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CRIMINAL PROCEDURE CODE

ARRESTS WITHOUT WARRANT

Sections: 41 - 43

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ARRESTS WITHOUT WARRANTS

Before we learn the law **of** arrests as laid down in the Criminal Procedure Code, let us emphasize on the law **against** arrests, with or without warrants.

THE FUNDAMENTAL LAW AGAINST ARRESTS

The Fundamental Right of **Life and Personal Liberty** granted by **Article 21** and Guaranteed by Article 32:

- **No person shall be deprived of his life or personal liberty**
 - **except according to procedure established by law**

Personal liberty as well as life can be taken away by a **procedure** established by law. What kind of “Procedure”? Any procedure or some special kind of procedure?

This is the law of our land as declared by the Supreme Court in **Maneka Gandhi v. Union of India** [1978] on the characteristics of such procedure:

- The procedure contemplated by Article 21 must answer the test of **reasonableness** in order to be in conformity with Article 14.
- It must be “**right and just and fair**” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Once we are equipped with the fundamental requirements of the procedure which can take away personal liberty of a person, we shall now see whether the procedure for arrests prescribed by the Criminal Procedure Code in sections 41 – 43 meets these requirements:



STATUTORY PROVISIONS OF CrPC:

Cognizable Offences: Where police can arrest without warrant

Section 41(1)

- without an order from a Magistrate and without a warrant
- Any police officer may arrest any person
- (a)
 - who commits **in presence** of a police officer a cognizable offence
- (b)
 - against whom
 - a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists
 - that he has committed a cognizable offence punishable with imprisonment for less than or upto 7 years
 - if
 - the Police officer has reason to believe that such person has committed the offence **and**
 - **he is satisfied that arrest is necessary**
 - (a) to prevent committing further offence or
 - (b) for proper investigation or
 - (c) to prevent disappearance of or tampering with evidence
 - (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to police officer or
 - (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured
- (ba)
 - against whom
 - credible information has been received
 - that he has committed a cognizable offence punishable with imprisonment for more than 7 years or death sentence



- **and**
 - the Police officer has reason to believe that he has committed the offence
- (c)
- who has been proclaimed as an offender
- (d)
- in whose possession suspected stolen property is found and who is suspected of having committed such offence
- (e)
- who obstructs a police officer in execution of his duty or who has escaped, or attempts to escape, from lawful custody
- (f)
- who is reasonably suspected of being a deserter from the Armed Forces

Section 41(1)(b) provides for arrests of persons who are suspected of having committed cognizable offences punishable with imprisonments of upto 7 years.

No routine arrests u/s 41(1)(b):

- No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officer to do so. Existence of the power to arrest is one thing, the justification for the exercise of it is quite another.
- *No arrest can be made in a routine manner on a mere allegation of commission of an offence.* No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation.

Arrest only if it is necessary...

- Under section 41(1)(b), a person accused of an offence punishable with imprisonment up to seven years cannot be arrested by a police officer only on his satisfaction that such person had committed that offence.
- The Police officer has to be further satisfied that **such arrest is necessary:**



- to prevent such person from committing any further offence; or
- for proper investigation of the case; or
- to prevent the accused from causing evidence of the offence to disappear; or tampering with such evidence; or
- to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or
- unless such accused person is arrested, his presence in the court whenever required cannot be ensured.

Duty of the police officer...

- Law mandates the police officer **to state the facts** which led him to come to a conclusion covered by any of these provisions.
- In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised.
- In fine, before arrest, first, the police officer should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or more **purposes** envisaged by sub-clauses (a) to (e) of clause (b) of sub-section (1) of section 41 of CrPC.
- When an accused is produced before the Magistrate, the police officer is required to furnish to the Magistrate, the facts, the reasons and his conclusions for arrest.

Duty of the Magistrate..

- The Magistrate in turn has to be satisfied that the **condition** precedent for arrest u/s 41(1)(b) has been satisfied and it is only thereafter that he will authorise detention.



