

SRIKAKULAM DISTRICT : WORKSHOP – III

CHAIRPERSON

HON'BLE SRI JUSTICE SUBBA REDDY SATTI GARU

**JUDGE, HON'BLE HIGH COURT OF ANDHRA PRADESH,
AND ADMINISTRATIVE JUDGE, SRIKAKULAM**

NODAL OFFICER

JUNAID AHMED MOULANA

**PRINCIPAL DISTRICT JUDGE,
SRIKAKULAM**

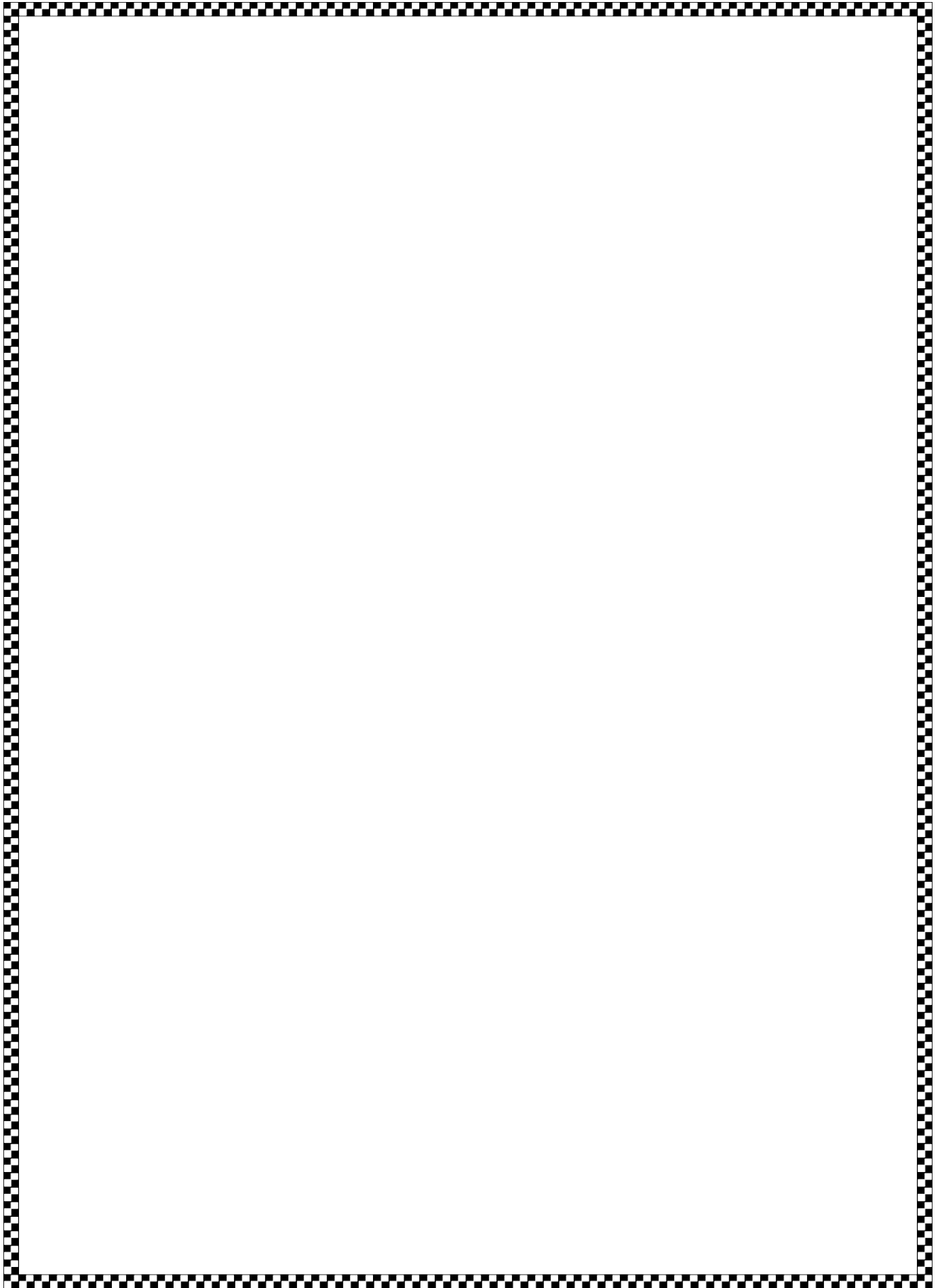
DATE : 20.09.2025

VENUE : DISTRICT COURT CONFERENCE HALL

TOPICS ON CRIMINAL SIDE:

Subject : LAW RELATING TO REMAND OF ACCUSED

- a). Duties and powers of Judicial Magistrates to examine prima facie case and compliance of Sec. 41 A Cr.P.C / Sec. 35(3) to 35(6) BNSS by Magistrates at the time of remand with reference to Arnesh Kumar's case.
- b). Transit remands in respect of Special Acts and Jurisdiction of the Judicial Magistrate of First Class, in general.
- c). Protection of life and personal liberty – cautious approach by the Courts of Magistrates and Special Sessions Judges.
- d). Power and duties of Magistrates, Sessions Judges and Special Sessions Judges pertain to bails.
 - a). Default Bail
 - b). Grounds on which Bail can be granted / rejected.
 - c). Imposition of conditions while granting bail.
 - d). Power to modify conditions of bail.
 - e). Post convictional Bail.
 - f). Powers of Sessions Court to grant Anticipatory Bail.



SESSION NO.I

TOPICS:

- a) Duties and powers of Judicial Magistrates to examine prima facie case and compliance of Sec. 41A Cr.P.C /Sec. 35(3) to 35(6) BNSS by Magistrates at the time of remand with reference to Arnesh Kumar's case.
- b) Transit remands in respect of Special Acts and Jurisdiction of the Judicial Magistrate of First Class, in general.

Paper Presentation by-

Sri. S.M.Phani Kumar,
IV Additional District Judge,
Srikakulam.

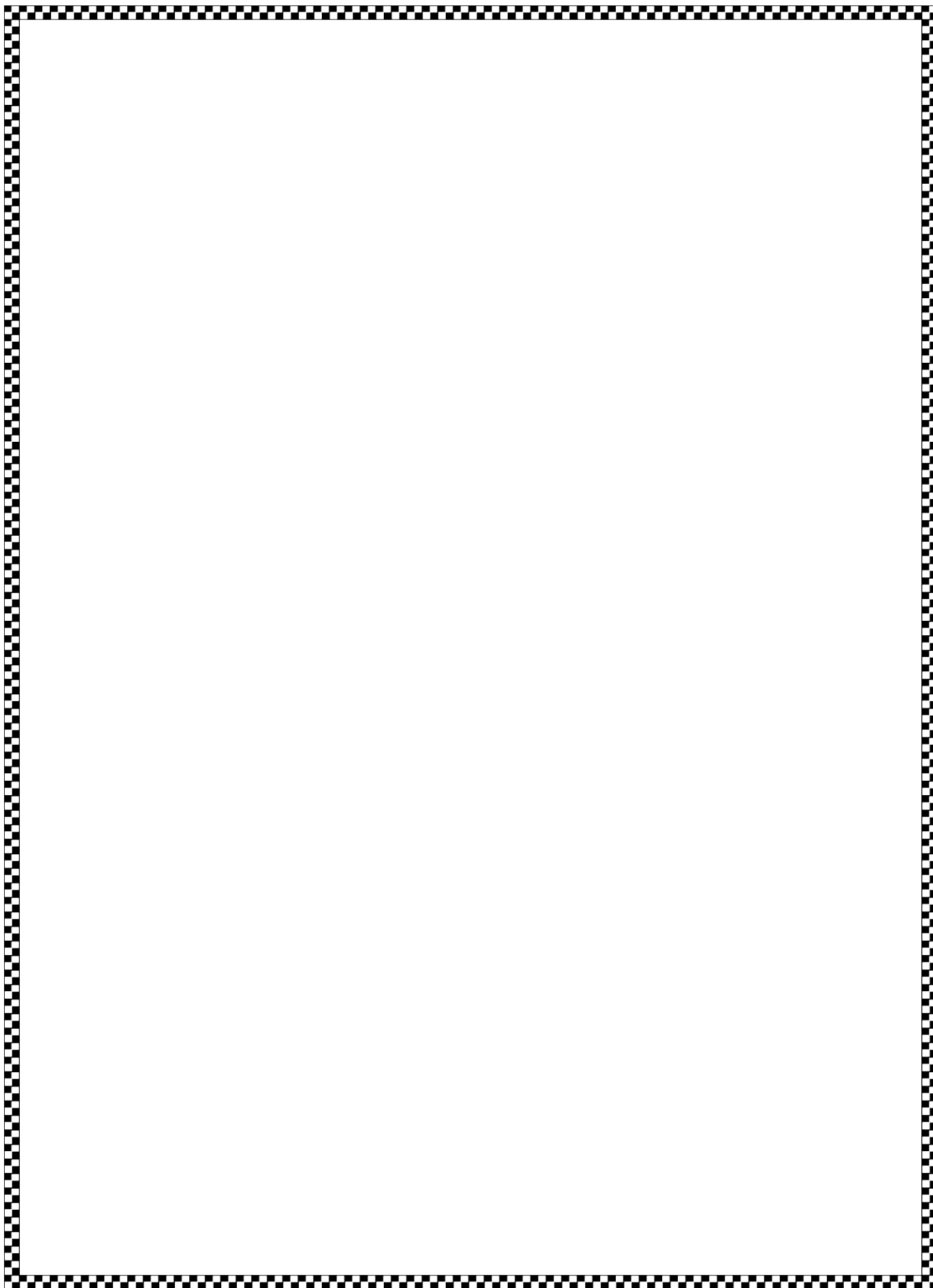
SESSION NO.II

TOPIC:

- c). Protection of life and personal liberty – cautious approach by the Courts of Magistrates and Special Sessions Judges.

Paper Presentation by-

Sri. P.Bhaskar Rao,
I Additional District Judge,
Srikakulam.



SESSION NO. III

TOPIC:

Power and duties of Magistrates, Sessions Judges and Special Sessions Judges pertain to bails.

- a) Default Bail.
- b) Grounds on which Bail can be granted / rejected.
- c) Imposition of conditions while granting bail.
- d) Power to modify conditions of bail.

Paper Presentation by-

Ms. M.Roshini,
Civil Judge (Junior Division),
Pathapatnam.

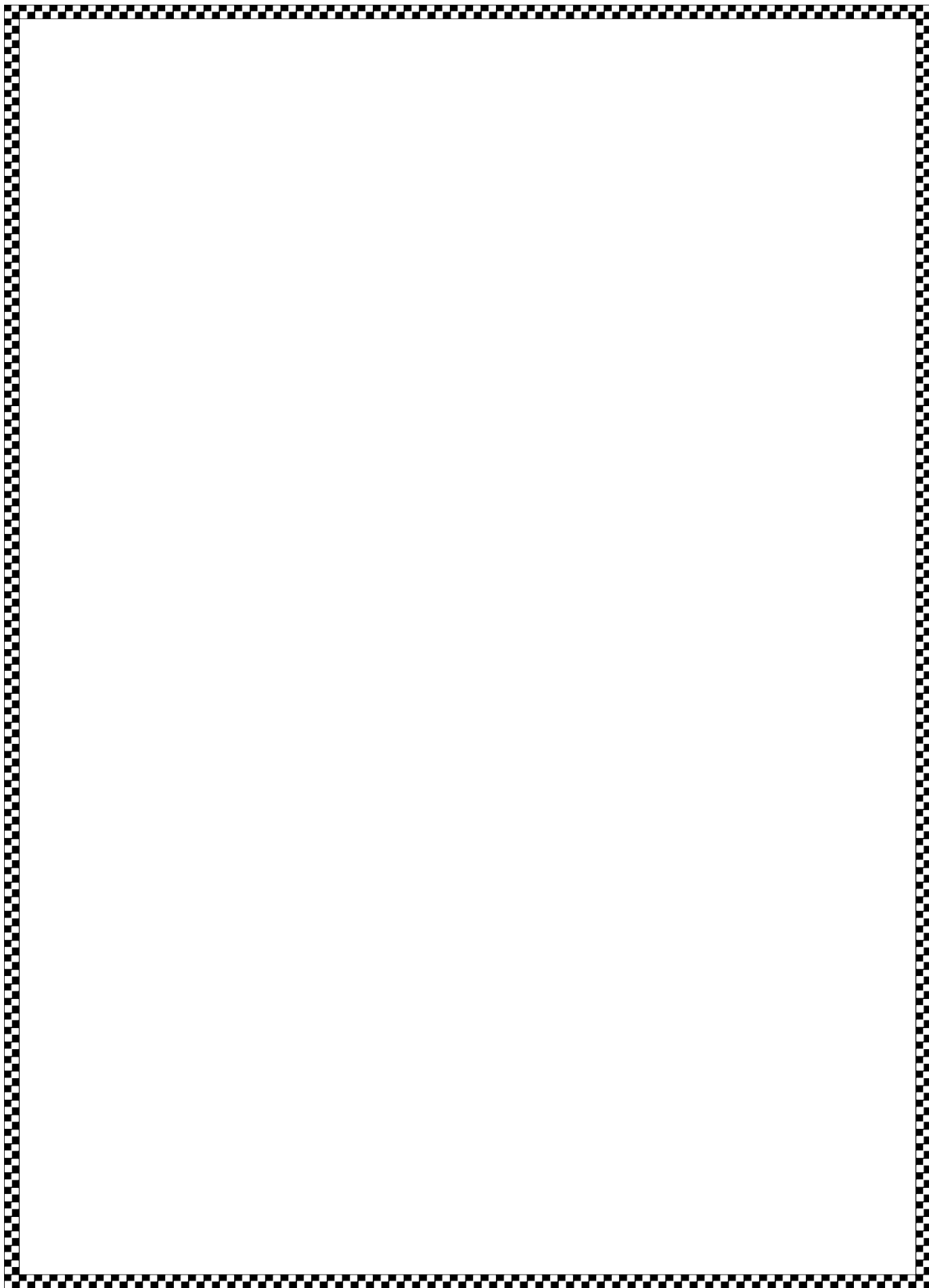
SESSION NO. IV

TOPIC:

- e). Post convictional Bail.
- f). Powers of Sessions Court to grant Anticipatory Bail.

Paper Presentation by-

Sri. K.Kishore Babu,
VI Additional District Judge,
Sompeta.



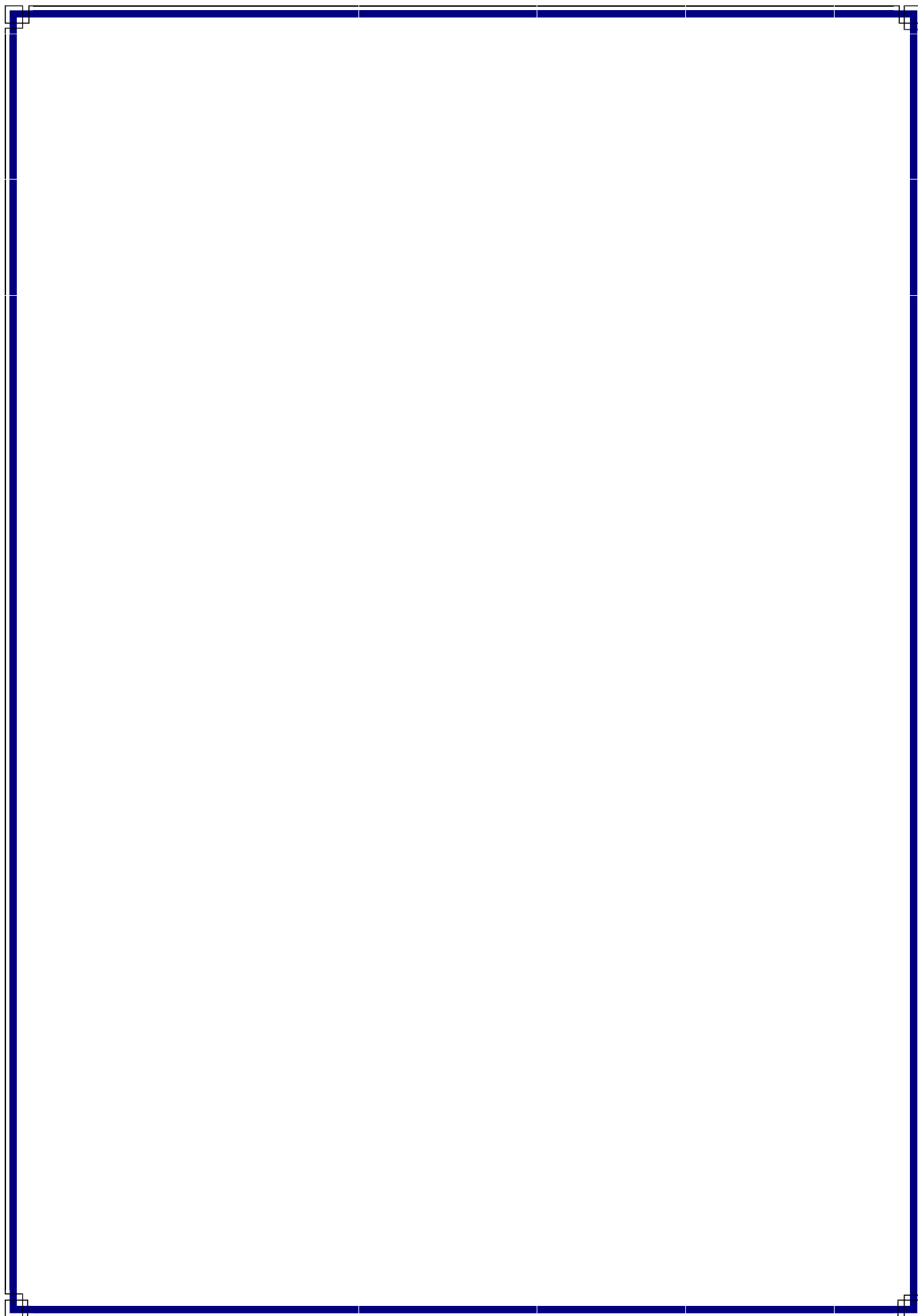
SESSION- I

- a) **Duties and powers of Judicial Magistrates to examine prima facie case and compliance of Sec. 41A Cr.P.C /Sec. 35(3) to 35 (6) BNSS by Magistrates at the time of remand with reference to Arnesh Kumar's case.**
- b) **Transit remands in respect of Special Acts and Jurisdiction of the Judicial Magistrate of First Class, in general. .**

Paper Presentation

by

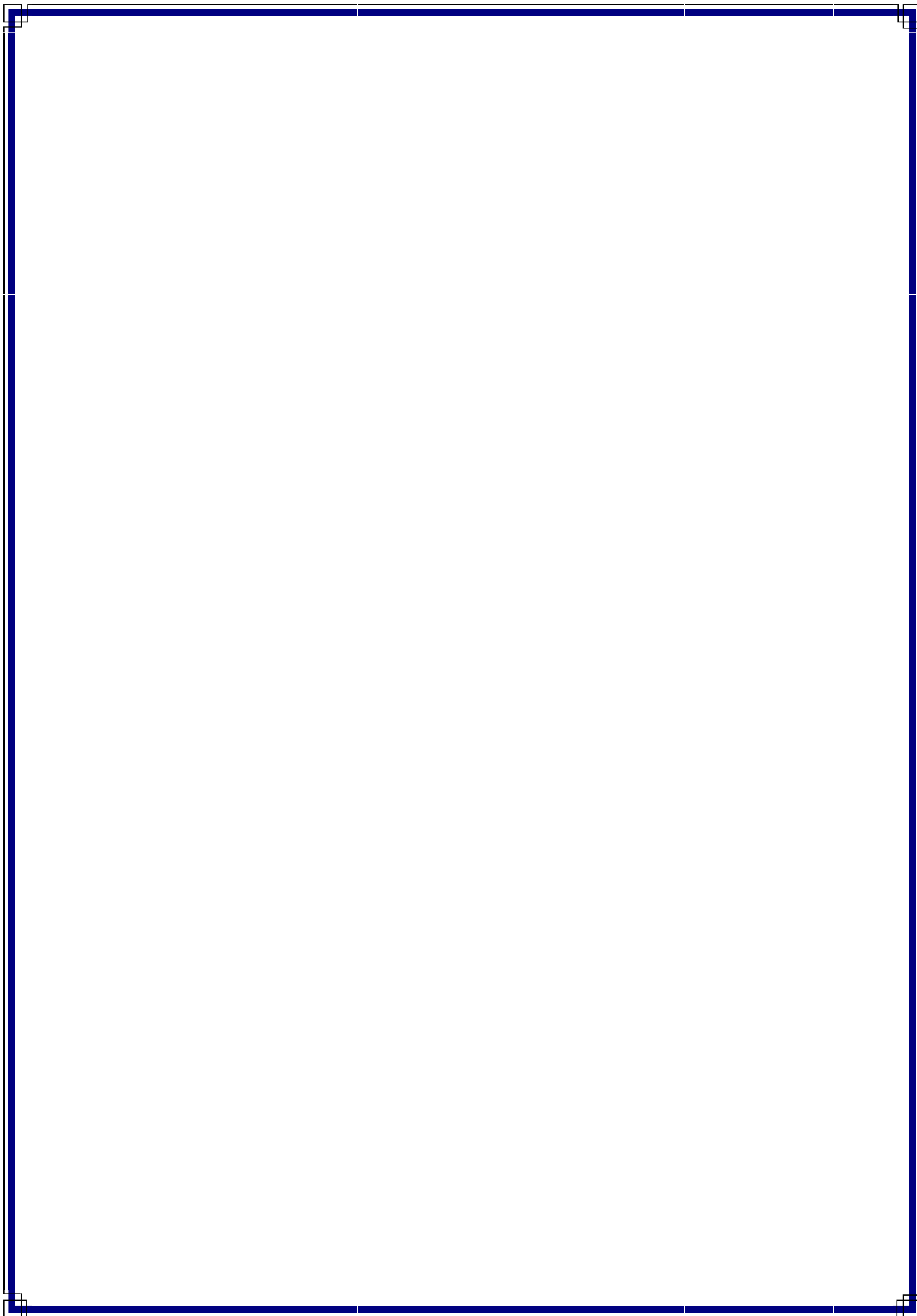
Sri. S.M.PHANI KUMAR,
IV Additional District Judge,
SRIKAKULAM.



TOPICS

- A) DUTIES AND POWERS OF JUDICIAL MAGISTRATES TO EXAMINE PRIMA FACIE CASE AND COMPLIANCE OF SEC. 41A CR.P.C /SEC. 35(3) TO 35 (6) BNSS BY MAGISTRATES AT THE TIME OF REMAND WITH REFERENCE TO ARNESH KUMAR'S CASE.**

- B) TRANSIT REMANDS IN RESPECT OF SPECIAL ACTS AND JURISDICTION OF THE JUDICIAL MAGISTRATE OF FIRST CLASS, IN GENERAL. .**



LAW ON ARREST AND REMAND

Duties and powers of Judicial Magistrates to examine prima facie case and compliance of Section 41- A Cr.P.C/ Sec. 35 (3) to 35 (6) BNSS by Magistrates at the time of remand with reference to Arnesh Kumar's case.

In a free society like ours, the law is always favourable towards personal liberty of every individual and does not tolerate the detention of any person without legal sanction. The right of personal liberty is a basic human right, recognized by the civilized society and guaranteed by the constitution.

Our constitution also recognizes this fundamental right in Article 21, which provides as under:-

"No person shall be deprived of his life or personal liberty, except according to procedure established by law"

Right to life and personal liberty is a sacred and cherished right under the constitution. The right to life and personal liberty, have been held to include the right to live with human dignity and as such it would include a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Hon'ble Supreme Court held that **"the quality of criminal justice system in a country, to a large extent**

depends upon the working of police force” (*Prakash Singh & others v. Union of India and others*¹.

