# PAPER PRESENTATION OF THE JUDICIAL OFFICERS ON THE EVE OF THIRD DISTRICT LEVEL WORK SHOP

## ON 20.09.2025
## (THIRD SATURDAY)

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**PAPER PRESENTATION ON THE TOPIC OF**

**I. DUTIES AND POWERS OF JUDICIAL MAGISTRATES, PRIMA FACIE CASE, SECTION.41-A Cr.P.C.,/SECTION.35 (3) to 35 (6) OF BNSS, ARNESH KUMAR'S CASE"**

**II. TRANSIT REMANDS, SPECIAL ACTS, JURISDICTION.**

**(FOR THE THIRD DISTRICT LEVEL WORKSHOP SCHEDULED ON 20.09.2025)**

Submitted by :

**Sri.G.Sai Krishna,**
Principal Civil Judge (Junior Division),
Kovvur.

**Introduction:**

The power of judicial magistrate under Section.167 of Cr.P.C., usually comes into play after the lapse of 24 hours (Section.57 of Cr.P.C.,) from the arrest of the accused by the police. In the case of **Arnesh Kumar Vs.State of Bihar**[1], while discussing the police power of arrest of a person without a warrant under Section.41(1) of Cr.P.C., the Hon'ble Supreme Court by reading Sub Clause (b) (i) and (ii) together and by emphasizing the strict compliance of Section.41-A Cr.P.C., changed the existing practice of arrest in each and every criminal case. In **Satender Kumar Antil Vs Central Bureau of Investigation**[2], the court held that, Sub-clause.(1)(b)(i) of Section.41 Cr.P.C., has to be read along with sub-clause (ii) and therefore both the elements of **'reason to believe'** and **'satisfaction qua an arrest'** are mandated and accordingly are to be recorded by the police officer. The Hon'ble Supreme Court also laiddown that, the custody of the accused to a Magistrate at the time of filing of the charge sheet as contemplated under Section.170 Cr.P.C., and Section.209 Cr.P.C., i.e., remand of the accused to custody by a court of Magistrate at the time of committal of the Sessions case does not imply necessarily sending the accused to Judicial custody. The court held that, Sub-sections (a) and (b) of Section.209 of the Code give ample power to the Magistrate to remand a person into custody during or until the conclusion of the trial. However, a Magistrate can take a call even without an application for bail if he is inclined to do so. In such a case, he can seek a bond or surety and thus can take recourse to Section.88. However, if he is to remand the case for the reasons to be recorded, then the said person has to be heard. The word **"custody"** appearing in Section.170 of Cr.P.C., does not contemplate either police or judicial custody. It merely connotes the presentation of accused by the investigating officer before the Court at the time of filing of the charge sheet where after the role of the Court starts. The court held that, if the

1 AIR 2014 SUPREME COURT 2756.
2 (2022) 10 SCC 51

Magistrate feels it is necessary, he can obtain bond or insist for sureties from the accused under Section.88 Cr.P.C., and that the Police officer is not compulsorily required to cause arrest of the accused. By reinterpreting Section.41, Section.170, Section.209 of Cr.P.C., the Hon'ble Supreme Court in the aforesaid two landmark judgments reduced unnecessary arrest in each and every case.

**1. <u>Prima facie case:</u>**

One of the primary requirement for remanding an accused to custody is the **"*prima facie*"** satisfaction of the Magistrate as to the grounds for believing that the accusation or information is well founded. The said requirement is stipulated in Section.167 (1) Cr.P.C. Further, *prima facie* satisfaction as to the accusation applies to remand before jurisdictional magistrate or to any nearest juridical magistrate exercising the remand power without territorial or other jurisdiction. The magistrate has to rely on entries in the Case diary submitted by the police officer concerned to form an opinion whether there is a *prima facie* case or not. This involves examining the report or mediator report or any other document which forms the basis for registration of the FIR, the Penal sections mentioned in the FIR, Remand report and careful perusal of the investigation already done by the police. *Prima facie means* "at first sight, on first view, or on its face". This involves looking for accusations made by the complainant, the 161 statements recorded by the police officer and seized crime property. It is common for the police officer seeking arrest at any cost to add totally irrelevant penal section or penal sections not supported by the material produced by him. This is done to overcome the directions of the Hon'ble Supreme Court in the case of Arnesh Kumar discussed above. Therefore, the magistrate is burdened with the onerous duty of cross checking each and every page of the remand report and the supporting material to verify if the penal sections mentioned in the FIR and in the Remand report in fact apply to the case at hand. Irrespective of jurisdiction of the magistrate,

whenever an accused is produced before him, he has duty to check the prima facie case before proceeding any further.

**2. Compliance with Section.41-A Cr.P.C.**

Based on the judgments of Arnesh Kumar case, Satendar Kumar Antil case, it can be said that the requirement of compliance with Section.41-A Cr.P.C., is broadly based on the quantum of punishment prescribed for the offence at hand, the grounds for arrest and the *prima facie* satisfaction of the magistrate on the necessity for arrest with reference to Section.41(1) (b) (i), (ii). Issuance of notice by the police to the accused is mandatory in all cases where the arrest of the accused is not required under Section.41(1). Therefore, in order to understand the applicability of Section.41-A Cr.P.C., one has to also examine Section.41.

**In the following cases the police officer may arrest without warrant;**

**a)** Cognizable office is committed in the presence of the police officer,

**b)** Credible information of commission of cognizable offence punishable with imprisonment term of more than 7 years or death sentence,

**c)** In case of a proclaimed offender,

**d)** Person in possession of the stolen property,

**e)** A person who obstructed a police officer in execution of his duty or attempts to escape from lawful custody,

**f)** A deserter from Armed forces of union,

**g)** A person who committed offence punishable in India but committed out of India and there is extradition treaty with the other country where the offence was committed,

**h)** A person who commits breach of Rule under Section.356(5) Cr.P.C.,

**i)** On requisition from another police officer provided it specifies the particulars of the person to be arrested, the offence and it is lawful and it appears that the person can be lawfully be arrested.

As can be seen from the above, in all the above cases the police officer can arrest without a warrant and without complying with Section.41-A Cr.P.C. In all other category of cases, the police officer has to comply with the Section.41-A Cr.P.C., notice. However, even without compliance with Section.41-A Cr.P.C., notice, a person accused of offence in the other category of cases referred above can be arrested when there exists reason that the suspected person committed the offence

**a)** The arrest is necessary to prevent further commission of the offence,

Or

**b)** For proper investigation of the offence,

Or

**c)** To prevent such person from tampering with or causing disappearance of the evidence,

Or

**d)** To prevent such person from making inducement, threat or promise to the witnesses,

Or

**e)** To secure the presence of person before the court.

As can be seen even in cases where the offence is punishable with less than 7 years, the police can arrest the accused for the reasons mentioned above. Those reasons should be supported by the material filed by the police along with the remand report. In all such cases filing of checklist for the grounds of arrest is mandatory as per the directions of the Hon’ble Supreme Court in the above referred cases.

**3.Issuance of 41-A Cr.P.C., notice:**

In case of offences punishable with less than 7 years and there exists no grounds for arresting the suspect in terms of Section.(b) (ii) of Section.41(1), the police officer has to record reasons in writing for not making the arrest and also issue a notice to such person to appear before him or at other place as specified in the notice and to comply with the terms of the notice. In case of non compliance of the terms of the notice, the suspect or accused can be arrested but the magistrate has to satisfy himself whether there exists any grounds to cause arrest under Sub clause (b) (ii) before remanding him to custody.

## II.TRANSIT REMANDS, SPECIAL ACTS, JURISDICTION.

### 1. Introduction :

There is nothing like “transit remand” referred anywhere in Cr.P.C., or any other law. However, the above term is used regularly during the course of judicial proceedings. The concept of transit remand and its nature was thoroughly analyzed by the ***Hon’ble Supreme Court in the case of Gautam Navlakha Vs. National Investigation Agency and another[3].*** The remand power of a magistrate flows from Section.161 Cr.P.C. In this context understanding Section.56 and Section.57 Cr.PC., the power of a magistrate under Section.167 Cr.P.C., is relevant.

### 2. Transit period :

A person arrested by police officer should be produced before magistrate within 24 hours exclusive of time necessary for the journey to the place of arrest to the magistrate court in the absence of any special order of the magistrate under Section.167 Cr.P.C. Similarly, under Section.57 Cr.P.C., a

[3] AIRONLINE 2021 SC 246.

police officer arresting a person in execution of a warrant should produce the arrested person before magistrate court within 24 hours.

As can be seen, Section.57 Cr.P.C., and Section.167 Cr.P.C., deal with two different aspects of arrest and detention. Section.57 Cr.P.C., provides that unless there is an special order passed under Section.167 Cr.P.C., a person arrested should be produced within 24 hours before the magistrate. The section itself provides that the journey time from the place of the arrest to the place of the magistrate court can be excluded for the purpose of calculating the 24 hours period. The only way a police officer can detain the accused for more than 24 hours is by obtaining a police custody order under Section.167 Cr.P.C. A police custody order can be obtained from a judicial magistrate having jurisdiction and also from one not having jurisdiction. The only difference is a magistrate without jurisdiction cannot remand the accused to any custody beyond the 15 days, whereas the magistrate having jurisdiction can authorize the detention of the accused in custody other than the police custody beyond 15 days. Section.56 deals with the production of accused and the time limit. Whereas Section.167 deals with the detention of the arrested person. In the aforesaid case law, the Hon'ble Supreme Court clarified that the power of the nearest magistrate to remand the accused to police custody for the purpose of producing him before the jurisdictional magistrate or court flows from 167 Cr.P.C.

