

The Suno India Show

Father Stan Swamy's custodial death: How far does the right to bail extend in the country?

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On July 6, Father Stan Swamy died in custody. Father Stan Swamy was a Jesuit priest and tribal rights activist based in Jharkhand. He was arrested in a case related to Bhima Koregaon violence in Pune. The case is from December 2017 but he was arrested last year. Several activists including artistes from Kabir Kala Manch and other human rights activists such as Sudha Bharadwaj, academic Anand Teltumbde, Nagpur based lawyer, Surendra Gadling, Delhi university professor, Hany Babu, among others were arrested under Unlawful Activities (Prevention) Act.

But the episode is not about the case. It is around the question of why Father Stan Swamy died in custody. Why did he not get bail?

Father Stan Swamy was 84 years old when he died in Mumbai's Holy Family Hospital. He suffered from Parkinsons' disease. Even to get a sipper in jail, he had to move the court. He died while his lawyers sought urgent medical bail for him. He also contracted Covid-19 in prison more than a month ago.

Hi, I am Menaka Rao, the host of this episode of the Suno India Show. We wanted to take a hard look at why it is so hard to get bail once a person is arrested? Even in the middle of the pandemic. Even for an 84-year old man like Father Stan Swamy.

I spoke with advocate Abhinav Sekhri, a criminal lawyer in Delhi. He also represents the Internet Freedom Foundation and writes extensively on criminal law. He also runs a blog called Proof of Guilt. He recently wrote a paper on the bail regime in the country laying bare the principles behind the current bail regime, and how it is antithetical to the core principle in our criminal justice system- that an accused is innocent until proven guilty. I will be linking all the references in the show notes.

Let's go to the interview!

Host: We are doing this episode in response to Father Stan Swamy's death and he was arrested under UAPA the Unlawful activities Prevention Act, and he died in custody. So I want to, in this episode, try to understand the principles of the bail regime in our country. And I really liked your article because it's sort of summed it up from the colonial era to right now. So, you know,

and, you know, there is one quote which I thought was very relevant. So, you wrote that, you know "Changed social modes, the relevance of presumption of innocence, the recognition of fundamental right to personal liberty in the Constitution of India, all of these found no expression in the enlarging, in enlarging the scope of the right to bail by at least declaring more offences as bailable." Yeah, the principle embedded in our criminal justice system, which is repeated over and over again, in the courts, is that, you know, an accused is presumed innocent until proven guilty. Yet we hear that, prisons still have under trials, you know, who are arrested for really small offences, such as theft, etc. And they're there for years sometimes. So, what happens to a person once he or she is arrested? And why is it so difficult for them to get free?

Abhinav: I think there are really, too far too many factors that that have contributed to the, the horrible situation that, frankly, we are in right now. And my argument across various places is consistent in so far, as I argue that the outcomes that we are seeing today that people end up suffering, several months on end, in prison, while they are sort of presumed to be innocent, is exactly how the system wants to work right now, and it is designed to function this way. Now, why do I say that? One of the main reasons behind this is what our law has in the form of a classification of offences, where offences are categorised along two parameters. One of them is the parameter of whether or not the police can arrest without a warrant. And now these are basically called offences that are cognizable versus offences that are non cognizable, which is where police can't arrest without a warrant. On top of it, the second parameter is where a person has a right. And I want to underscore the word right to bail, as opposed to offences where there is no such right. But what you have is, what everyone always has is the ability to make a request to a court that please grant me. And there is a world of difference between the two. Because frankly, only in the first can you really say that the rule is bail, not jail. Whereas in the second, all that you have, is a liberty to ask a court to release you on bail. If you can satisfy that court that you ought to be relieved on bail. This bailable versus non-bailable regime has been there since the first criminal procedure codes that were there way back since 1861. And frankly, shockingly, there have been little or no attempts to try and revisit that classification. Today, in 70 years of a constitutional regime, we haven't spent even the minimal effort to try and revisit that classification. And the outcome is that today, offences such as simple theft, which is punishable with up to three years as a maximum is something that is not only cognizable, but also a non bailable offence, which means that persons arrested don't have a right to be released upon their arrest. But they have to go apply before a court and then hope that the court agrees with their arguments that they ought to be released on bail. So I'm saying that, for me is something that doesn't get as much attention as it ought to. Because underneath the rhetoric of the rule of bail nor jail lies the reality that the rule is actually definitely not bail first, as opposed to jail. The reality is somewhere on the line, that everyone definitely has the ability to ask to get bail. And then your application will be processed. I mean, look, normally, when you are talking about bail and non bailable case, you have, it's, there are no rules as such, for a court to decide, okay, how should I go ahead and grant bail? There are no statutorily defined factors that say that, okay, you know, this is your checklist, please check ABC if this is made out or not. What the law is, is that courts have a very undefined, unimaginably broad scope of discretion. But within that, they have to look at certain things such as, how serious is the crime? How serious are the allegations? What is the risk of a person fleeing, if released on bail? What is the risk of a person tampering