2. Thus, the personal liberty, being the corner stone of our social structure, legal provisions, relating to arrest, have special significance and importance and for that reason they have been incorporated specifically in the Criminal Procedure Code.

3. Arrest, Detention & the Guidelines of Hon’ble Supreme Court in Arnesh Kumar v. State of Bihar and another².

Arnesh Kumar vs. State of Bihar (2014) (hereinafter referred to as the “Arnesh Kumar case”) is a historic case in criminal law. Indiscriminate arrests and extended detention were prevalent throughout the country.

Arrests even in petty offences, and offences punishable within seven years of imprisonment were being carried out. The police arbitrarily exercised its powers of arrest, resulting in a delay of justice, and overcrowding of prisons. Several fundamental rights of the accused were being violated.

There were ubiquitous violations of the Right to life, movement, and freedom of the arrested. They were illegally detained based on mere suspicion. Therefore, understanding the grave situation, the Hon’ble Supreme Court, historically laid down guidelines to regulate arrests in the Arnesh Kumar case. This case laid down comprehensive rules to be followed by the police during arrest and by the magistrate while deciding upon the detention of

¹ 2006 (8) SCC (1)

² (2014) 8 SCC 273

the accused. It laid down the circumstances during when an accused could be arrested and also provided a thorough interpretation of Section 41 of Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC)- now, Section 35 of Bhartiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as BNSS).

4. The Hon'ble Supreme Court has explained the facets of liberty through several judgments. In **A.K Gopalan vs. State of Madras (1950)**, the court observed that liberty refers to liberty of the body, that is, freedom from arrest or detention. In the case of **Maneka Gandhi vs. Union of India (1978)**, the court observed that Article 21 includes the right to dignity and life. In the case of **Olga Tellis vs. Bombay Municipal Corporation (1985)**, the right to livelihood is an essential part of the right to liberty under Article 21. In the case of **Puttaswamy vs. Union of India (2018)**, the Supreme Court observed that the right to privacy was a part of Article 21. It was held that individual privacy cannot be compromised except by the procedure established under law.

5. **Effect of arrests**

- The court observed that arrests bring with them several ill-effects. The court observed that arrests bring unhealed scars. Although both police and lawmakers are well aware of the ill effects of arrests, indiscriminate arrests often happen. The court reprimanded the police stating that despite getting independence, the police failed to shed its colonial nature. The court observed that arrest was used as a tool for harassment. It re-emphasized that although CrPC mandates to cautiously exercise the power of arrests, neither the police nor the magistrate abides by it. Further, the court observed that

arrests had become a handy tool for police officers with ulterior motives or extremely insensitive.

- The court went on to explain the blatant violations of legal provisions by indiscriminate arrests by the police officers.
- The court observed that law commission reports and court judgments have held that balance between the right to arrest, maintenance of law and order and protection of individual rights and liberty.
- The court further observed that the police officers believe that they possess the right to arrest however the court observed to the contrary. The court held that merely because the offence is cognizable and non-bailable, arrests cannot be made. Reasonable justification for arrest needs to be specified. The court laid down that arrests cannot be made routinely because of a mere allegation of offence.
- The court pointed out that the legislature, even after these grave situations, has not introduced any changes. Further, based on the 177th Law Commission, the parliament intervened and passed section 41 of CrPC. Further, the court observed that Section 41 Cr.P.C is necessary to curb indiscriminate arrests.

6. Guidelines for making an arrest (Arnesh Kumar guidelines)

- The Apex Court laid down guidelines for the arrest of the accused by the police in non-cognizable offences.

- State governments have to pass instructions to check arrests. State governments have to order police officers to exercise their power of arrests cautiously. Arrests under Section 498A must be made only if it has been satisfied that it is necessary and after following provisions of Section 41 of CrPC.
- The state is obligated to provide all police officers with a checklist containing the sub-clauses of Section 41 which need to be adhered to before arrests.
- While presenting the accused before the magistrate for detention, the police officer is obliged to furnish the checklist and the reasons that necessitated the arrest.
- The magistrate is required to prudently analyse the checklist, reasons and other documents put before him while granting or rejecting detention.
- Further, any decision not to arrest the accused must be forwarded to the magistrate within two weeks of initiation of the case.
- The notice must be mandatorily given to the accused before initiating the case in accordance with Section 41 of Cr.P.C.
- Failure to issue notice can lead to departmental action against the police, and contempt of court that can be initiated by the High Court possessing territorial jurisdiction.
- Failure on the part of the magistrate to properly evaluate the reasons put forth and substantiate the detention can make him/her liable for contempt of court.

- Further, authorising detention without recording reasonable reasons shall render the magistrate for departmental action from the High Court.
- The court held that these guidelines shall be applicable in all non-cognizable offences punishable with a maximum of seven years imprisonment and not in the offences of domestic violence or dowry deaths as in the present case.
- Further, the court directed the order to be forwarded to the Director General of Police of all states and union territories and the registrar of police of all High Courts.

7. Effects of the Judgment

This judgment had several ramifications for police officers, jurists, and the members of society. This was the first time the court laid down comprehensive guidelines recognizing the existence and negative effects of indiscriminate arrests. The court also specified severe consequences of not adhering to the guiding light for several cases. Further, this case also impacted the law enforcement bodies. Law enforcement bodies are being forced to abide by these guidelines to avoid departmental action. Several law enforcement bodies have actively begun adhering to these guidelines fearing the negative consequences. Additionally, this case establishes a three-layered protection against misuse of power to arrest. First, it laid down guidelines for the police to follow, secondly, this case also mandates supervision by the magistrate while allowing or dismissing the police's application for detention. Thirdly, this case also laid down a checklist of guidelines that the court needs to look for while deciding the application for bail or illegal arrests.

8. Important 12 points in the check list to be followed by the Judicial Officers at the stage of remand:

1) The Presiding Officer has to verify whether all the copies i.e., FIR, Remand Report and the documents attached to the remand report were furnished to the accused and acknowledged or not.

2) The Presiding Officer has to enquire whether the accused has suffered any ill treatment in the hands of Police before or after arrest. If the accused reports any ill treatment, then the Presiding officer has to record the statement of the accused with regard to the manner in which he was ill treated and by whom, he was ill-treated and thereafter, has to proceed against the police officer concerned in accordance with Law.

3) The Presiding Officer has to enquire whether the accused was informed of the grounds of his arrest and whether the same was acknowledged by the accused or not.

4) The Presiding officer has to enquire whether the arrest intimation was given to the relatives or kith and kin of the accused and the same was acknowledged or not.

5) The Presiding Officer has to enquire whether medical examination of the accused was done before production for remand. Whenever, any injuries are found over the body of the accused, the Presiding Officer has to enquire as to how the said injuries were caused and the

information furnished by the accused has to be recorded separately on the remand report.

6) The Presiding Officer has to verify whether there is prima-facie ingredients to remand the accused in respect of the offences listed in the remand report by the police. If the prima facie ingredients are not found for any specific offence, the Presiding Officer can refuse to remand the accused for that specific offence and proceed for the remaining offences.

7) The Presiding Officer has to verify whether the Police Officer who arrested the accused informed his name and designation to the accused at the time of arrest or not.

8) The Presiding Officer has to verify whether the accused was produced for remand within 24 hours period from the time of arrest, if not produced within 24 hours, the Presiding Officer has to call for explanation from the concerned police officer in this regard and proceed in accordance with law.

9) The Presiding Officer has to verify whether the police furnished sufficient information with regard to the identity and the residential address i.e., Aadhar Card or any other identity or residential proof of the accused to secure his presence in future along with affixing passport size colour photograph of the accused on the remand report.

10) The Presiding Officer has to verify whether the accused has got sufficient means and capacity to engage advocate to defend him even at the stage of remand. The Presiding Officer has to appraise the accused that he is entitled to get a free legal aid to defend his case. If the accused seek legal aid, then the Presiding Officer has to address a letter to the District Legal Service Authority or MLSC concerned to provide legal aid to the accused at the stage of remanding the accused itself.

11) The Presiding Officer has to verify whether the offences mentioned in the remand report are punishable with imprisonment with more than 7 years or not. If the offences are punishable with imprisonment of more than 7 years, then the presiding officer can accept the remand subject to satisfaction of other requirements. In case the punishment provided is upto 7 years or less than 7 years, then further scrutiny with regard to the reasons assigned by the Police Officer for making arrest is to be analyzed by the Presiding Officer. Only on the satisfaction that there are sufficient grounds exist to arrest the accused which are enumerated in Section 41 of Cr.P.C corresponding to Section 35 of BNSS.

12) The Presiding Officer has to verify whether the person arrested and produced before him is a Juvenile in Conflict with Law. If the Presiding Officer suspects or finds any material to show that the accused proposed for remand appears to be a Juvenile, then the Presiding Officer shall

direct the police to produce the accused before the Juvenile Justice Board.

The Juvenile Justice Board will conduct enquiry to ascertain whether the accused brought for remand is a Juvenile or not.

9. Case Laws after the Arnesh Kumar case

i) Munawar vs. State of Madhya Pradesh (2021)

The Apex Court in this case was analysing the application for interim bail of the accused. The accused was a standup comedian arrested for hurting religious sentiments. The Apex Court relied on the Arnesh Kumar case and passed an interim order allowing his interim bail. It held that the arrest was illegal because the guidelines mentioned in the Arnesh Kumar case were not followed.

ii) Kahkashan Kausar and Ors. vs. State of Bihar (2022)

The Supreme Court, in this case, was analysing a dispute over domestic violence. The court relied upon the Arnesh Kumar case, amongst several others, to highlight the misuse of Section 4 of the Dowry Prohibition Act, 1961 and Domestic Violence Act, 2005. The court held that jurists also had a duty to ensure that the fabric of the society i.e., the family shall not be broken.

**iii) Md Asfak Alam vs. State of Jharkhand & Anr.
(2023)**

- Adherence to the arrest guidelines laid down in the Arnesh Kumar case was in question in the present case. On similar lines to the present case, the Apex Court was dealing with an appeal under Section 498A of IPC. Further, the court laid down some additional guidelines to be followed along with those laid down in the Arnesh Kumar case to ensure stricter implementation of the general rule of bail over arrest.
- The court observed that the denial of bail to the husband charged under Section 498A was erroneous provided complete cooperation of the accused with the police. However, the Arnesh Kumar guidelines specified that arrest may be made only if provisions of Section 41 of CrPC were attracted. An accused could be arrested only when found that he would escape, or tamper with evidence or any other valid reason. The court observed that none of these provisions is applicable in the present case and therefore, the arrest of the accused was not necessary.
- The court laid down additional guidelines (16.2-16.4). The court directed the High Court to frame further guidelines for compliance by sessions and other criminal courts. Further, the court directed the director general of Police and High Courts to issue strict instructions for abiding by the Arnesh Kumar guidelines. Further, the court also ordered all High Courts to file affidavits regarding compliance with the additional guidelines.

10. The relevant provisions regarding the arrest of the persons, accused of the commission of an offence are contained in Sections 41 to 60 Cr.P.C. corresponding to Sections 35 to 61 of BNSS.

11. **Police can arrest a person without warrant under Section 41Cr.P.C. corresponding to Section 35 of BNSS**

- a) who has been concerned in any cognizable offence, or against whom a reasonable complaint, has been made or credible information, has been received, or a reasonable suspicion exists, of his having been, so concerned; or
- b) who has in his possession without lawful excuse, the burden of proving which excuse, shall lie on such person, any implement of house breaking; or who has been proclaimed as an offender either, under this code or by order of the state government; or
- c) in whose possession anything is found which, may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
- d) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
- e) who is reasonably suspected of being a deserter, from any of the Armed Forces of Union; or
- f) who has been concerned, in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been

concerned, in , any act committed at any place, out of India, which, if committed in India, would have been punishable, as an offence, and for which he is, under any law relating to extradition, or otherwise liable to be apprehended or detained in custody in India. Or

g) who, being a released convict commits a breach of any rule, made under Sub Section 356 or

h) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person, to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant, by the officer, who issued the requisition.

Section 41 and 41-A of Cr.P.C. are clubbed together in Section 35 of BNSS.

12. Protection to Members of Armed Forces from arrest

Section 197(2) (3) Cr.P.C. prohibits taking cognizance of any offence, alleged to have been committed by any member of the Armed Forces, acting or purporting to act in the discharge of official duty except with the previous consent of Central or State Government, as the case may be whereas Sections 45 Cr.P.C. provides as under :-

1)Not with standing anything contained in Section 41 to 44, no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties.

13. Section 36 of BNSS corresponding to Section 41-B of Cr.P.C.

Sec. 36. Procedure of arrest and duties of officer making arrest.

Every police officer while making an arrest shall-

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be-

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend or any other person named by him to be informed of his arrest.

14. Section 39 of BNSS corresponding to Section 42 of Cr.P.C.

Sec.39. Arrest on refusal to give name and residence.

(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses on demand of such 5 officer to

give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Judicial Magistrate if so required:

Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.

(3) Should If the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or if he fails to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

15. Section 49 of BNSS corresponding to Section 51 of Cr.P.C.

Sec. 49. Search of arrested person.

(1) Whenever,-

- (i) a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; and
- (ii) a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, the officer making the

arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

16. Section 46 Cr.P.C. corresponding to Section 43 of BNSS provides that in making arrest, the police officer or other persons shall actually touch him. It also provides that, if a person, forcibly resists the endeavor to arrest him, or attempts to evade the arrest, such police Officer may use all means necessary, to effect the arrest. However, Sub Section 3, says that nothing, in this section, shall give a right to cause death of a person, who is not accused of the commission of an offence, punishable with death, or with imprisonment for life.

17. Right of arrested person Section 50 Cr.P.C. corresponding to Section 47 of BNSS.

Every Police Officer or other person, arresting any person without warrant, shall forthwith communicate to him, with full particulars of the offence, for which he is arrested and grounds of his arrest.

Under Sub-Section (2) the Police Officer arresting a person, without warrant, other than a person accused of a non-bailable offence, shall inform the person arrested that he is entitled to be released on bail and may arrange for sureties on his behalf.

18. Communication of charges to the accused

Section 55 Cr.P.C. corresponding to Section 55 of BNSS provides that when a Subordinate Officer is deputed by a Senior Officer to arrest a person, then he shall before making the arrest, notify to the person, to be arrested, the substance of written order, given to him, by a Senior Police Officer, specifying the offence or other cause for which the arrest is to be made. Non-compliance of this provision, will render his arrest to be illegal.

19. Section 75 Cr.P.C. corresponding to Section 77 of BNSS.

Provides that the Police Officer or other person, executing a warrant of arrest, shall notify the substance thereof, to a person, to be arrested and, if so arrested, shall show him the warrant. If substance of the warrant, is not notified, by such officer, then arrest would be unlawful.

20. Article 22(1) of Constitution of India also provides as under

No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds of such arrest, nor he shall be denied the right to consult and to be defended by a legal practitioner of his choice.

In order to give practical shape to this provision, a Free legal Aid Counsel is deputed, in every Court, at the Cost of the State under the provisions of the Legal Services Authorities Act, 1987, to defend the accused who are not represented by any Counsel, during remand proceedings.

21. **Medical examination of the accused after his arrest at the request of the Police Officer. Section 53 Cr.P.C. corresponding to Section 51 of BNSS.**

i) When a person is arrested on a charge of committing an offence of such a nature, and alleged to have been committed, under such circumstances, that there are reasonable grounds, for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner acting on the request of a police officer not below the rank of Sub Inspector and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

ii) Whenever the person of a female is to be examined under this section, the examination shall be made only by or under the supervision of a female registered medical practitioner.

22. **Report of arrest Section 58 Cr.P.C. corresponding to Section 59 of BNSS.**

This provision provides that officer Incharge of the police station, shall report to the District Magistrate, or if, he so directs

to the Sub Divisional Magistrate, the cases of all the persons arrested without warrant within the limits of their respective Stations, whether such person has been admitted to bail or otherwise.

The object of this provision is to keep the District Magistrate, informed of the situation regarding the commission of grave offences. The administration of police in a District is under the general control and directions of District Magistrate, therefore, report under this section would enable him to see whether the police is exercising the powers properly or not.

**23. Right to be produced before a Magistrate without delay
Section 56 Cr.P.C. corresponding to Section 57 of BNSS.**

Provides that a Police Officer making an arrest without warrant, without unnecessary delay and subject to the provisions regarding grant of bail take or send the person arrested before a Magistrate, having jurisdiction in the case or before the officer incharge of the Police Station.

**24. Section 76 Cr.P.C. corresponding to Section 78 of
BNSS.**

Provides that the Police Officer or other person executing the warrant of arrest, without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person. The proviso engrafted to this provision, provides that such delay in any case shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest, to the Court of a Magistrate.

The right to be brought before a Magistrate, within a period not more than 24 hours of arrest, has been created, with a view

(i) to prevent arrest and detention for the purpose of extracting confessions, or as a means there of compelling people to give information.

(ii) To prevent Police Stations, being used, as though they are prisons, the places for which they are unsuitable.

(iii) to afford an early recourse to a Judicial Officer, independent of police of all questions of bail or discharge.

The **Hon'ble Supreme Court in Khatri (II) versus State of Bihar**³, has strongly urged upon the State and its police authorities to see that this Constitutional and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest, must be scrupulously observed.

25. Right of the accused to be examined by a medical practitioner at his request Section 54 Cr.P.C. corresponding to Section 53 of BNSS.

When a person who is arrested, whether on a charge or otherwise alleges, at the time, when he is produced before a Magistrate, or at any time during the period of detention, in custody, that the examination of his body will afford evidence which will disprove the commission by him of any offence, or which will establish the commission by any other person of any offence against his body, the Magistrate, shall if requested by the arrested person, so to do, direct examination of the body of such person, by a Registered Medical Practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

³ 1981 RCR (Criminal) 288

26. **Arrest of juvenile delinquents.**

No Magistrate can remand a person below the age of 18 years, to any custody, because it is prohibited by the provisions of the Juvenile Justice Act, 2000. In case, a Juvenile delinquent, is produced before a Magistrate, then he is to record that apparently he appears a juvenile, and, as such, he is to be produced before the Juvenile Justice Board.

27. If a public servant, having authority, to arrest, knowingly exercises that authority, in contravention of law and affects an illegal arrest, he can be prosecuted for the commission of offence, under Section 220 IPC, apart from the remedy available under Section 342 IPC, for wrongful confinement.

If the arrest is illegal it is a sort of false imprisonment and the person, making such arrest exposes himself, to a suit, for damages.

28. **REMAND:**

Judicial Magistrate to whom the accused is forwarded may authorize his detention in such custody as he thinks fit for a term not exceeding 15 days, in the whole. The nature of custody can be altered from judicial to police and vice-versa, during the first period of 40 days or 60 days mentioned in Sub Section (3) of Section 187 BNSS, but after the expiry of said period, accused can be detained only in judicial custody.

It is specifically provided that no Magistrate shall authorize the detention, in any custody, unless the accused is produced before him physically at first instance as per Section 187 (4) of BNSS. The object is to enable the magistrate whether the remand is necessary and also enable the accused to make any representation, he wishes to make to controvert the grounds on which the police asked for remand. In order to facilitate proof of factum of production of the accused before him, the Magistrate may obtain his signatures.

The magistrate has to apply the judicial mind, whether or not the detention of an accused, in any custody is necessary for which he is under obligation to peruse the Police file and the case diaries. The order of detention shall not be mechanically passed in routine, by the Magistrate, on the request of the police. It is very often seen, that the remand is granted although recovery has been effected and there is no scope for further investigation, but it is denied where the accused, is to be taken to a distant place for further investigation and his assistance is necessary to ascertain the involvement of other person and collection of incriminating evidence. Therefore it is desirable that the Magistrate shall record the reasons for grant or refusal to grant remand, as envisaged by Section 167(2) Cr.P.C. corresponding to Section 187 (2) of BNSS.

It is provided in Section 167(2) Cr.P.C. corresponding to Section 187 (5) of BNSS, that no magistrate of Second Class, not specifically empowered by the Hon'ble High Court can authorize detention of an accused in police custody.

The total period of detention shall not exceed 90 days if the investigation relates to the commission of an offence punishable with death, imprisonment for life. Imprisonment for a term not less than 10 years than not more than 60 days, where the investigation relates to any other offence. The period of 90 days and 60 days is to be computed from the date the Magistrate authorized detention of the accused. If the detention is ordered on the very day of arrest, then the said period is to be computed from that date.

29. **Maintaining Balance**

The quality of a Nation's Civilization can be largely measured by the methods it uses in the enforcement of criminal law. The horizon of rights is expanding but at the same time, the crime rate is also increasing. The court has been receiving complaints about violation of human rights because of indiscriminate arrests. **The law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other. (*Joginder Kumar v. State of U.P.*⁴)**

30. **The Perennial Problem of Statecraft**

“To strike the balance between the needs of law enforcement on the one hand and the protection of citizens from oppression and injustice at the hands of law enforcement machinery on the other is a perennial problem of state craft. The pendulum over they ears has swing to the right (Lewis Mayers)”.***Nandini Satpathy v. P.L. Dani***⁵,

⁴ AIR 1994 SC 1349

⁵ AIR 1978 SC 1025

31. **Evolution of Law to control Colonial Attitude**

1. Khatri v.State of Bihar⁶
2. Joginder Kumar v. State of U.P⁷.,
3. D.K.Basu v. State of West Bengal⁸,
4. LalitaKumari v. State of U.P.& Others⁹,
- 5.Shaukin v. State of U.P¹⁰.

A. Joginder Kumar v. State of U.P⁷.,

1. Arrest of a person should not be merely on suspicion about the person's complicity in the crime and the Police Officer must be satisfied about the justification of such arrest on the basis of some investigation.
2. Arrest should normally be avoided except in cases of heinous crimes. Reasons for arrest must be recorded by police officer in his case diary.
3. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where he is being detained.

⁶ (1981) 1 SCC 627

⁷ AIR 1994 SC1349

⁸ AIR 1997 SC 610

⁹ (2014) 2 SCC 1

¹⁰ Crl. Misc., Writ Petition No. 17410 /2011

4. Police officer should inform the arrested person when he is brought to the police station of this right.
5. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) of the constitution and must be enforced strictly.

It should be the duty of the Magistrate before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

B. D.K.Basu v. State of W.B¹¹,

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee.
2. To bear accurate, visible and clear identification and name tags with their designations.
3. Prepare a memo of arrest at the time of arrest to be attested by at least one witness.
4. To notify time, place of arrest and venue of custody of the arrestee to relative or friend.
5. To make the arrestee aware of this right to have some one informed of his arrest.
6. To make entry in the diary regarding the arrest and also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

¹¹ AIR 1997 SC 610

7. At the request of the arrestee to examine at the time of his arrest and record major and minor injuries, if any at that time; and to prepare “inspection memo” in this regard to be signed both by the arrestee and the police officer.
8. Medical examination of arrestee by trained doctor every 48 hours.
9. Copies of all the documents including the memo of arrest to be sent to the illaqa magistrate.
10. Permission to meet his lawyer during interrogation.
11. Police control room to be informed at all district and state headquarters regarding the arrest and the place of custody.
12. There is a battle between the law makers and the police and it seems that the police has not learnt its lesson. The police has not come out of its colonial image. The need for caution in exercising the drastic power of arrest has been emphasized time and again by the court but has not yielded desired result.
13. S. 41 (1)(b)(ii) provides that arrest for any offence punishable less than or upto 07 years can be made only on the following satisfaction:
 14. To prevent such person from committing any further offence;
 15. For proper investigation;
 16. To prevent disappearance or tampering of evidence;

17. To prevent inducement, threat or promise to the witness and thereby dissuading the person from disclosing the evidence to court or police;
18. To ensure the presence of the person in court;
19. Police Officer shall record such reasons in writing both for making an arrest or not arresting the person.

Siddarth Vs. State of UP (2021)

The Hon'ble Apex Court held that arrest is not mandatory for filing of charge sheet.

Satender Kumar Antil Vs. CBI (2022)

The Hon'ble Apex Court extensively dealt the principles relating to arrest, remand and bail in this Judgment.

