰. While furtherance of political will and corruption are tacit evils that influence executive functions, another paradigm of fair investigation involves the proper collection of evidence. A larger chunk of criminal cases in the past remained unsolved owing to the technology in this sphere being largely obsolete. The dip in crime rates with the accession of the technological revolution in the twenty-first century is a testament to this assertion¹¹. This paper aims to consolidate and analyze the various changes made to the powers of the investigative agencies under the BNSS.

POLICE PROVISIONS

Rules regarding Arrest

Although most of the provisions relating to arrest under the erstwhile law have been retained under Chapter V of the BNSS, certain provisions depart from the language as well as settled propositions under the previous law. Section 35¹² of the BNSS provides that for offences punishable for a period of less than 3 (three) years or if the arrest is of an infirm person or a person above 60 (sixty) years of age, an officer not below the rank of Deputy Superintendent of Police must grant prior permission for the same. Further, under Section 43(3)¹³ of the BNSS, the police officer may keep in view the nature and gravity of the offence while making an arrest or while producing such a person who is a habitual or repeat offender or a person who has escaped from custody or has committed an organised crime or an act of terrorism or drug-related offences or rape or acid attack or was in illegal possession of arms or is alleged to have committed counterfeiting of notes and coins or sexual offences against children or offence against the State before a court can use handcuffs in the course of the same. This provision is in direct contradiction with the view of the Apex Court in *Prem Shankar Shukla v. Delhi Administration*¹⁴ in which it was laid that the classification of prisoners into better classes and ordinary classes for the purpose of handcuffing was 'strange, unconscionable and outrageous'. The Court further observed that the reasons for handcuffing must be communicated 'contemporaneously' and the authorised officers should not take recourse to a 'mindless mechanical process' which puts an undertrial in a state where he is bound hand and feet with hoops of steel, shuffled around the streets with his dignity defiled. The aforesaid provision is also in contravention of the "Guidelines regarding Arrest"¹⁵ issued by the National Human Rights Commission.

Detention in Custody

The Supreme Court has time and again emphasised the personal liberty of the individual, its scarce deprivation only in case there is a procedure established by law and rights against preventive detention in accordance with the letter of the law enshrined under Article 21¹⁶ and Article 22(2)¹⁷ of the Constitution of India ("the Constitution"). On a precursive reading of Section 187(2)¹⁸ of the BNSS, a deviation from the original provision enshrined under Section 167(2)¹⁹ of the CrPC is found. The relevant rule is that the period of detention can be extended if the investigation cannot be completed within twenty-four hours after submitting copies of the entries to the case diary to the nearest judicial magistrate. The first deviation is the requirement of the Magistrate to take into consideration if the accused has been granted bail or if his/her bail has been cancelled. It is relevant to bear in mind that in the case of most offences, the "nearest magistrate" is not the "jurisdictional magistrate" and it is settled that only the jurisdictional magistrate can grant bail to the accused²⁰, a view that has been modified in *Sundeep Kumar Bafna v. State of Maharashtra & Anr*²¹ to permit the even High Courts to entertain petitions of bail. Therefore, such considerations should not hold relevance or good ground for the "nearest magistrate" to remand a person to "police custody" or "judicial custody".

The second and immediate deviation made under Section 187(2) of the BNSS is that under the erstwhile law, the magistrate had the power to remand every person arrested to "police custody" only for the first 15 (fifteen) days of remand²². The aforementioned fifteen days could also be for broken periods that is, custody at different intervals amounting to fifteen days. Any further extensions for remand could only be applied to judicial custody²³. In the recent case of *Senthil Kumar Balaji v. State represented by Deputy Director & Ors.*²⁴, the Apex Court observed that "the upper limit of remand of fifteen days in police custody applies to the total duration of investigation of 60 (sixty) days or 90 (ninety) days as a whole. Under the new law, the "nearest magistrate" can order for police custody for a term not exceeding fifteen days in whole or in part during the first 40 (forty) days if the period of investigation is 60 (sixty) days or the first 60 (sixty) days if the period of investigation is 90 (ninety) days. There is no safeguard placed under the aforesaid provision that the period of police custody shall be ordered only for a cumulative of