with evidence or threatening witnesses and released on bail? So these are you can say, and, you know, the last thing, obviously, is are there any, you know, special personal circumstances or whatever person has serious medical conditions, or if a person, you know, is the sole breadwinner for his or her family, and it's not only him, but you know, an entire household that is going to get affected by his continued incarceration. So, these are the broad factors you ask a court to look at when you're thinking about bail in a non-bailable case.

Host: So over the decades, we've had many stringent laws, you know, related to smuggling, organised crime, terrorism. Can you explain the ways in which many of these laws attack provisions related to liberty?

Abhinav: I'd say that, historically, there has been a, you know, a barrage of situations in which, so various governments over time and independent India have created rather drastic statutes, which sort of deal with what they identify as a very serious problem. And one of the ways in which they want to deal with said 'very serious problem' is by creating provisions that, you know, sort of seek to have a deterrent effect. So there's so scary to look at that, the hope is that people are not going to turn to committing these kinds of crimes. A classic example of this, as you identified already was smuggling where smuggling is not only something that has very harsh provisions under the Customs Act, but also has laws for preventive detention of such persons who are accused of smuggling, and also the confiscation of properties that are suspected to be either smuggled properties or benefits gained by persons after having engaged in smuggling. So that's a total complex of really scary laws that the state can tap into when it wants to if it wants to deal with alleged smuggling. And similarly, one other obvious area that has emerged over time has been terrorism and anti terror laws, of which the UAPA in its current avatar is sort of the the main anti terror law that we have at the central level. The various ways in which I would say that these statutes, you know, attack liberty or other try and create that deterrent effect. One is obviously in respect of your personal liberty by you know making bail harder and making, shifting the burden of innocence. UAPA and other such offences, what they do is that they tell a court that, you know, yes, you will decide a bail application. But while doing that, you will, you will not grant bail if ABC situations can be fulfilled. Right. So that really restricts the scope of a judge's discretion, while considering an application for bail.

Host: If a person has to get bail under these draconian acts, how can they get it?

Abhinav: What these serious crimes do is they cast further conditions upon a court above what are these generic sort of, you know, standards. On top of standards, you have rules, and why is it harder with those rules, is one is the one rule that gets crafted in almost all of these crimes. In that there is a default position that comes. And the law then now asks courts to not grant bail unless something can be established. So, let's just open that statute. And actually before the UAPA, what's more interesting to look at is the NDPS Act, which is the drugs law what I'm reading right now is the the act itself, and section 37 of this Act says that no person accused of certain offences shall be released on bail, unless the public prosecutor has been given an opportunity to oppose the application, And where the court is satisfied, that there are reasonable

grounds for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence any offence while on bail. Right? So what's happening here is that if the prosecutor opposes your bail application, you will not be granted bail, unless you Mr accused, can satisfy a court that there are reasonable grounds to believe that you aren't guilty of the offence, and that you are not going to commit any offence while on bail. That frankly, is a monstrous condition to really fulfil in its terms. I know this conversation is triggered by an ongoing UAPA prosecution. But it is, in its terms, the kind of impact that the NDPS casts on persons who are embroiled in this statute is unbelievably bad. Now, as compared to this, what you have is a slightly differently worded section in the Unlawful Activities Prevention Act. UAPA 43 D (5) says that persons accused of certain offences will not be released on bail, unless the public prosecutor has the opportunity of being heard. So far, so good, and then provided that such accused person shall not be released on bail. If the court is of the opinion that there are reasonable grounds for believing that the accusation made against such a person is prima facie true. Now, that is on its terms, very different from what we just saw in the NDPS context. And let me just flag two differences. One is it's not talking about requiring the accused to show that the accused is not guilty. What it is requiring is that a court has to look at whatever the prosecution puts before the court and decide whether there are reasonable grounds wants to believe that the prosecution's case of crime is prima facie true and the burden here is on the prosecution. Similarly, the accused is not required to satisfy a court that look, if I get bail, I am not going to commit any other offences while on bail, that condition doesn't exist here.