Lalitha Kumari Vs. State of UP

In the Judgment, the Hon'ble Apex Court held that police are required to register an FIR as soon as they receive information about a cognizable offence. Failure to do so, is considered a violation of legal and constitutional obligations and shall invite contempt.

The Hon'ble Apex Court further held that the police can conduct preliminary enquiry before proceeding further in the investigation in some category of cases.

32. Legislative Mandate to Effectuate Judicial Directions

1. Amendments in Section 41 Cr.P.C. corresponding to Section 35 of BNSS.
2. Section 41A Cr.P.C. corresponding to Section 35 of BNSS- Notice of Appearance before P.O.
3. Section 41B Cr.P.C. corresponding to Section 36 of BNSS- Procedure of Arrest & Duties of Officer making arrest
4. Section 41 C of Cr.P.C. corresponding to Section 37 of BNSS.-Control Room at Districts
5. Section 41 D of Cr.P.C. corresponding to Section 38 of BNSS-Right to meet an advocate of his choice during interrogation

33. Important Observations in *Arnesh Kumar v. State of Bihar & Another*¹².

- 1) Police officers should maintain a balance between individual liberty and societal order while exercising power of arrest under sections 41, 41 A and 57 of Cr.P.C.
- 2) Due to the rampant misuse of Sections 498A IPC and Section 4 of D.P. Act 1961, it would be prudent and wise for a Police Officer that no arrest is made without reasonable satisfaction reached after some investigation as to the genuineness of allegations.

¹² (2014) 8 SCC 273

34. The 'WIWW' Test

The Police Officer before Arrest must put the following Questions to himself;

- W – Why Arrest?
- I-I sit really required?
- W – What Purpose it will serve?
- W – What Object it will achieve?

- Furthermore, the Hon'ble Supreme Court observed that as a first measure, this court, being the sentinel on the *qui vive* of the fundamental rights, needs to strictly control and limit the authorities from arresting accused in contravention of guidelines laid down by this court in **Arnesh Kumar v. State of Bihar and another**¹³. It may be relevant to quote the same :

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

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

¹³ (2014) 8 SCC 273

- (ii) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- (iii) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
- (iv) 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;
- (v) 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;
- (vi) Notice of appearance in terms of Section 41A of 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;
- (vii) 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 High Court having territorial jurisdiction.

- (viii) Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

We hasten to add that the **directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case 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.**

35. **LAW ON TRANSIT REMAND**

What is Transit Remand?

The law on transit remand in India governs transferring an accused across state borders. When police arrest someone outside the state where the crime occurred, they need a transit remand order from a judicial magistrate. This order allows police to move the accused to the state where the case is filed. The law on transit remand in India ensures legal scrutiny. The magistrate verifies the arrest's legality and the out-of-state police's authority. It authorizes moving the accused from their home state. The law on transit remand in India protects against unlawful detention in unfamiliar places. Though not defined in the BNSS, it stems from Section 187 and Article 22 of the Constitution. It's a key criminal procedure safeguard.

36. **Legal Framework of Transit Remand**

The law on transit remand in India is rooted in the BNSS, effective since July 2024. Section 187 applies when investigations exceed 24 hours, per Section 58. It mandates police to produce the accused before the nearest judicial magistrate with case diary entries. If the magistrate lacks jurisdiction, they can issue a transit remand order to transfer the accused to the jurisdictional Detention may be authorized for up to 15 days, including transit. Section 82 of the BNSS governs arrests under a warrant outside the issuing court's jurisdiction. It requires production before the nearest magistrate for orders like transit remand. Section 57 ensures the accused reaches the required court without delay. Article 22(2) of the Constitution mandates production before a magistrate within 24 hours, excluding travel time. These provisions define the law on transit remand in India.

37. **Constitutional Safeguards**

The law on transit remand in India protects constitutional rights. Article 22(1) ensures the accused knows arrest grounds and can consult a lawyer. Article 22(2) requires production before a magistrate within 24 hours. The law on transit remand in India upholds these in inter-state arrests. In **Sandeep Kumar v. State (2019, Delhi High Court, Justices Dr. S. Muralidhar and Talwant Singh)**, the court stressed effective legal representation. Ineffective legal aid violates Article 22(1). The court quashed a transit remand order for this reason. The law on transit remand in India prevents arbitrary detention.

38. **Detailed Analysis Gautam Navlakha V. State (2018)**

A landmark case on the law transit remand in India **Gautam Navlakha v. State (2018, Delhi High Court)**. Navlakha was arrested in New Delhi by Maharashtra Police for a Pune offence. The police sought a transit remand order. The Delhi High Court quashed it due to violations. The police didn't submit case diary entries, per Section 167(1) of the CrPC (now Section 187(1), BNSS). The accused wasn't informed of arrest grounds, breaching Article 22(1). The legal aid lawyer was ineffective. The court ruled that magistrates must apply judicial mind, not issue transit remand orders mechanically. Illegal detention resulted. This case reinforced the law on transit remand in India's due process requirements. It ordered Navlakha's house arrest under Section 187.

39. **Priya Indoria V. State of Karnataka (2023) :**

The Hon'ble Supreme Court clarified the law on transit remand in India. It mandated a transit remand order for arrests outside the offence's jurisdiction, per Article 22 and Section 187, BNSS. The Court said transit remand enables transfer to the jurisdictional magistrate for investigation. The nearest magistrate must verify arrest grounds and ensure legal representation. Transit remand is mandatory unless exceptional circumstances exist, with recorded reasons. The ruling upheld the law on transit remand in India as a liberty safeguard. It allowed High Courts and Sessions Courts to grant transit anticipatory bail. This case is pivotal for the law on transit remand in India under BNSS.

40. **Case Study: 2009 Delhi High Court Judgment**

In a 2009 case, the Delhi High Court exposed violations of law on transit remand in India. Gujarat Police arrested an accused in Delhi without local police assistance. They took him to Gujarat without a transit remand order. The court called this "lawlessness", Article 22(2) breaching 24-hour production rule. Removing the accused from their home caused mental harm. The law on transit remand in India was violated, as no Delhi magistrate issued a transit remand order. The court awarded compensation. This case shows the law on transit remand in India's role in preventing arbitrary actions, per Section 82 of BNSS.

41. **Procedure for Obtaining Transit Remand**

The law on transit remand in India under BNSS follows a strict process. When police arrest someone outside their jurisdiction, they must:

1. Produce the accused before the nearest magistrate within 24 hours, per Article 22(2) and Section 58 of BNSS.
2. Submit a transit remand application with case diary entries, per Section 187(1) of BNSS.
3. Inform the accused of arrest grounds, per Article 22(1).
4. Ensure effective legal representation.
5. Justify transfer to the jurisdictional court.

The magistrate reviews the case diary and ensures Article 22 compliance. They can grant a transit remand order for 1-7 days. Section 187(4) prefers personal appearance but allows video conferencing. The law on transit remand in India demands judicial scrutiny (**Manubhai Ratilal Patel v. State of Gujarat**¹⁴,.

42. **Application of Judicial Mind**

The law on transit remand in India requires magistrates to apply judicial mind. In **Manubhai Ratilal Patel v. State of Gujarat (2013)**, the Supreme Court held that remanding an accused is a judicial function. Magistrates must justify transit remand based on materials. Mechanical orders are invalid. The law on transit remand in India mandates reviewing case diaries, arrest grounds, and legal representation. In **Sandeep Kumar v. State (2019)**, the Delhi High Court quashed a transit remand order for lacking scrutiny. This prevents arbitrary detention.

43. **Transit Remand VS. Transit Anticipatory Bail**

The law on transit remand in India interacts with transit anticipatory bail. If someone fears arrest in another state, they can seek transit anticipatory bail from a local court. This grants temporary protection to approach the jurisdictional co for regular bail. In **Priya Indoria (2023)**, the Hon'ble Supreme Court upheld this under Section 482, BNSS. In the Greta Thunberg "toolkit" case, the Bombay High Court granted transit anticipatory bail to **Shantanu Muluk and Nikita Jacob**. The law on transit remand in India balances police powers with liberty.

¹⁴ 2013, 1 SCC 314

44. **Case Study: Disha Ravi's Arrest (2021)**

The law on transit remand in India was highlighted in the Disha Ravi case (2021). Delhi Police arrested the activist in Bengaluru for the "toolkit" case. Critics noted no transit remand order from a Bengaluru magistrate, breaching Article 22(2) and Section 167, CrPC (now Section 187, BNSS). The Delhi Commission for Women took suo motu cognizance. The law on transit remand in India requires 24-hour production before the nearest magistrate. This case underscores the law on transit remand in India's role in preventing illegal detention.

45. **Challenges in Applying Transit Remand**

The law on transit remand in India faces hurdles. First, police may skip case diary submissions, violating Section 187. In **Gautam Navlakha (2018)**, this quashed a transit remand order. Second, ineffective legal representation breaches Article 22(1). Magistrates may issue transit remand orders without scrutiny. Third, inter-state coordination fails. In the 2009 Delhi High Court case, Gujarat Police bypassed local police, violating Section 82, BNSS. These lapses risk illegal detention. The law on transit remand in India needs stricter enforcement.

46. **Historical Perspective: R.K. Nabachandra Singh (1964):**

The Hon'ble Gauhati High Court clarified the law on transit remand in India. It ruled that police must produce the accused before a magistrate if investigations exceed 24 hours, without waiting the full period. This aligns with Article 22(2) and Section 187, BNSS. The case laid a foundation for the law on transit remand in India, emphasizing timely oversight.

47.

Modernization Under BNSS

The BNSS modernizes the law on transit remand in India. Section 187(4) permits video conferencing for accused production, reducing travel. Personal appearance is preferred for transit remand orders. The BNSS retains Article 22 safeguards. Technology enhances efficiency while protecting rights. The law on transit remand in India balances innovation and liberty.

48.

Prisoner Transit Warrant

Section 302 of BNSS corresponding to Section 267 of Cr.P.C.

Sec.302. Power to require attendance of prisoners.

(1) Whenever, in the course of an inquiry, trial or proceeding under this Sanhita, it appears to a Criminal Court,-

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him; or

(b) that it is necessary for the ends of justice to examine such person as a witness, the Court may make an order requiring the officer in charge of the prison to produce such person before the Court answering to the charge or for the purpose of such proceeding or for giving evidence.

(2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded

to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate, to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.

Section 303 of BNSS corresponding to Section 268 of Cr.P.C.

Sec. 303. Power of State Government or Central Government to exclude certain persons from operation of section 302.

(1) The State Government or the Central Government, as the case may be, may, at any time, having regard to the matters specified in sub-section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under section 302, whether before or after the order of the State Government or the Central Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under sub-section (1), the State Government or the Central Government in the cases instituted by its central agency, as the case may be, shall have regard to the following matters, namely:-

- (a) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;
- (b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;
- (c) the public interest, generally.

Section 304 of BNSS corresponding to Section 269 of Cr.P.C.

Sec. 304. Officer in charge of prison to abstain from carrying out order in certain contingencies.

Where the person in respect of whom an order is made under section 302-

- (a) is by reason of sickness or infirmity unfit to be removed from the prison; or
- (b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or
- (c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or
- (d) is a person to whom an order made by the State Government or the Central Government under section 303 applies, the officer in charge of the prison shall

abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining: Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometers distance from the prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (b).

Section 305 of BNSS corresponding to Section 270 of Cr.P.C.

Sec. 305. Subject to the provisions of Section 304, the officer in charge of the prison shall, upon delivery of an order made under sub-section (1) of Section 302 and duly countersigned, where necessary, under sub-section (2) thereof, cause the person named in the order to be taken to the Court in which his attendance is required, so as to be present there at the time mentioned in the order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

49. How to deal when the case involved the offences under SC & ST (POA) Act and POCSO Act :

Unknown Vs. Mangali Yadagiri ¹⁵ of Hon'ble AP High Court.

The Apex Court in Sarwan Singh V. Kasturi Lal held as under:

¹⁵ CRP No. 1596 of 2014 dated 08.04.2015

"When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier.

In KSL & Industries Limited v. Arihant Threads Limited and others the Apex Court held as under:

In view of the non-obstante clause contained in both the Acts, one of the important tests is the purpose of the two enactments. It is important to recognize and ensure that the purpose of both enactments is as far as possible, fulfilled. Indeed, the question as to which act shall prevail must be considered with respect to the purpose of the two enactments; which of the two Acts is the general or special; which is later. It must also be considered whether they can be harmoniously construed.

From a reading of the judgments referred to above, it is clear that when there are two different enactments containing two non-obstante clauses, the Court has to see the object and purpose of the two enactments and the legislation which is later in point of time.

A perusal of both the enactments would show that POSCO Act is a self contained legislature which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and other allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure.

The legislature introduced the non-obstante clause in Section 42-A of the POSCO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POSCO Act, though the legislature was aware about the existence of non-obstante clause in Section 20 of the SC/ST Act.

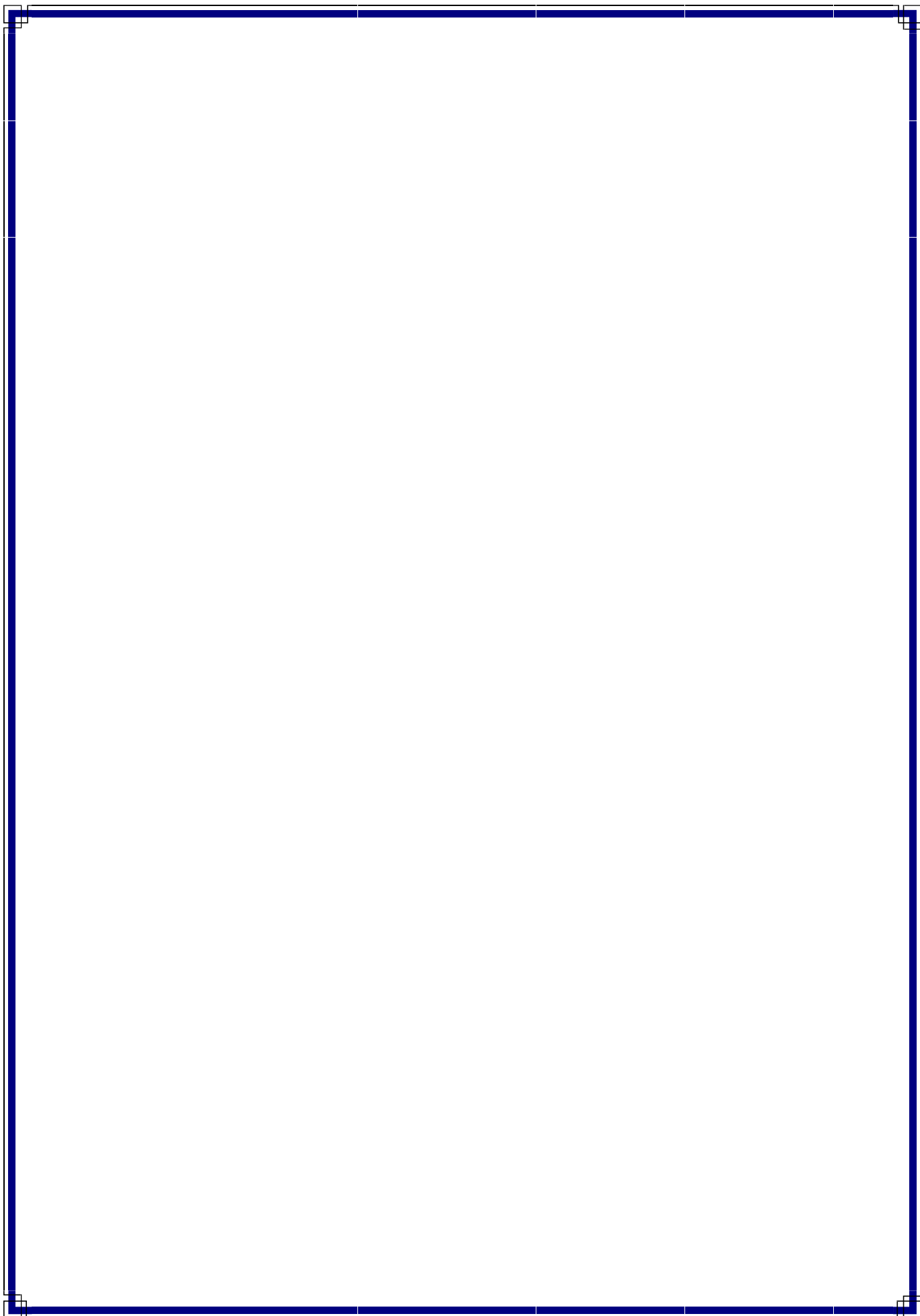
Applying the test of chronology the POSCO Act, 2012 came into force with effect from 20.06.2012 whereas SC/ST Act was in force from 30.01.1990. The POSCO Act being beneficial to all and later in point of time, it is to be held that the provisions of POSCO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments.

Where an accused is involved for offences under both the enactments, the appropriate Court to try the offence would be the Court designated under Section 28 of the POSCO Act.

Conclusion

The case of Arnesh Kumar vs. State of Bihar (2014) is an important judgment for constitutional and criminal cases. The court recognised the menace of arbitrary arrests even in non-cognisable offences. Though the case related to the offence of

Domestic violence, the court laid down universal guidelines to be followed while arresting and detaining persons accused of offences punishable with seven years or lesser imprisonment. The court laid down that the police officers must prepare a checklist, specifying reasons for arrest in accordance with Section 41A of CrPC corresponding to Section 35 of BNSS. Further, magistrates are also required to properly peruse the reasons provided by the police with the application for detention and state proper reasons for allowing or dismissing the same. Non-compliance by the police or magistrate with the above guidelines would lead to strict departmental action against them. Therefore, utmost care and attention has to be paid by the Judicial Officers at the stage of remand as emphasized by the Hon'ble Apex Court in catena of Judgments. The Judicial Officers have to apply their mind properly at the stage of remand as it involves the personal liberty of an individual and any violation of the guidelines of Arnesh Kumar case would result in serious consequences. Therefore, utmost judicial discipline, attention and application of mind of the Presiding Officer is required at the stage of remand of accused.



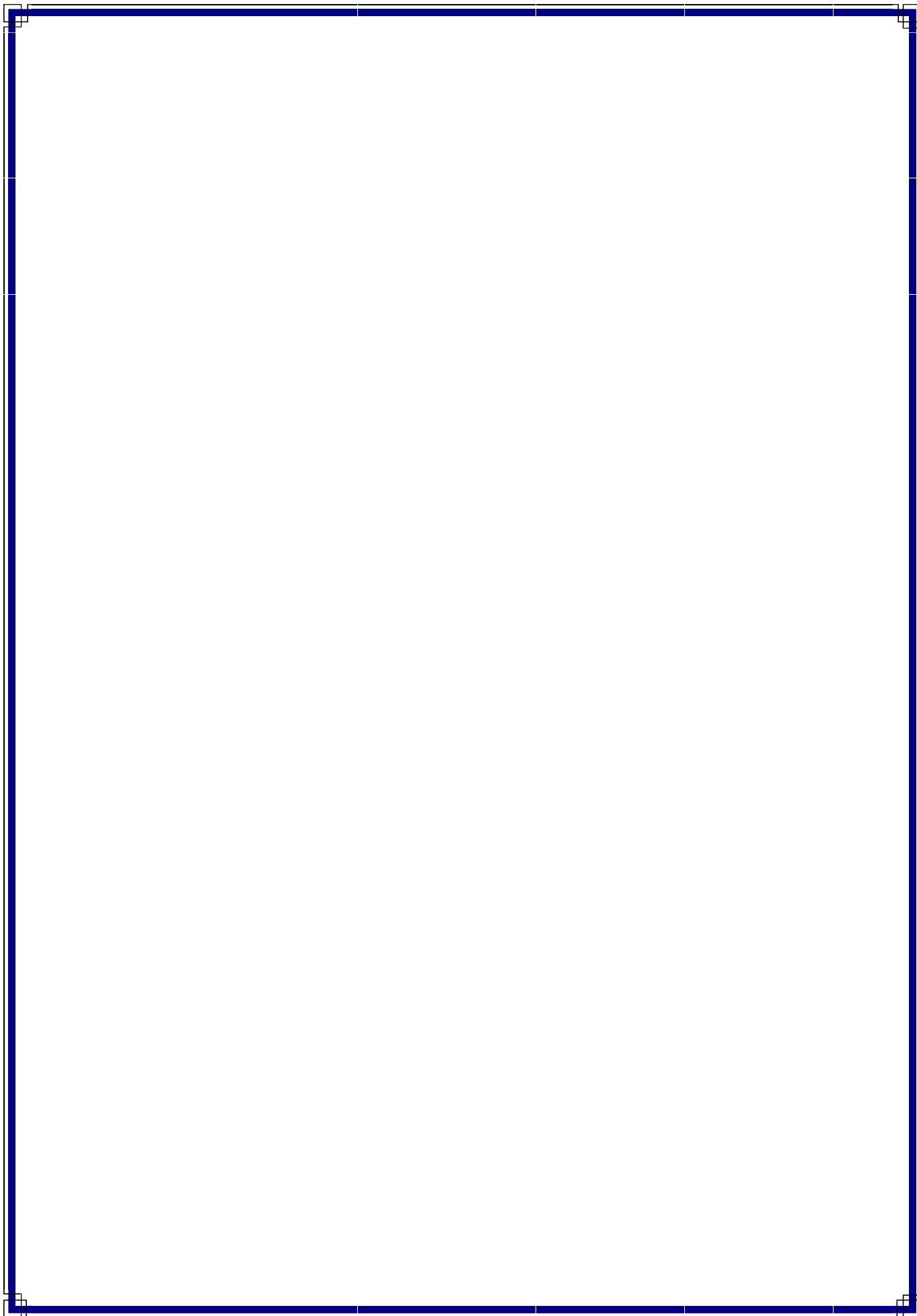
SESSION- II

Protection of life and personal liberty –
cautious approach by the Courts of
Magistrates and Special Sessions
Judges.

Paper Presentation

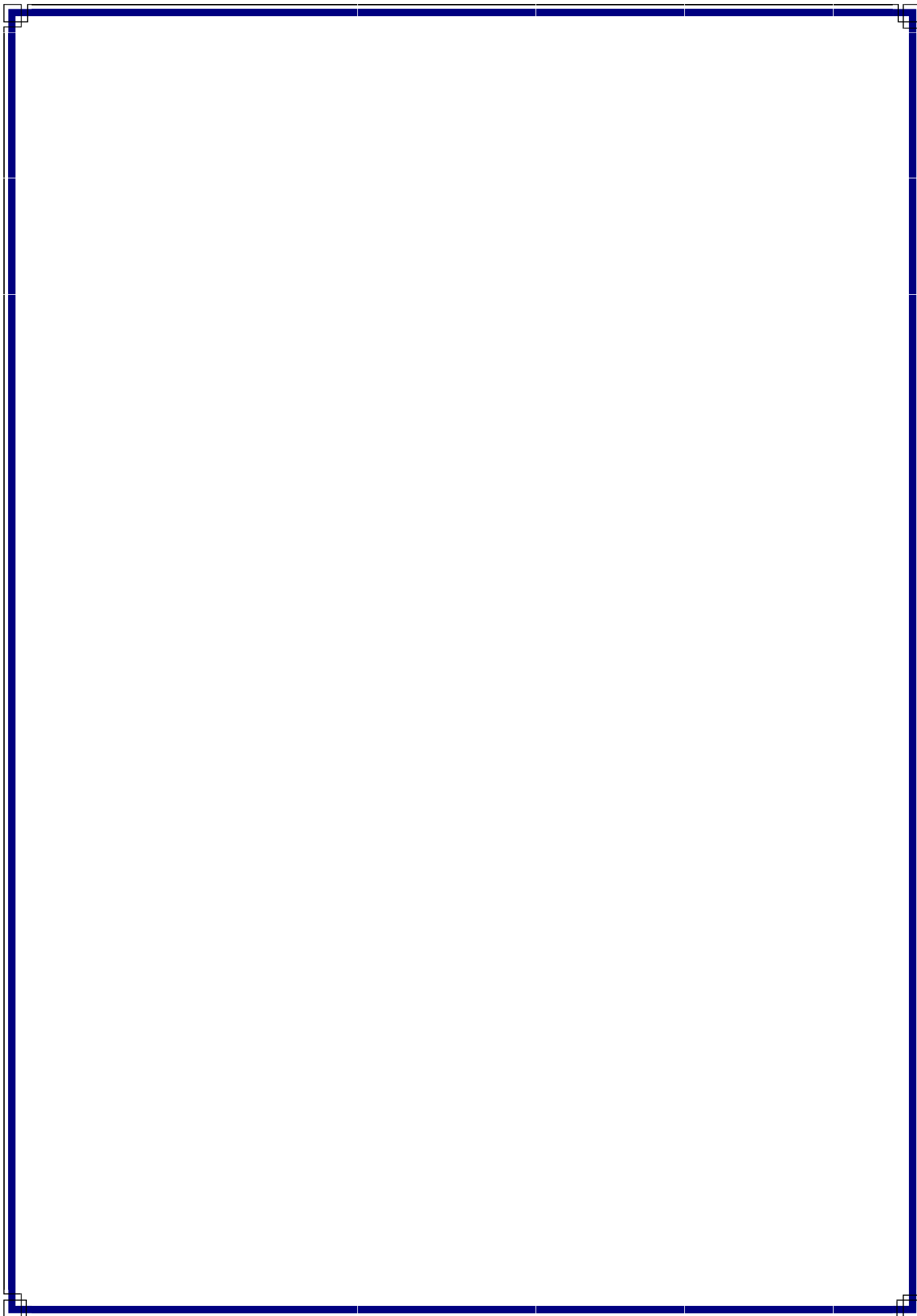
by

Sri. P.BHASKAR RAO,
I Additional District Judge,
SRIKAKULAM.