fifteen days during the total period of sixty or ninety days of detention²⁵. This provides sufficient cause to ascertain that the said provision is likely to be abused by the police and other investigative agencies²⁶. The object of extending the duration of custody of the accused to sixty or ninety days under the erstwhile Section 167(2) was not to further the whim of an investigative agency to indefinitely continue the investigation and hence, the new law in this regard is in contravention of the principle enshrined under Article 22(2) of the Constitution. In *Sheela Barse v. State of Maharashtra*²⁷, the Court reiterated its position in *Sunil Batra* that police lockups are havens for torture and unreasonable deprivation of personal liberty while adjudicating on the extension of the permissible duration for police custody.

Finally, Section 187(5) designates “police station” as the place for police custody and “prison” as the place for judicial custody. While the former part of the provision does not further any particular object as the purpose of police custody is to facilitate investigation and not confine a person within the police station, the latter part of the provision relating to judicial custody is redundant as the same is covered under Section 457²⁸ of the BNSS (corresponding to Section 417²⁹ of the CrPC).

Application for Attachment and Seizure of Property

Under Section 86³⁰ of the BNSS, the Court may on an application made by a police officer, who is not below the rank of Superintendent of Police or Commissioner of Police commence the process of attachment and forfeiture of assets of a proclaimed offender. On the other hand, Section 107³¹ provides for attachment and forfeiture of property obtained out of criminal activity by way of an application made by a police officer with the approval of the Superintendent of Police. It also provides for the proportionate distribution of such property if the Court makes a finding that the property was in fact a proceed of crime as defined under Section 111³² of the BNSS (corresponding to Section 2(u)³³ of the Prevention of Money Laundering Act, 2002 (“PMLA”)). The aforesaid provision is similar to Section 5³⁴ of the PMLA³⁵. However, the provision under the BNSS does not afford the same safeguards. Firstly, the attachment under PMLA is provisionally up to 180 (one hundred and eighty) days whereas there is no ceiling on the duration for which the property may be seized under the BNSS. The period of notice to show cause as to why the property is not to be attached as a proceed of crime is 30 (thirty) days under the PMLA whereas the BNSS only affords a period of 14 (fourteen) days for the same³⁶.

INVESTIGATION

Preliminary Enquiry

The concept of ‘preliminary enquiry’ was not envisaged under Section 154³⁷ of the CrPC as a mandatory stage of investigation. The position on the same was clarified in *Lalitha Kumari v. Government of Uttar Pradesh and Ors.*³⁸. It was observed that preliminary enquiry was only necessary in cases which required registration of the First Information Report (“FIR”) e.g. cases of medical negligence, matrimonial disputes, etc. Even in such cases, such preliminary enquiry was to be conducted only to ascertain if the information discloses the commission of a cognizable offence. Section 173(3)³⁹ expressly provides for such an enquiry on obtaining prior permission from the Deputy Superintendent of Police to determine if a *prima facie* case is made or not. The implications of setting up such a process are that it renders unfairness to complainants against offences punishable with imprisonment between three to seven years. Such complainants would have to prefer an application to the magistrate or file a private complaint. The Bharatiya Nyaya Sanhita⁴⁰ (“BNS”) presently consists of over 98 offences which are punishable with the aforesaid range of imprisonment providing great scope for abuse of power by an investigating officer in

determining whether a prima facie case is made to warrant the registration of a FIR, a power which was previously conferred upon criminal courts⁴¹. This is a significant consideration bearing in mind that crimes ranging from theft to acts affecting religious sentiments fall within the same bracket. In *State of Gujarat v. Shyamlal Mohanlal Choksi*⁴², it was observed that directing an “inquiry” came under the monopoly of the Magistrate and not the Police. In *P. Sirajuddin v. State of Madras*, it was observed that conferring unfettered powers to one public servant to proceed against another public servant in the context of corruption cases could harm the latter against whom there would already be ‘disgruntled elements’ waiting to launch ‘vexatious prosecutions’⁴³.

