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HUSSAINARA KHANTOON &amp; ORS.

v.

HOME SECRETARY, STATE OF BIHAR, PATNA

April 19, 1979

[P. N. BUAGWATS, O. CHINNAPPA REDDY AND A. P. SEN, JJ.]

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*Legal Aid to Poor—Administration of Criminal Justice—Constitutional obligation of State Government—Free legal services—Absence of—Violation of trial—Art. 21 Constitution of India.*

*Criminal Procedure Code, 1973—S. 167(2)(a)—Right of under-trial prisoner—Release on bail—Entitlement to counsel at State expense.*

On further hearing the petition for release of under-trials in the State of Bihar.

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**HELD :** 1. The State Governments do not seem to be alive to their constitutional responsibility in the matter of provision of free legal services in the field of administration of criminal justice. If law is not only to speak justice but also deliver justice, legal aid is an absolute imperative. Legal aid is really nothing also but equal justice in action. It is in fact the delivery system of social justice. [765D]

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2. Every State Government will have to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Art. 21 and every State Government should try to avoid such a possible eventuality. [765F-G]

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3. When an under-trial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the under-trial prisoner that he is entitled to be released on bail.

[762H, 763A]

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4. The Magistrate must take care to see that the right of the under-trial prisoner to the assistance of a lawyer provided at State cost is secured to him with a view to enable him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of s. 167 Criminal Procedure Code. [763B]

5. The Magistrate must deal with the application for bail in accordance with the guidelines laid down in the Court's order dated February 12, 1979.

[763C]

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**ORIGINAL JURISDICTION :** Writ Petition No. 57 of 1979.

*Mrs. K. Hingorani* for the Petitioner

*U. P. Singh* and *S. N. Jha* for the Respondent.

The Order of the Court was delivered by

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BHAGWATI, J. This writ petition has again come up before us for further directions. Mr. U.P. Singh, learned Advocate on behalf of the State of Bihar, has intimated to us that pursuant to the directions given by us in our order dated 9th March, 1979<sup>(1)</sup>, the State of Bihar

(1) [1979] 3 SCR 532-544.

has already released 70 undertrial prisoners whose names were set out in the chart filed by Mrs. Hingorani on 9th March, 1979. It is highly regrettable that these undertrial prisoners should have remained in jail without trial for periods longer than the maximum term for which they could have been sentenced if convicted. We fail to see what moral or ethical justification could the State have to detain these unfortunate persons for such unreasonably long periods of time without trial. We feel a sense of relief that they should once again be able to breathe the air of freedom. But we find that there are still many more undertrial prisoners who fall within this category of persons who have been in detention for periods longer than the maximum term without their trial having been commenced. Mrs. Hingorani has filed before us at the hearing of the writ petition on 16th April, 1979 a second chart giving the names and particulars of some of these undertrial prisoners who have not yet got the benefit of the earlier order made by us. There are 59 undertrial prisoners whose names and particulars are set out in this chart and we direct that they should be released forthwith as their continued detention is clearly illegal and in violation of their fundamental right under Art. 21 of the Constitution. There are also several other undertrial prisoners who are accused of multiple offences and even if we were to proceed on the assumption that the State would be able to secure their conviction and maximum sentences would be imposed on them and such sentences would not be concurrent in accordance with the usual practice followed by the courts but would be consecutive, they have already suffered the aggregate imprisonment which could be inflicted on them, and there is no reason why they should be subjected to any further detention. It may be pointed out that ordinarily the sentences imposed on conviction for multiple offences are concurrent and if we proceed on that assumption which is more realistic, it would be found that there are many undertrial prisoners who have already been in jail for periods exceeding the maximum term which could be imposed on them even if they were convicted of the multiple offences with which they are charged. We have requested Mrs. Hingorani to prepare a chart showing separately the above two categories of undertrial prisoners so that we can pass appropriate orders in regard to them at the next hearing of the writ petition. Mr. U.P. Singh, appearing on behalf of the State Government, will help Mrs. Hingorani in preparing this chart since Mrs. Hingorani has undertaken this public interest litigation as a matter of public duty and her resources are therefore, bound to be limited.

We are informed that amongst the undertrial prisoners there are some who are lunatics or persons of unsound mind. It is difficult to under-

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- A** stand how such persons could possibly be kept in the same jail along with other undertrial prisoners. We should like to know from the State Government, in an affidavit to be filed before the next hearing of the writ petition, as to what are the circumstances in which these persons have been kept as undertrial prisoners in the ordinary jails and what the State Government proposes to do in regard to them. Mrs. Hingorani will prepare a list showing the names and particulars of these persons and Mr. U. P. Singh on behalf of the State Government will render the necessary help in this connection. The list may be filed by Mrs. Hingorani at the next hearing of the writ petition so that we may be able to pass final orders in regard to this category of undertrial prisoners.