TOPICS

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PROTECTION OF LIFE AND PERSONAL LIBERTY – CAUTIOUS APPROACH BY THE COURTS OF MAGISTRATES AND SPECIAL SESSIONS JUDGES

The constitution of India is the mother of all laws. The Indian legal system is a blend of democratic ideals and constitutional safeguards, wherein every individual is presumed innocent until proven guilty. The purpose of ensuring rights to an accused is not to protect criminals but to protect the legal rights of those who may be wrongfully accused. The Indian Criminal system therefore, operates on the presumption of innocence and mandates that the burden of proof lies entirely on the prosecution. Therefore, the legal system provides for a comprehensive framework of rights at every stage, from arrest, interrogation, bail, investigation and trial to ensure due process is followed and abuse of authority is prevented. Constitution of India, acts as the foundation of personal liberties, enshrining fundamental rights that cannot be taken even during arrest or trial. It ensures fairness, equality and justice under Articles 20,21 and 22 and these articles are interpreted broadly by courts to ensure that procedural due process is followed at all stages of criminal prosecution.

Criminal procedure code, 1973:

It is a procedural code that law enforcement must follow to avoid arbitrary and unlawful actions. It lays down rules for arrest, bail, charge framing , trial and appeal processes. It ensures every criminal proceeding meets standards of fairness, impartiality, and opportunity to be heard.

Indian Evidence Act, 1872:

The Act regulates the rules of admissibility and proof, ensuring that no accused is convicted without lawful and just evidence. It reinforces the presumption on innocence and lays the burden of proof on the prosecution. The rules of evidence are crucial to prevent wrongful convictions based on unreliable or fabricated testimonies.

Judicial pronouncements:

This system play a vital role in interpreting statutes, filling legal gaps and setting precedents to protect and uphold the rights of the accused. The Indian courts have been trying to ensure fair trial, procedural safeguards, legal aid, custodial protection and bail jurisprudence. These foundational sources collectively uphold the principles of justice and prevent misuse of power by authorities, thereby preserving the rights and dignity of every individual accused of an offence.

POCSO Act:

The children are the precious human resources of our country and they are the country's future the hope of the girl child is in a very vulnerable position. A girl child deserves from protection and need great care and protection whether in the urban or rural. The Protection of children from sexual Offences (POCSO) act was enacted to provide more stringent punishment for the offences of child abuse of various kinds.

Human Rights Act:

The protection of the Human rights Act , 1993 is an act to provide for the constitution of national Human rights commission, State Human Rights Commission in States and Human rights courts for better protection of human rights and for matters connected therewith or incidental thereto.

Probation of Offenders Act. :

Accused entitled to benefit of Probation of offenders Act. Accused persons on the profession of good conduct: Probation of offenders act under sections 3 and 4 and Cr. P.C under sections 360, 361 released on persons for offences are not punishable with death and imprisonment of life, and sentence to undergo simple imprisonment for a period 3 months and fine of Rs.3000/- in default for one month., No criminal antecedents against them they are entitle for release under probation of good conduct.

It was held that in *somedatt and others v/s state of Himachal Pradesh*,¹. The Honourable Apex court observed in *Kunti kumar V/s state of Jarkhand*² of sec. 3 and 11 released on probation under section, if the accused convicted under 509 of IPC when maximum sentence two years, no previous conviction under Sessions court accused can be released after due admonition instead of carrying out sentence, accused is directed to be released after admonished under sec.3 of PO Act.

¹ AIR 2022 SC 1650

² AIR 2022 page 1716

As per the Judgment of the Honourable Apex court delivered in between Supriya jain v/s state of Haryana³, it was held that Sec. 180 IPC is not attracted, with a person refused to sign on the statement made through a police officer in the course of investigation.

The Honourable Apex court it was held in between Kailash Vijay Vajia v/s Rajyalakshmi Choudhawmani and others. Cr.,P.C sec.154,. 156(3) and section 41 registering FIR. While registering FIR, arrest is mandatory on registering FIR or not. For making arrest in terms of U/s 41(1)(b) or 8 reasonable complaint or credible information. The arrest of the accused is not mandatory.

Prevention of corruption Act 1988:

Under sec. 17-A of the Act, protects honest officers to prosecute public servants and necessary for sanction of the prosecution.

Indian Constitution:

Part- III of the Indian constitution Art.12 to 35 deals with fundamental rights. Part-IV of the constitution deals with directive principles from Art 36 to 57. Right to comfortable living with dignity has become a right to live. Art. 21 of the constitution of India, deals with the protection of life and personal liberty. Right to property is well settled law that a right to property is not a fundamental right but it is still constitutional right as it is elevated as human right 2017(4) ALT page No. 595. These rights are designed to protect individual dignity, prevent misuse of state power, and ensure fair treatment of those under criminal investigation or trial.

³ 2023- SRC page -2 of SC

Article 20 : Protection in Respect of the conviction for offences:

This article is a crucial safeguard comprising three key elements:

Ex Post Facto law:

A person cannot be convicted of an act that was not a crime when committed. This ensures fairness and predictability in the law.

Double Jeopardy:

Prevents prosecution and punishment for the same offence more than once. Protecting against harassment by repeated trials.

Right against self incrimination:

Guarantees that an accused cannot be compelled to testify against themselves, preserving mental privacy, and dignity.

The Honorable apex court observed in Nandini Satpathy V/s P.L. Dani (1978) that the right to silence must be respected and that the compelling a person to answer questions during investigation is a violation of Article 20(3).

Article: 21 Right to life and personal liberty:

Article 21 is one of the most expansive and interpreted articles. It not only guarantees life and liberty but ensures they are not curtailed without fair, just and reasonable procedure. Through Judicial interpretation, rights such as the right to a fair trial, legal representation, protection from custodial torture, and even the right to compensation for wrongful detention have been included.

In the case of Maneka Gandhi V/s Union of India (1978), the Apex court broadened the meaning of “ Personal liberty” , linking it with due process, justice and fairness.

Article 21 of the constitution says that “ No person shall be deprived of his life or personal liberty except according to procedure established by law. The right guaranteed in Art 21 is available to citizens as well as non citizens. In Gopal case personal liberty said to be mean only liberty relating to or compelling of person or body of the individual and his sense which was antithesis of physical stress or coercion. Personal liberty means personal right not to be subjected to imprisonment or arrest or physical coercion in any manner. The Honourable apex court observed in Maneka Gandhi V/s union of India the scope of liberty observed the expression personal liberty in Art; 21 implied to it conversant variety of lives. The court has given the widest possible interpretation to the words to the personal liberty. In that case,

the petitioner's passport was impounded by under section 10 © of the passport act. The right to live with human dignity. The protection of Art. 21 is available to even to convicts in jails.

Article : 22 Protection against arrest and Detention:

This article safeguards individuals from unlawful detention.

- a) The right to be informed of the grounds of arrest.
- b) The right to consult and be defended by a legal practitioner.
- c) Production before a magistrate within 24 hours of arrest.

In the case of Joginder Kumar V/s state of UP (1994) , the court emphasized that arrest should not be a mechanical exercise and must be justified based on facts and circumstances.

Protection to the accused in NDPS cases:

Sec. 50 of the Narcotic drugs and Psychotropic Substances Act, , 1985 :

Sec. 50 of the act states the conditions on which a search of person shall be conducted in the presence of gazetted officer in any of the department mentioned in the sec. 42 or to be nearest Magistrate. The accused has valuable right to be informed of his right to be search in the presence of gazetted officer and statutory right given under section 50, the proviso of Sec. 50 are intended to safeguards the innocent person. The whole trial will be come effective and be pronounced illegal with mandatory provisions with the section are not complied with (State of Punjab V/S Balbeer Sing⁴).

⁴ AIR 1994 SC 1872

Roll of the court to protect the accused:

The duty of the magistrate to examine the FIR, examine the case diary, find out what is happening and remand the person to police custody or judicial custody only if it is necessary. The court must see fairness of investigation. It is difficult to know the truth, the police and investigation. The magistrate must be very careful to observe the *prima facie* that there is some substance in FIR, case diary and then only magistrate should take things forward. Duty of magistrate to be on guard in order to ensure that the police does not exceed its authority.

“Truly liberty can adjust only when justice is equally administered to all”.

If any person right is infringed, he can approach the court to protect his right by way of filing writ petition of the Habeas corpus or search warrant petition to protect the life of the individual and personal liberty. The protection of life and liberty is guaranteed by the constitution of India under art 21.

Guidelines issued by the Honourable Apex court in Criminal cases:

In Ashok V/s state of Uttar Pradesh government case, Honourable apex court issued guidelines to protection of personal life and liberty of the individual to the accused in criminal proceedings.

1. It is the duty of the court to ensure that proper legal aid is provided to the accused.

2. When an accused is not represented by advocate, it is duty of every Public Prosecutor to point out the court the requirement of providing free legal aid. The reason is that it is the duty of Public Prosecutor to ensure the trial is conducted fairly and lawfully.
3. The right of the accused to defend himself in a **criminal trial is guaranteed by art.21 of constitution of India and he is entitled to fair trial.** The legal aid counsel system is to provide full time experienced lawyer to represent the accused. The LADCS scheme of 2022 provides for the selection of process of the legal aid defense system.
4. a) provided qualitative and all eligible persons
b) to manage and provide legal system in criminal system. The legal aid is an essential component of a fair and efficient system founded in rule of law.
5. The life line of the constitution.

Art 39(A) equal justice and free-legal aid:

The state shall secure the operation of equal opportunity and shall by suitable legislation or schemes or any other ways are not denied any citizen by reason of economic or any other disabilities.

As per the land mark judgment of “Honorable Apex court reported in between **SATYENDER KUMAR ANTIL V/S CBI AND ANOTHER**⁵ deals with bail, bail bond and categories of offences classified as A, B,C and D and it was further observed the definition of “Bail and Trial” and presumption of innocnes, provisions related to arrest under section 41 of Cr.P.C, issuance of notice and under section 41(A) procedure, under section 60(A)

⁵ AIR 2022 SC 3386

and also further observed bail is the rule and jail is the exception, and it was held this again is the touch stone of Art. 21 of constitution of Indian held in Mukesh Tarachand Shah v/s Union of India.

CRPC 439, 41, 41A 88, 170, 204, 209, 436(A) grant of bail. **The Honourable apex court issued guidelines to prevent unnecessary arrest and remand.**

The Supreme Court of India case Satender Kumar Antil v. CBI⁶. This case is notable for its discussion on the rights of under trial prisoners, particularly concerning bail, and the importance of speedy trials. The case also addressed the issue of arrest procedures under the CrPC, specifically Sections 41 and 154.

- **Table of Contents**
- **Introduction**

[Satendra Kumar Antil v. Central Bureau of Investigation](#)(2022) is a **landmark judgment on bail and pre-trial arrest**. Although pronounced by a two-judge bench, the depth of jurisprudence and the extensive references to precedent it offers are immense. It serves as a guiding light for anyone working on matters related to bail. One could even call it a modern scripture guiding bail jurisprudence in India.

Division of Offences into four categories

In this case, the Supreme Court divided offences into four categories, providing a different procedure for each category. These categories were:

⁶ AIR 2022 SC 3386

Category A: 7 Years or less imprisonment and not falling in Categories B & D.

Category B: Death, Imprisonment for life, or more than 7 years imprisonment.

Category C: Special Act NDPS, UAPA, Companies Act, PMLA, etc.

Category D: Economic Offences not covered by Special Acts.

For all categories, there were two **requisite conditions**: 1) Person is not arrested during investigation. 2) Cooperated throughout in the investigation including appearing before investigating officer whenever called.

Now, for each category the procedure were enshrined by Supreme Court:

- **For Category A**

- (1) Ordinary summons at the 1st instance/including permitting appearance through lawyer.
- (2) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.
- (3) NBW on failure to appear despite issuance of bailable warrant.
- (4) NBW may be cancelled or converted into a bailable warrant/summons without insisting physical appearance of the accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physical on the next date/s of hearing.

(5) Bail applications of such accused on appearance may be decided without the accused being taken into custody or by granting interim bail till the bail application is decided.

- **For Category B & D:**

On the appearance of the accused in the court pursuant to process issued bail application to be decided on the merits.

- **For Category C:**

Same as Categories B and D with the additional condition of compliance of the provisions of Bail under NDPS (Section 37), Section 45 of the PMLA, Section 212(6) of the Companies Act, Section 43-D(5) of the UAPA, POSCO Act, etc.

After categorising the types of offences, the Court examined relevant precedents to support its reasoning. The judgment addresses several key areas in significant detail, including the definitions of **‘bail’ and ‘trial,’ the presumption of innocence**, provisions related to arrest under Section 41 of the CrPC, issuance of notice under Section 41A, and procedures under Section 60A, among others.

- **Discussion of key concepts in the Judgment**

The Court took cognizance of the prevailing situation in the country, particularly the overcrowding of jails with under trial prisoners. It observed that in a democracy, the State must never create the impression of functioning as a police state, as the two concepts are fundamentally opposed.

- **Trial**

Court defined trial for the purpose of enlargement on bail to include, the stage of investigation and thereafter. Similarly, an appeal or revision shall also be construed as a facet of trial when it comes to the consideration of bail on suspension of sentence.

- **Bail**

Bail is also not defined in the Code, though is used very often. **A bail is nothing but a surety inclusive of a personal bond from the accused. It means the release of an accused person either by the orders of the court or by the police or by the investigating agency.**

- **Bail is the rule:**

The principle that bail is the rule and jail is the exception has been well recognized through the repetitive pronouncements of this Court.

This again is on the touchstone **of Article 21 of the Constitution of India** as held in *Nikesh Tarachand Shah v. UOI*.

The object of the bail is to secure appearance of accused to the Court facing trial Further, the object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required that an accused person will stand his trial when called upon.

- **Presumption of Innocence**

The presumption of innocence is an internationally recognized legal principle, enshrined in Article 14(2) of the International Covenant on Civil and Political Rights, 1966, and Article 11 of the Universal Declaration of Human Rights, 1948. The Supreme Court

of Canada, in *R. v. Antic* (2017), held that the right not to be denied reasonable bail without just cause is a fundamental element of an enlightened criminal justice system. This right reinforces the presumption of innocence at the pre-trial stage and serves as a safeguard for the personal liberty of accused persons. Notably, this right encompasses two key aspects: **first, bail must not be denied without just cause; and second, the conditions imposed must be reasonable.**

- **Provisions of Code of Criminal Procedure, 1973:**

In this case, the Hon'ble Supreme Court examined a wide range of provisions under the Code of Criminal Procedure, including Sections 41, 41A, 60A, 87, 88, 167, 170, 204, 209, 309, 389, 437, 439, and 440. The following discussion analyses the Court's interpretation of each of these provisions in the context of bail jurisprudence.

- **Section 41, 41-A and 60-A of CrPC**

Section 41 of the Code of Criminal Procedure deals with arrest in cognizable offences without a warrant. It mandates **that a police officer must record the reasons for making such an arrest in writing. This duty is not discretionary and must be strictly complied with. Any non-compliance with this requirement shall operate in favour of the person suspected of the offence.**

The Hon'ble Supreme Court referred to the landmark judgment of *Armesh Kumar v. State of Bihar*, wherein it was held that while making an arrest under Section 41 of the Code of Criminal Procedure, the police must record in writing the specific

reasons justifying the arrest. **The Court further emphasised that the power exercised under Section 167 CrPC should not be invoked in a routine or casual, manner.**

The Magistrate must independently record their satisfaction, which cannot rest solely on the ipse dixit of the police officer. Additionally, the mechanical reproduction of the grounds mentioned in Section 41 CrPC in the case diary—without due application of mind—should be firmly discouraged and discontinued. This direction was issued to apply in all 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.

Moving to section 41A of CrPC, it deal with serving of notice by police where arrest is not required under Section 41. **The compliance with notice is important for the person as it protects him from getting arrested. However, police can arrest with recorded reasons as held in *Arnesh*.**

- **Section 87 and 88 of the Code**

Section 87 deals with the Issue of Warrant in lieu of, or in addition to, summons and Section 88 deals with the power to take bond for appearance. In *Inder Mohan Goswami v. State of Uttarakhand*, it was held by the Supreme Court that the Courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued. **Personal Liberty is of paramount importance.**

- **Section 167(2) of the Code**

Section 167 deals with the provision of default bail when the investigation cannot be completed on time. It is another limb of Article 21 of the Constitution of India. Presumption of innocence is also inbuilt in this provision. **In Rakesh Kumar Paul v. State of Assam, it was held that in matters of personal liberty and Article 21, it is not always advisable to be formalistic or technical.**

- **Section 170 of the Code:**

Section 170 marginal note states, “Cases to be sent to magistrate when evidence is sufficient”. The scope of this provision is dealt with in *Siddharth v. State of U.P.*, This is a power which is to be exercised by the court after the completion of the investigation by the agency concerned. Therefore, this is a procedural compliance from the point of view of the court alone, and thus the **investigation agency has got a limited role to play. In a case where the prosecution does not require custody of the accused, there is no need for an arrest** when a case is sent to the Magistrate under Section 170 of the Code.

There is no need for filing a bail application, as the accused is merely forwarded to the court for the framing of charges and issuance of process for trial. If the court is of the view that there is no need for any remand, then the court can fall back upon Section 88 of the Code.

- **Section 309 of the Code**

Section 309 provides power to postpone or adjourn proceedings. While considering this section, the court observed that right to a fair and speedy trial is yet another facet **of Article 21**. Therefore, while it is expected of the court to comply with Section 309 of Code of Criminal Procedure to the extent possible, an unexplained, avoidable and prolonged delay in concluding a trial, appeal or revision would certainly be a factor for consideration of bail.

- **Precedents**

Court referred to precedent laid down by Supreme Court in *Hussainara Khatoon v. State of Bihar*, where it was observed by the court that many people are in prison without even facing trial and after Maneka Gandhi, the pre-trial detention ensure “reasonable, just and fair” procedure.

Further, ***Surinder Singh v. State of Punjab* was referred, wherein, it was held that speedy trial is a fundamental right enshrined under Article 21 of the Constitution of India.**

- **Section 389 of the Code**

Section 389 provides for suspension of sentence pending appeal; release of appellant on bail. In *Atul Tripathi v. State of U.P.*, it was held that Section 439 applies in pre-conviction stage whereas section 389 applies during the post-conviction stage.

- **Section 436-A of the Code**

Section 436-A provides for maximum period for which an under-trial prisoner can be detained. It states that if a person has

been imprisoned for one-half of the maximum period of imprisonment, he should be enlarged on bail.

- **Section 437 of the Code**

Section 437 provides when bail may be taken in case of non-bailable offence. The court also discusses power of magistrate while dealing with this provision. The Hon'ble Supreme Court referred to *Ishan Vasant Deshmukh v. State of Maharashtra*, wherein it was held that

“.....The observations of the Supreme Court that generally speaking if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to the Section 437 of the Code. Thus, merely because an offence is punishable with imprisonment for life, it does not follow that a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate would be entitled to grant bail in cases triable by him even though punishment prescribe may extend to imprisonment for life.”

- **Section 439 of the Code**

Section 439 provides for special power of High Court or Court of Session regarding bail.

- **Section 440 of the Code**

Section 440 provides for the amount of bond and reduction thereof.

- **Categories A & B**

In category A, one would expect a better exercise of discretion on the part of the court in favour of the accused. In Category B, these cases will have to be dealt with on a case-to-case basis again keeping in view the general principle of law and provision as discussed above.

- **Special Acts (Category C)**

General principles governing delay would apply to these categories also. In *UOI v. K.A. Najeeb*, it was held **that liberty guaranteed by part II of the Constitution would cover within its protective ambit** not only due procedure and fairness but **also access to justice and a speedy trial**. Further, in *Supreme Court Legal Aid Committee v. UOI*, **it was held that under trials cannot be indefinitely detained pending trial**.

Further, the court clarified one aspect of the interpretation of section 170 of the Code. That is only a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. Similarly, the court stated that the existence of a *pari materia* or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect, entitling the accused to a default bail.

- **Economic Offences (Category D)**

The Court stated that the position of this was already discussed in *P. Chidambaram v. E.D.* and reiterated the same “(para 23) even if the allegation is one of grave economic offence,

it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does bail jurisprudence provides so.”

- **Judgment Analysis/Conclusion of the Honourable Apex court in Satyendar kumar Antil case:**

This judgment comprehensively addresses issues related to bail, personal liberty, pre-trial detention, and the constitutional imperative of safeguarding individual rights. It may rightly be regarded as a holistic pronouncement and a significant advancement in the development of bail jurisprudence.

By categorizing offences and laying down distinct guidelines for each category, and further recommending the enactment of a special Bail Act in India, this judgment marks a significant advancement in bail jurisprudence. It may aptly be described as a modern scripture guiding bail jurisprudence in India.

This is a landmark judgment that will continue to guide legal professionals for years to come. Its seminal contribution lies in the structured reasoning, the **emphasis on human rights**, and the clear interpretation of foundational concepts such as **‘trial,’ ‘presumption of innocence,’ and ‘bail,’** among others. These elements collectively make this ruling a lasting legacy in Indian bail jurisprudence.

Bail and Under trial Prisoners:

- The Supreme Court, in Satender Kumar Antil v. CBI, highlighted the need to balance the rights of under trial prisoners with the interests of justice.

1. It emphasized the importance of considering the length of custody of an under trial when deciding on bail applications.
2. The court referenced Section 436A of the CrPC, which deals with the release of under trial prisoners who have completed half the maximum sentence prescribed for the offense.
3. The case also addressed situations where the offense carries a minimum sentence of ten years and a minimum fine of one lakh rupees, suggesting release on bail after five years of custody, provided certain bail conditions are met.

Grant of bail:

It was held by the Honorable Apex court in Kalyan Chandra Sarkar v/s Rajesh ranjan @ Pappu yadav ⁷, Honourable Supreme court observed that “ The court granting bail should exercise its discretion in a judicial manner and not as matter of courts. Reasonable grounds for believing instead of the evidence,. Whether there is a genuine case against the accused and that the prosecution will be able to produce prima facia of evidence in support of charge”.