Despite this, the Supreme Court's interpretation of this law is what makes bail harder. The decision was taken in the case against Zahoor Ahmad Shah Watali, a Kashmiri businessman accused of funding for terror activities. The Delhi high court looked at his allegations in great detail and found it lacking before granting bail.

Abhinav: The case goes to the Supreme Court of the Supreme Court reverses it. While doing so the easy out for the Supreme Court, which it did take was that the word prima facie before truth indicates that a court is not required to enter into such a thorough examination of material and the stage of bail. What the court says as far as the idea of prima facie truth, and when it goes on to elaborate, it says what you have is a standard that makes it very easy for bail to be rejected. Because what you have is a very, very low threshold what happens is that the prosecution, just by merely having a case, can go ahead and create a presumption that a person ought not to be granted bail, because the accusations are prime facie true the impact of Watali at one point was such and in some places the language is, you know, is problematic. And it allows the prosecution today to argue and it is something that they do argue each time in a UAPA case, that you know, just don't think about bail, because hey, we have a charge sheet that says that there are serious accusations, don't look too hard at our case. Right. And this is for me at least one this is the supreme court took a wrong step there. And made UAPA bail unnecessarily more complicated than what it had to be.

In 2021, in the case of KA Najeeb, who is accused of terrorism activities, the Supreme Court granted upheld his bail on the ground that the trial against Najeeb had been delayed for more

than five years. This case can provide a succor to others who are similarly arrested under UAPA with delayed trials.

Abhinav: The conversation right now, we focus on the pre trial aspects. I know we are in India and trials take forever to happen, but they still do happen. And if you look at the numbers about conviction rates, or rather discharge rates, where you know, a court later thinks that it's not even a sufficient case to go to trial. The rates for the UAPA and even the NDPS are startling in terms of how high acquittal rates are. Also as far as the UAPA is concerned, another startling feature is just how slow the process moves. So, what you have is the UAPA will show as per the 2019 NCRB data that pendency rates of investigations as well are alarmingly high. So what that means is that at the end of the year, if a case is registered and investigation is not completed, it gets carried forward. For the UAPA it's, it's an above 90% rate of pendency as far as investigations are concerned. So on an average, you will be in investigations that always take more than a year. And if you then couple it with the fact that, you know, person normally will not get bailed during an investigation, you see, you know how that ties up where you spend longer periods in jail and the police also take longer as far as continuing an investigation is concerned, then trials again, UAPA trials take far longer than average trials. But when you end back in the UAPA, is an acquittal rate of around 70%. It is shocking because for a bail regime that is as harsh said as it is you take forever to get to a trial and ultimately those trials and in acquittals. Similarly, as far as the NDPS is concerned, again, the acquittal rates are not that high. But the acquittal rates are not zero by any means. And still, person spend, you're on you're in custody at the pre trial stage, for what for ultimately to get an acquittal.

Host: I was gonna ask you about medical grounds for bail. And, you know, like, it's very puzzling for many people that why are some kinds of undertones not getting bail, even on medical grounds. And you know, why is it so hard for someone like Anand Teltumbde who has asthma or Sudha Bharadwaj who has diabetes to get bail. So even the Bombay High Court made some comments on how they tried to get Father Stan Swamy medical care.

Abhinav: Okay, that's a great question and a very complicated question as well, because it doesn't have an easy answer. And it's complicated further by the odd reality that we're in right now with because of COVID. And what courts have tried to do to alleviate so-called stress on prisons during COVID. What's happening right now since March of 2020, is that once it became sort of apparent that COVID is going to become a really big problem. The Supreme Court was surprisingly proactive and asking the High Court to take charge of the situation as far as prisons and persons housed in prisons are concerned, they asked High Courts to form what has been called high powered committees that consisted of, you know, the top brass of the state law and order administration, as well as members of the High Court to sit together and craft a policy for decongesting prisons. Now, this obviously extended to taking out convicts by granting them parole for certain weeks. It also extended to giving interim bail to certain persons. What's curious here is that while the court did all of this on account of a pandemic and as time progressed, it became apparent that persons with comorbidities are going to be at risk far greater than other persons have, you know, contracting the disease and also having fatal consequences upon contracting the disease. High-powered committees since March till today have retained his zone