**3. <u>Conclusion:</u>**

Generally, a police custody petition is filed for the purpose of investigation unlike an application for transit remand, which is filed for the purpose of keeping the accused in the custody of the police until he is produced before the Jurisdictional magistrate. The requirement for transit remand arises as many times delay in the production of the accused might happen for many reasons including the mode of transport, condition of roads, availability of transport facility, the timings of the Trains or Aeroplanes. In such

cases, the delay in production might exceed the actual travel time taken. However, the magistrate granting such transit remand must pass necessary orders to ensure that the accused is not subjected to third degree torture and is subjected to medical examination prior to his production before the jurisdictional court. Care should be taken to ensure that only such limited time is granted as is absolutely necessary for the production taking into account the actual travel time, the mode of transport and any other prevailing circumstances at the time of deciding the application.

In the aforesaid judgment, the Hon'ble Supreme Court held that a remand by a magistrate whether having jurisdiction or not to any form of custody should always be by application of judicial mind. Therefore, *prima facie* case, existence of grounds for arrest should also be considered even in case of transit remand. In the case of **Arnesh Kumar**, the Hon'ble Supreme Court held that the directions issued pursuant to the interpretation of Section.41-A Cr.P.C., are applicable in all cases where the punishment is for less than 7 years or which may extend to 7 years.

* * * * *

Paper presented by
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# DUTIES AND POWERS OF JUDICIAL MAGISTRATES TO EXAMINE PRIMA FACIE CASE

## Introduction:

Remand is not a routine or mechanical exercise. It is a serious judicial function impacting personal liberty guaranteed under Article 21 of the Constitution. Magistrate acts as the first line of protection against arbitrary police action.The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.[1]

## Meaning of 'Prima Facie Case' at Remand Stage:

"Prima facie" means on the face of it or at first glance. At the time of remand, the Magistrate does not conduct a detailed trial or weigh evidence as in final adjudication. The duty is to see whether there are reasonable grounds to

[1] Manubhai Ratilal Patel Tr. Ushaben Vs. State of Gujarat and Others, AIR 2013 SC 313.

believe that the accused is connected with the offence and that further investigation requires custody. A prima facie case at remand means:

- There is some credible material in FIR, case diary, or remand report linking accused to the offence;
- The police have recorded valid reasons for arrest and necessity of custody;
- Magistrate is satisfied, after judicial scrutiny, that further detention is justified.

It is not proof of guilt, but only a threshold check to ensure that liberty is not curtailed without lawful basis.

**Powers and Duties of Magistrate to examine prima facie case at the stage of remand:**

1. The magistrate should verify legality of arrest, arrest memo, and grounds of arrest.
2. The magistrate should ensure that accused is informed of rights (legal aid, intimation to relatives, medical check-up).
3. The magistrate should Peruse FIR, case diary, remand report. Check whether reasonable grounds exist to believe the accused's involvement.
4. The magistrate should Prevent remand in cases of insufficient material or mala fide arrest.
5. The magistrate should Record reasons while granting remand.
6. Remand cannot be ordered mechanically on police request.
7. The magistrate should ensure Balance between needs of investigation and rights of accused.

**Conclusion:**

Prima facie scrutiny at remand stage is the cornerstone of judicial duty. Magistrate must act as a constitutional sentinel, ensuring that liberty is curtailed only on legal and reasonable grounds. A well-reasoned remand order strengthens both the rule of law and public trust in the judiciary.

## 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 CASE

**Introduction**:

Though 41 A CrPC was introduced in the statute as long back as in 2009, it did not attract the attention of all till Mid,2014, when the judgment of Arnesh Kumar Vs State of Bihar {(2014) 8 SCC 273 } was delivered by Supreme Court (2nd July, 2014). While the said judgment, reiterated the provision in 41 A CrPC, it added a new condition of sending the check list along with the remand papers, depicting the satisfaction of the I.O. for arresting the accused. It also restricted the usage of Sec. 41A CrPC, to offences punishable with imprisonment less than 7 years.

**Sec. 41-A Cr.P.C:**

Let us first observe the Sec 41 A CrPC, which had been inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008(Act 5 of 2009), which is relevant in the context reads as follows:

"41A. Notice of appearance before police officer.-(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has

been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice. (2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice. (3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. (4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

Sec 41A CrPC, starts with "The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice". So, the sum and substance is that Sec 41A CrPC, comes into play only when the I.O. feels that Arrest is not necessary. So, if the I.O. is of the opinion that the accused has to be arrested, then, the I.O. can directly arrest the accused, without resorting to Sec 41 A CrPC notice. What is required for an I.O. to resort to arrest without notice under sec 41 A CrPC, is the subjective satisfaction of the conditions in Sec 41(1) CrPC.

**JUDICIAL INTERPRETATION (Arnesh Kumar Case):**

The Arnesh Kumar Vs State of Bihar, has suddenly jolted the Criminal justice functionaries and general public alike from what can be termed as deep slumber, as the amendment of Sec 41A CrPC was inserted in 2009, but it was not strictly implemented till 2014. The said judgment gave guidelines for following the Sec 41 A CrPC, which are summarized as under:

| EXTRACT FROM THE ARNESH KUMAR Vs STATE OF BIHAR JUDGMENT | REMARKS |
|---|---|
| Sec. 41-A crpc makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded. | Where the arrest of the accused is not required, notice to appear before the I.O. be given and conditions like to co-operate with the investigation and not to leave the jurisdiction etc, be mentioned. Even after issuance of the notice, the Accused can be arrested, if he commits default of conditions mentioned in notice or if he interferes or meddles with investigation. |
| The police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid. We are of the opinion that if the provisions of Section 41, Cr.P.C which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued. | Where the arrest of accused is required, Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid |
| Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction: | No mechanical arrest and no mechanical remand. REASONS to be mentioned for ARREST and also REMAND |
| | IF ACCUSED IS TO BE ARRESTED |
| 1.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; (2) All police officers be provided with a check list containing specified sub clauses under Section 41(1)(b)(ii); (3) The police officer shall forward the check list duly filed | I.O. to satisfy himself about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC; forward the check list containing specified sub-clauses under Section 41(1)(b)(ii) duly filed and furnish the reasons and materials which necessitated the arrest, forward the same to the Hon'ble Court with the remand, who after satisfying with the reasons mentioned by the I.O, will remand the accused. |

| | |
|---|---|
| and furnish the reasons and materials which necessitated the arrest, while forwarding producing the accused before the Magistrate for further detention; (4) The Magistrate while authorising 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 authorise detention | |
| | IF ARREST OF THE ACCUSED IS NOT REQUIRED |
| 5) 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; (6) Notice of appearance in terms of Section 41A of Cr.PC 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 | Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case/41 A Notice. |
| | DEFAULT CLAUSES |
| 7) 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 | the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court. |
| (8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court. | Departmental action against the Magistrate |

**<u>To What Cases Does Sec 41-A Crpc Apply</u>**:

Sec 41A CrPC does not mention that it is applicable only in IPC offences. What all is stated in Sec 41(1) is the punishment of imprisonment. Further, the judgment in Arnesh Kumar Vs State of Bihar, clears this cloud by stating in the said judgment as "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." Further, in the judgment between Konidhana Anand Sharma Vs State of A.P. [2017 (2) ALD (Crl) 756], wherein the Hon'ble judge reiterated the fact that Sec 41 A CrPC notices can be served even in Special laws like S.C & S.T.POA Act, 1989.

The judgment delivered in Arnesh Kumar judgment appears tobe restricting the service of notice to offences punishable with imprisonment upto Seven Years, but when we give a cursory reading of Sec 41 A CrPC, it refers to offences covered by sec 41(1) CrPC. Sec 41(1) CrPC, consists of sub sections (a); (b) and (ba). In Sub-section (ba), the offences referred are punishable with more than 7 years. However, in order to not to add further to the already existing dilemma about the implementation of Sec 41 A CrPC, It is advisable that the sec 41A CrPC notice be confined to offences punishable with imprisonment upto 7 years.

**BNSS:**

Section 41A of the Code of Criminal Procedure has been incorporated into Section 35(3)-(6) of the Bharatiya Nagarik Suraksha Sanhita (BNSS), so the sections are not different but represent a continuation and refinement of the same principle: a police officer must issue a notice of appearance to a person whose arrest is not immediately required for a cognizable offense, rather than making an immediate arrest.

BNSS integrates notice into arrest provisions, making it part of the arrest decision process. The Supreme Court has explicitly clarified that notices under Section 35 BNSS (and its CrPC predecessor) cannot be served electronically, such as through WhatsApp. The service must be physical, a point of emphasis under the new act.

# TRANSIT REMAND IN RESPECT OF SPECIAL ACTS AND JURISDICTION OF THE JUDICIAL MAGISTRATE OF FIRST CLASS IN GENERAL

## Meaning of Transit Remand:

The term ‘Transit Remand’ is neither mentioned nor defined in Cr.P.C and also in BNSS. It is rather a term that has evolved through its usage in common parlance. To put it simply, transit remand can be said to be the remand of accused, sought by the police, for taking the accused from one place to another in their own custody, usually for the purpose of producing him before the concerned magistrate who has jurisdiction to try/commit the case. The concept of Transit Remand is implicit in Sec.167 of Cr.P.C (187 of BNSS) which is given for the particular purpose of the transit of the accused from one place to another to be presented before the jurisdictional magistrate.