Circular of the Honourable High court of Andhra Pradesh in 6807/2024 KVR Vidyasagar petitioner/ accused V/s state of Andhra Pradesh. To follow the circular, under Art. 22 of Indian constitution to see the right of the accused at the stage of remand under section 47 (BNSS), a person arrested to be informed the grounds of arrest and right to bail.

⁷ 2004 7 (SC 9c)) 528

Arrest Procedures and FIRs:

- (1) The case clarified the distinction between the power of arrest under Section 41 of the CrPC and the registration of an FIR under Section 154.
- (2) The court emphasized that while registration of an FIR is mandatory upon receiving information, arrest is not automatic and should be based on the circumstances of each case.
- (3) The decision in *Satender Kumar Antil* included directions for police to follow specific procedures when making arrests, including providing grounds for arrest and filling out a checklist.

Cr.PC 41 Police officer have a duty to apply their mind to case and ensure that the conditions under section 41 are met before their conduct and arrest. The power of arrest is exercised without application of mind and without due regard of law it amounts to abuse of power.

Interim bail:

The trial court is not precluded from granting interim bail taking into consideration the accused during investigation which has not warranted arrest.

Sanjay Chandra V/s CBI 2012 91) 40 apex court has observed in part 39 of determining to grant bail. Both aspects taken in account.

1. Seriousness of charge
2. severity of the punishment.

CRPC 437, 438 condition bail: Courts while imposing bail conditions must balance liberty of accused and necessity of fair trial. 438(2) stipulates that high court, the court of session to be released on condition of bail: Proviso provides that the court shall impound conditions the facts of the particular case. Accused enlarged in interim bail as per the citation Mohammad Zubair V/s state of NCT of Delhi, AIR 2022 SC 3649. Accused enlarged on interim bail.

Right of the accused to grant default bail :

The Honourable apex court it was held in Ritu chhabaria v/s Union of India, wherein it was held that Cr.PC under section 167(2), IPC 120(B) and sec. 420 prevention of corruption Act, u/s 7, 12, and 13 (2) and sec. 13(1)(d) filing of preliminary charge sheet statutory bail.

Sec. 167(2) of the Cr.P.C was enacted to ensure that the investigation agency completes the investigation within the prescribed time limit. **Failing which, no accused could be detained with, if they are willing to avail bail. Under section 167(2) is limb of Art. 21 of constitutional right.**

Investigation authority is under a constitutional duty to expedite the process of investigation within the stipulated time, which the accused is entitled to release on default bail. Accused has got indefeasible right to default bail as per art. 21. Accused is entitled for default bail on expiry of 91 days statutorily.

Default bail – if violates it amounts to violation of fundamental right:

2017 (1) ALT, criminal page No. 158 SC, police has to statutory right and duty under relevant provisions of Cr.P.C chapter XIV, if cognizable offence and police must be permitted to complete the investigation and also fairness in trial (2023 (2) ALT page No. 48 SC).

The Honorable apex court it was held that under section 167(2) of Cr.P.C extension of remand, presence of accused either physically or virtually is sine -quo non. Accused has indefeasible right to oppose prayed for extension of remand, it amounts to violation of fundamental right.

Police custody:

The Honourable apex court , it was held in AIR 2023 SC 1808, Cr.P.C under section 167(2), 309(2), the accused had successfully avoiding from operation of order of police custody, accused can not be permitted to judicial process by his conduct.

Right of custodial interrogation is also very important right in favour of investigation agency to – unearth truth, which accused had purposely tried to first trial. CBI permitted to have police custody remand of accused for a period of 4 days.

Right against custodial violence or torture:

custodial torture is one of the most serious violations of an accused fundamental rights. Indian law and jurisprudence recognize the dignity of individual , including those in custody, and impose strict limitations on the power of police

Speedy Trials:

The case also touched upon the importance of speedy trials, citing **Article 21** (right to life and personal liberty) and the need to avoid unnecessary adjournments, especially for those in custody.

- a. The court stressed that prolonged trials, due to delays not attributable to the accused, could be a violation of Article 21.
- b. The decision highlighted the need for courts to prioritize the recording of evidence, particularly for private witnesses, to prevent delays.

In essence, *Satender Kumar Antil v. CBI* is a landmark case that reinforces the rights of **undertrial prisoners**, emphasizes the importance of speedy trials, and clarifies the procedures for arrest and FIR registration under the CrPC.

Fairness in trial:

the Honorable Apex court it was held in *Ajfai Alisha , Abdul Shaukath sha V/S state of west Bengal* ⁸ fairness in trial, High Court and district Judiciary are ensured the fairness in trial proceedings within their Judicial frame work. We are not inclined to accept that the victim's family will not get fair justice in the proceedings.

Sections 231 and 233 of Cr.P.C allow the accused to present witnesses and produce evidence in their defense. This includes the right to summon witnesses, produce documents, and cross examine the prosecution witnesses. The defense must be given ample opportunity to contest the evidence brought against the accused.

⁸ 2023 () ALT (Criminal) page 48 SC

313 Cr.P.C examination guidelines issued by the Honourable Apex Court:

The Honorable apex court it was held in Asokh V/s state of Uttar pradesh case in CrI. A No. 771/2024, the apex court issued guidelines to conduct **fair trial**:

Legal aid must be effective. Prosecution must ensure fair trial. Supreme court issued guidelines to legal aid lawyers. Public Prosecutors must assist the trial court in recording the accused statement under section 313 of Cr.P.C.

Right of hearing of the accused in appeal stage under section 235 (2) of Cr.P.C:

The Honourable Apex court it was held that in between Fedrick Cudinha v/s state of Karnataka it was held that Cr.P.C under section 235(2) IPC, 302, 326 sentence opportunity of hearing accused persons acquitted by the trial court were convicted by the High Court in appeal.

Appellate court was bound under law to hear them on quantum of sentence in according to mandatory of sec. 235(2) before pronouncing any sentence passed against them.

Right to remain silent and consult a lawyer (Section 41D of Cr.P.C and Art. 20(3)) The accused has the right to consult a lawyer during interrogation and cannot be forced to give self incriminating answers. In Selvi V/s State of Karnataka (2010), the court ruled that narco analysis, polygraph tests, and brain mapping without consent violate Article 20 (3).

Protection Against Medial Trial and public prejudice:

Media trials can lead to public shaming and bias the judicial process. Though the media has the right to report, it must avoid prejudging the accused guilt.

In the Sahara India Real Estate Corporation Ltd. V/s SEBI 2012, the court held that media coverage should not interfere with a fair trial and that courts can impose postponement orders to prevent prejudice.

Claim of Juvenility:

As per the juvenile justice , a care and protection of children claim of juvenility after holding an enquiry in to the claim of the application that he was juvenile on the date of commission of offence, it shall be forthwith set at liberty provided if he denied under any other order of competent court as it was held in apex court in sanjay patel and another v/s UP ⁹ CrPC under 41(A) and sec. 167 arrest of accused it is the duty of the court to see that citizens are not harassed by arresting in petty offences carrying less than 7 years of punishment.

Directions to the police officers : Bollinene Rajagopal naidu V/s state of AP¹⁰ The law declared by the honourable supreme court is already operative in the filed we reiterated the same and observed the same shall be followed smoothness in all sincere by the police officer.

⁹ AIR 2022 SC 1952

¹⁰ 2022 (ALT DB AP 3)

Directions to the Judicial Officers:

The Honorable high court further directed the magistrates to record their satisfaction before authorize detention in exercise of Sec. 167 Of Cr.P.C. While doing so, the JMFC to apply their mind objectively in the observing the facts of the case and pass a reasonable order. Negative in the reason shall be view seriously and JMFC concerned shall be have for departmental action by the high court as and when such defective detention order are brought to the notice of the high court.

Role of court in ensuring Fair trial:

Right from the inception of the judicial system which has been accepted that discovery, vindication and establishment of truth are the main purpose underlying existence of force of justice. The penetrating principle for a fair trial parameter common law in both civil and criminal contents. Application of these principles involve balancing of competing interest in a criminal trial. The investigation of the accused and public and grate extent of the victim have to weighed not loosing cite of the public interest in involve of the persons.

Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial still possible, except at the gist of undermine the fair name and conduct of the justice impartially and independently.

The principles and due process are closely linked with human rights protection. Fair trial obvious, could mean a trial before an impartioned judge and advocate, fair atmosphere of

judicial calm. Since the object is to meet out the justice and convict the guilty and save the innocent, the trial should be a search for the proof and not about over technicalities, and must be conducted such rules to protect the innocent and punish the guilty. It has greater duty and responsibility to render justice in case in role of the prosecuting agency it self and it said to be hand in glove parading a marked making a mockery of criminal justice and administration it self. (In best bakery case in Jaheri abibullah sheik and another V/s state of Gujarath) Jaheri apprehended before the National human rights commissioner in short NHRC stating that she has threatened by politician not to depose against the accused.

Speedy justice and fair trial are integral part of Ar. 21 of Indian constitution.

The Honourable Apex court observed appellant was denied due process of law and whether the conduct of trial was contrary to the procedure deceived under the provisions of the code in particular that fair and impartial trial and denied the right of the counsel. It is equally proved that the options of the fair and proper trial would be violation of fundamental rights on account of breach of mandatory provisions under section 304 of Code of criminal procedure.

Art-21 of constitution provides that no person shall be deprived of his life or personal liberty except according to procedure Speedy justice and fair trial to a person accused of a crime or integral part of art-21.

Art 22(1) of the constitution provides that no person who is arrested without being informed of the ground of such arrest nor shall he be denied the right to consult and to be defended by legal practitioner of his choice.

Art. 39(A) state shall provide free legal aid to the accused who is not in position to engage counsel.

Art 303 of the code confers a right upon any person accused of an offence before a criminal court to be defended by a pleader of his choice.

Sec. 304 of the code legal aid to the accused at state expenses in trial before the court of session and accused not defended by the pleader., If the accused has no sufficient means to engage the pleader. (The honourable Apex court observed speedy justice and fair trial are integral part of Ar.21 of constitution and and in case decided between Mohmmad hussain @ Julfio caul/Vs government of NCT / Delhi

Hand cuffing of under trial prisoners:

Art. 21, 14, and 19 of Indian constitution hand cuffing while taking them from jail and to court and back. Justice Krishna ayyar and chinnapureddy observed in Premshankar sukla case 1980(3) supreme court case 526 to hand cuff is to hoot harshly and to punish humiliating.

Search warrant:

Under section 97 of Crl.P.C scope and effect “reason to believe and the words so confined connotation of petition by husband of for issues of search warrant in respondent of his wife.

Duty of magistrate : when a search warrant is issued against his wife of her own accord but it is not wrongfully confined amount to

an offence. Of the issuance of search a warrant she is living voluntarily away from her husband. 1982 CrI J page 1446 AP high Court .

Supply of documents under section 207 of Cr.P.C

The Honourable apex court issued guidelines it was held in criminal trials : regarding inadquess and deficiets in Reg v/s state of AP

The right of accused entitles to receive documents under section Cr. P. C 173,207,208 (2023 I ALT Criminal, page No. 165 SC)

Directions issued to determine the juvenility of the petitioner: As per the proviso under section 7(A) , 15 of juvenile justice (care and protection) children act and rule 2007 under provision 12(3) claiming juvenility with the age proof of 10th class and ossification is not binding of the court. The apex court held vinod katari Vs state of UP ¹¹

Constitution liberty guarantee to individual:

Publication or telecast, of any informal relating to material relationship of parties to the litigation in the matrimonial proceedings. Which are conducted in camera would certainly effect with constitution liberty guaranteed to individual (between R. Sukanya V/s R. Sridhar¹².)

Accused released on bail in crime stage:

If the accused released on bail, he need not be required to appear before the court or until charge sheet is filed. AIR 1982 SC 1463, AIR 1980 SC 785.

¹¹ AIR 2022 SC 4771

¹² AIR 2008 Madras page No. 244

The Honorable supreme court directions with regard to keeping of female suspects and interrogation female suspects:

The Honourable Apex court has issued certain directions to the police in police remand as it was held in Sheela Barsc V/s state of M.P¹³ to keep police lock up in good localities, if female suspect should be guarded by female constable. Female suspects should not keep in a lock up ion which male suspects were detained. Interrogation should be carried in the presence of female officer and female constable. The magistrate before whom the arrested person should enquire whether he or she tortured or maltreated in the police lock up. He should also have the right to medical examination.

Default bail application filed /charge sheet also filed.

Under section of 167 Cr.P.C when charge sheet not filed in 60 days, he is entitled to bail (2001 I ALD criminal SC 700).

Properties in possession of transferees can be attached only by the special court constituted under section 8 of AP protection of depositors finance establishment act, 1989 but not government as it was held in the case of Madanapalle horticulture V/s government of AP ¹⁴.

Magistrate while accepting the charge sheet has to invariably issue summons and not arrest warrant. Even record shows he absconded or shall not obey summons then only the court may issue NBWs as per the observation of the Honourable Apex court observed in Aman preeth singh appellant V/s CBI through director.

¹³ AIR 1983 SC378

¹⁴ 2009 (4) ALT page No. 520

In Bihar legal support society v/s the Chief Justice of India and another the honourable apex court held that weaker section of India has been deprived for long years. They have ignorance and illiteracy. They are not aware of rights and benefits conferred on them by the constitution and socially and economically disadvantaged position, they are lack of capacity and they do not have with material of social and economic entitlements and come back exploitation and injustice. The rights of pre- legal aid and speedy trial are guaranteed under Art. 21 of Indian constitution. As per the Art 21 of the constitution right of accused person who is unable to engage an Advocate and secure legal services on account of incommunicative situation and the state is under a mandate to provide a lawyer to accused person. Art.11 (1) of universal declaration of human rights every one charged with a penal offence has a right to be presumed innocent until proved guilty all the necessary for his guarantees. The BNSS, 2023 section 341 are dealt with legal aid to accused at state expenses and the CPC order 33 deals with suit by indigent person where as order 44 deals with appeal by indigent person order 33 of CPC by instituting suits by indigent person.

Guidelines laid down by the Honourable supreme court in Ashok V/s state of UP government

6. It is the duty of the court in Ensure that proper legal aid is provided to the accused.
7. When an accused is not represented by advocate, it is duty of every Public Prosecutor to point out the court the requirement of providing free legal aid. The reason is that it is the duty of Public Prosecutor to ensure the trial is conducted fairly and lawfully.

8. The right of the accused to defend himself in a criminal trial is guaranteed by art.21 of constitution of India and he is entitled to fair trial. The legal aid counsel system is to provide full time experienced lawyer to represent the accused. The LADCS scheme of 2022 provides for the selection of process of the legal aid defense system.
9. 1) provided qualitative and all eligible persons b) to manage and provide legal system in criminal system. The legal aid is an essential component of a fair and efficient system founded in rule of law. The life line of the constitution.

Art 39(A) equal justice and pre-legal aid the state shall secure the operation of equal opportunity and shall by suitable legislation or schemes or any other ways are not denied any citizen by reason of economic or any other disabilities.

Right to appeal : An accused has the right to appeal against conviction and sentence. The CrPC provides for appeal in Sessions courts, High Courts and the Supreme court depending on the seriousness of the offence.

Right to seek revision and review :

Even after appeals are exhausted, the accused can seek revision or file a review or curative petition in exceptional cases. The Judiciary has held that procedural irregularities and lack of fair hearing are grounds for such relief.

Clemency powers under Articles 72 and 161 empower the President and Governors to grant pardons , reprieves, and commutations . These are humanitarian safeguards especially relevant in death penalty cases. In Kehar Singh V/s Union of India, (1989) the Apex court held that president's power to grant mercy is not just judicial but also based on moral and political considerations.

Summary of rights : The rights of the accused in India span across constitutional, statutory, and Judicial domains. From the presumption of innocence to rights during arrest, trial and appeal , the legal framework ensures that justice is delivered fairly.

On going challenges: Despite strong legal safeguards, several challenges persist:

Prolonged under trial detention, lack of awareness about rights among marginalized communities, inadequate access to legal aid , misuse of preventive detention laws.

Conclusion:

The rights of the accused are essential to maintain the balance between crime control and civil liberties. Strengthening these rights ensures that the Indian Justice system upholds not just the rules of law but also the dignity of every individual.

Court has to examine First information report, examine the case diary, find out what is happening and remand the person to police custody or judicial custody only if it is necessary. There must be fair investigation and the court cannot accept the remand report blindly without applying mind. The court must avoid remand the accused mechanically and it is nothing but effecting human rights. Magistrate has to be very very careful and see its

prima facie, offence is made out and that there is some substance in FIR , in case diary and only then Magistrate shall satisfy the reasons for arrest and accept the remand. Duty of magistrate to be on guard in order to ensure that the police does not exceed its authority. The court must see the necessity of issuance of the prisoner trial warrant and preferably to connect the accused in trial proceedings to avoid the delay in trial proceedings and also to avoid the difficulty of other accused.

Protection of life and personal liberty of the individual guaranteed by Art. 21 of Indian constitution. A duty cast upon the court to protect the personal liberty of the individual. People repose great faith and confidence in the police force. The police officer must have impeccable character and integrity. Police officers are not only required the crime by effectively enforcing law and order. They are also duty bound to take all steps to prevent occurrence of crime and save the life of the person. Constitution provides fundamental right to the comfortable living with dignity as become right to life under Art. 21 of constitution of India. Duty of the court, one should search for absolute truth, not relative truth. The mythological meaning of absolute truth is the supreme soul. A sacred duty is cast upon the courts, prosecutors, police, advocates and institution concerned with Judiciary to protect the individual rights.

SESSION- III

**POWER AND DUTIES OF MAGISTRATES,
SESSIONS JUDGES AND SPECIAL SESSIONS
JUDGES PERTAIN TO BAILS.**

a) DEFAULT BAIL.

**b) GROUNDS ON WHICH BAIL CAN BE
GRANTED / REJECTED.**

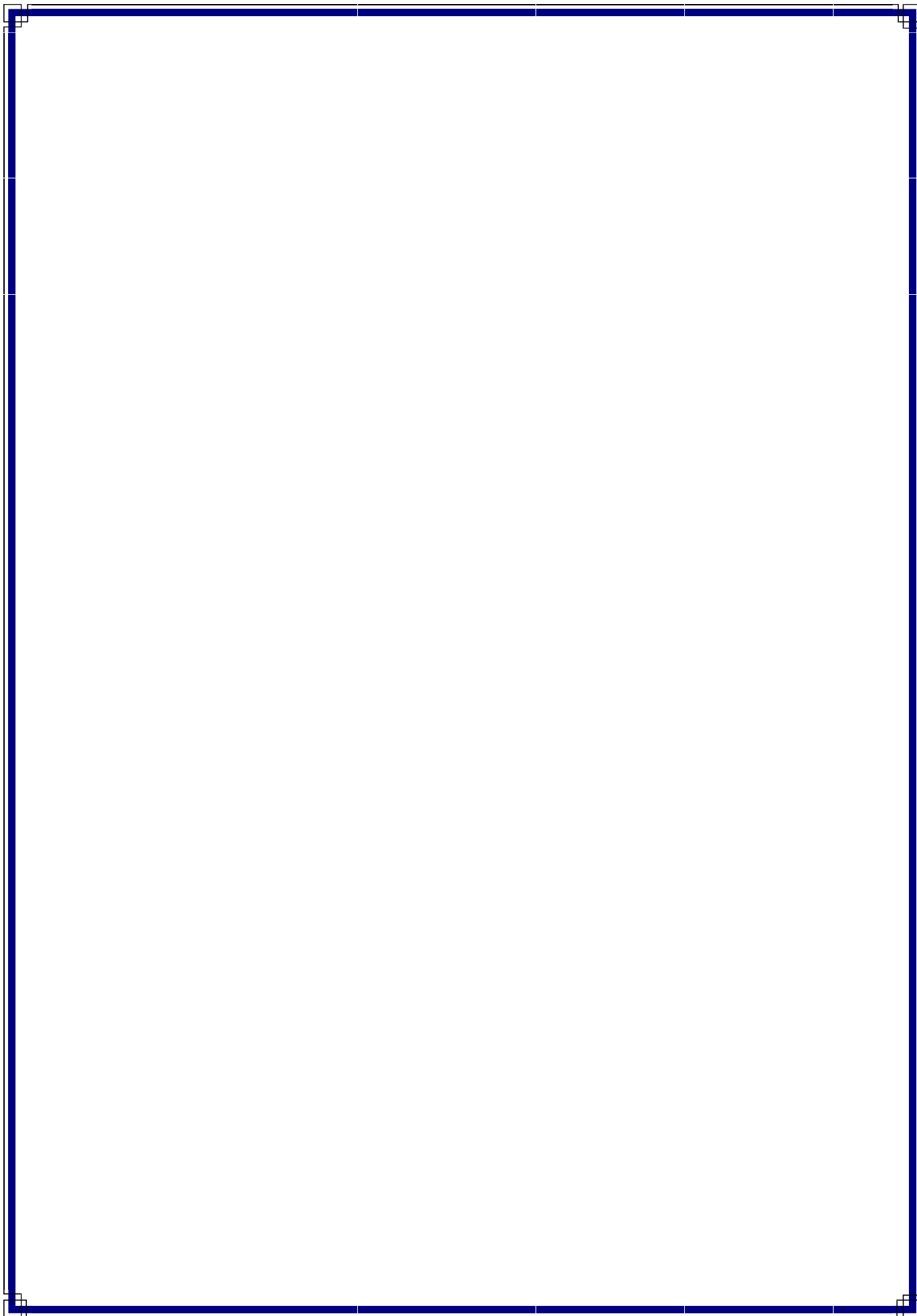
**c) IMPOSITION OF CONDITIONS WHILE
GRANTING BAIL.**

d) POWER TO MODIFY CONDITIONS OF BAIL.

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TOPICS

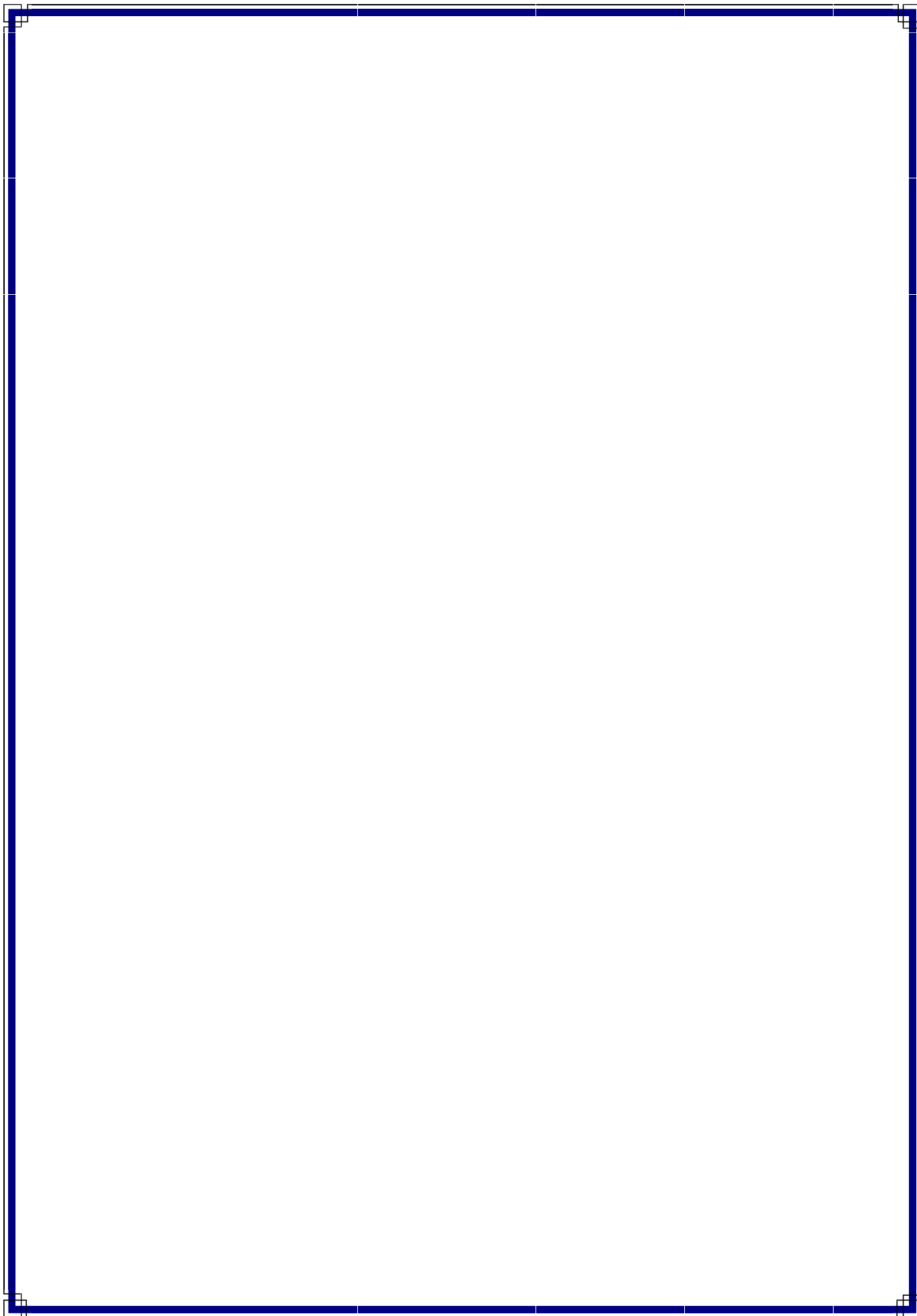
**POWER AND DUTIES OF MAGISTRATES,
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::BAIL ::

“The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a society sensitized judicial process.”