of exclusion for what are called serious crimes, where they said that the benefits that we are conferring will not be applicable, where the person is accused of serious crime. This was challenged by persons before the Bombay High Court, that challenge did not result in a favourable finding, till now, and frankly, it's, it's preposterous, and I'm sorry, to be a bit excessive in my language. But really, if what you had is knowledge of a general and genuine medical concern, and clear science, and clear scientific data showing you that certain persons are going to be more at risk, the logic ought to have been purely determined by the science. And at some stage, you hope that you know, you look past the accusations, which are what they are, you are dealing with accusations, you look past them to deal with what are the medical facts of a person's existence. But courts have consistently refused to do it, and it's mind-boggling really. One would assume you know that the idea at some level is a fear of manipulation, that all persons accused of serious crimes are going to fudge the record. And I want to, you know, go ahead and try and avail benefits, where benefits ought not to have accrued to them. But surely, the answer can't be a blanket exclusion, where you won't even consider such persons for interim relief, especially where the normal law is so harsh on them for bail that they have little or no chance of being released on bail. Because of the way the rules have been stacked. Despite, you know, saying that, oh, we're looking at the science, we're looking at the science, somehow it seems that the science has to not be looked at when you're comparing it with gravity or certain accusations, which to me, at least, is mind-boggling. That problem played a part in the tragedy that unfolded before all of us very recently. Because ultimately, if the rules were different than Father Stan Swamy and frankly, a lot of other persons who are in custody and are probably suffering a great deal or have suffered a great deal, would have had a better chance of quicker medical care if they were at home and if they were in the company of their loved ones and if they had regular medical care, because it's one thing to say that, you know, presence can provide medicine that's one thing, but let me say this Especially in COVID, and the treatment for COVID. It's the isolation that really hurts. And having been someone who has personally, you know, been there as far as COVID is concerned and has faced loss. It's, it's one thing to talk about the medical aspects of, you know, hospital care. But at the same time, you can't be blind to just the comfort that convalescence in the presence of family and friends brings. And to think that courts, who are comprised of judges, who also would have seen this firsthand, have somehow steadfastly refused to acknowledge it, I am at a loss to really explain how it's still going on this way. But that, like I said, is the shorter problem. The bigger problem is generally what happens with medical bail, how courts are going to look at it. The answer there is, again, medical bail, there is no real rule as such that you have to give a person bail for anything. When you're talking about bail and non-bailable offenses, what you have are standards, standards that a court ought to consider various factors. And so like I said, one of the factors that a court has to look at is if there are certain personal circumstances of an accused that make it a good case to grant bail. Medical factors fall in this bracket. Now, since there is no real rule as such, and given the fact that you will be granted some medical care in jail, courts are frankly, really, you know, nonplussed about the fact that okay, a person ought not to be granted bail on medical grounds alone, because ultimately, the fact of medical care can be given while you're in custody. So that's one thing. The second is there is no clear, you know, set of rules that says okay, what are the facts of a person's medical condition, because what will happen in a bail hearing, and what did happen in Father Stan Swamy on his bail hearing at a point, I wouldn't say at the end, but at a point is that

