

has laid down the guidelines that how the police and the learned Magistrate have to act in respect of offences, which carry punishment of 7 years or less than 7 years.

4. The learned APP next submits that offences in India are categorized by the Cr.P.C as cognizable and non-cognizable, bailable and non-bailable, for a cognizable offence, the police registers an FIR and arrests the accused without a warrant, if offence is bailable, the police must release the accused upon a reasonable security, if the offence is non-bailable, only court can order release on bail. It is next submitted that police high-handedness in making arrests and a sluggish magistracy in remanding accused to judicial custody have been a source of concern to the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of *Joginder Kumar vs. the State of UP and others* reported in (1994) 4 SCC 260 emphasized that simply because the police have the power to make arrest does not mean that an arrest should be made rather the power of arrest should be exercised only as a necessity given the paramountcy of liberty in our constitutional scheme. Further the Hon'ble Supreme Court in the case of *D.K. Basu vs. State of West Bengal* reported in (1997) 1 SCC 416 issued a continuous mandamus on the mode and manner of arrest.



5. It is further submitted that the iteration of these principles in judgment after judgment prompted various amendments to Chapter 5 of the Cr.P.C, which deals with arrest by police while investigating cognizable offences.

6. It is submitted that Section 41 of the Cr.P.C was amended in the year 2009 to divide the non-bailable and cognizable cases where police have the power to arrest into two categories -- those carrying imprisonment of seven years or less falls under Section 41(b) of the Cr.P.C to be dealt differently by those carrying a term higher than seven years, which comes under Section 41(b)(a).

7. As per Section 41(b) Cr.P.C, offences punishable with seven years or less are not to automatically lead to arrest, rather before making arrest in such a case, a police officer is required to record his satisfaction that the arrest is necessary to prevent the accused from absconding, repeating the offence or tampering with the evidence, where an arrest is not necessary for these reasons, it shall be recorded that the accused has not been arrested and instead a notice under Section 41(a) of the Cr.P.C shall be issued requiring the accused to appear before the police and aid the investigation and it is obligatory for the accused to comply with the notice, if there is compliance, there



is statutory protection from arrest, if there is non-compliance, or there are compelling reasons for arrest, the fact must be recorded in writing and subject to orders passed by a court of competent jurisdiction, an arrest be made. It is further submitted that the statute emphasizes on recording of reasons so that the Magistrate before whom the accused is produced after arrest, examines the necessity of arrest and continued custody. The Hon'ble Supreme Court in the case of *Arnesh kumar vs. State of Bihar, (2014) 8 SCC 273*, held – before a Magistrate authorizes detention under Section 167 Cr.P.C, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of Cr.P.C, Magistrate is duty bound not to authorize his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, the reasons and its conclusion for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under Section 41 Cr.P.C has been satisfied and it is only thereafter he will authorize the detention of an accused. The Magistrate before authorizing



detention will record its own satisfaction, may be in brief but the satisfaction must reflect from its order. It shall never be based upon the *ipse dixit* of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc, the police officer shall furnish to the Magistrate the facts, the reasons and the materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorizing the detention and only after recording its satisfaction in writing that the Magistrate will authorize the detention of the accused, when a suspect is arrested and produced before a Magistrate for authorizing detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, *prima facie* those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted.

8. It is further submitted that with regard to Section 41 of the Cr.P.C the Hon'ble Supreme Court held that the aforesaid provision -- makes it clear that in all cases where the



arrest of a person is not required under Section 41(1) Cr.P.C, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of the notice, he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that arrest is necessary.

9. The learned APP further submits that when an accused is first produced before the learned Magistrate in relation to offences carrying punishment of seven years or less, must be released, if the preconditions of Section 41 of the Cr.P.C are not met, i.e., the learned Magistrate has to apply his judicial mind whether to remand or not to remand the accused to judicial custody and will not be swayed by the claim of the police officer arresting the accused. It is next submitted that recently the Hon'ble Supreme Court in the case of *Md. Asfak Alam vs. the State of Jharkhand and another* reported in *2023 Live Law (SC) 583* set aside the order passed by the Hon'ble Jharkhand High Court rejecting the anticipatory bail application of the husband (Md. Asfak Alam) for reasons stated in the order and at the same time directed all the courts ceased of proceeding to



strictly follow the law laid down in *Arnesh Kumar (supra)* and reiterated the direction contained therein as well as other directions, which are as follows:-

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

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1) (b)(ii);

11.3. The police officer- shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;



11.4. The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. 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 the High Court having territorial jurisdiction.