## Transit Remand in respect of Special Acts:

Transit remand under Special Acts is not a separate concept, but an application of CrPC Section 167 read with Special Act provisions, ensuring that an arrest made outside the jurisdiction is legally validated before transferring the accused to the competent Special Court. Production is before the nearest Judicial Magistrate, but ultimate remand lies with Special Court**.**

## Jurisdiction of Judicial Magistrate of First Class in general :

The Magistrate's jurisdiction in a transit remand situation is to authorize the accused's transfer by the nearest magistrate, regardless of their own jurisdiction over the case. The police must bring the arrested person before the nearest available magistrate to obtain an order for police or judicial custody for transit to the court that has territorial jurisdiction over the offense. This process protects the accused's right to be produced before a

magistrate within 24 hours of arrest, as mandated by the Constitution. The Magistrate is not acting in an executive capacity but is performing a judicial function by applying their mind to whether the arrest and subsequent custody are justified. The nearest magistrate issues the transit remand order to allow the police to take the accused to the jurisdiction where the case was registered. The Magistrate is obligated to satisfy themselves that there are reasonable grounds for the arrest and detention and should not automatically pass a remand order. They must review the case diary to understand the situation. Under the Bharatiya Nagarik Suraksha Sanhita (BNSS), Section 187 deals with this situation, mirroring Section 167 of the Code of Criminal Procedure (CrPC). This procedure ensures compliance with Article 22 of the Constitution, which requires the production of an arrested person before a Magistrate within 24 hours (excluding travel time).

**PAPER PRESENTATION**

**By**
**Lalitha Kundrapu**
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# Duties and Powers of Judicial Magistrates in Examining Prima Facie Case and Compliance of Section 41-A CrPC / Section 35 BNSS at the Stage of Remand, with Reference to *Arnesh Kumar v. State of Bihar*

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## Abstract

The institution of remand represents a critical juncture where the right to liberty intersects with the necessity of effective investigation. Judicial Magistrates occupy a pivotal position at this stage, acting as constitutional gatekeepers to ensure that police powers of arrest and detention are not exercised mechanically or abusively. This paper explores the statutory framework under the Code of Criminal Procedure, 1973 (CrPC) and its successor, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), with special emphasis on Section 41-A CrPC and Section 35 BNSS. It analyses the duties of Magistrates when faced with remand applications, highlights the safeguards articulated in *Arnesh Kumar v. State of Bihar* (2014), examines subsequent jurisprudence including *Satender Kumar Antil v. CBI* and *Vihaan Kumar v. State of Haryana* (2025), and discusses the detailed guidelines laid down in *Gautam Navlakha v. State (NCT of Delhi)* (2018) regarding transit remands. Particular attention is given to the power of the Magistrate to assess the existence of a prima-facie case before authorizing remand**.**

## Introduction

The word *remand* literally means to “send back.” In the criminal process, it refers to sending an accused into custody during the investigation or trial. At this stage, liberty is curtailed not by a conviction but merely on the strength of suspicion or accusation. This makes the role of the Magistrate especially significant, for he or she stands as the first judicial authority empowered to scrutinise the deprivation of

liberty. Article 21 of the Constitution guarantees the right to personal liberty, while Article 22 prescribes safeguards during arrest and detention. Thus, the Magistrate is entrusted with a constitutional responsibility: to ensure that liberty is not sacrificed to administrative convenience or routine police practice. This document discusses the powers and duties of Judicial Magistrates primarily under Sections 41A of the Criminal Procedure Code (CrPC), Sections 35(3) to 35(6) of the BNSS, examination of prima facie case at the time of Remand with reference to the landmark Supreme Court ruling in Arnesh Kumar vs State of Bihar (2014) and other important Judgments.

## Section 1: Legal Framework Governing Arrest and Remand

### Section 41A Cr.P.C. - Notice of Appearance Instead of Arrest

**41A. Notice of appearance before police officer.--** (1) [The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.**]**

In essence, Section 41A CrPC mandates that in cases where the arrest of a person is not immediately necessary, the police must issue a notice directing the accused to appear before them instead of effecting an arrest. This provision is designed to prevent unnecessary and arbitrary arrests, safeguarding the individual's liberty while maintaining the investigation's integrity. The Judicial Magistrate's role involves reviewing police requests for remand to ascertain adherence to these safeguards.

**BNSS Sections 35(3) to 35(6) - Arrest and Remand Safeguards**

**Section 35 BNSS**

The BNSS, 2023 retains the substance of Section 41-A while strengthening it further. Sub-sections (3) to (6) mirror the CrPC provision. Sub-section (7) adds a new safeguard, requiring prior approval from a Deputy Superintendent of Police before arresting elderly or infirm persons in cases punishable with less than three years. This demonstrates the legislature's continuing emphasis on liberty and proportionality in arrest.

> (3) The police officer shall, in all cases where the arrest of a person is not required under sub-section (1) issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.
> (4)Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.(5)Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.(6)Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

(7)No arrest shall be made without prior permission of an officer not below the rank of Deputy Superintendent of Police in case of an offence which is punishable for imprisonment of less than three years and such person is infirm or is above sixty years of age.

The BNSS provisions provide further guidelines on the lawful arrest, detention, and remand of accused persons. They emphasize judicial oversight, requiring police to strictly comply with procedures that prevent abuse of power. The sections stipulate that remand should be granted only when necessary for investigation, preventing witness influence, or ensuring the accused does not commit further offences. ( Proforma – Notice for Appearance by the Police – See Sch. II Form No.1)

**Practical Aspects:**

**Can the remand of the accused be returned for not invoking Section 41-A**

Service of notice under Section 41-A CrPC is the discretion of the IO, Magistrate need not insist for service of notice under Section 41-A Cr.P.C. IO has discretion with the supporting reasons for non issuance of notice and to arrest the accused.

**Refusal to receive S.41(1) Notice – Arrest –** Whether the police can arrest and forward the accused for remand on the ground that he reused – Yes – Service of notice shall be made within first 15 days from the date of registration of FIR – The said information has to be sent to the court – In case of beyond 15 days, the IO need to obtain permission from their DGP

**Kalki Ramu vs The State Of Telangana –** Before making arrest for non compliance of S.41-A Cr.P.C notice, permission of the Magistrate to arrest the accused is required.

**Powers of the Magistrate at Remand**

The authority to remand an accused to custody flows from Section 167(2) CrPC and Section 187 BNSS. This authority is judicial in nature. In ***Manubhai Ratilal Patel v. State of Gujarat*** **(2013),** the Supreme Court described remand as a

“fundamental judicial function.” The Magistrate cannot behave as an extension of the police; he must independently decide whether further deprivation of liberty is justified.

When an accused is produced, the Magistrate exercises two interlinked functions. First, he must verify the legality of the arrest and compliance with statutory safeguards. Second, he must examine whether there exists a prima facie case that warrants detention for investigation.

**Section 3: The Role and Responsibilities of Judicial Magistrates**

Judicial Magistrates must exercise diligent scrutiny while hearing remand applications. A Magistrate is a constitutional gatekeeper – he cannot authorize custody unless the arrest itself is lawful, necessary, and procedurally compliant.

- **Mandates for Magistrate at Remand Stage**

**1. Check legality of arrest**

- Was the arrest made within 24 hours?
- Is an arrest memo prepared, signed by witness/relative?
- Were grounds of arrest communicated meaningfully to the accused? In *Vihaan Kumar v. State of Haryana* (2025)

**2. Examine compliance with Section 41(1)(b) CrPC / Sec.** 35(1) BNSS

- Did the police record reasons justifying necessity of arrest (prevent further offence, tampering, absconding, etc.)?
- Magistrate must be satisfied these reasons exist.

**3. Scrutinize Section 41-A Notice (≤ 7 years offences)**

- Was a 41-A notice issued and served?
- If not, were reasons for dispensing with it recorded?
- If accused complied, arrest not permissible unless fresh grounds shown.

**4. Check constitutional safeguards**

- Was accused informed of right to have a relative/friend notified (DK Basu guidelines)?
- Was medical examination done, if required?

**5. Apply judicial mind**

- Prima facie case exists?
- Is custodial interrogation really necessary for investigation?
- Mechanical orders like “perused, satisfied” are impermissible.

**6. Pass a reasoned order**

- Record that the Court examined arrest compliance + necessity for remand.
- If safeguards missing, remand must be refused and accused released.

**Examination of Prima Facie Case**

Beyond procedural scrutiny, the Magistrate must ascertain whether a prima facie case exists. This does not involve a detailed inquiry or evaluation of guilt, but it does require satisfaction that the FIR, case diary, and supporting materials disclose a cognizable offence and provide reasonable grounds to link the accused to it. In ***Ram Doss v. State of Tamil Nadu*** **(1993),** the Court held that detention beyond twenty-four hours can only be justified if investigation cannot be completed and if the accusation is credible and well-founded. Thus, if no prima facie case is made out, remand would amount to illegal detention.

The Magistrate’s order should therefore reflect two findings: that the arrest is lawful and procedurally compliant, and that there exists a prima facie case necessitating custody for investigation. Only when both elements are satisfied can remand be legally and constitutionally justified.

**Judicial Pronouncements**

The foundation of this jurisprudence was laid in ***Arnesh Kumar v. State of Bihar*** **(2014)**, where the Supreme Court cautioned against routine arrests in offences punishable up to seven years. It directed that police officers must prepare a checklist of reasons for arrest under Section 41(1)(b)(ii), and Magistrates must peruse the checklist before authorizing detention. The Court warned that non-compliance would invite disciplinary action against both police and Magistrates.

**Guidelines issued in Arnesh Kumar v. State of Bihar (2014),**

1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;
2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
3. The police officer- shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
4. 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;
5. 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;
6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the 10 Superintendent of Police of the district for the reasons to be recorded in writing;
7. 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 the High Court having territorial jurisdiction.
8. Authorizing detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

**In *Satender Kumar Antil v. CBI* (2021–2023),** the Supreme Court reiterated these principles and emphasized that arrest and remand are exceptional, not routine. In ***Vihaan Kumar* (2025)**, the Court added a new dimension by holding that failure to meaningfully communicate grounds of arrest vitiates the arrest itself, and

subsequent remand or charge-sheet cannot cure this illegality. Together, these cases confirm that Magistrates are guardians of liberty, not rubber stamps for police requests.

