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Where quick bail is a courtesy

- Gupta case shows how US system protects presumed innocence K.P. NAYAR



Rajat Gupta

speedy trial.

Washington, Oct. 30: Rajat Gupta's speedy bail in a New York court on Wednesday within hours of his surrender on insider trading charges has thrown the spotlight on a rarefied world where aggressive prosecutors, feisty criminal defence lawyers and sedate American judges all work in complete harmony to protect the presumed innocence of those accused of breaking the law until they are actually found guilty under due process.

Gupta walked out on bail within a few hours of his surrender after a federal grand jury in Manhattan indicted him on one count of conspiracy and five counts of securities fraud.

Indians, Russians, Chinese and other immigrants here are looking askance at the process, used as they are in their countries of origin to judicial backlogs and delays.

Many immigrant communities here are also used to instances back home of those charged with white-collar crimes spending months, if not years, behind bars without even being formally charged of their crimes, let alone being given the benefit of a

Union law minister Salman Khurshid recently expressed concern that businessmen being locked up could affect business confidence and come in the way of investment.

Gupta's bail was agreed upon in courteous, matter-of-fact discussions between his lawyer and the state's prosecutor before the accused was produced in court after his surrender, which was also negotiated by the two sides in gentlemanly negotiations.

Ravi Batra, a prominent New York lawyer, who successfully argued for dismissal of criminal charges against Kritika Biswas, the school-going daughter of an Indian diplomat recently, told The Telegraph that "such courtesies amongst lawyer-adversaries, which have become the established convention in the American legal system, promote merit-based dispute resolution and enhance public confidence in the courts".

This reporter's conversations with Batra and other lawyers show a pattern where everyone involved in a judicial process ensures the presumptive innocence of an accused even after a grand jury is convinced that someone is guilty, as in Gupta's example, and a case is sent for jury trial.

Batra said this is because of the rule of law where "prosecutors and defence attorneys have a sacred duty towards the court in our highly adversarial system of justice." The courtesies extended by opposing lawyers to each other, he stressed, help the courts to function better and dispense justice.

A sample survey of court cases by this reporter showed that in American state courts, judges, more often than not, rubber-stamp a bail deal agreed upon between prosecutors and defence attorneys before an accused is produced in court after his or her indictment.

Curiously, actual negotiations on the bail, including the bail amount, take place outside the court in conversations between prosecutors and defence attorneys. When a defence lawyer formally moves a bail application in court after the surrender of an accused, it is often approved speedily with the judge merely ensuring that the two sides have agreed on bail, including its terms and the bail amount.

However, the pattern shows that in federal courts, this may well be different. There have been many well-known instances where the judges satisfied themselves that an accused is not a flight risk or that an accused would not be out on bail and tamper with evidence.

One famous case was that of mafia boss John Gotti who was denied bail by a district judge in New York while his case went on trial. But the denial of bail even in such a case where the accused was arguably capable of eliminating witnesses was so sensitive an issue that the judge, Leo Glasser, held a three-hour bail hearing in camera.

The prosecutors and defence lawyers could not agree on any bail terms and the judge denied bail to Gotti. One lawyer here who spoke to this reporter surmised that bail may have been denied to some of the accused in India's 2G scam because people who were connected to the case had died under questionable circumstances while investigations were in progress.

In a more recent case in the US last year, several people who were accused of spying for Russia for at least a decade, including a 28-year-old femme fatale of the alleged spy ring, Anna Chapman, were denied bail.

Here again, there was no agreement on any bail terms between lawyers, with the prosecutors arguing that there were Russian government officials in the US actively assisting this group and they could pose flight risks. Russia and the US eventually agreed on a spy swap ending the case.

The established arrangement for speedily securing bail in the US justice system has, however, created a dubious institution here, the bail bondsman, a paid agent working for profit in what could arguably be a contravention of the idea of justice.

Posting bail for alleged criminals for a fee would be an obstruction of justice comparable to witness tampering or bribing a juror in many parts of the world with an independent judicial system. But in the US, it is a thriving business that the courts approve of.

Only a few American states have banned the trade of bailing out the accused and these states now largely rely on the more respectable social value of trusting defendants to return for their trial. In recent years, voices have been rising within the legal establishment here against the big bucks business of posting bail for profit.

In practice, it discriminates against poor defendants who are unlike Gupta and cannot raise money for their freedom while under trial. Bail bondsmen charge between five to 10 per cent in non-refundable fees for ensuring bail.

That means if Gupta had no assets to secure his \$10-million bail this week, he would have either languished in jail through his trial or paid \$1 million to a private business in a non-refundable commission for his freedom during this period.

It is an aberration in the US judicial system like the election of judges or their appointment based on affiliation to one political party or the other that controls the White House. Or for that matter having a

quarter of the entire world's prisoners, a number far higher than even China which has about four times America's entire population.