Consequences of failure to comply

- *Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court.*

Authority: **ARNESH v. STATE OF BIHAR [2014 SC]**

Arrests under the SC/ST [Prevention of Atrocities] Act:

- In view of the acknowledged abuse of the law of arrest in cases under the Atrocities Act, arrest of a public servant can only be made after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.
- To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

Authority: Dr. Subhash Kashinath Mahajan v. State of Maharashtra [2018 SC]

REVERSAL BY PARLIAMENT:

Parliament amended the SC & ST [Prevention of Atrocities] Act **in August 2018** and inserted a new section in the following words:

- preliminary enquiry shall not be required for registration of a First Information Report against any person
- the investigating officer shall not require approval for the arrest, if necessary, of any person against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply



Current legal position

- in cases of accusations under the SC & ST [Prevention of Atrocities] Act preliminary inquiry will not be necessary before registering FIRs and arrests can be made by the police officer without any approval.

Non- cognizable offences: When police cannot arrest without warrant

Section 41(2)

- No person
 - concerned in a non-cognizable offence or
 - against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of his having so concerned
- shall be arrested except under a warrant or order of a Magistrate

The general rule

- Section 41(2) lays down the general rule that the Police would not arrest a person concerned in a non-cognizable offence without orders from a Magistrate. This provision is without any exception and has not been made “subject to” any other provision.
- The definition section too declares the same law, in Section 2(l): “**non-cognizable offence**” means an offence for which a police officer **has no authority to arrest without warrant.**

Cognizable offences

Police can arrest without orders from Magistrate in a cognizable offence because the term “cognizable offence” has been defined to mean an offence for which a police officer may arrest without warrant. It matches with the provisions of section 156 which empower the Police to investigate such a case on its own. Any officer in charge of a police station may investigate any cognizable case without the order of a Magistrate. Further, section 157 empowers the Police to make an arrest if it is **necessary** in such investigation.



Non-cognizable offences

- On the other hand, section 155 forbids a police officer against investigation and arrest in non-cognizable cases in the following terms:

Section 155(2) : No police officer shall investigate a non-cognizable case without the order of a Magistrate.

Section 155(3) : Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as in a cognizable case.

- It is thus clear that the Police cannot make investigations in a non-cognizable case without orders from a Magistrate. Even in such investigation, section 155 forbids the Police to make an arrest without express orders from a Magistrate.

That being the legal environment for arrests and investigations, Section 42 CrPC stands out incongruous.

[Arrest without warrant even for a non-cognizable offence](#)

Section 42

- Any person
 - who has committed or has been accused of committing a **non-cognizable offence**
 - refuses on demand of a police officer to give his name and residence or
 - gives a name or residence which such officer has reason to believe to be false
- **may be arrested** by such officer **to ascertain his name or residence**
- When true name and residence of such person have been ascertained
 - he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required
- he shall be forwarded to the nearest Magistrate having jurisdiction
 - should true name and residence of such person not be ascertained within 24 hours
 - should he fail to execute the bond or to furnish sufficient sureties



The incongruity of section 42

- Despite the express provisions of section 41(2) and section 2(l), this section permits the Police to make an arrest on its own even in a non-cognizable offence! **The very definition of a non- cognizable offence is thereby negated.**

Purpose of arrest

- No less incongruous is the reason or the purpose of this unwarranted attack on the personal liberty of a citizen. This section empowers the Police to make an arrest in every non- cognizable offence whenever the Police officer has reason to believe that the name and residence given by the suspected offender is false.

The all important questions:

- What do the Police do with the name and residence of the person who is alleged to have committed a non- cognizable offence?
- Why do the Police need his name or residence?

Unfortunately, there is no answer to these questions in section 42.

For how long

- And for how long will he be kept in custody? The section permits his release only after the police have ascertained his true name and residence. Unfortunately, this ascertainment is not made time-bound; it may take any amount of time.
- There is still more unreason in section 42. Even after it is discovered that the alleged offender had given his true name and residence in the first instance and it is clear that the Police was wrong in arresting and keeping him in custody, his release is not immediate and complete. For securing his release, he has to bind himself in a bond and has to furnish sureties too.
- All this for a non- cognizable offence about which there may not be any complaint with a competent Magistrate and about which no criminal proceedings might have been formally initiated.



Arrests by Private persons

Section 43.