## Transit Remands

Transit remand refers to the temporary custody order passed when an accused is arrested outside the territorial jurisdiction of the investigating agency. Under Section 167(2) CrPC, the accused must be produced before the nearest Magistrate, who may or may not have jurisdiction to try the case. The danger here is that transit remand could become a mechanical formality, undermining constitutional protections.

In *Gautam Navlakha v. State (NCT of Delhi)* (2018), the Supreme Court laid down detailed guidelines to ensure that transit remands comply with constitutional requirements. The Court held that the Magistrate must apply judicial mind and not grant transit remand automatically. Police must place on record the FIR, grounds of arrest, and relevant case diary entries. The Magistrate must evaluate whether these disclose a cognizable offence and whether the arrest is lawful.

The Court also held that Article 22(1) of the Constitution requires the accused to be informed of the grounds of arrest, and the Magistrate must ensure that this has been done. Further, the Magistrate must ask the accused whether he wishes to consult a lawyer, and facilitate this right if sought. The Magistrate is also obliged to record short but clear reasons for granting transit remand, and must limit its duration to the minimum necessary for production before the jurisdictional court.

These guidelines underscore that even transit custody—though temporary—amounts to deprivation of liberty and must be justified by law, reason, and necessity. The Magistrate considering a transit remand therefore performs the same constitutional role as in ordinary remand proceedings: protecting liberty while enabling legitimate investigation.

**Remand in Special Act;**

Andhra Pradesh Protection of Depositors of Financial Establishment Act, 1999 - "**Dr K Narmada vs. State of Andhra PRades**h " the Hon'ble High Court of AP held at para No.13 as follows:

> 13. **Procedure and Powers of Special Courts regarding offences - (**1) The Special Court may take cognizance of the offences without the accused being committed to it for trial and in trying the accused person, shall follow the procedure prescribed in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), for the trial of warrant cases by Magistrates. (2) The provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), shall, so far as may be, apply to the proceedings before a Special Court and for the purpose of the said provisions, a special Court shall be deemed to be a Magistrate.

Only the Special Judge in the cadre of District Judge is competent to try the cases under Protection of Depositors of Financial Establishment Act

**POCSO & SC ST Act –** In the Registrar (Judicial) vs. Krishna Swami Naidu and Anr. On 17-03-2017 – While answering reference, a division of Madras High Court clarified all the provisions contained in Section 167 of Code are applicable to a Special Courts constituted under the POCSO Act and SC ST Act – The Spl.Judge will be the Magistrate – Only to save the time of 24 hours, the accused can be produced before neare**st Magistrate**

**NDPS Act –** Section 36A of NDPS Act – Anitha Mohan Waghware Vs. IV Addl.Metropolitan Magistrate RR District and 3 Others, 2016 SCC Online Hyd, 335 Hon'ble High Court of AP at para 11 held that the Sec.36(A) (a) (b) – Only first remand the Magistrate is empowered to grant remand, subsequently, he has to be produced befor**e the Spl.Court**

**AP Price and Chit Fund Act –** Only Chief Metropolitan Magistrate is empowered to grant remands under this Act.

## Recent Trends

The Andhra Pradesh High Court has repeatedly emphasized that Magistrates must not authorizes remand automatically, particularly in modern contexts such as

cyber crime and social media offences. The Court has warned that casual remand orders undermine constitutional rights and could attract disciplinary action. This reflects a growing judicial insistence that Magistrates treat liberty as the rule and custody as the exception.

## Conclusion

The power to remand an accused to custody is both statutory and constitutional. It is statutory because it flows from Section 167 CrPC and Section 187 BNSS; it is constitutional because it safeguards the right to liberty under Article 21. At this stage, the Magistrate must verify compliance with arrest safeguards, examine whether a prima facie case exists, and apply his mind to whether custody is genuinely necessary.

The jurisprudence developed in *Arnesh Kumar*, *Satender Kumar Antil*, and *Vihaan Kumar* makes it clear that routine arrest and routine remand must end. The detailed guidelines in *Gautam Navlakha* extend this philosophy to transit remands, ensuring that even short deprivations of liberty are subject to judicial scrutiny.

Magistrates, therefore, are not passive endorsers of police action but active guardians of liberty. By passing reasoned orders that reflect satisfaction on legality, necessity, and prima facie case, they uphold both individual dignity and the majesty of law. This careful balance between liberty and investigation is at the heart of their constitutional role.

## References


1. *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.
2. *Satender Kumar Antil v. Central Bureau of Investigation*, (2021–2023) series of orders.
3. *Vihaan Kumar v. State of Haryana*, 2025 INSC 162.
4. *Manubhai Ratilal Patel v. State of Gujarat*, (2013) 1 SCC 314.
5. *Ram Doss v. State of Tamil Nadu*, 1993 Cri LJ 2147.
6. *Gautam Navlakha v. State (NCT of Delhi)*, (2018) 10 SCC 329.
7. *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

# THIRD DISTRICT LEVEL WORKSHOP ON THE TOPIC OF PROTECTION OF LIFE AND PERSONAL LIBERTY

## WEST GODAVARI Dt. 20.09.2025

## Session -2

## Article 21 of the Indian Constitution : Protection of Life and Personal Liberty

**Presented by**

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**Bhimavaram**

## 1. Introduction

The sanctity of human life is probably the most fundamental of human social values which is recognized in all civilized societies and their legal systems. Every person is entitled to live their life on their own terms, with no unfair interference from others.

In India, the Protection of Life and Personal Liberty is a Fundamental Right granted to citizens under Part III of the Constitution of India. These Fundamental Rights represent the foundational values cherished by the people and are granted against actions of the State, means no act of any State authority can violate any such right of a citizen except in accordance with law. **Article 21** of the Constitution states that “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. Thus, violation of the right by private entities is not within its purview. Hence, this Article 21 prohibits the encroachment upon a person’s right to life and personal liberty by the State.

## 2. Understanding Article 21 of Indian Constitution

Though provision in in negative language, Article 21 confers the fundamental right to life and personal liberty on every person, including foreigners, and these two rights have been given paramount importance by the courts. These rights enjoy a fundamental ascendancy over all other attributes of the political and social order, and thus, the Legislature, Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. Moreover, though the word ‘person’ indicates an individual, through ‘Public Interest Litigation’ under **Articles 32 and 226**, the collective rights of the people have also come to be enforced under Article 21. But over the course of time, the scope of application of the Article 21 has been expanded by ‘liberal interpretation’. Thus, protection against arbitrary privation of ‘life’ no longer means mere protection against physical injury/death but also an invasion of the right to ‘live’ with human dignity and would include all these

aspects of life that would go to make a man's life meaningful and worth living.

In fact, citizens who are detained in prison either as under-trials or as convicts are also entitled to the benefits of the guarantee, subject to reasonable restriction. The State can't violate their rights merely because the person is an under-trial or a convict, as the prisoner doesn't cease to be a human being.

It must also be noted that while the protection of Article 21 is extended to foreigners as well, the same is confined to life and liberty and does not include the right to reside or stay in India.

The terms 'life' and 'personal liberty' encompass a wide variety of rights of the people, which are a result of the evolution in the interpretation of Article 21 by the Courts over the years. **In A.K. Gopalan v. State of Madras (1950): Prevention Detention,** the Petitioner, a political leader, was detained under the Preventive Detention Act, 1950. He claimed that such detention was illegal as it infringed upon his freedom of movement granted in Article 19 of the Constitution of India and thus also violated his Personal Liberty as guaranteed by Article 21 since freedom of movement should be considered a part of a person's personal liberty.

**In Kharak Singh v. State of U.P. and Ors. (1964):**

It was held that the right to personal liberty constitutes not only the right to be free from restrictions placed on one's movements but also to be free from encroachments on one's private life. Thus, personal liberty was considered to include all the residual freedoms of a person not included in Article 19(1).

**In Maneka Gandhi v. Union of India (1978)**

The Hon'ble Supreme Court held that the right to travel and go outside the country must be included in the Right to Personal Liberty. It stated that "personal liberty" given in Article 21 had the widest amplitude and covered a variety of rights related to the personal liberty of a person. Such a right could only be restricted by a procedure established by law, which had to be "fair, just and reasonable, not fanciful, oppressive or arbitrary."

## Scope of Article 21: Right to Life and Personal Liberty

After elucidating upon the expansion of purview of Article 21, it is important to understand the wide array of different rights and privileges this single right holds as per its meaning in the present era.

- **Right to live with human dignity**
- **Right to livelihood**
- **Right to shelter**
- **Right to nutritional food**
- **Right to reputation**

**In Subramanian Swamy v. Union of India, Ministry of Law and Ors. (2016),** the Hon'ble Apex Court examined the meaning and interpretation of the terms "defamation" and "reputation." Further, it discussed a number of international treaties highlighting the value of honour and respect for one's life. It was emphasized that once the reputation of an individual has been held to be a basic element of Article 21 of the Constitution, it is extremely difficult to accept the view that criminal defamation has a chilling effect on freedom of speech and expression.

- **Right to go abroad**
- **Right against illegal detention**
- **Right against harsh living conditions of prisoners**
- **Right to health and medical assistance**

The Right to Life, of course, cannot be upheld if every person is not given access to proper health and medical assistance. It is the most primary prerequisite to living a full life.

- **Right to a healthy environment** includes right to get pollution-free water and air

## Prisoner's rights and Article 21 of the Indian Constitution

Fundamental Rights form the basis of human existence and are not denied to anyone except under special circumstances. A person convicted of a crime too, therefore, is not deprived of his Fundamental Rights. Restrictions are usually placed on a criminal's movement, the practice of the profession, etc. but the Right to Life and Personal Liberty is one right that is not snatched from him, except through procedure established by law (for eg. imprisonment).

What constitutes the Right to Life and Personal Liberty of a convict?