- Justice Sri. V.R. Krishna Iyer

The word bail is not defined in Code of Criminal Procedure, but we find bailable and non-bailable offence in the code. However, that grey area was cleared by new Act i.e, the Bharathiya Nagarik Suraksha Sanhitha. Where,

Section 2(b) of BNSS defined Bail, means release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or court on execution by such person of a bond or bail bond.

Bond(section 2 (e)) means, a personal bond or an undertaking for release without surety.

Bail Bond (section 2 (d)) means, an undertaking to release with surety.

::OBJECT OF BAIL::

Neither Cr.P.C nor BNSS, expressed the object of granting bail to the accused. However, from the catena of judgments rendered by Hon'ble Supreme court of India and various Hon'ble High courts we can derive the object of granting bail and those are the following:

1. To prevent the individual from suffering unnecessary imprisonment;
2. In ***Sanjay Chandra v. CBI***, the Hon'ble Supreme Court of India expressed the object of bail to be '***to secure the appearance of accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventive.***

The courts owe more than verbal respect to the principle that punishment begins after conviction, that every person is deemed to be innocent until duly tried and duly found guilty. '

::GROUNDS UNDER WHICH BAIL CAN BE GRANTED OR REJECTED ::

The code of criminal procedure, 1973 (New Act – BNSS) elaborately dealt with bails and the different kinds of bails provided the Code is as follows:

Section 436 of Cr.P.C/ Section 478 of BNSS - Bail in Bailable cases

Section 437 of Cr.P.C/ Section 480 of BNSS – Bail in non-Bailable cases

Section 438 of Cr.P.C/ Section 482 of BNSS – Anticipatory bail

Apart from the above, the code also deals with other kinds of bails and those are:

Section 389 of Cr.P.C/ section 430 of BNSS - Bail after conviction

Section 167(2) of Cr.P.C / Section 187 of BNSS - Bail on Default.

SECTION 436 : Bail in bailable cases

Section 436 of Cr.P.C/ Section 478 of BNSS provides for the release of accused person on bail in bailable offence.

It is a mandatory provision and the court has no discretion to act. When any person is accused of bailable offence, he must be released. However, the only discretion available to him is whether to be released on personal bond or with sureties.

For Instance: *If an accused produced before a Magistrate for remand of an offence which is cognizable and bailable, then such magistrate must release the accused on personal bond or bond with sureties.*

Section 437: Bail in Non-Bailable cases:

Unlike bail in bailable cases, in non-bailable cases, granting of bail is a discretionary power of court. Section 437 of Cr.P.C/ Section 480 of BNSS deals with it. The section enumerated certain circumstances under which bail will not be granted or will be granted.

The list, under which bail will not be granted as per Section 437 of Cr.P.C/ Section 480 of BNSS of Cr.P.C

where the accused is suspected of commission of -

- An offence punishable with imprisonment of life or death;
- If the offence alleged against him is cognizable and he has previously convicted for an offence punishable with 7 years or more, imprisonment for life or death; or
- If he had been convicted on two or more occasions for a cognizable offence which is to be punishable with imprisonment for a period more than 3 years but less than 7 years.

Note: No court shall release an accused on application of bail without hearing of concerned public prosecutor, if the offence alleged against the accused is punishable with death or imprisonment for life or imprisonment for a period of 7 years or more

The list, under which bail will be granted as per Section 437 of Cr.P.C/ Section 480 of BNSS of Cr.P.C:

where the accused is suspected of commission of an offence mentioned in Clause (i) and (ii) of section 437 of the code may be released on bail when the accused is :

- under 16 years of age('16 years' was replaced by child in BNSS)
- a woman;
- a sick or infirm person.

Note: mere fact that the accused person is required for investigation for identification by the witness will not be a ground to refuse bail. By taking undertaking with such directions imposed by the court, the court may be released the accused on bail.

::IMPOSITION OF CONDITIONS WHILE GRANTING BAIL ::

While granting bail, the court may impose conditions to release the accused from the custody. The object of imposing condition is to conduct trial seamlessly as well as to mitigate potential risks associated with the release of accused. The same was observed in ***Sanjay Chandra v. CBI***¹ – ***‘it was held that the object of imposing conditions is to secure the attendance of accused during pendency of trial and should not be punitive.’***

Section 437(3) of Code of Criminal Procedure deals with imposition of conditions while granting bail in specific circumstances. Those are:

If the accused is suspected of commission of an offence punishable with

- i. Imprisonment which extends up to 7 years or more;
- ii. Offence under Chapter VI of IPC
- iii. Offence under chapter XVI or Chapter XVII of IPC; or
- iv. Conspiracy or abatement or attempt of above said offence

Then the court shall impose the following conditions:

- That such accused shall attend in accordance with the conditions of the bond executed while granting bail;
- That such person shall not commit an offence similar to the offence of which he is accused of;
- That such person shall not directly or indirectly make any threat, inducement or promise to any person acquainted with the facts of the case or tamper evidence; or
- Any such other conditions, if it is necessary.

¹ 2012 (1)SCC 40

The scope under 'such other conditions' is very wider and such power should be intellectually used by the courts to see the light of practicality.

In ***Sumith Mehta v. State NCT of Delhi***², the Hon'ble Supreme court of India discussed the scope of discretion of the court to impose **'any such condition' on the grant of bail. It further held that 'any condition should be interpreted as reasonable condition acceptable in the facts and circumstances of the case and effective in pragmatic sense and should not defeat the order of grant of bail.'**

In ***Sheik Javed Iqbal @ Ashfaq Ansari v. The State of Uttar Pradesh***, the Hon'ble Supreme Court held that **'the courts must show restraint while imposing bail conditions. Therefore, while granting bail, the courts can curtail the freedom of the accused only to the extent required for imposing the bail conditions warranted by law. Bail conditions cannot be so onerous as to frustrate the order of bail itself.'**

In the above case, the Hon'ble High court of State of Uttar Pradesh imposed a condition to the accused to grant bail and the condition is that the accused shall drop a pin on the google map so as to ascertain his movements. However, on perusal of affidavit filed by the Google company affidavit it is noted that the user has full control over pin with whom he wants to share. But it is not possible to tract the movements of such user or track his mobile phone with that pin in real time. From this we can understand that it is not possible to accused to get him tracked with that google pin as it is practically not possible, which was recognized as impractical by Hon'ble Apex court.

² 2013 (15) SCC 570

Some of the conditions which are recognized as freakish and arbitrary by our Hon'ble Apex court are:

1. Condition to deposit Rs.2,50,000/-, the amount allegedly misappropriated by the accused for grant of bail is arbitrary on ground that the condition is vitiated the very nature of trial – ***Ayub v. State of MP*** ³.
2. Insist local surety for the accused persons from other states is onerous. Therefore, it is suggested that whenever possible friend or relatives who can be surety should be arranged. The surety system must be effective must not be onerous – ***Motiram V. State of MP*** ⁴.
3. Condition imposed by sessions judge that the accused to pay amount per month till the disposal of case was held improper – ***Mukeshbhai Nanubhai Patel V. State of Gujarat***⁵.
4. A condition to return the items received in dowry as a condition of bail was held as excessive and unnecessary - ***Mohinder Kaur v. State of Punjab*** ⁶.
5. A condition to tie rakhi to the victim by the accused as condition to grant anticipatory bail is setasided by our Hon'ble Supreme court and remarked that bail conditions should avoid any personal contact between the accused and the victim. – ***Aparna Bhatt v. State of MP*** 2021.

³ 2004(13) SCC 457

⁴ 1978 (4) SCC 47

⁵ 1998 Cri. L.J (guj)

⁶ 2008 (4) SCC 580

Note: *The list is not exhaustive and there is no hard and fast rule to say that this condition is arbitrary and that condition is unnecessary. It is based on facts and circumstances of the case and the economic and social roots of the accused.*

::POWERS OF COURT TO MODIFY CONDITIONS OF BAIL ::

After grant of bail on conditions, is there any possibility to relax the conditions of bail, if the accused is unable to comply with the conditions because of their inability to fulfil conditions. Neither Cr.P.C nor BNSS specified any enabling provision to relax the conditions of bail once granted. This situation resulted in increasing the number of under trial prisoners despite grant of bail.

One of the reasons flagged for increase of number of undertrial prisoners is that the accused are unable to furnish sureties as ordered by the court while granting bail. To check these kinds of reasons Hon'ble Supreme court of India take up a Suo Motu writ petition No. 04/2021 '***In Re Policy Strategy for Grant of Bail v. Respondents***' observed that one of the reason flagged why the accused are in jail despite the grant of bail is that the involvement of accused in multiple cases and non -furnishing of sureties as directed by the court because of their poverty.

Therefore, Hon'ble supreme court of India, as an answer to this problem, made certain directions and one of the directions is with regard to modification of conditions of bail in respect of sureties. The direction is read as follows:

6. if the bail bonds are not furnished within one month from the date of grant of bail, then the concerned court may suo moto take up the case and consider whether the conditions or bail require any modification/ Relaxation.

Now, the point which requires consideration is whether magistrate has a power to modify the conditions imposed by it in granting bail?

From the section 439 (1) (b) of Cr.P.C it is clear that a High court or Court of Session may modify or set-aside any condition imposed by a magistrate on granting bail. But there is no direct enabling provision which empowers magistrate court to modify the conditions imposed by it while granting bail. Which is quite contrast to the direction given by Hon'ble Supreme Court of India in ***In Re Policy Strategy for Grant of Bail v. Respondents***

Here, there is a conflict between the direction given by Hon'ble supreme court of India in ***In Re Policy Strategy for Grant of Bail v. Respondents and section 439 (1) (b) of Cr.P.C.***

In ***Brijesh Singh V. State of Karnataka***⁷ it was held that a magistrate has a power to alter, amend or delete some of the conditions of earlier bail granted by him. The trial magistrate has a power to pass the subsequent order altering or amending or deleting the conditions of the earlier bail order in any manner whatsoever. Section 437(5) of Cr.P.C impliedly confers such power on him.

⁷ 2002 Cri.L.J1362 : 2002 AIR Kant HCR 568

Section 437(5) of Cr.P.C read as follows:

Any court which has released a person on bail under subsection (1) or subsection (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

When the magistrate is conferred with a power to cancel his order, then as a logical corollary, it follows that he does have the power as well to amend or effect necessary alterations, short of cancellation, in the earlier bail order passed by him.

Note: *Power as to modification or relaxation not only confined to the amount or number of sureties, but it can extend to any other conditions which are not practically not possible to comply by the accused who is going to be released on bail.*

::DEFAULT BAIL ::

Default bail is also known as Mandatory bail or statutory bail upon meeting certain criteria which is envisaged in the Code of Criminal Procedure under section 167(2) and section 436A.

The basic concept of default bail is that when the investigating agency did not complete investigation within the time frame i.e, 60 days or 90 days in concerned offences, then the accused has a right to be released on default bail. The right of default bail is indefeasible right. The same was held by Hon'ble Supreme court in **Suresh Kumar Bhikamchand Jain V. State of Maharashtra** ⁸ and further held that '*in case the*

⁸ (2013) 3 SCC 77

investigation is not completed within the prescribed custody period, the magistrate shall order the release of the accused by complying with the requirements of default bail under section 167(2) and that any detention of the accused beyond the prescribed period without the chargesheet being filed would be considered an illegal detention.'

In *Uday Mohan Acharya v. State of Maharashtra* ⁹, the Hon'ble supreme court in Para 17 observed that '**default bail contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of constitutional safeguard that no person shall be detained except in accordance with the rule of law.**'

1. How can the accused avail his right of default bail?

In case the investigation is not completed within the stipulated period then the accused has a right to make an application to be released on default bail. Now the short question which requires consideration is whether such application be oral or written? As an answer to this question, In *HV Thakoor V. State of Maharashtra*¹⁰ it is held that written **application is required** to avail right of default bail. But in *Rakesh Kumar Paul v. State of Assa*,¹¹ the three bench judge of Hon'ble Supreme court held that the **application can be either oral or written.**

But mere filing of application is not enough, he should also furnish bail and if he does not furnish bail, his detention in

⁹ (2001) 5 SCC 453

¹⁰ AIR 1994 SC 2623

¹¹ AIR 2017 SC 3948

custody can be continued until he furnishes bail, the same was held in ***Uday Mohan Acharya v. State of Maharashtra***¹² **by three bench judge of Hon'ble Supreme court** but the same was overlooked in ***Rakesh Kumar Paul v. State of Assam***¹³.

2. At what stage, an application for Default bail has to be made?

In a case where the investigation is not completed within 60 or 90 days as prescribed under section 167(2) of the code then the accused has to make an application after lapse of 60 or 90 days and before filing of charge sheet. Then only his right of default bail survives. But the same right does not survive or remain enforceable if the charge sheet being filed before the court before the accused make an application. That means the accused must have filed an application for default bail after the lapse of period under section 167(2) of the code and before the filing of charge sheet then his right will not be frustrated or extinguished. The same was observed by Hon'ble Supreme court in ***Sanjay Dutt v. State through CBI***¹⁴.

For Instance, if the accused unable to fulfil bail conditions as directed by the magistrate then the continued custody of the accused even beyond the period prescribed under section 167(2) will not be unauthorized. If during that period the investigation is completed and the charge sheet is filed, then the so called indefeasible right of the accused would stand extinguished. The

¹² (2001) 5 SCC 453

¹³ AIR 2017 SC 3948

¹⁴ (1994) 5 SCC 410

same was observed in ***Para 17 of Uday Mohan Acharya v. State of Maharashtra***¹⁵. Latter a three bench judge of Hon'ble Supreme court of India in Sayed Mohd Ahmed Kazmi ¹⁶, it was held that the indefeasible right of the accused cannot be defeated by filing of charge sheet if the default bail application is pending before the court and the same was rendered in ***Rakesh Kumar Paul v. State of Assam***¹⁷ .

3. What if the accused released on bail on merits and then the bail is cancelled on violation of conditions of bail, the chargesheet was not filed by investigation agency. Can the accused avail his right of default bail?

The answer is no. Since the accused has misused his liberty once, he cannot contend that he has an indefeasible right to default bail. Even in the case of bailable offence falling under section 436 of Cr.P.C. where the accused is entitled to bail as of right, section 436(2) empowers court to refuse bail to an accused person who has failed to comply with the conditions of bail bond regarding time and place of attendance. The same was supplied in Nishil V. Station House Officer ¹⁸2007 (4)KLT 870.

4. What if chargesheet and application for default bail was filed on same day?

The answer was provided in Sanjay Dutt Case (stated supra) that if there is a situation where application and chargesheet is filed on the same day then as per the settled position of law, as soon as the chargesheet is filed the provision of section 167

¹⁵ (2001)5 SCC 453

¹⁶ AIR 2013 SC 152

¹⁷ AIR 2017 SC 3948

¹⁸ 2007 (4) KLT 870

ceases to apply. Then the magistrate cannot ignore the chargesheet in order to grant default bail and the magistrate will not entertain the application of the bail as the stage cease to exist. The similar contingency was discussed by Hon'ble supreme court of India in Uday Mohanlal Acharya case (stated supra). Here for better appreciation the extract of the concept is given below:

'What will happen if on the 61th day an application for bail is filed for being released on bail on the ground of default and on the same 61st day the chargesheet is also filed , by the time the magistrate is called upon to apply his mind to the chargesheet as well as the petition for grant of bail?... such an application for bail has to be dismissed because the stage of proviso to section 167(2) is over, as such right is extinguished the moment the chargesheet is filed.'

DEFAULT BAIL IN SPECIAL STATUTES

UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967:

Section 167 of the Code of Criminal Procedure is amended by Section 43D of the Act. The offense committed under this act is serious and heinous in nature, and the initial period of police custody is amended and extended to a period of 30 days. The total time period to complete the investigation of an offence irrespective of its nature is fixed to a maximum period of 90 days. Thus, the period of 15 days is stretched to 30 days, the period of 60 days is stretched to 90 days and the period of 90 days is fixed to 90 days.

However, the period of 90 days can be extended to the maximum period of 180 days in cases where the investigation is not concluded within the specified period of 90 days. The period of

90 days is extended by the court on the submission of a report by the public prosecutor for the advancement in investigation and the justification for detaining the accused in custody beyond the period laid down in the statute.

However, the extension of the period of investigation cannot be done authoritarian but is subject to certain parameters:

- The report of the public prosecutor should be unfettered and independent from that of the officer investigating the case.
- There should be proper scrutiny and implementation of the personal intellect of the public prosecutor and not a reiteration of the report of the investigating officer.
- The report must entail progression in the investigation and precise and concrete justification must be ascribed against each of the accused for apprehending the accused beyond the specified period.
- The report of the public prosecutor so prepared shall be served upon the accused and he shall be given an opportunity of being heard before the order of extension is passed.

The extension of the specified time can only be granted if all of the above variables are complied with. In case, the order is passed in contravention of the above-stated criterion, such an order is unlawful and illegal and stands liable to be quashed. Quashing can be done under section 482 of Cr. P. C. by the High Court. Thus, the right of mandatory bail shall accrue only on the expiry of the extended time.

NARCOTICS DRUGS OR PSYCHOTROPIC SUBSTANCES ACT, 1985:

Section 36A (4) of NDPS enumerates the maximum time period for the conclusion of the investigation.

This section lays down two scenarios:

- i. Cases where an offence committed under this Act concerns the recovery of commercial quantity of the prescribed drug or psychotropic substance
- ii. Offences committed which are penalized under Section 19, 24 or 27 A of the Act

In both of the above scenarios, the maximum time limit stipulated for the investigating officer or agency to conclude the investigation of the case and submission the report thereupon is fixed to 180 days. Like the UAPA, the court is empowered under this section to extend the period of 180 days and stretch it up to a period of one year on the submission of the report of the public prosecutor denoting the progression in the investigation and the justification for detaining the accused in custody beyond a period of 180 days.

However, apart from the above two scenarios mentioned, the time period of investigation of all the offences committed under this act shall be governed as per the provisions of Cr. P. C. This means that since no other offence under the NDPS Act is punishable for a period of more than 10 years, the maximum time period for the conclusion of the investigation and the submission of the report will be thus, 60 days. This time period cannot be extended in any case.

Manas Krishna TK vs.State,2020, Bombay High Court: It was held that the non-inclusion of the chemical report in the Challan results in exposing the accused to endangering his liberty as the very cognizance of the case would depend upon the chemical report. Thus, the non-inclusion of chemical report results under Section 173 Cr. P. C. results in an incomplete challan and if not submitted within 189 days, it would entitle the accused to the benefit of default bail.

Note: From the above case, it is clear that mere filing of chargesheet before court by the investigating agency is not sufficient, but it should be in accordance of criterial which qualifies the chargesheet to get it numbered for taking cognizance.

PROTECTION OF CHILDREN AGAINST SEXUAL OFFENCES ACT, (POCSO), 2012

The major topic of discussion under this head in the context of default bail is Section 35. Section 35 enumerates the time frame within which the evidence of the child shall be normally recorded, i. e. within 30 days of taking cognizance by the Special Court. It also entails such cases should be tried as far as possible within a period of one year from the day of taking cognizance. In case of delay, the reasons should be recorded in writing.

The provision of default bail gives an indefeasible right to the accused to be released on bail upon the failure on the part of the investigating agency to complete the investigation within the stipulated period. Section 35, however, only lays down the

timeline of the conclusion of a POCSO case for its expeditious disposal as in to lessen the burden on Children's Courts. The non-compliance with this provision does not give the right of default bail to the accused. The reasons for the non-entitlement of the accused to default bail in case of non-compliance with Section 35 have been discussed in various landmark judgments.

Mohiddin versus State of Karnataka, Karnataka High Court, 2017: The accused filed an application for default bail on non-compliance with Section 35(1) and on the ground that the victim's evidence was not recorded within a period of 30 days. The High Court dismissed the bail application on the ground that mere non-compliance with Section 35 of the Act does not entitle the accused to default bail. A delay in recording the statement of the victim cannot throw the entire case out of the window. The special court shall record the reasons for the delay in the proceedings but will not entitle the accused to bail as mere delay will not result in brushing aside the entire story of the prosecution.

Hanumatha Mogaveera vs State of Karnataka, Karnataka High Court, 2021: The entitlement of the accused to mandatory bail in defiance of Section 35 of the POCSO Act has been discussed by the Division Bench of Karnataka High Court and the following has been held:

- i. The High Court held that the main objective of Section 35 is to decrease the trauma of the child victim. This section is for the benefit of the victim enabling his rehabilitation in society and cannot be used in the favor of the accused.

- ii. Statements recorded before the Magistrate under Section 164 of Cr. P. C. is not to be treated as evidence.
- iii. Strict compliance with Section 35 will result in deliberate attempts on the part of the accused to delay the proceedings beyond the period of one year and secure bail.