11.8. Authorizing detention without recording



reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

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

II. The High Court shall frame the above directions in the form of notifications and guidelines to be followed by the Sessions courts and all other and criminal courts dealing with various offences.

III. Likewise, the Director General of Police in all States shall ensure that strict instructions in terms of above directions are issued. Both the High Courts and the DGP's of all States shall ensure that such guidelines and Directives/Departmental Circulars are issued for guidance of all lower courts and police authorities in each State within eight weeks from today.

IV. Affidavits of compliance shall be filed before



this court within ten weeks by all the states and High Courts, through their Registrars.

10. The learned APP next submits that the Hon'ble Patna High Court in compliance of the order passed in *Md. Asfak Alam vs. the State of Jharkhand* (*supra*) issued Memo No. 62973 dated 19.9.2023 wherein it was recorded that all the courts under territorial jurisdiction of this court shall be required to follow the law laid down in the case of *Arnesh Kumar versus the State of Bihar* (*supra*) and the following direction contained in the said decision:

11.1 "All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 Cr.P.C.;

11.2 All police officers be provided with a check list containing specified sub-clauses under Section 41 (1) (b)(ii);

11.3 The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the



accused before the Magistrate for further detention;

11.4 The Magistrate while authorizing detention of the accused shall peruse the report furnished by the Police Officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

11.5 The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6 Notice of appearance in terms of Section 41-A Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7 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 the High court having territorial jurisdiction.



11.8 Authorizing detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

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

11. At this stage, the learned counsel for the petitioner submits that despite such direction of the Hon'ble Supreme Court as recorded hereinabove, the police mechanically are making arrests in cases involving punishment of seven years or less and the learned Magistrates in casual manner are remanding the accused persons in judicial custody, which can well be appreciated from the fact that this court is burdened with anticipatory bail application with regard to offences carrying punishment of seven years or less, the present application is one of them.

12. After hearing the learned APP and the learned



counsel for the petitioner, the present anticipatory bail application is disposed of with a direction that the concerned Superintendent of Police of every district and investigating officers of the case shall forthwith comply with the direction of the Hon'ble Supreme Court as contained in the case of ***Arnesh Kumar*** (*supra*) and ***Md. Asfak Alam*** (*supra*).

13. It is made clear that if any breach of the direction of the Hon'ble Supreme Court is brought to the notice of this court, the police and the learned Magistrate shall be dealt in terms of the Memo No. 62973 dated 19-9-2023 issued by this Court under the signature of the learned Registrar General.

14. Let a copy of this order be sent to the DGP, Bihar, Principal Secretary (Home), Government of Bihar and all the learned District Judges for its onward communication to all the Superintendents of Police, Investigating Officers and the learned Magistrates.

15. The Court directs that the police and the learned Magistrate shall completely adhere to the directions given by the Hon'ble Supreme Court in the case of ***Arnesh Kumar*** (*supra*) and ***Md. Asfak Alam*** (*supra*).

16. The Court for the present is not seeking any report from the police or the learned District Judges with regard to



compliance of the order of the Hon'ble Supreme Court, as recorded in the Memo dated 19.09.2023 issued by the learned Registrar General of this Court, but in the event, if it is found that anticipatory bail application with respect to offences involving punishment of seven years and less is flooding the court, in that event, in an appropriate case, report would be called from the authorities and the learned District Judges and in the event if it is found that lackadaisical approach has been adopted at the end of the Police or the learned Magistrate, in that event, proper action would be initiated, in terms of paragraphs 11.7 and 11.8 of the Memo No. 62973 /AD (Rules) dated 19.09.2023, issued by the learned Registrar General of this Court.

(Satyavrat Verma, J)

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