- **Right to free legal aid**

Article 39A of the Constitution in consonance with Article 14 which provides equal protection before the law and Article 22(1) which states that every arrested person must get the chance to be represented by a legal practitioner of his choice. Hence, this right helps to ensure one of the most essential elements of justice – that it is made accessible to all.

- **Right to a speedy trial**

Right to speedy trial means that the accused should be put under trial as soon as possible to face trial, which is available to the accused at all stages including investigation, inquiry, trial, appeal etc. This right is based on the principle which says that "justice delayed is justice denied." **Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar (1979).**

- **Right to fair trial**

Every person undergoing a trial should be given a fair chance, so as to ensure the application of fundamental elements of human rights and proper administration of justice.

- **Constitutionality of a death sentence**

The death sentence is a type of punishment awarded to criminals who

have committed the serious offences.

The constitutional validity of a death sentence has been much discussed and debated, with many arguing that it is inhumane, that it violates the Fundamental and Human Rights, or that the ‘eye for an eye’ ideology behind it achieves no purpose in law and justice.

- **Bachan Singh v. State of Punjab (1980).**
- **Attorney General of India v. Lachma Devi and Ors. (1985).**
- **Right against delayed execution**

**Police atrocities and custodial death**

Police are one of the most necessary institutions of a State as it is the acting arm of law and legislation. Police keep a check on unwanted activities and ensure order in society, for which it is given considerable powers.

However, sometimes, certain members of the police get caught up in the power and try to take undue advantage of it. They cease to abide by the law and instead, take it in their own hands. It is a sad sight to see the very guardians of law compromising it – leading to cases of police brutality and atrocities.

Police officers sometimes unfairly arrest individuals, beat and torture the prisoners, and commit various other crimes.

## Trial of cases of women victims

It was in the brutal rape case of Delhi Domestic Working Women’s Forum v. Union of India (1995), that the court laid down parameters to assist the victims of rape in the trial process.

In this case, a Public Interest Litigation was filed against the rape of six women travelling in a train from Ranchi to Delhi, by seven army personnel.

The Hon’ble Apex Court has recognised the defects in the system where complaints are not handled properly and victims are often humiliated by

the police and suffer grave psychological stress. The parameters laid down include-

**1.** Provision of legal representation to the victims from the moment they arrive at the police station for the complaint, and the duty of the police to inform them of this right.

**2.** Maintenance of anonymity of the victims as far as necessary.

**3.** Establishment of Criminal Injuries Compensation Board to award compensation to victims even before conviction of offender takes place.

From the above it can be safely say that the officer of the Court is duty-bound to look into various provisions of **Cr.P.C./BNSS** and other laws in force which are within the ambit of the decisions of the Hon'ble Apex Courts while dealing with the matters which involve life and personal liberty of any person.

## Conclusion:

The Right to Life and Personal Liberty has a wide ambit which is only growing over time. There has been increasing awareness about the various aspects of a person's life which any person is entitled to control and which would, thus, facilitate the enhancement in quality of their life. This Right has been described as the "heart and soul" of the Constitution of India by the Hon'ble Supreme Court and Hon'ble High Courts and certainly proves to be so – representing the very basic necessities of human life.

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

***PRESENTED BY:***

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***PRL.CIVIL JUDGE (JR.DIVISION),***
***TADEPALLIGUDEM***

The meaning of life is the concept of an individual's life or existence in general, having an inherent significance or a philosophical point. The meaning of life can be derived from philosophical and religious contemplation of and scientific inquiries about existence, social ties, consciousness and happiness. Many other issues are also involved, such as symbolic meaning, ontology, value, purpose, ethics, good and evil, free will, the existence of one or multiple gods, conceptions of god, the soul and the afterlife. The meaning of life has been broadly interpreted to include mental and physical well being, the right to livelihood, and the ability to live a full and complete life.

Protection of life is the fundamental right that guarantees a person's existence and personal liberty, encompassing not just mere physical survival, but also, the right to live with human dignity, access, basic necessities like food, water, and shelter, and enjoy a healthy environment, preventing arbitrary deprivation by law or private entities. It is a core principle found in legal systems and religious doctrines, asserting that human beings life is significant and that all efforts should be made to preserve it.

**Right to live**: It ensures a person's fundamental right to exist, as articulated in legal frameworks life, Article 21 of the Indian Constitution.

**Human Dignity:** Protection of life extends beyond basic existence to include the right to live with dignity and a sense of worth.

**Basic Necessities:** This right entails access to essential resources such as food, clean water, healthcare and a healthy environment which are vital for a meaningful life.

**Liberty and personal freedom:** The concept is intrinsically linked to personal liberty, meaning, no one can arbitrarily deprived of their freedom, except through a legally established process.

**Indian Constitutional Law:**

Article 21 of the Indian Constitution is a prime example, guaranteeing the right to life and personal liberty and preventing their deprivation unless by procedure established by law. The courts must recognize that the right to life under Article 21 includes the right to live with human dignity, encompassing access to the necessities of human life and autonomy over personal decisions.

**Religious Doctrines**:

Religious like Judaism also strongly emphasize the paramount importance of preserving human life above other laws and practices.

**International Law**:

The concept is also central to modern international law, ensuring that individuals are protected from harm and arbitrary actions.

In essence, protection of life ensures that individuals have the support and freedom to live not just any life, but, a life that is meaningful, healthy and dignified.

Magistrates and Special Sessions Judges exercise a crucial role in protecting article 21's guarantee of life and personal liberty through a cautious approach, ensuring that any deprivation of liberty follows a just, fair, and reasonable procedure as mandated by law. Their caution involves upholding due process, preventing arbitrary state actions, and safeguarding fundamental rights, by ensuring impartiality and adherence to legal procedures in all cases, from arrests to trials.

Judges must ensure that any state action to deprive a person of life or liberty is based on a duly enacted law and a procedure that is just, fair, and

reasonable, not arbitrary. Judges must act as impartial referees, making decisions free from personal bias or prejudice to maintain public confidence, in the justice system.

A cautious approach includes preventing unlawful detention, ensuring that individuals are not deprived of their freedom without proper legal justification or adherence to due process. Judges must be vigilant against actions that infringe upon personal liberty. The courts must ensure that every person accused of an offense receives a fair and impartial trial, including the right to legal representation, to be heard, and to present evidence.

While upholding individual rights, judges must also balance them with the need for security and public order, as the right to personal liberty is not absolute.

In the case of **Menaka Gandhi Vs. Union of India, AIR 1978 SC 597** it was held that Article 21 of the Constitution now protects the right of life and personal liberty of citizen not only from the executive action but from the legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with, first, there must be a law and secondly, there must be a procedure prescribed by that law provided that the procedure is just, fair and reasonable.

The Universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India, but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 & 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Sessions Court or High Court to grant bail, if such a person is in custody. The difference of language manifests the sublime

differentiation in the two provisions, and, therefore, there is no justification giving the world 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand.

In the case reported in **Unnikrishnan J.P. Vs. State of A.P., AIR 1993 SC 2178**, the Hon'ble Supreme Court has given the following list of the rights under Article 21 of the Constitution to be treated as rights as to 'personal liberty' :

1) Right to go abroad, 2) Right to privacy 3) Right against solitary confinement 4) Right against bar fetters 5) Right to legal aid 6) Right to speedy trial 7) Right against handcuffing 8) Right against delayed execution 9) Right against custodial violence 10) Right against public hanging 11) Right to medical assistance 12) Right to shelter. 13) Right to sleep 14) Right against noise pollution, (2015) 4 SCC 801 15) Certain other rights also as declared by the Hon'ble Supreme Court in it's subsequent decisions.

**CONTEXT OF BAIL** :

The fundamental principle of our system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. If there is no substantial risk of the accused fleeing the course of justice, there is no reason why he should be imprisoned during the period of his trial. The basic rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice. When bail is refused, it is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution.

In **Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 SC 830 (Note: it was 2G Spectrum Scam Case)** it was held that object of bail not punitive or preventive but to secure appearance of accused at trial : The object

of grant of bail to an accused of an offence is neither punitive nor preventive in nature. The true object behind grant of bail is to secure appearance of accused during trial. It was further held that Bail is the rule, jail exception : While considering an application for bail either under Section 437 or 439 Cr.P.C., the court should keep in view the principle that grant of bail is the rule and committal to jail an exception. Refusal of bail is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution. It was further held that deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after convictions, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earlier times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial, but, in such case 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the constitution that any persons should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty under Article 21 of the Constitution upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

Furthermore, in criminal cases an accused of an offence presumed to be innocent, until his guilt is proved beyond all reasonable doubts. But, presumption of innocence ends with the conviction and sentence by the lower

court and does not continue thereafter: When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it never existed and the sentence is set aside. But, that is not to say that the presumption of innocence continues, after the conviction by the trail court. The conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.

The courts have to consider the facts and circumstances of each case while granting bail or while rejecting bail to an accused of an offence.

In **Kalyan Chandra Sarkar Vs. Rajesh Ranjan (2005) 2 SCC 42** it was held that detention of a person accused of offences, which are non-bailable, during the pendency of trial unless enlarged on bail cannot be questioned as being violative of Article 21 of the Constitution, as it is in accordance with law.

In **Narinderjit Singh Sahni Vs. Union of India, AIR 2001 SC 3810** Where the accused had allegedly deceived millions of countrymen who had invested their entire life's savings in fictitious and frivolous companies promoted by him and thousands of cases were pending against him in different parts of the country, it has been held by the Hon'ble Supreme Court that the accused cannot claim of violation of Article 21 of the Constitution on the ground that he is not being able to be released out of jail in view of different production warrants issued by different courts.

