

BHARATIYA NAGRIK SURAKSHA SANHITA 2023

ARREST-II

Notes - Procedure of arrest, Rights of the arrested persons

Procedure of Arrest

In the Cr.P.C., Section 41 had given wide powers of arrest to the police whose abuse led to the Apex Court and the legislature directing and amending the portions to improve reasonability and credibility of arrests. This was done by including guidelines, limitations and procedure for when and how a police officer may or may not effect arrest. They are present in the BNSS, 2023 under Sections 36, 43, 46 and 53.

Section 36: Power of arrest and duties of officer making arrest

This section comes from the guidelines made in the D.K. Basu case in 1996. This section says that when a police officer is making an arrest, he has to have a clear and visible identification to facilitate easy identification of his name.

Also when he is doing the arrest, he should prepare an arrest memo which contains the details of that arrest. That memorandum must be attested by a signature of a member of the family of the person arrested who, through this memorandum, is informed of the arrest. The memorandum should also be countersigned by the person arrested.

If in absence of a family member of the person arrested, a respectable member of the locality where the arrest is made shall attest the arrest memo, and the police officer shall inform the person arrested that he has a right to have a relative or a friend or any other person named by him to be informed of the fact of his arrest. The authentications and the right given in provision ensures that the arrest is legal, fair and free from abuse.

Section 43: Arrest how made

This section corresponds to Section 46 in the Cr.P.C., and went through two amendments. The amendments came from guidelines by the Supreme Court, largely introduced by the case of Prem Shankar Shukla v. Delhi Administration (1980) and Article 21.

The general rule established in Section 43(1) is that the police should not touch or confine the body of the person arrested unless circumstances demand so. A person can submit to custody through words or actions. This is because being handcuffed and paraded harms the dignity of an individual irreparably.

Section 43(3) says that a police officer while arresting can handcuff a person depending on the nature of offence and its gravity, i.e. if the accused has been observed to have violent tendencies. Apart from that, if the accused is a repeat offender, has escaped from custody, related to organised crime, terrorist act, drug related crime, or has committed murder, rape, acid attack, counterfeiting of coins, human trafficking, sexual offence against children or offence against the State or illegal possession of arms and ammunition, he can be handcuffed while being arrested or while producing such offender before the court.

Reading Section 43(2) with Section 43(4), we see that if a person forcibly resists or attempts to evade arrest, the police officer or person can use all means necessary to effect the arrest. Such necessary means can extend to causing death when the offence that the person is accused of is punishable with imprisonment for life or death.

Also the exception in Section 43(1) and subsection 43(5) talk about special provisions for women's arrest. In case of women, it will be presumed that she has submitted to custody or oral intimation of arrest. Women shall also be arrested only between sunrise and sunset. If any confinement is needed due to the circumstances and she needs to be touched, it will only be done by a woman police officer. If the arrest is to be made at any other time due to exceptional circumstances, the woman police officer shall obtain prior permission of Judicial Magistrate (FC) of the area of arrest or offence.

Section 46: No unnecessary restraint

It says that no person shall be subjected to more restraint than necessary to prevent his escape.

Section 53: Examination of arrested person by medical officer

This is a mandatory provision for whenever an arrest happens. When a person is arrested, he shall be examined by a medical officer soon after such arrest who will prepare a record of it, mentioning any injuries or marks of violence, and their approximate time of happening.

A copy of this record will be furnished to the person arrested or any person whom the arrested person nominates.

If the medical officer is not present, such examination can be conducted by the registered medical practitioner, defined in explanation to Section 51. Such an officer can also order one more examination if he feels that it is necessary. In case of women, the examination shall be conducted by or under a female medical officer or practitioner.

Examination (Section 51, explanation)

Examination shall include examination through scientific techniques such as DNA profiling or other necessary tests of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings and other tests which the medical practitioner may think necessary in a particular case.

Registered Medical Practitioner (Section 51, explanation)

It means a medical practitioner who possesses any medical qualification recognised under the National Medical Commission Act, 2019 or whose name has been entered in a National or State Medical Register under NMC Act, 2019.

Difference between Section 51, 52 and 53.

Though all of these sections talk about examination of accused by medical practitioner, the examinations in Section 51 and 52 are not mandatory and are to be conducted under certain circumstances.

Under Section 51, the examination of an accused is to be conducted on the request of the police officer who has reason to believe that an examination of the arrested person by a registered medical professional, as defined earlier will afford evidence or to ascertain facts as to the commission of the offence.

Under Section 52, in case of a person arrested for the commission of rape or attempt to commit rape, and with reasonable grounds, the police officer can request a medical practitioner at a Government hospital or a hospital by a local authority, and if unavailable within radius of 16 kms of the offence, any other registered medical practitioner available. Under Section 42, objects to be recorded are more, and the report after being forwarded to the Investigating officer, will be forwarded by him to the Magistrate (*under documents submitted with police report when report is with respect to a case with sufficient evidence, Section 193(6) read with Section 190*)

Under Section 53, the examination is with respect to recording the condition of the accused when he is taken by the police and not for obtaining evidence. This examination report will only be given to the arrested person/someone he knows and not to the investigating officer. Section 53 is a safeguard for arrested persons, whereas 51 and 52 are tools for better conduct of investigation.

Rights of the arrested person when he is being arrested

These protections are a recognition of rights of arrested persons and are offered to the person from the moment that they are arrested. They are contained in Section 38, 47 and 48 of the BNSS, 2023 and derive their power from Article 22(1) and Article 21.

Section 36: Right of arrested person to meet an advocate of his choice during interrogation

As the heading indicates, this section says that when the person is arrested and interrogated, he is entitled to meet an advocate of his choice during investigation. This right does not mean that the advocate will stay with the arrested person during interrogation, but only get to meet him.

Section 47: Person arrested to be informed of grounds of arrest and of right to bail

When a person is arrested without a warrant, he has a right to be informed by the police officer arresting him of the full particulars of the offence or on whatever grounds he is arrested. (Section 47 (1))

If the person who is arrested without warrant is accused of a bailable offence, he shall be informed that he is entitled to be released on bail and that he can arrange sureties on his behalf. (Section 47(2))

Section 48: Obligation of person making arrest to inform about the arrest, etc. to relative or friend

This section puts an obligation on the person making the arrest to give information about the arrest and where the arrested person is being held to his family members, relatives or anyone nominated by him. A diary with entries as to whom this disclosure was done shall be maintained

by the police station. This information shall also be given to the ‘designated police officer’ of the district.

The arrested person shall be informed of his rights as soon as he is brought to the police station. (Section 48(2))

When the person is presented to the magistrate, the magistrate has a duty to verify that all the above actions (i.e. disclosure to known person, entry of it and informing of rights) have been complied with in respect of such arrested person. (Section 48(4))

The designated police officer (Section 37) is an officer not below the rank of Assistant Sub-Inspector appointed in every district and in every police station by the State government. He shall be responsible for maintaining names and addresses of arrested persons and the nature of offence with which they are charged with.