Another significant procedural issue arising out of the same stems from the lack of a FIR as of the date of the preliminary enquiry. Firstly, it is in direct contradiction with the decision of the Apex Court in the case of *Youth Bar Association of India*⁴⁴ which established the right of the accused to access a copy of the FIR at a stage earlier than that prescribed under Section 207 of the CrPC⁴⁵. Secondly, it creates confusion as to whether a person to whom a notice or summons has been issued is being summoned as a witness or as an accused.

Medical Examination

Section 51⁴⁶ of the BNSS provides that a person can be medically examined by a medical practitioner on a request by ‘any police officer’ if there are reasonable grounds to believe that the examination of the person will provide evidence as to the commission of any offence. This waters down the requirement under the corresponding Section 53⁴⁷ of the CrPC which provides that such a request shall only be made by an individual not under the rank of a sub-inspector. Such watering-down expands the ambit of the category of police officers across seniority and skills who can request such examination. This could lead to perils of improper handling of evidence which is intrinsic to an individual’s privacy if the police officer is not sufficiently equipped with the skill, experience or training to handle the same. Since the evidence in the present context is of a private nature, there could be far-reaching adverse implications on the right to privacy of the accused which has been upheld in landmark decisions⁴⁸ of the highest court of the land.

Under the extant procedure, an arrestee is to be medically examined by a medical officer or a registered medical practitioner upon arrest. Further, if the arrestee is female, she is to be examined by a female medical officer or female registered medical practitioner. The provision relating to this under Section 54⁴⁹ of the erstwhile law is reproduced as it is under Section 53 of the new law apart from an additional proviso which has been introduced under BNSS. This additional proviso provides discretionary powers to the registered medical practitioner to render an opinion for another medical examination. This is a deviation from the current proposition which is derived from the D.K. Basu Guidelines which require medical practitioners to medically examine the arrestee in custody once every 48 (forty-eight) hours.

Proving of ‘Document’ or ‘Report’ by a successor officer

Under Section 336 of the BNSS⁵⁰, the successor-in-office of a public servant, scientific expert or medical officer can be called upon by the Court to depose on the ‘Document’ or ‘Report’ prepared by the preceding public servant who is dead, has been transferred, has retired, is incapable of deposing or securing the attendance of person shall cause delay in proceedings. This provision is only applicable in cases where such ‘Document’ or ‘Report’ has been disputed⁵¹. The primary issue in this regard is the lack of clarity as to whether the aforesaid provision would override or replace Section 41(1) of the Bharatiya Sakshya Adhiniyam⁵² (“BSA”) which corresponds to Section 47 of the Indian Evidence Act⁵³ (IEA). The ancillary issues that arise in this regard in the lack of specificity regarding the types of documents and reports

covered under this ambit. While the admissibility of such material is a proposition for the laws of evidence, the law does not clarify the nature of transfer or retirement as well. Courts have raised caveats in the past about depositions of retired police officers on the cases they have investigated while in service. The judicial opinion in this regard is that the Courts cannot remain a silent spectator in allowing such a retired police officer to depose anything and everything, especially in cases where an unholy alliance with the accused is speculated beforehand⁵⁴.

CONCLUSION

Through this paper, the authors intend to circle out peculiar improprieties and prospective legal and enforcement issues that may arise out of the Pandora's box coming into force which is the BNSS. The object is to re-centre focus on contentious aspects of the law on criminal procedure while the discussion in the mainstream largely revolves around the substantive law. While the State floats the new laws with a view of putting an end to colonial mentality, it is pertinent to realise that unlike the Indian Penal Code⁵⁵ (IPC) or the Indian Evidence Act, the CrPC in force as of the day of writing this paper is not from the Macaulayan era. It was the outcome of consultations with the judges of all the high courts of independent India and the work of half a dozen Law Commissions who worked intensively from 1961 till it became law in 1974. One must bear in mind that the issues raised above do not merely cause inconvenience to parties but also have a chilling effect on the personal liberty of an individual. While some of the observations showcase a deviation from an existing legislative position derived from the words of the Statute, most of them are in contravention of various directions and decisions of the Apex Court. At this juncture, it would only be appropriate to wait for the Courts to take judicial notice and mull over the likelihood of amiability to amendments.

Footnotes

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