In the cases of **District Registrar & Collector Vs. Canara Bank, AIR 2005 SC 186 and Maneka Gandhi Vs. Union of India, AIR 1978 SC 597** it has been ruled by the Hon'ble Supreme Court that any law interfering with the right as to 'personal liberty' guaranteed to a citizen or non-citizen under Article 21 of the Constitution must be just, fair and reasonable and must satisfy the following tests :

1) It must prescribe a procedure

2) The procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 of the Constitution which may be applicable in a given situation.

3) It must also withstand the tests under Article 14 of the Constitution.

Speedy trial of the cases of under trial prisoners has also been declared by the Supreme Court as their fundamental right under Article 21 of the constitution.

A Constitution Bench of the Hon'ble Supreme Court in the case of **P. Ramachandra Rao Vs. State of Karnataka, (2002) 4 SCC 578 (Seven-Judge Bench)** has laid down that although speedy trial is a fundamental right of an accused/under trial under Article 21 of the Constitution, but, courts cannot prescribe any specific time limit for the conclusion of a criminal trial.

In **Rajesh Ranjan Yadav alias Pappu Yadav Vs. CBI, AIR 2007 SC 451** It was held that speedy trial is implicit in Article 21 of the Constitution. While it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but, at the same time, a balance has to be struck between the right to individual liberty and the interest of the Society. No right can be absolute and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time. The court has also to take into consideration, the other facts and circumstances, such as the interest of the society.

In **Bal Krishna Pandey vs. State of UP, (2003) 12 SCC 186** it was held that in a criminal trial, where there was seven months delay in framing of the charges against the accused, it has been observed by the Hon’ble Supreme Court that in a simple matter of framing of charges, the court should have taken more than seven months to frame the charges, is negation of principles of speedy trial and the grounds on which the case had been adjourned from time to time reflected poorly on the manner in his trial was being conducted. The Apex court directed the court to be careful in future in dealing with such cases and not to take up the cases for framing of charges in such a casual

manner and keep the pending for long periods, while the accused languishes in custody and directed that the accused be released on bail.

In **S. Sant Singh Vs Secretary, Home Department, Government of Maharashtra Mantralaya, 2006 CrLJ 1515 (Bombay...Full Bench)** Bail and Parole distinguished: Parole is a form of temporary release of a changes the mode of undergoing sentence . Parole has nothing to do with the actual merits of the matter i.e. the evidence which has been led against the convicted prisoner, but, parole is granted in cases of emergency like death, illness of near relative or in cases of natural calamity such as house collapse, fire or flood. Bail and parole operate in different spheres and in different situations. The Cr.P.C does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States regulating the grant of parole. Thus, the action of grant of parole is generally speaking as administrative action.

In **Upendra Singh (vs) State of UP, 2012 (77) ACC 801(Allahabad-DB) 10(D)** it was held that no short term bail to attend marriage etc : Where the accused/husband was convicted along with his father for offences u/sec.304-B, 498-A of the IPC and u/s 3 and 4 DP Act and was serving out sentence in jail and meanwhile father/convict was granted bail in appeal by the High Court, the co-accused/husband moved a second application for bail appeal by the High Court for bail him to go from jail to the venue of the marriage in police custody.

A Division Bench of the Hon'ble Allahabad High Court vide its order dated 05.02.2014 passed in Criminal Appeal No. 356/2010, in **Shiv Sagar Rai Vs. State of UP,** granted short term bail (parole) for three weeks to the convict/appeallant who was convicted by the lower court for the offences u/sec. 147, 148, 302/149, 201, 218 IPC to attend marriage of his daughter with the direction to the convict/appeallant to surrender before the CJM, Sonbhadra, after expiry of the said period of three weeks

Bail application cannot be entertained/heard unless the accused is in the custody of the court. If the accused is already lodged in jail under some

order of court, the bail application can be heard and disposed of even without physical appearance/production of the accused before the court. Since the provisions of Sec. 438 Cr.P.C regarding anticipatory bail have been omitted in the State of U.P. vide U.P. Act No. 16 of 1976, so granting bail without seeking custody of the accused would amount to bring in vogue the omitted provisions of Sec. 438 Cr.P.C. Even u/s 88 Cr.P.C., bail cannot be granted to a person without his personal appearance before the court.

In **Devendra Singh Negi Vs. State of U.P., 1993 A.Cr.R. 184 (All)** it was held that the practice of some of the subordinate Magistrates not to permit an accused to surrender, when they make such request and simply ask the Public Prosecutor to report is not proper. When an accused surrenders in court and makes an application stating that he is wanted in the crime, his prayer should be accepted. The practice of postponing surrender application is not fair and cannot be approved. Things may, however, stand differently if the surrender application does not specifically mention that the person surrendering is wanted in a case or that the police may be asked to report, if he is wanted at all.

Relevant Considerations for grant or refusal of bail : Interpreting the provisions of bail contained u/s 437 & 439 Cr.P.C., the Supreme Court has laid down following considerations for grant or refusal of bail to an accused in a non-bailable office:

1) Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

2) Nature of accusation and evidence there for

3) Gravity of the offence and punishment which the conviction will entail

4) Reasonable possibility of securing presence of the accused at trial and danger of his absconding or fleeing if released on bail

5) Character and behavior of the accused

6) Means, position and standing of the accused in the Society

7) Likelihood of the offence being repeated

8) Reasonable apprehension of the witnesses being tampered with

9) Danger, of course, of justice being thwarted by grant of bail

10) Balance between the rights of the accused and the larger interest of the Society/State

11) Any other factor relevant and peculiar to the accused.

12) While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, but if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

**Discussions of evidence/merits of the case in bail order** :

While disposing of bail applications u/s 437/439 Cr.P.C., courts should assign reasons while allowing or refusing an application for bail. But detailed reasons touching the merit of the matter should not be given which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken. Though the court can make some reference to materials but it cannot make a detailed and in-depth analysis of the materials and record findings on their acceptability or otherwise which is essentially a matter of trial. Court is not required to undertake meticulous examination of evidence while granting or refusing bail u/s 439 of the Cr.P.C.

Seriousness of the offence not to be treated as the only consideration in refusing bail : Seriousness of the offence should not to be treated as the only ground for refusal of bail. It was held in **Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 SC 830 (Note: it was 2G Spectrum Scam Case).**

**Bail in altered sections :**

Where the accused was earlier granted bail for the offences u/s 324, 352, 506 IPC but during investigation the offences were altered by the I.O. to Sec. 304 IPC and during trial the charge against the accused was framed for the offence u/s 302 IPC and the Allahabad High Court allowed the accused to continue on bail on his previous bail bonds furnished for the offences u/s 324,

352, 506 IPC, the Supreme Court has held that the High Court illegally ordered the accused to continue to be on bail for the altered offences u/s 304 or 302 IPC on his previous bail bonds as the accused ought to have applied for fresh bail for the offences under the altered penal sections. It was held in **Hamida Vs. Rashid, 2007 CrLJ 3422 (SC)**

**In Sundeep Kumar Bafna Vs. State of Maharashtra, AIR 2014 SC 1745** it was held that the High Court and the Sessions Court u/s 439 CrPC have only the procedural requirement of giving notice of the bail application to the public prosecutor, which requirement is also ignorable if circumstances so demand.

When bail was granted to an accused person in non-bailable offences and on execution of personal bond with sureties, order rejecting surety because he or his estate was situate in a different district is discriminatory, illegal and violative of Art. 14 of the Constitution. Likewise, geographic allergy at the judicial level makes mockery of equal protection of the laws within the territory of India, India is one and not a conglomeration of districts, untouchably apart. It was held in **Moti Ram Vs. State of M.P., AIR 1978 SC 1594.**

**In Pusai Vs. State (NCT) of Delhi, AIR 2004 SC 1184** it was held that where there was delayed release of the accused despite grant of Bail and acceptance of his bonds and sureties by the Court, the Hon'ble Supreme Court issued notice to the Superintendent of jail requiring his explanation and on finding that delay took place on account of certain procedural formalities in giving effect to the bail order and not because of individual's laxity, the notice was withdrawn by the Hon'ble Court.

The Sessions Judges and Addl. Sessions Judges are empowered u/s 439 Cr.P.C. to grant interim bail to an accused of non-bailable offence keeping the bail application pending for disposal on merits. But, interim bail pending hearing of a regular bail application ought not to be passed. Reasons must be recorded by court when adjourning the hearing of bail application and not granting interim bail.

**Cancellation of bail in bailable offences**---

A person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court u/s 482 Cr.P.C. Bail granted to an accused with reference to bailable offence can be cancelled only if the accused---

1) misuses his liberty by indulging in similar criminal activity,
2) interferes with the course of investigation,
3) attempts to tamper with evidence or witnesses,
4) threatens witnesses or indulges in similar activities which would hamper smooth investigation,
5) attempts to flee to another country,
6) attempts to make himself scarce by going underground or becoming unavailable to the investigation agency,
7) attempts to place himself beyond the reach of his surety, etc.

However, these grounds are illustrative and not exhaustive. It was held in **Rasiklal (vs) Kishore (2009) 2 SCC (Criminal) 338**

Only Sessions Judge or High Court and not the Magistrate can cancel bail in bailable offences: An application for cancellation of bail in bailable offences can either be made before the Sessions Court or the High Court and not before the Magistrate as he has no power. It was held in **Madhab Chandra Jena vs. State of Orissa,1988 CrLJ 608 (Orissa..DB),**

**Bail by ASJ under NDPS Act, 1985 :**

When the Special Judge exercises power to grant bail, he is bound by Section 37 of the NDPS Act, 1985. He has to take into account the conditions laid down in Clauses (i) and (ii) of Clause (b) of Section 37(1) of the NDPS Act and if he satisfied that those conditions have been fulfilled, he can release a person on bail under this Section. The other conditions laid down in Section 37 will also apply to him when he intends to grant bail in such a case. It was held in **Union of India Vs. Rattan Mallik, (2009) SCC 624.**

**Bail under Prevention of Corruption Act, 1988 :**

Apart from other relevant considerations, some of the considerations for grant or refusal of bail for the offences under the Prevention of Corruption Act, 1947 would be whether or not the ingredients of Sec. 5 of the Act are fulfilled. These ingredients are---- (i) abuse of position as public servant; (ii) obtaining for himself or for another any valuable thing or pecuniary advantage; (iii) by corrupt or illegal means. It was held in **R. Balakrishna Pillai Vs. State of Kerala, 2003 (46) ACC 837 (SC)**

**Bail under Prevention of Cow Slaughter Act, 1955 :**

Slaughtering of cow in public gauge is a public offence and it offends religious faiths of a section of society and such an act is liable to create communal tension between two communities and would disturb the public tranquility of the area and the harmony between the people of divergent sections of the society would be shattered. Act of cutting cows and calves pertains to public order and the accused has no rights to break law.