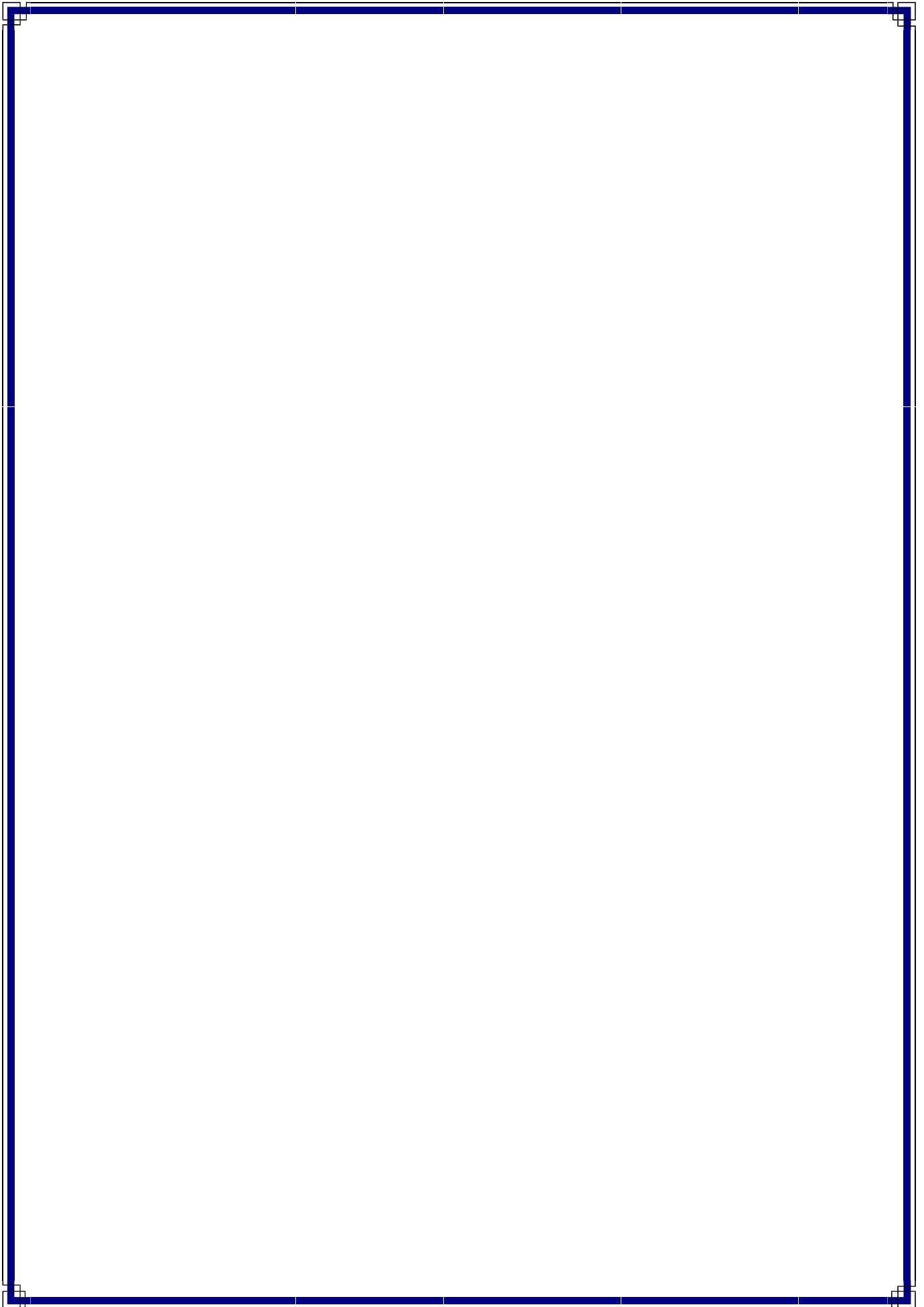
The lack of an adequate number of special courts dealing with POCSO cases often results in a delay of the proceedings of the said cases beyond a period of one year. This shall not entitle the accused to default bail.

Conclusion –

Personal liberty is too precious a value of our constitutional system, recognized under Article 21, that the crucial power to negate it is carefully hedged. Section 167 is one such provision where default bail becomes the rule and jail is only an exception.

- Justice Sri. V.R. Krishna Iyer

----- Thank you -----



SESSION- IV

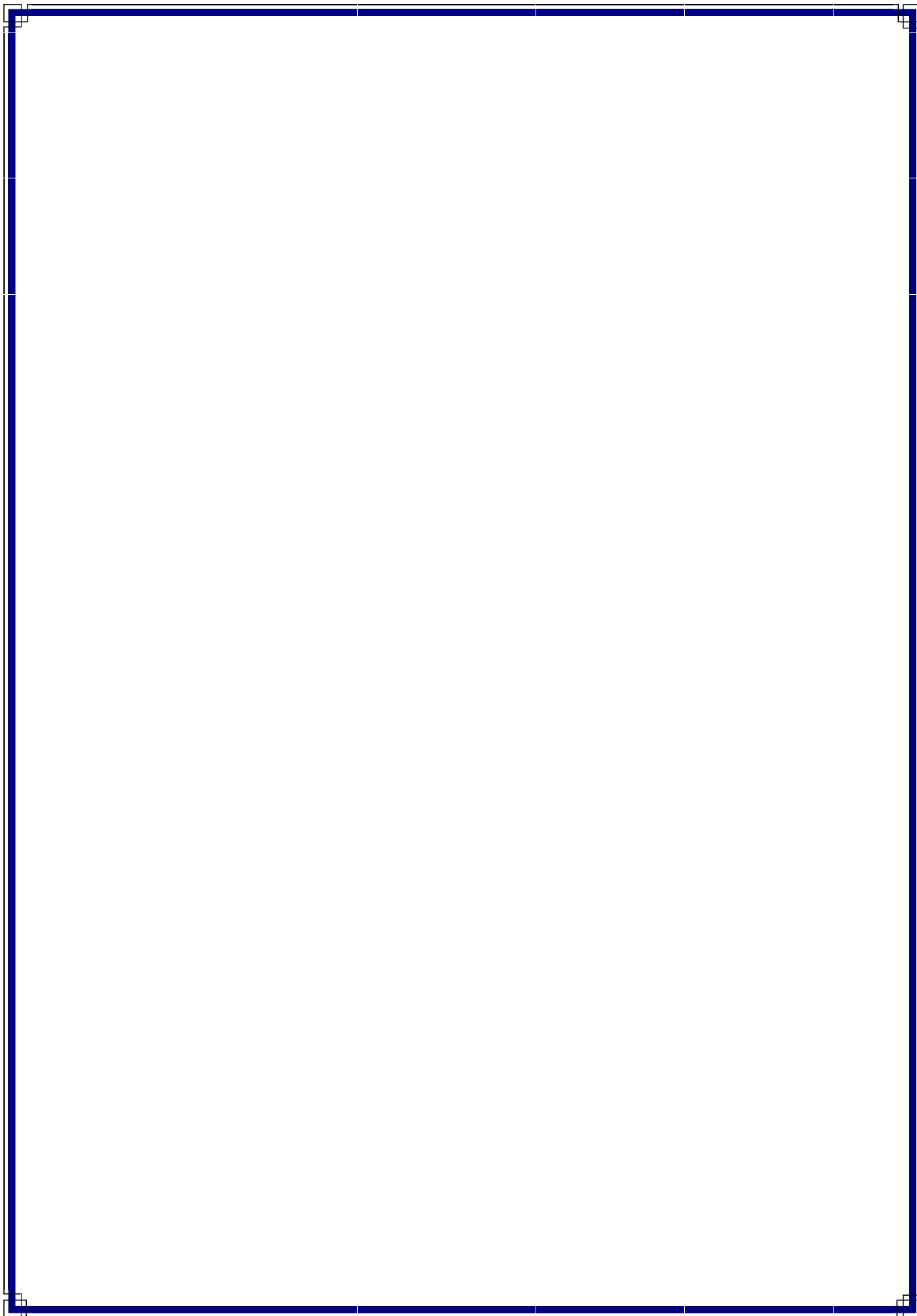
e. Post convictional Bail.

f. Powers of Sessions Court to grant anticipatory Bail.

Paper Presentation

by

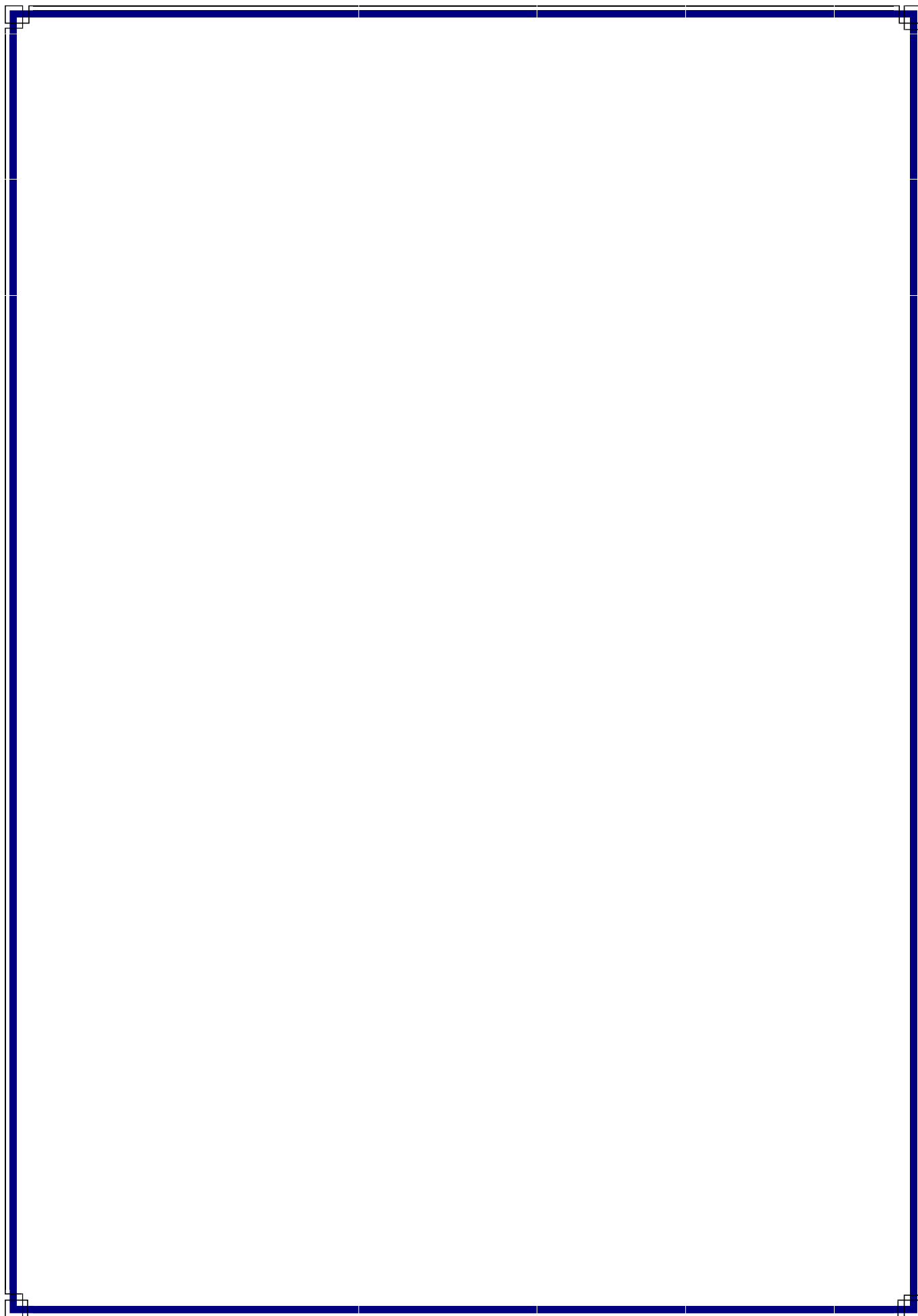
Sri. K.KISHORE BABU,
VI Additional District Judge,
SOMPETA.



TOPICS

1. POST CONVICTIONAL BAIL.

**2. POWERS OF SESSIONS
COURT TO GRANT
ANTICIPATORY BAIL.**



POST CONVICTIONAL BAIL

INTRODUCTION-

Bail after conviction under section 389 of the Criminal Procedure Code / Section 430 of BNSS deals with the power of the appellate courts to suspend, or release a convicted person on bail. It applies to cases where a person has been convicted by a trial court and has filed an appeal against the conviction

Suspension of sentence and conviction are both remedies available to a person while an appeal is pending in the court of law and no final judgment has been obtained. Section 430 of Bharatiya Nagarik Suraksha Sanhitha (Sec. 389 of the Code of Criminal Procedure) provides suspension of sentence as a statutory remedy. However, neither section 389 nor any other section of Cr.P.C makes an explicit mention of suspension of conviction as a statutory remedy. So, does this imply that there exist no such relief as stay on order of conviction.

Section 430 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, (Sec.389 of Cr.P.C.) deals with the suspension of sentence and release on bail pending an appeal. It empowers appellate courts to suspend the execution of a sentence and grant bail to a convicted person while their appeal is being considered.

The new Act **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, establishes the Appellate Court and entitles them with the necessary powers to review or rehear the matters which are already disposed of by

the subordinate courts. Accordingly, Section 430 **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, the appellate court has the power to direct the suspension of the sentence of an accused pending the appeal and also to release the appellant on bail based on the nature of offence, facts and circumstances of each case. It states that- *"Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he/she is in confinement, that he/she be released on bail."*

Types of Bail under Section 389 CrPc

There are two types of bails that can be granted under Section 389 CrPc:

Regular Bail

Regular bail is granted when a person who has been convicted by a trial court, is released on bail pending the hearing and final disposal of the appeal. The appellate court may grant regular bail if it is satisfied that the convicted person is not likely to abscond or tamper with the evidence, and that their release on bail will not pose a threat to public safety or the administration of justice.

Interim Bail

Interim bail is granted for a short period of time, usually during the pendency of the hearing of the bail application. Interim bail is granted to provide temporary relief to the convicted person while the appellate court is considering their bail application. Interim bail may be granted subject to conditions, such as a requirement to report to the police station regularly, surrendering their passport or refraining from contacting certain persons.

The grant of bail under Section 389 CrPc is subject to the discretion of the appellate court and may be granted with or without conditions, depending on the facts and circumstances of each case.

Eligibility for obtaining Bail after Conviction

The convicted person must have filed an appeal against the conviction in the appellate court.

The convicted person must have been sentenced to imprisonment for a term of three years or less. If the sentence is for more than three years, then the convicted person must first approach the Hon'ble High Court for bail under Section 439 CrPc/483 BNSS.

The convicted person must satisfy the appellate court that there are reasonable grounds for believing that they are not guilty of the offense for which they were convicted, and that they will not abscond or tamper with the evidence if released on bail.

The convicted person must show that their continued pending of the hearing and final disposal of the appeal will cause them irreparable harm or injustice, and that their release on bail will not be contrary to the interests of justice or public safety.

The appellate court has the discretion to grant or deny bail after conviction, even if the convicted person satisfies the eligibility criteria. The court will consider various factors, such as the nature of the offense, the severity of the sentence, the criminal record of the convicted person, and the likelihood of the convicted person fleeing from justice or interfering with the administration of justice.

Few Case Laws in Granting and Denying Post conviction bails.

Sanjay Chandra v. CBI ¹

In this case, the managing director of a real estate company was convicted in a 2G scam case and sentenced to three years imprisonment. He filed a bail application under Section 389 CrPc, which was initially rejected by the trial court. However, the Delhi High Court granted him bail after considering his health condition and the fact that he had already spent two years in jail.

Narayan Rao Laxman Rao Jagdale v. State of Maharashtra

In this case, the accused was convicted of murdering his wife and sentenced to life imprisonment. He filed a bail application under Section 389 CrPc, which was rejected by the Bombay High Court. The court held that the seriousness of the offense, the likelihood of the accused absconding, and the possibility of tampering with evidence were sufficient grounds to deny bail.

Dinesh Kumar v. State of Haryana

In this case, the accused was convicted of murder and sentenced to life imprisonment. He filed a bail application under Section 389 CrPc, which was initially rejected by the trial court. However, the Punjab and Haryana High Court granted him bail after considering the fact that he had already served more than ten years in jail, his good conduct in jail, and the fact that the appeal against his conviction was likely to take several years.

¹ AIR 2012 SUPREME COURT 830

On a meticulous reading, It gives rise to three significant questions-

- (1) Whether there is any distinction between suspension of sentence and suspension of conviction?
- (2) In a case where if someone's sentence has been suspended, then will it subsequently imply that there is a temporary stay on his conviction as well?
- (3) Further, in the absence of a separate legal provision for suspension of conviction, whether or not the Appellate Court has the jurisdiction to entertain and decide over the matters seeking relief for the same?

As per the judgment reported in between **Boya Nallabothula Manohar vs The State Of Andhra Pradesh on 5 March, 2024** wherein the Hon'ble High Court of Andhra Pradesh has held that :

While dealing with an application under Section 389 of the Code, the Appellate Court has to consider the following aspects like;

- (1) prima facie grounds in appeal,
- (2) Nature of the offence,
- (3) Manner in which the occurrence took place
- (4) Danger to the life and limb,
- (5) Gravity of the offence,
- (6) Criminal Antecedents,
- (7) Commission of similar offence pre - conviction,
- (8) Misuse of bail granted during the trial, if any and
- (9) Chance of the Appeal being heard in time.

Development of the concept of Suspension as a relief-

The foundation of our Indian Legal System lies in the core principle of the "**Presumption of Innocence.**" This signifies that any individual accused of a criminal offense is entitled to be regarded as innocent until proven guilty through a lawful process. As a result, the Indian criminal justice system is prominently inclined towards adopting perspectives that assist the accused in substantiating their innocence, rather than embracing viewpoints that stand against them.

DIFFERENCE BETWEEN THE ORDER OF SUSPENSION OF SENTENCE AND ORDER OF SUSPENSION OF CONVICTION-

Suspension is an act of temporarily preventing something from operating or being in force. It is an act of keeping the sentence in abeyance by the authorized person to suspend the sentence. Conviction and sentence, although often associated with each other, are two entirely different things. Conviction can be defined as the decision of the judge declaring someone as guilty of an offence. Accordingly, in effect, if one prays for a stay of conviction, he is asking for a stay of operation of the effects of the declaration of being guilty. On the other hand, sentence is a form of punishment whereby the accused has to undergo either imprisonment, fine or punishment for the offence committed by him/her. Additionally, it is upon the discretion of the court to entirely suspend the sentence or just a part of it whereas the conviction cannot be partially suspended. Thus, it can be established that the order of sentence is always subsequent to the order of conviction and the suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of an offence and has attracted the sentence of imprisonment.

Consequence of stay in order of sentence -

When the order of sentence is stayed by the court, then that particular order will not be operative for an indefinite time. That is, there is no particular time period assigned for this relief as in the case of reprieve of sentence where temporary relief is provided to the convict by postponing the judgment of the court for a certain period of time.

Consequence of stay in order of Conviction-

The order of stay on conviction does not make the conviction non-existent, but only non-operative. That is, by staying the order of sentence the presumption of guilt does not come to an end. Therefore, it is clear that an order of suspension of sentence is not equivalent to an order of suspension of conviction and that these two reliefs operate in different fields. In circumstances, where the sentence passed against the petitioner is suspended, he must not be held entitled to seek suspension of the order of conviction either. On the contrary, it may be pointed out that when the order of conviction is suspended, the accused cannot remain behind the bar and has to be released either on bail or on his own bond. Consequently, when an order of conviction is suspended, the order of sentence has to be suspended. In other words, an order suspending conviction will, eventually, lead to an order of suspension of sentence.

JURISDICTION OF THE APPELLATE COURT TO STAY THE ORDER OF CONVICTION-

The Apex Court, through its various judgments and precedents, has settled the position of law with respect to stay on the order of conviction. Accordingly, the appellate Court, while exercising its powers under section 430 of **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, can suspend the order of conviction.

In the case of **Ram Narang V. Ram Narang** a 3-judge bench of the Supreme Court for the first time recognized the authority of the appellate court to suspend conviction. The court was of the opinion- *"that there is no reason to give a narrow interpretation on Section 389(1) of the code and to not extend it to an order of conviction in a fit case."* A wide interpretation was given to section 389(1) wherein the power of the court to stay the order of conviction was acknowledged. Correspondingly, it was highlighted that the expression *"order appealed against"* in section 389(1) means the order of conviction. Thus, section 389(1) does not only provide relief against order of sentence and bail but also encompasses stay on the order of conviction.

Further, it was observed that even if it is considered that the Code of Criminal Procedure 1973, does not provide the High Court with the power of staying the order of conviction under section 389(1) then the same can be exercised by the High Court in its inherent jurisdiction under section 482 of the code to make orders as may be necessary to prevent abuse of process of court and to secure justice.

WHAT CONSTITUTES TO BE A FIT CASE FOR SUSPENSION ON ORDER OF CONVICTION?

Suspension of conviction is a "relief" and not a "right" by the law. Although the Apex Court has widened the scope of Section 389, it has also again suggested that the appellate court should always maintain caution while exercising its jurisdiction or providing relief under this section. The Hon'ble Supreme Court also clarified that an order granting a stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Till now the Apex Court has not specifically laid down any set of guidelines or

tests to determine as to what will constitute a fit case for providing a relief under this section. However, from its innumerable judgments on this subject matter certain essentials can be listed down that can be considered by the courts while staying the order of conviction.

1. **Rare And Exceptional Cases and irreversible damages-** Precisely from the acknowledgment of this relief, both the Supreme Court and the High Court have time and again expressed through their judgments that the power of the court to stay the order conviction should be used in exceptional circumstances only. Such rare and exceptional circumstances can vary from case to case and "no *straight jacket formula*" can be evolved. Thus, a *prima facie* case coupled with peculiar or special circumstances involved may place the case in exceptional or extra ordinary category when entailment of specific consequences is shown. It was also observed that to constitute a fit case for this relief, specific attention of the appellate court should be drawn to the consequences that may arise if the conviction is not suspended. Basically, the court should make a comparative analysis and see in whose favour the balance of convenience lies that is the consequences of withholding the relief against the consequences of granting it. To summarize it we can state that the court can only provide relief of this nature in a case where if the conviction is not stayed then it will lead to injustice and irreversible consequence to the convict against the harm that can be caused to the opposite party.

2. **Seriousness of offence or offence of moral turpitude-** The gravity of the offence and the impact that it can cause to the society and people in general plays a significant role while providing such a relief. It was observed in the case of ***Shyam Narain Pandey Vs. State of Utt Pradesh*** "If the convict is involved in crimes which are

so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have a serious impact on the public perception on the integrity of this institution and such orders definitely will shake the public confidence in judiciary." Although the expressions moral turpitude or seriousness of the offence is not defined under any law, the Supreme Court interpreted them as an expression which is used in legal and societal parlance to describe a conduct which is inherently base, vile, depraved or having any connection showing depravity.

3. Criminal antecedents of the accused will be a relevant consideration

The criminal history of the accused and the nature of offences committed by him over a period of time is to be noted. It was held that the criminal antecedents of the accused is not only a necessary requirement for staying the order conviction but also for staying the order of suspension.

Recent case Law

Recently, Rahul Gandhi filed a criminal revision application before the Hon'ble High Court of Gujarat praying to stay the order of conviction against him. He was convicted for the offence punishable as defamation under the provisions of IPC, 1860. In the same case, Gandhi was also sentenced for two years of imprisonment for which he obtained an order for suspension of sentence by the Surat Sessions Court until the disposal of his appeal. So, if the Session Court has already suspended the sentence than, why did Rahul Gandhi have to sort for another order for suspension of conviction?

Essentially because Section 8(3) of the Representation of People's Act which provides that- *"A person convicted of any offence and sentenced to imprisonment for not less than two years, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release"*

Therefore, even when Gandhi's sentence order was suspended, he was still not allowed to contest for election and to hold his office as a Member of Parliament as his conviction continued to operate and he was considered as an offender before the eyes of law. Thus, to prevent his disqualification and to meet the eligibility criteria mentioned under section 8(3) of the RPA, Rahul Gandhi sought for a stay order on his conviction. He argued that by not staying the order of his conviction damages of irreversible nature will be befalling on him as not only his democratic right to continue his constituency are curtailed but also, he is denied to seek an opportunity for re-election. Further, he also mentioned that defamation in itself does not constitute to be a serious offence and thus, his conviction should be stayed. However, the Gujarat High Court rejected the plea on ground that representatives of people should be a man of clear antecedent.

CASE LAWS-

1. Public Servant Convicted for the offence of Corruption-

KC SAREEN v. C.B.I (2001)- (Para 13) The apex court laid down the legal position that in a case where the public servant is charged for the offence of corruption then the appellate court should not suspend the order of conviction even if the sentence for imprisonment is suspended. This policy was considered necessary by the court since when a person who is convicted for an offence of

corruption continues to hold his office then it can diminish the morale of other people manning such office which can consequently erode the confidence of people in public institution (para 12). Later, similar approach was taken by the Apex court in the case of *Union of India v. Avtar Singh & another* and *State of Maharashtra v. Gajanan & another*.