- Any private person may arrest any person
 - who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender
- He shall
 - make over such person to a police officer or take him in custody to the nearest police station
- If there is reason to believe that such person comes u/s 41
 - a police officer shall re-arrest him
- If
 - there is reason to believe that he has committed a non-cognizable offence and
 - he refuses to give his name and residence or gives a name or residence which such officer has reason to believe to be false
- he shall be dealt with under section 42
- If there is no sufficient reason to believe that he has committed any offence
 - he shall be at once released

Where does section 43 lead to

- Section 43 empowers every private person to arrest a person who is suspected to have committed a cognizable and non-bailable offence. After such arrest, he would be taken to the Police. Police shall re-arrest him if his case falls within section 41.
- But he shall still not be released even if his case does not fall within section 41 despite the fact that the private person had arrested him illegally as he could not arrest in those cases which do not fall u/s 41.
- Instead of compensating him for injury to his reputation and time, he would then be put to the rigours of section 42. The Police would then ask him his name and residence. So far so good. But thereafter lies the catch. **Even if the name and residence were truly disclosed by him**, if the Police officer



considers that the name or residence is not true, he will arrest him! And, he continues to be in custody till the police ascertain his true name and residence.

- For how long? As far as the law goes, it could be any number of days. It is up to the sweet will or efficiency of the concerned police personnel.

What kind of law is this? For what fault was this person kept in custody?

An illustration

- Let us take the case of a migrant worker from Bihar who is arrested in Delhi by a private person on the ground that he committed a cognizable, non-bailable offence. He is taken to the police station and there, on initial investigation, the police think that he committed only a non-cognizable offence.
- The Police then ask him his name and residence. He discloses his residence **truly** in a remote village in Bihar. The Police in Delhi consider it to be untrue. He is then arrested on this ground and kept in custody. Though he is taken to a Magistrate in 24 hours but he continues to be in custody. The Delhi Police take let us say 5 days in ascertaining his residence in that remote village of Bihar.
- He then becomes entitled to be released but before that, he is asked to furnish 2 sureties. It takes him 5 more days to arrange for these sureties from his native village in Bihar. He is finally released a bonded person.

The injustice, the illegality, the unconstitutionality

- Did he deserve this custody of 10 days? First, he was illegally arrested by a private person. Secondly, the Police arrested and detained him even though he had disclosed his name and residence truly.
- Whatever happened to the much-hyped Article of our great Constitution? What protection does it provide against such state encroachment of personal liberty?



PART II : RIGHTS OF ARRESTED PERSONS

I. FUNDAMENTAL RIGHTS:

Rights of an arrested person under Article 22(1)

(1)

- An arrested person
 - shall not be detained in custody without being informed of grounds of arrest

(2)

- An arrested person
 - shall not be denied the right to consult and to be defended by a legal practitioner of his choice

Rights of an arrested person under Article 22(2)

(3)

- An arrested and detained person
 - shall be produced before nearest magistrate within 24 hours of arrest
 - excluding journey time from place of arrest to court

(4)

- No person shall be detained in custody
 - beyond the said period of 24 hours without authority of a magistrate

II. STATUTORY RIGHTS [granted by the Code of Criminal Procedure]:

- Section 41B: Arrested person has to be informed that he has a right to have a relative or a friend informed of his arrest
- Section 41D: Arrested person is entitled to meet an advocate of his choice during interrogation
- Section 49: Arrested person shall not be subjected to more restraint than is necessary to prevent his escape
- Section 50: Arrested person has to be informed of grounds of arrest and of his right to bail



- Section 50A: Arrested person shall be informed of his right that a person nominated by him shall be informed of his arrest
- Section 56: Arrested person shall be produced before a Magistrate without delay
- Section 57: Arrested person shall not to be detained for more than 24 hours without authorization by a Magistrate

III. LEGAL RIGHTS [declared by the Supreme Court]:

Dilip K. Basu v. State of West Bengal [1997]

(1) The police personnel carrying out the arrest should bear accurate, visible and clear identification and name tags with their designations.

(2) The police officer carrying out the arrest shall prepare a memo of arrest and such memo shall be attested by at least one witness, who is either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall be countersigned by the arrestee.

(3) A person who is being held in custody shall be entitled to have one friend or relative or other person known to him informed that he has been arrested and is being detained at the particular place.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary regarding the arrest which shall also disclose the name of the next friend who has been informed of the arrest.

(7) The arrestee should be examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time.

(8) The arrestee should be subjected to medical examination every 48 hours.

(9) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