**Arrest and detention of a judgment debtor:**

**In Jolly George Varghese v. Bank of Cochin(1980)** the question involved in this case was that whether a person can be imprisoned on the ground that he has failed to discharge his contractual obligations and whether such imprisonment amounts to deprivation of his personal liberty enshrined in Article 21 without fair and reasonable procedure? Article 11 of the International Covenant provides that “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.” It has been held that the arrest and detention of an honest debtor in civil prison, who has no means to pay the debt in absence of malafide and dishonesty violates Article 11 of the International Covenant on Civil and Political Rights and Article 21 of the Constitution.

Arnesh Kumar v. State of Bihar (2014) is a landmark Judgment of Hon’ble Supreme Court that established crucial guidelines to curb arbitrary arrests and protect individual liberty by emphasizing that arrest should be an exception, not a rule, for offenses punishable by imprisonment for a term less

than seven years, including those under Section 498A of the IPC. The ruling mandated that police officers must be satisfied that an arrest is necessary for reasons like preventing evidence destruction or influencing witnesses before making an arrest, as stipulated by section 41 of Code of Criminal Procedure.

**CONCLUSION:**

The right to life and personal liberty has a wide ambit which is only growing overtime. There has been increasing awareness about the various aspects of person's life which he or she is entitled to control and which would, thus, facilitate the enhancement in quality of his or her life. This right has been described as the 'heart and soul' of the constitution of India by the Hon'ble Supreme Court and certainly proves to be so-representing the very basic necessities of human life. The courts are trying to expand the scope and application of Article 21 by scrutinizing its each and every aspect so that no right of citizens could be encroached.

PRESENTED BY:

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# Right to Life & Personal Liberty

**--- Paper submitted by**

**Sri Ch.Kishore Kumar,**

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**Article 21 of the Indian Constitution**:

*"Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."*

- This fundamental right is available to every person, citizens and foreigners also alike.

- Article 21 provides two rights:
  - Right to life
  - Right to personal liberty

- The fundamental right provided by Article 21 is one of the most important rights that the Constitution guarantees.

- The Supreme Court of India has described this right as the **'Heart of Fundamental Rights'**.

- The right specifically mentions that no person shall be deprived of life and liberty except as per the procedure established by law. This implies that this right has been provided against the State only. State here includes not just the government, but also, government departments, local bodies, the Legislatures, etc.

## Personal liberty and Right to Live

Judicial interpretations for the word “Personal Liberty” has been widening by several landmark judgments.

**Important interpretations by Hon’ble Apex court concerned with Article 21:**

1. ***AK Gopalan v. State of Madras AIR 1950 SC 27*** **:** In this case the Hon’ble Supreme court interpreted the ‘Law’ as “State made Law” and rejected the plea that by the term law in Article 21 meant not the stage made law but jus natural or the principles of natural justice. Hon’ble justice Fazal Ali.J, in his dissenting judgment he gave a wide and comprehensive meaning to the words ‘Personal Liberty’ as consisting of freedom of movement and Locomotion.

2. ***Maneka Gandhi v. Union of India Case AIR 1978 SC 597*****: (Passport impound case)** This case overturned the Gopalan case, and widened the scope of the words’ Personal Liberty’ considerably. Hon’ble justice Bhagavathi.J.(as he then was) observed: “ the expression ‘Personal Liberty’ in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the ‘Personal Liberty’ of man and some of them have raised to the status of distinct fundamental rights and a given additional protection under Article 19”. The court also held that a law that comesunder Article 21 must satisfy the requirements under Article 19 as well. That means any procedure under law for the deprivation of life or liberty of a person must not be unfair, unreasonable or arbitrary.

3. ***Francis Coralie v. Union Territory of Delhi AIR 1978 SC 597*****:** In this case, the court held that any procedure for the deprivation of life or

liberty of a person must be reasonable, fair and just and not arbitrary, whimsical or fanciful.

4. **Peoples Union for Democratic Rights v. Union of India AIR 1982 SC 1473**: Following Maneka Gandhi and francis Coralie cases, the Hon'ble Supreme court held that non-payment of minimum wages to the workers employed in varies Asiad projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Article 21.

5. ***OlgaTellis v. Bombay Municipal Corporation (1985) 3 SCC 545*: (Pavement dwellers case) in** this case Hon'ble Supreme court five judge bench has finally ruled that the word 'Life' in Article 21 includes the 'Right to livelihood ' also.

6. ***Unni Krishnan v. State of Andhra Pradesh AIR 1993 SC 2178*:** In this case, the Hon'ble Supreme court upheld the expanded interpretation of the right to life. The Court gave a list of rights that Article 21 covers based on earlier judgments. Some of them are:

    1. Right to privacy (**R.Rajgopal v. State of Tamilnadu(1994) 6 SCC 632**)
    2. Right to go abroad
    3. Right to shelter**( Chameli singh v. State of U.P (1996) 2 SCC 549)**
    4. Right to live with Human dignity
    5. Right to life and livelihood
    6. Right to health and medical assistance **(Paramananda Katara AIR 1989 SC 2039)**
    7. Right to social justice and economic empowerment
    8. Right against hand cuffing ( **Prem Shankar v. Delhi AIR 1980 SC 1535)**
    9. Right against Solitary confinement **(Sunil Bathra v. Delhi administration AIR 1980 SC 1579)**
    10. Right against custodial death**(Jogendar Kumar v. State(1994) 4**

**SCC 260)**

11. Right to pollution-free water and air**( Subhas Kumar v. State of Bihar AIR 1991 SC 420)**
12. Right to education( **Mohini Jain v. State of Karnataka(1992) 3 SCC 666)**
13. Protection of under-trials

## Right to Life and Euthanasia

'Euthanasia' is the practice of intentionally ending life in order to relieve suffering and pain. It is also called 'mercy killing'. Many countries have legalized euthanasia (the Netherlands, Belgium, Colombia, Luxembourg).

There are various types of euthanasia.

- **Passive Euthanasia:** This is where treatment for the terminally-ill person is withdrawn, i.e., conditions necessary for the continuance of life are withdrawn.
- **Active Euthanasia:** This is where a doctor intentionally intervenes to end someone's life with the use of lethal substances.
- This is different from **physician-assisted suicide** where the patient himself administers the lethal drugs to himself. In active euthanasia, it is a doctor who administers the drugs.
- **Voluntary euthanasia:** Under this, euthanasia is carried out with the patient's consent.
- **Non-voluntary euthanasia:** Under this, patients are unable to give consent(coma or severely brain-damaged), and another person takes this decision on behalf of the patient.
- **Involuntary euthanasia:** Euthanasia is done against the will of the patient, and this is considered murder.

**International Position on Euthanasia:-**

In the Netherlands and Belgium, both euthanasia and physician-assisted suicide are legal. In Germany, euthanasia is illegal while physician-assisted suicide is legal. Both euthanasia and physician-assisted suicide are illegal in India, Australia, Israel, Canada and Italy.

## Approach of the Magistrates and Session Judges

Our Constitution specifically empowers the judiciary to protect the human rights in the form of fundamental rights enumerated in our Constitution and in case of any violation of the fundamental rights of the citizens, judiciary has been empowered to protect and restore the same. Generally the approach of Magistrates and Session judges in protecting personal liberty of an individual will start at the stage of registration of FIR. In other words the aspect of protecting personal liberty of an individual will arise at pre-cognizance stage of a criminal case. The magistrates and special courts must exercise their judicial functions judiciously, while remanding accused and granting of bail.

**Presumption of innocence as human right :**

Presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life and liberty, but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefore.

**No detention in police custody beyond 24 hours**

No person who is arrested shall be detained in custody beyond 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the court of the Magistrate. Section 58 of Bharatiya Nagarik Suraksha

Sanhita (BNSS) also provides that no person shall be detained in police custody beyond 24 hours exclusive of the time necessary for journey from the place of arrest to the Magistrate's court for remand u/s 187 BNSS.

**Delayed trial a ground for bail:**

An under trial prisoner cannot be detained in jail to an indefinite period as it violates Article 21 of the Constitution. If the trial is likely to take considerable time and the accused will have to remain in jail longer that period of detention had they been convicted, it is not in the interest of justice that the accuse should be in jail for an indefinite period of time and in that event he should be granted bail u/s 480 or 483 of the BNSS. (State of Kerala v. Raneef, AIR 2011 SC 340)

***Interim Bail :***

The courts have powers U/s 480 and 483 of BNSS to grant interim bail to an accused of non-bailble offence keeping the bail application pending for disposal. The Hon'ble Supreme court in Lal Kamlendra Pratap Singh v. State of U.P approved the decision of Hon'ble Alahabad High court in between **Smt.Amaravathi and others v. State of U.P.**

***Hand cuffing and duty of courts***

A duty has been imposed upon the courts that no under trail prisoner is produced before the courts with hand cuffed. In a case between **In Re v. M.P.Dwivedi and others AIR 1996 SC 2299** a contempt proceeding initiated against a judicial magistrate for unauthorized hand cuffing of under trail prisoner. The Hon'ble Supreme court severely reprimanded for not having observed the guidelines issued by Hon'ble Supreme court in relation to the hand cuffing.