2. **Politicians disqualified under RPA'1950-**

BR Kapur v. State of Tamil Nadu

J. Jayalalitha was convicted under section 409 of IPC and section 13 of Prevention of Corruption act. Because of which she was disqualified to be a member of the state legislature. However, yet her party contested for the election and appointed her as the Chief Minister after securing a landmark majority. When her appointment was challenged the Madras High Court suspended the execution of her sentence. Later, when an appeal was preferred in Supreme Court, the court was of the opinion that merely suspending the execution of sentence does not alter the effect that the offender is convicted for a very serious and that her conviction still operates which disqualifies them to be appointed as a chief minister. Thus, a person who is disqualified under section 8(3) of RPA, 1950 cannot be appointed as Chief Minister and cannot continue to function as such.

Navjot Singh Sidhu v. State of Punjab- In this case Navjot Singh along with other co-accused were convicted under section 304 part II of IPC and were sentenced for 3 years of imprisonment. After his conviction he resigned from the post of MP from Lok

Sabha, yet he wanted to contest for the elections again. However, still the apex court provided him with the relief of stay on order of conviction.

High Courts in cases like ***Nehru C. Olekar Vs. State of Karnataka, Mohammed Moquim Vs. State of Odisha, Shakuntala Khatik Vs. State of M.P*** have granted the stay on order of conviction on grounds that irreparable losses will befall on the convicts and the public exchequer because not staying the order of conviction, it will ultimately lead to an untimely bye-election

Key Differences between Bail before and after Conviction

The key differences between bail before and after conviction are as follows:

Stage of the Criminal Proceedings

Bail before conviction is granted during the pendency of the trial, while bail after conviction is granted after the accused person has been convicted and sentenced.

Burden of Proof

In bail before conviction, the burden of proof is on the prosecution to establish that the accused person should not be granted bail. In bail after conviction, the burden of proof is on the accused person to establish that they are eligible for bail and that there are sufficient grounds for granting bail.

Eligibility Criteria

The eligibility criteria for bail before conviction are different from those for bail after conviction. In bail before conviction, the accused person may be granted bail if they can establish that there are no substantial grounds for believing that they have committed the offense. In bail after conviction, the accused person must establish that there are special reasons for granting bail, such as ill-health or the pendency of an appeal.

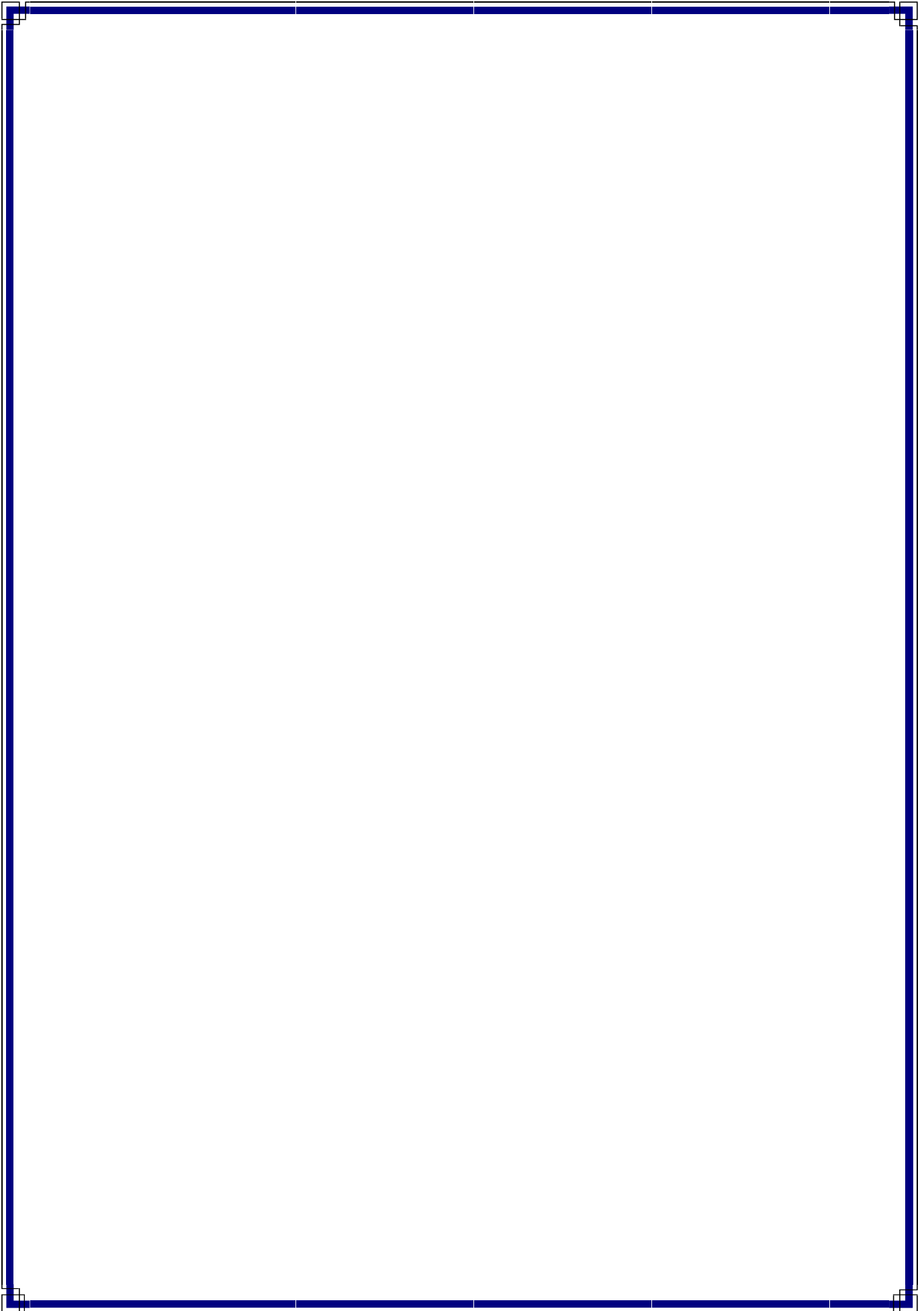
Discretion of the Court

The court has greater discretion in granting bail before conviction, as there is a presumption of innocence in favour of the accused person. However, after conviction, the court must consider the nature of the offense, the likelihood of the accused person absconding, and the possibility of the accused person tampering with evidence or influencing witnesses.

Conclusion-

To conclude, bail after conviction under Section 389 CrPc is a legal provision that allows an accused person to be released on bail after they have been convicted and sentenced by a court of law. The eligibility criteria for bail after conviction are different from those for bail before conviction, and the court must consider various factors before granting bail, such as the nature of the offense, the likelihood of the accused person absconding, and the possibility of the accused

person tampering with evidence or influencing witnesses. The object of Sec.430 of BNSS. A perusal of Section 430 of BNSS would show that **suspension** of **sentence** during pendency of appeal is not the absolute right of the convict. The discretion to suspend the **sentence** vests in the court and it is required to be exercised judicially keeping in view all facts and circumstances and the nature of offence. The Court has to exercise this discretion with utmost care and caution, balancing one's right and liberty on one hand and the interest of the society on the other.



POWERS OF SESSIONS COURTS TO GRANT ANTICIPATORY BAIL

- **Introduction**

“Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty and is given him by the author of nature, because necessary for his own sustenance.” –

Thomas Jefferson

Personal liberty is a natural, and essential right of an individual, which is recognized as a fundamental right under Article 21(1) of the Constitution of India. When an individual is suspected to have committed an offence (punishable under the law for the time being in force), the machinery of law is mandated to arrest them, bring them to trial and punish them if found guilty. Arrest deprives an individual of his personal liberty, and the act of securing bail usually sets him free. The concept of bail is linked to the right to personal liberty. The entitlement to secure bail flows from the provisions of Sections 436, 437 and 439 of the Code of Criminal Procedure, 1973 along with the facet of anticipatory bail, introduced thereto by the Law Commission's 41st report.

History

The concept of anticipatory bail was unknown to the old code of criminal procedure of 1898. The Law Commission of India, in its 41st report, dated September 24, 1969, drew attention to the necessity of introducing a provision in the Code, to enable the High Courts and the Session Courts to grant anticipatory bail, for protecting an accused or any person, who is apprehending or having a belief that they may be arrested for any non-bailable offence.

The Law Commission noted that the necessity for granting anticipatory bail arose because, at times, influential individuals tried to implicate their rivals in false cases for the purpose of disgracing them or for other purposes, by detaining them in jail for a couple of days. It was also observed that, with the accentuation of political rivalry, the aforesaid tendency showed signs of a steady increase. The Law Commission also suggested that it may not be practical to exhaustively enumerate conditions under which anticipatory bail may be granted, as the same may have been construed as prejudging the entire case. Hence, this was left to the discretion of the courts, without any fetters on such discretion in the statutory provision.

Accordingly, taking into consideration the Law Commission's report, the Parliament, while enacting the Code, introduced a provision for anticipatory bail under Section 438, under the heading "*Direction for grant of bail to person apprehending arrest*".

The law on anticipatory bail has developed in a non-linear course, through a plethora of judgments passed by the Supreme Court. The following cases are considered to be landmark breakthroughs in the law on anticipatory bail.

The very first landmark judgment on anticipatory bail was passed by a five-judge bench of the Supreme Court on April 9, 1980, in ***Gurbaksh Singh Sibbia v. State of Punjab***, which laid down the prevailing law of the land on this issue, along with some guiding principles on the concept of anticipatory bail. The Supreme Court, while considering personal liberty as a fundamental right under Article 21, declared that any provision of law, which deals with personal liberty of an individual cannot be unduly whittled down by reading restrictions into it, especially the ones, which find no mention in the statute itself. This due process drew inspiration from the judgment passed in ***Maneka Gandhi v. Union of India***, which upheld the primacy of an individual's personal liberty and mandated all laws having an interface with personal liberty to be "*just, fair and reasonable*".

Additionally, the Supreme Court held that courts should lean against imposition of unnecessary restrictions on the scope of Section 438 of the Code when no such restrictions have been imposed by the legislature. In the light of this, the Supreme Court held that the period for which anticipatory bail is granted should not be limited. The Supreme Court noted that one of the most important aspects of anticipatory bail is that no time-based limitation was ever statutorily envisaged, as the same would change the very basis of the concept from being a provision ensuring personal liberty, to one granting contingent freedom. Further, the Supreme Court also stated that courts are entitled to impose restrictive conditions as they deem fit, but due consideration should be given to the seriousness and nature of the proposed charges. Furthermore, the Supreme Court laid down guiding principles *inter alia* being that (i) the applicant must show that he has "***reason to believe***" that he may be arrested for a non-bailable offence (ii) the High Court or the Sessions Court as the case may be must **apply its own mind to the**

question and decide whether a case is made out for granting such a relief (iii) the filing of a First Information Report (“**FIR**”) is not a condition precedent to the exercise of power under Section 438 (iv) anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested (v) the provisions of Section 438 cannot be invoked after the arrest of the accused (vi) a blanket order of anticipatory bail should not generally be passed and (vii) the normal rule should not be to limit the operation of the order in relation to a period of time.

Soon after, a five-judge bench of the Supreme Court in *Sushila Aggarwal v. State (NCT of Delhi)*___overruled the aforesaid contrary judgments, including the judgment passed in *Siddharam Satligapa Mhetre (Supra)* and held that anticipatory bail should not invariably be limited to a fixed period and that the same should ensure in favour of the accused without any restriction on time. It was further held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial and if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open to do so. The Supreme Court leaned towards the findings and judgment laid down by the Constitution Bench in *Sibbia (Supra)* and reaffirmed the same. Additionally, the Supreme Court held that the application for anticipatory bail should be based on concrete facts, relatable to one or other specific offence, along with the reason for apprehending arrest. It was iterated that courts should consider the nature of the offence, role of the person, likelihood of him influencing the course of the investigation or tampering with evidence or likelihood of fleeing and accordingly courts may impose restrictive conditions. Furthermore, while concluding, the Supreme Court laid down certain guiding principles and held that the police or the investigating

agency were entitled to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any terms of the conditions laid down and were also entitled to investigate the charges against the person who seeks the same.

Anticipatory bail is given to the person who is apprehending arrest and can only be granted by the Session court or the High court. According to Section 482 of the BNSS (Section 438 of CrPC), if any person believes that he may be arrested for any non-bailable offence, he may apply to the High court or the Session court to direct for his release on bail on event of his arrest, subjected to the conditions as imposed by the respective court while considering the facts of the case. Under this Section the respective courts have discretionary powers while granting bail to the person apprehending arrest. In the case of ***N.S. Sahni v. Union of India***², the Hon'ble SC held that the court has the discretionary powers in the matter of anticipatory bail and it is not an essential part of right to life enshrined under Article 21 of the Indian Constitution.

Substantive Bar on Bail in Certain Offences

A significant change under the BNSS is the express bar on anticipatory bail in specific sexual offences. Section 482(4) BNSS (Section 438(4) CrPC) imposes a statutory prohibition against granting anticipatory bail in the following cases:

Rape on a woman under 16 years of age (Section 65 (1), BNS, 2023- Section 376 (3) IPC).

² AIR 2001 SC 3810

Gang rape on a woman under 18 years of age (Section 70(2), BNS, 2023).

In the case of *Pratibha Manchanda v. The State of Haryana*³, the Hon'ble SC held that the High Court and the Court of Session while dealing with applications for anticipatory bail, should consider the nature and gravity of the alleged offence and its impact on the society.

Section 438 CrPC permitted a person to apply for anticipatory bail if there existed a **reasonable apprehension of arrest for a non-bailable offence**. The Section provided that:

“...the Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.” Courts were required to consider relevant factors including the **nature and gravity of the accusation, antecedents of the applicant, possibility of fleeing from justice, and the probability of tampering with evidence or threatening witnesses**.

Judicial Pronouncements

In *Balchand Jain v. State of M.P.*⁴, Justice P.N. Bhagwati described anticipatory bail as an **“extraordinary remedy”** to be granted in **exceptional circumstances**, where a person might be falsely implicated, or a frivolous case might be launched against him.

The Supreme Court in *Sanjay Chandra v. CBI*⁵, reiterated the principle that an accused cannot be detained in custody merely on the presumption of guilt. “bail is the rule and committal to jail is an exception.” Such interpretations emphasised that **custodial detention should not be punitive**, especially before conviction.

³ (2023) 8 SCC 181

⁴ 1977 SCR (2) 52

⁵ (2012) 1 SCC 40

It was in the case of **Gurbaksh Singh Sibbia and Ors. v. State of Punjab**⁶, where a Constitution bench, for the first time, laid down the scope of Section 438, CrPC. The Court interpreted Section 438(1) in the light of Article 21 of the Constitution of India. The Supreme Court laid down the following principles with regard to anticipatory bail:

Section 438(1) cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. *“Anticipatory bail is a device to secure the individual’s liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.”*

- (4) Where an application for anticipatory bail is preferred before the High Court or the Court of Session, it is incumbent upon the Court to apply its independent judicial mind to the matter and determine whether a prima facie case exists for the grant of such relief. The Court cannot abdicate this responsibility by deferring the decision to the Magistrate under Section 437 of the Code of Criminal Procedure at a later stage, as such a course of action would undermine the very purpose and intent of Section 438.
- (5) Filing of FIR is not a condition precedent to exercise of power under Section 438.
- (6) Anticipatory bail can be granted even after filing of FIR, as long as the applicant has not been arrested.

⁶ (1980) 2 SCC 565

(7) The provisions of Section 438 cannot be invoked after the arrest. After arrest the accused must seek his remedy under Section 437 and Section 439.

5) Order under Section 438 would not affect the right of police to conduct investigation.

(8) Conditions mentioned in Section 437 cannot be read into Section 438.

(9) Although the power to release on anticipatory bail can be described as of an “extraordinary” character this would “not justify the conclusion that the power must be exercised in exceptional cases only.” Powers are discretionary to be exercised in light of the circumstances of each case.

(10) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and the question ought to be re-examined after hearing. Such an interim order must conform to requirements of the Section and suitable conditions should be imposed on the applicant.

It has been held in the **Gurbaksh Singh Sibbia v. State of Punjab** that section 438 of Cr.PC was enacted to protect those people who are implicated by their rivals in false cases for the purpose of disgracing them or for other purposes by detaining them in jail.

In , **State of M.P. & Anr. v. Ramkishan Balothia** Section 18 was held not to be violative of Articles 14 and 21 of the Constitution. It was observed that exclusion of Section 438 Cr.P.C. in connection with offences under the Act had to be viewed in the context of prevailing social conditions and the apprehension that

perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of these offenders, if they are granted anticipatory bail.

In **Nirmal Jeet Kaur v State of Madhya Pradesh and Ors.** Protection in terms of Section 438 is limited that is it can be sought only till the time person is not in custody.

In **Adri Dharamdas v State of West Bengal** court held the power exercisable under section 438 is extraordinary and is exercisable only in exceptional cases. Where it appears that a person may be falsely implicated in such cases this power may be exercised.

In **State of U.P. v. Amarmani Tripathi**, this Court held as, it is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.

The Supreme Court in **Siddharam Satlingappa Mhetre v. State of Maharashtra**, observed: the law of bail dovetails two conflicting interests namely, the obligation to shield the society from the hazards of those committing and repeating crimes and on the other hand absolute adherence to the fundamental principle of criminal jurisprudence - presumption of innocence and the sanctity of individual liberty.

The Supreme Court emphasized that anticipatory bail is a device to secure the individual's liberty, and neither a passport for the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. History and object of introducing the provision of anticipatory bail can be traced back to judgment of the Supreme Court in *Balch and Jain v. State of M.P.*⁴⁸ and *Gurbaksh Singh Sibbia* case.

Lalita Kumari v State of U.P it was observed : “While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for “anticipatory bail” under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.”

In **Dhiren Prafulbhai Shah v State of Gujarat** the Gujrat High Court in this case dealt with section 438 of CrPC in the context of Section 18 of atrocities act where court held that “If a person is accused having committed murder, dacoity, rape, etc., he can pray for anticipatory bail under Section-438 of the Cr.P.C. on the ground that he is innocent and has been falsely involved, but if a person alleged to have committed an offence under the Atrocities Act, cannot pray for an anticipatory bail because of the bar of Section-18 of the Act, and he would get arrested. This is the reason for the authorities to guard against any misuse of the Provisions of the Atrocities Act.” the law, and there are several safeguards

available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for “anticipatory bail” under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.”

Dr Subhash Kashinath Mahajan v The State Of Maharashtra And Anr Exercise of jurisdiction under Section 438 CrPC is an extremely important judicial function of a Judge and must be entrusted to judicial officers with some experience and good track record. Both the individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

Whether the grant of anticipatory bail should be time-bound:

In the case of **Sushila Aggarwal v. State (NCT of Delhi)**⁷, two major issues arose before the Supreme Court:

4. If the protection granted to a person under Section 438 Cr. P.C. should be restricted to a specific amount of time to enable the accused to surrender before the Trial Court and seek regular bail?
5. Whether the lifespan of anticipatory bail shall expire at the time and stage when the accused is called by the Court?

The Supreme Court held that the time period for which anticipatory bail can be granted is discretionary and can vary

⁷ 2018 (7) SCC 731

depending on the facts and circumstances of each case. The Supreme Court also placed reliance on **Gurbaksh Singh Sibbia v. State of Punjab**⁸, wherein it was held that anticipatory bail was a question of personal liberty, and hence not subject to a time period.

Whether application for Anticipatory bail for children in conflict with law is maintainable or not:

Various High Courts have expressed differing views regarding the maintainability of anticipatory bail applications for children in conflict with law under Section 438 of the Code of Criminal Procedure (CrPC). Two primary reasons are highlighted for denying such applications:

1. Non Obstante Clause in Section 12: Some courts argue that the on obstante clause in Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 indicates that the Act supersedes the provisions of the CrPC, thereby preventing High Courts or Sessions Courts from entertaining anticipatory bail applications for children.
2. Terminology Distinction: Other courts note that the Act uses the term “apprehend” rather than “arrest,” suggesting that the legal prerequisites for applying for anticipatory bail (i.e., apprehension of arrest for a non-bailable offence) are not satisfied, and thus the power under Section 438 of the CrPC cannot be exercised.

The Hon’ble High Court of Jharkhand in the case of **Birbal Munda v.State Of Jharkhand**⁹, is of the view that the non obstante

⁸ (1980) 2 SCC565

⁹ 2019 SCC online Jhar 1794

clause does not eliminate the provisions for bail, including anticipatory bail, in the CrPC but rather facilitates the granting of bail to children by overcoming certain barriers. Citing the Supreme Court case of ***Nikesh Tarachand Shah v. Union of India***, the Hon'ble Court argues that the absence of explicit exclusions for anticipatory bail in specific legislations indicates that such bail can still be granted under appropriate circumstances. The author asserts that children, as defined in the Indian Penal Code and the CrPC, fall under the term "person" and can thus seek anticipatory bail.

The Hon'ble court also discusses the term "apprehend" as defined in legal lexicons, emphasizing that it encompasses the act of arrest. The distinction made between "arrest" and "apprehension" suggests that apprehension entails a restriction of personal liberty, thus falling under the jurisdiction of bail provisions.

Ultimately, the Hon'ble court concludes that Section 12(1) of the Juvenile Justice (Care and Protection of Children) Act does not extinguish the jurisdiction of High Courts or Sessions Courts to grant anticipatory bail under Section 438 of the CrPC. This interpretation aligns with the principles of juvenile justice aimed at protecting the rights and liberties of children in conflict with the law.

Courts must take into account while dealing with cases under Section 438 of Cr. P.C. (Section 482 BNSS)-

3. When a person complains of fear of arrest and seeks an order, the application should be based on concrete facts of the offense, focusing on why the person fears arrest

as well as his account of the story, rather than ambiguous and universal allegations relating to one or more specific offenses;

4. On the gravity of the threat of arrest the court should issue a notice to the Public Prosecutor and obtain facts even while granting provisional anticipatory bail;
5. A person may apply for anticipatory bail before the FIR if the facts show that there is a credible reason for the arrest;
6. The Court held that nothing in Section 438 of the Cr. P.C. compels the court to set restrictions barring relief in terms of time, recording of witness testimony, or filling an FIR. While granting anticipatory bail, the Court should consider the seriousness of the crime such as the type of crime, evidence gathered, the harm is done to the victim, etc. before laying down any conditions on the petitioner;
7. An order granting anticipatory bail, cannot extend to a future occurrence constituting a commission of a crime and there cannot be a 'blanket' order;
8. Anticipatory bail can be extended until the completion of the trial once the charge sheet is filed;
9. Anticipatory bail does not restrict or impede the rights and obligations of the police and investigative authorities in any way. It also said that under Section 439(2), the police can bring a claim to the court to arrest the accused again in certain circumstances;

10. The accuracy of an anticipatory bail may be reviewed by a superior court, at the request of the investigating authorities. There is a possibility of the order being set aside on failure to consider relevant facts and critical circumstances. This does not mean cancellation of the order but simply dismissing it.

The BNSS, 2023, which replaces the CrPC, codifies anticipatory bail under **Section 482**. The basic framework empowering the Court of Session or the High Court to issue a direction for release in the event of arrest—has been retained. However, certain changes signal both conceptual and procedural shifts.

Wider Discretion: The language “if it thinks fit” has been retained, but without further codified criteria. Unlike CrPC, BNSS does not expressly enumerate the considerations for granting anticipatory bail. This Increases judicial discretion and introduces the risk of inconsistent or arbitrary decision-making.

Conclusion

The scope and ambit of the law on anticipatory bail has been elucidated by the judiciary time and again. Since the inclusion of Section 438 in the Code was envisaged as an antidote for preventing arrest and detention in false cases, it is in larger public interest that Section 438 is interpreted fairly under Article 21, to keep arbitrary and unreasonable limitations on personal liberty at bay. The clear ratio of *Sibbia (Supra)* and *Sushila Aggarwal (Supra)* appear to be in line with the object and purpose of Section 438 of the Code. The Constitution Bench in *Sushila Aggarwal (Supra)* has considered and given due weightage to personal liberty, which at the very heart of the law, is central to the concept of anticipatory bail.