- C** We find that pursuant to the directions given by us in our order dated 9th March, 1979, Bageshwari Prasad Pandey, Superintendent of the Patna Central Jail has filed an affidavit dated 4th April, 1979 along with a chart showing the dates on which petitioners Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 confined in the Patna Central Jail prior to their release on personal bond, were produced before the Magistrates in compliance with the proviso to section 167(2) of the Code of Criminal Procedure. A similar affidavit dated 4th April, 1979 has also been filed by Pradeep Kumar Gangoli, Superintendent of Muzaffarpur Jail along with a chart showing the dates on which petitioners Nos. 10, 11, 12, 13, 15, 16 and 18 who were previously confined in the Muzaffarpur Central Jail prior to their release on personal bond, were produced before the Magistrates in compliance with the requirement of the proviso to section 167(2). Bhuvan Mohan Munda, Superintendent of the Ranchi Central Jail has also filed an affidavit dated 12th April, 1979 together with a chart showing the dates on which some of the undertrial prisoners referred to in our Order dated 9th March, 1979 were produced before the Magistrates in compliance with the requirement of the proviso to section 167(2). It is apparent from these charts that some of the petitioners and other undertrial prisoners referred to in these charts have been produced numerous times before the Magistrates and the Magistrates have been continually making orders of remand to judicial custody. It is difficult to believe that on each of the countless occasions on which these undertrial prisoners were produced before the Magistrates and the Magistrates made orders of remand, they must have applied their mind to the necessity of remanding those undertrial prisoners to judicial custody. We are also very doubtful whether on the expiry of 90 days or 60 days, as the case may be, from the date of arrest, the attention of the undertrial prisoners was drawn to the fact that they were entitled to be released on bail under proviso (a) of sub-section (2) of section 167. When an undertrial prisoner is produced before a Magistrate and he has been in deten-

tion for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the undertrial prisoner with a view to enable him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cost is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated 12th February, 1979.<sup>(1)</sup> We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrate and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law.

The State Government has also filed an affidavit of B. Srinivasan, Superintendent of Police (C.I.D.), Government of Bihar, giving in Annexure (I) particulars regarding number of cases pending investigation by the police in each sub-division of the State as on 31st December, 1978 and in Annexure (II), particulars regarding number of cases pending investigation for more than six months. These annexures show that a total number of 10,339 cases relating to major offences and 17,687 cases relating to minor offences were pending investigation in the State of Bihar on 31st December, 1978 and out of these, 5835 cases relating to major offences and 7228 cases relating to minor offences were pending investigation for a period of more than six months. It is a matter of great regret that such a large number of cases should be pending investigation for a period of more than six months and the number of such cases in relation to minor offences should be over seven thousand. It is difficult to understand why as many as seven thousand and odd cases relating to minor offences should remain pending investigation for more than six months. It is no doubt true that reasons have been attempted to be given by B. Srinivasan in a statement annexed to his affidavit, but we are not at all satisfied about the validity of these reasons, particularly in so far as investigation in relation to minor offences is concerned. One of the reasons given by B. Srinivasan in his statement is that in 10 per cent of the cases investigation is held up because of delay in receipt of opinions from experts. We find it difficult to appreciate this reason. We fail to see why the State Government cannot employ more experts or set up a larger num-

(1) [1979] 3 S.C.R. 169—183

- A** ber of testing laboratories or establish more forensic laboratories. It is also necessary to have more than one serologists in the State. This is a situation which the State Government can certainly remedy by taking prompt action. There are also many other measures which can be taken by the State Government for the purpose of accelerating the pace of the investigating machinery but it would not be
- B** proper for this Court to suggest or recommend any such measures because this Court has not the requisite expertise of material for doing so and moreover the National Police Commission appointed by the Government of India is seized of this question and it is considering what steps and measures should be taken for the purpose of expediting the investigative process
- C** and making qualitative improvement in it. But we would be failing in our duty if we do not express our sense of amazement and horror at the leisurely and almost lethargic manner in which investigation into offences seems to be carried on in the State of Bihar. It is high time that the State of Bihar took steps to overhaul and streamline its investigative machinery so that no investigation may take more than the bare minimum time required for it and the judicial process may be set in motion without any unnecessary delay.
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We directed by our Order dated 9th March, 1979 that on the next date when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them with a lawyer at its own cost for the purpose of making application for bail and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad guidelines set out by us in our Judgment dated 12th February, 1979. We are told by Mr. U. P. Singh that the necessary instructions to this effect have been issued by the State Government to the District Magistrate, but we do not know whether and to what extent these instructions have been carried out and lawyers at State expense have been provided to the undertrial prisoners accused of bailable offences for the purpose of making application for bail on their behalf. We should like the State Government to file an affidavit stating how many undertrial accused of bailable offences who have been in jail for a period of more than 18 months as on 1st February, 1979 have been provided lawyers at State expenses and whether or not they have been released on bail in accordance with the directions given by us. The State Government will also file an affidavit giving similar information in regard to those undertrial prisoners who have been in jail for periods longer than half the maximum term of imprisonment for which they could, if convicted, be sentenced, because we had given direction of a like nature also in regard to these undertrial prisoners in our judgment dated 9th March, 1979.