you will have a state opposing your bail application whereas a matter, of course, as a routine practice, they are going to oppose it, right. The state is rarely, if ever going to turn around and go out and say that, you know, I totally agree this is a very serious case, please relieve this person on bail. For some reason, that basic level of decency and fairness does not exist in this system today, and the default setting is that prosecutions must oppose all bail applications, wherever and whoever made the file. So given that, that is the reality, what you have is the prosecution will turn around and say we don't believe the genuineness of this. You go ahead and prove the genuineness of this, you ask for inquiry, you do this, you do that and ultimately, that takes time. So in medical bail, then you have this really odd situation where you know, there really isn't a clear path for a court to follow. There will be courts, and there are courts who say that we are not experts, please let ask a body of experts constitute a medical board to look at how serious these conditions are, to decide whether or not you know, your continued incarceration is prejudicial to your health. You don't know what how or what is due to process it there are no timelines. So for instance, if you asked for a medical board, how long might it take? Does it take a month? I think, ultimately, this is not something that is empirically borne out yet. But what ultimately happens is, bail hearings are driven largely by one factor and one factor alone in most cases, which is how serious are the accusations against you. I think that the consequence of not having rules of not having a clear, guideline approach where you know, new courts are sort of help in assessing how to process the effect and the stage of bail. I'm not saying that you should ignore serious allegations. By no means am I suggesting that, but there has to be some sanity in how we process these facts at the stage of bail, because ultimately, you know, we have to make a choice, what is going to be the guiding approach. If the guiding approach is, look, we have to be driven by the seriousness of allegations, then that can't co-exist with an approach that says, look, persons are presumed innocent until proven guilty. If your guiding approach is, I will respect a presumption of innocence, then in that approach, you can't give pride of place to the seriousness of the allegation. So ultimately, it is a question of formalising to some extent, you know, what are the guiding approaches that courts have to follow while hearing bail applications. Because often what we have is a situation where at the stage of bail we want answers to everything, where bail decisions have to serve as the moral compass that society needs. about, okay, how am I want to make sense of the situation? Okay, a person denied bail, that means the person is guilty. That's actually not what the law says. And where courts end up feeding into this unwittingly, is where they make the gravity of the accusation and the seriousness of the crime the main consideration by assessing bail applications, and this, I think, is ultimately, you know, where the rubber meets the road. And this is why you end up seeing really horrible injustice in specific facts, because courts, unfortunately, turn a blind eye to facts in the face of accusations.

Host: So yeah, I'll go to the last one that, you know, like, what are the ways in which you think the bail regime can be more reasonable? And in a way that, you know, the discretion of judges can be minimal? What do you think are the ways in which we can reform this, if at all?

Abhinav: As far as things that could work, and then there are tonnes of things which we could try. The first would naturally be taking a long, hard look at our current ways of classifying offenses. And I mean this in two respects. One is obviously just looking at all our laws. And trust me, there are a lot of laws that are there creating offenses and seeing, how are we arriving at a conclusion that this crime should be non-bailable. So we, I mean, it's high time as we start with

the IPC in the basic Indian Penal Code, and then look past it at both the central and the state levels to really think about this. And then change rules where we need to to create a more broad base right of bail, rather than have what is the current reality in which have a vast vast number of offenses does not have any right of bail. But you have to ask, and you have to, you have to have the wherewithal and the ability to be asking the court to grant you bail. So that, for me is definitely like, you know, one place to start. Today, I'm saying don't have objective criteria on bail, but certainly have some objective criteria to make it harder for parliament, or to make it harder for a state legislature to make non-bailable offenses. Today, you don't have anything, right. So all you have is you have unfettered discretion with legislators to say, okay, this kind of crime, you can make non-bailable, you have that, and you have a very problematic default rule within the Criminal Procedure Code, all offenses punishable up to three years, all right, that's really nothing punishable up to three years, they become non-bailable by default. We need to have more conversations around this idea of a broader right to bail. And as far as the question of judicial discretion is concerned. I mean, I strongly think that the the free for all secret sauce approach to their politics somewhere is something that is all right in the abstract, but it contributes to arbitrariness in specific cases. And it contributes to creating injustice in each specific case. We need some semblance of sense to make judicial discretion rational. Because right now, what we have is a system where, you know, you have court decisions that are saying, oh, judicial discretion ought to be used judiciously. I mean, try making sense of that. You need to move past that and acknowledge that ultimately, please have discretion, but there have to be some identified guiding principles which this discretion is serving. And like we discussed earlier, there has to be a reckoning with what are your founding your foundational values on the question of bail. So that, you know, courts have a clear idea of what is it that their decisions ought to be guided by? If they are going to be guided by how serious the accusations are, then please have that discussion in Parliament, have a law that says it in as many words and please consign the presumption of innocence to the relative dustbin where it needs to go then. But if that is not the case, and we do need to acknowledge that okay, we are at the stage of bail, and we still believe that persons ought to be presumed innocent till trial happens when they can be convicted of a crime, then we need to acknowledge and reflect that in how bail hearings take place and how bail decisions are made. Because ultimately, if that doesn't happen, then the dissonance between practice and theory is going to remain, you know, it's going to remain a bridge too far. It's not going to be surpassed.

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