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We may point out that according to the law as laid down by us in our judgment dated 9th March, 1979, it is the 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, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require. We do not know whether the State Government has set up any machinery for the purpose of providing free legal services to persons who are accused of offences involving possible deprivation of liberty and who are unable to engage a lawyer on account of poverty or indigence. This constitutional obligation cannot wait any longer for its fulfilment, since more than 30 years have passed from the date of enactment of the Constitution and no State Government can possibly have any alibi for not carrying out this command of the Constitution. We are repeating this observation once again in the present judgment because we find that barring a few, many of the State Government do not seem to be alive to their constitutional responsibility in the matter of provision of free legal services in the field of 'administration of criminal justice'. Let it not be forgotten that if law is not only to speak justice but also deliver justice, legal aid is an absolute imperative. Legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. It is intended to reach justice to the common man who, as the poet song :

"Bowed by the weight of centuries he leans  
Upon his hoe and gazes on the ground,

The emptiness of ages on his face,  
And on his back the burden of the World."

We hope and trust that every State Government will take prompt steps to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality.

We have no report from the State Government as to whether women under "protective custody" in jails have been transferred to remand or welfare homes conducted by the social welfare department as directed by us by our Order dated 26th February, 1979. Mr. U.P. Singh on behalf of the State of Bihar stated before us that this direc-

- A** tion has been carried out by the State Government, but we should like to have an affidavit of some responsible officer of the State Government stating that women who were confined in jail under the label of "protective custody" have been transferred to welfare homes and that necessary instructions have been issued by the State Government to the effect that women or children who are victims of
- B** offence or whose presence is required for giving evidence should not be kept in jail under so called "protective custody". This affidavit may be filed by the State Government within ten days from today.

We had given direction by our Order dated 26th February, 1979 that the State Government should enquire into cases where the offence

**C** charged against undertrial prisoners are triable as summons cases, for the purpose of ascertaining whether there has been compliance with the provision enacted in section 167, sub-section (5) of the Code of Criminal Procedure. It is clear from this provision that if in any case tried by a Magistrate as a summons case the investigation is not concluded within a period of six months from the date on which the

**D** accused was arrested, the Magistrate must make an order stopping further investigation into the offence, unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice, the continuation of the investigation beyond the period of six months is necessary. With a view to securing compliance with this provision we directed that if, in a case triable by a

- E** Magistrate as a summons case, it is found that investigation has been going on for a period of more than six months without satisfying the Magistrate that, for special reasons and in the interest of justice, the continuation of the investigation beyond the period of six months is necessary, the State Government will release the undertrial prisoner,
- F** unless the necessary orders of the Magistrate are obtained within a period of one month. The reason for giving this direction was that in such a case the Magistrate is bound to make an order stopping further investigation and in that event, only two courses would be open: either the police must immediately proceed to file a charge-sheet, if the investigation conducted till then warrants such a course,
- G** or if no case for proceeding against the undertrial prisoner is disclosed by the investigation, the undertrial prisoner must be released forthwith from detention. The State Government has not filed before us any report of compliance with this direction and we would, therefore, require the State Government to do so within a period of ten days from today. We would also request the High Court to draw the
- H** attention of the Magistrates to the provision in section 167, sub-section (5) and ensure compliance with the requirement of this provision by the Magistrate.

We find that pursuant to the direction given by us in our Order dated 9th March, 1979, the High Court of Patna has forwarded to us a compilation containing particulars giving the location of 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 with yearwise break up of such pending cases and briefly explaining the reasons why it has not been possible to dispose of these cases within a reasonable period of time. The figures of pending cases given in the compilation are staggering and it is distressing to find that quite a few of these cases have been pending for more than five years, sometimes extending even to seven or nine or ten years. We shall examine the position arising from the pendency of such a large number of cases for such long periods of time at the next hearing of the writ petition, with a view to considering what directions are necessary to be given to the State Government by way of taking positive action for the purpose of securing enforcement of the fundamental right of the accused to speedy trial. We would, however, require for this purpose information from the High Court of Patna as to the norms of disposals fixed by the High Court for the different categories of Magistrates and Sessions Judges in the State of Bihar, since without this information, it would not be possible for us to decide whether the existing strength of courts and judges in the State of Bihar is adequate for the purpose of ensuring speedy trial to the accused or it is necessary to have additional courts and judges. We would request the High Court to furnish this additional information to us at the next hearing of the writ petition.

We will proceed with the further hearing of the writ petition on 24th April, 1979.

N.V.K.