***Duty of courts when the female accused has Baby***

The female prisoners shall be allowed to keep their baby children with them in jail. When the female accused has brought before a magistrate for remand, while remanding the female accused the court must issue direction to the jail authorities for proper feeding and well being of the baby in jail**.( R.D.Upadhyay v. State of A.P and others AIR 2006 SC 1946)**

***No direction fixing time limit for disposal of criminal trials***

A Constitution Bench of the Hon'ble Supreme Court in the case of **P. Ramachandra Rao Vs. State of Karnataka, (2002) 4 SCC 578 (Seven-Judge Bench)** has laid down that although speedy trial is a fundamental right of an accused/under trial under Article 21 of the Constitution, but courts cannot prescribe any specific time limit for the conclusion of a criminal trial.

***Conclusion:-***

The interpretation and scope of Article 21 have evolved through various landmark judgments of the Hon’ble Supreme Court, expanding its ambit to include protection against torture, custodial violence, and the right to healthy environment. It's important to note that reasonable restrictions can be imposed on the rights guaranteed under Article 21 in the interests of public order, national security, public health, or morality. However, such restrictions must be fair, just, and in accordance with the principles of reasonableness and proportionality.

***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 and d) Power to modify conditions of bail.***

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# BAIL—COMPARATIVE STUDY OF Cr.PC, 1973 AND BNSS,2023

## Constitutional Foundations of Bail

The right to bail, as a facet of Article 21 of the Constitution of India, has evolved through statutory codification and judicial interpretation. The Code of Criminal Procedure, 1973 (CrPC), and now, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), codify procedural provisions regulating the arrest, detention, and release of accused persons.

Article 21 of the Constitution guarantees the right to life and personal liberty. Bail serves as a mechanism to ensure that this liberty is not arbitrarily curtailed prior to conviction. ***In Sanjay Chandra v. CBI, [(2012) 1 SCC 40],*** the Honourable Supreme Court held that bail is not to be withheld as a punitive measure. Pre-trial detention, it emphasized, must be justified by necessity and not merely on apprehension or public pressure. Honourable Supreme Court comprehensively elaborated on the fundamental objective of bail, emphasizing that its primary purpose is to ensure the accused's appearance at trial, and not to serve as a form of punishment or preventive detention. Honourable Apex Court underlined that the deprivation of liberty must be treated as a punishment only after a person is found guilty through due process, and until then, every accused is presumed innocent. Detention pending trial, unless absolutely necessary, causes undue hardship and contradicts

the constitutional guarantee of personal liberty under Article 21. The Apex Court stressed that “necessity” is the operative test for pre-trial custody, and that mere apprehensions, such as the belief that the accused might tamper with evidence or witnesses should not justify denial of bail except in the most extraordinary circumstances. Furthermore, the Honourable Apex Court cautioned against using pre-conviction imprisonment as a tool to express disapproval of the accused’s past conduct or to give a pre-trial taste of punishment. It was also observed that imprisonment before conviction inevitably carries a punitive character and should not be imposed to serve moral or deterrent ends. The judgment reaffirmed that bail decisions must be grounded in legal necessity alone, keeping in mind the presumption of innocence and the right to liberty until guilt is conclusively established.

Reaffirming this position, Honourable Apex Court in the recent case of **Jalaluddin Khan v. Union of India, (2024)8 S.C.R. 633** reiterated the principle that “bail is the rule and jail is the exception.” The Apex Court sought to strike a balance between an individual’s right to personal liberty and the interests of criminal justice.

Currently, the provisions relating to bail and bonds are codified under Chapter XXXV of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as the BNSS). This chapter comprehensively deals with various aspects of bail, including bail in bailable and non-bailable offences, the grant of bail to under trial prisoners, and the execution of bonds.

**Meaning of Bail**

The term ‘bail’ is derived from the French word ‘baillier’ which means ‘to give away or deliver’. Bail is “the setting free of the accused by releasing him from the custody of law and entrusting him to the custody

of his sureties who are liable to produce him to appear for his trial at a specific date and time."

**According to Section 2 (1) (b) of the BNSS,** the term 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."

## MANDATORY BAIL/STATUTORY BAIL

### Bail in bailable offence

According to Section 2(1)(c) BNSS "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force. An accused can claim bail as a matter of right if he is accused of committing a bailable offence.

Thus, in bailable offences, it is the duty of the police officer or the court to intimate the accused about his right to get bail.

Section 478 BNSS and Section 436 of CrPC provides for in what cases bail to be taken and as per this, bail can be granted provided following conditions are fulfilled:

• When any person other than a person accused of a non-bailable offence

• Is arrested or detained without warrant by an officer in in charge of a police station, or appears or is brought before a Court,

• If he is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail.

• Then such person shall be released on bail.

Therefore, Section 478 BNSS (Section 436 of CrPC) is mandatory in nature and the court or the police have no discretion in the matter. Any

accused person arrested for a bailable offence willing to provide bail must be released.

**Case of Indigent Person:** Proviso to the Section further provides that such officer or Court:

• if he or it thinks fit, may, and

• shall, if such person is indigent and is unable to furnish surety, the courts shall release him on his execution of a bond without sureties.

Explanation to the Section further clarifies that where a person is unable to give bail bond within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

Section 478(2) BNSS (Section 436(2) CrPC) allows the Court to refuse bail to a person who has previously violated the conditions of their bail bond, such as failing to attend court at the designated time and place, if they appear before the Court again in the same case, or are brought before the Court in custody.

In **Rasiklal v. Kishore ,AIR 2009 SC 1341** case, the Honourable Supreme Court held that the right to bail for bailable offences is an absolute and in-defeasible right and no discretion can be exercised as the words of Section 436 Cr.P.C are imperative and the person accused of an offence is bound to be released as soon as the bail is furnished.

# DEFAULT BAIL

## Evolution of Provisions on Statutory Bail in India: A Comparative Analysis of CrPC, 1973 and BNSS, 2023

The concept of statutory or default bail, embedded within India's criminal procedural law, reflects a delicate equilibrium between investigative efficiency and individual liberty. It arises when the investigating agency fails to complete the investigation within the statutorily prescribed period, thereby triggering the right of the accused to seek release on bail. Governed by Section 167(2) of the Criminal Procedure Code, 1973 (CrPC) and now correspondingly reflected in Section 187 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), this provision has undergone significant evolution both legislatively and through judicial interpretation.

## Statutory Bail under Cr.P.C, 1973: A Historical Perspective Legislative Origin

Section 167 of the CrPC, 1973 was designed to limit arbitrary and prolonged detention during the investigative stage. It stipulated that upon failure to complete the investigation within 24 hours, the police must produce the accused before a Magistrate. The Magistrate could then authorize either police custody or judicial custody, subject to stringent time limits. In particular:

• **Police custody** could be granted for a maximum of 15 days.

• **Judicial custody** could extend up to **60 days for lesser offences and 90 days for offences punishable with death, life imprisonment, or imprisonment not less than ten years.**

• On expiry of these limits, the accused acquired an **unqualified right to be released on bail under Section 167(2) proviso, if they furnished bail.**

**Evolution through Judicial Interpretation of Section 167 (2) of CrPC:**

The Honourable Apex court in ***CBI v. Anupam J.Kulkarni 1992(3) SCC 141*** firmly held that police custody was limited to intial 15 days following arrest. Honourable Apex Court in ***Budh Singh Vs State of Punjab, (2000) 9 SCC 266*** reiterated this position.

However in, CBI **v. Vikas Mishra (Criminal Appeal No. 957/2023**), the Court hinted at reconsideration of the rigid interpretation of the 15-day limit, especially in light of complex economic offences. The landmark shift came in **V. Senthil Balaji v. The State 2023 SCC OnLine SC 934,** where the Honourable Supreme Court observed:

“The period of 15 days being the maximum period would span from time to time with the total period of 60 or 90 days as the case may be… the proviso merely reiterates the maximum period of 15 days, qua a custody in favour of the police while there is absolutely no mention of the first 15 days alone for the police custody.”

This judgment permitted split custody, allowing the 15-day police custody to be availed in non-continuous spells within the overall remand period (60/90 days), thereby departing from the earlier restrictive interpretation.

**The Shift to Section 187 (2) of BNSS, 2023**

**Section 187 of BNSS: Wording and Intent**

Following the Judicial shift in Senthil Balaji, the BNSS, 2023, introduced to replace the CrPC, encapsulated the logic of split custody. Section 187(2) BNSS provides that:

“The Magistrate may authorize police custody of the accused in whole or in part during the first forty or sixty days, as the case may be.”

This statutory language reflects the reasoning in **Senthil Balaji, thereby legitimising non-continuous and staggered police custody** within the overall 60/90-day investigation period. It no longer confines the 15-day window to the first 15 days post- arrest.

Section 187 (2) BNSS now permits 15 days of police custody to be spread over 40 or 60 days, a significant departure from the CrPC’s Section 167, which mandated continuous custody within the first 15 days.

Earlier in the Cr.P.C Section 167 (2) proviso (a)(i) laid down the criteria for maximum period of detention during investigation as 90 days and 60 days respectively depending upon the quantum of punishment prescribed in the respective offences which is summarized below:

• Ninety days, if the offence is punishable with death, life imprisonment, or imprisonment for a term of not less than ten years.

• Sixty days, if the investigation relates to any other offence.

Application of this Section 167(2) proviso (a)(i) Cr.PC to different offences mentioned in the IPC is very important since only after the expiry of 60 or 90 days, as the case may be, the accused became entitled to default bail, provided they are prepared to furnish bail with sureties.

In the newly enacted BNSS under Section 187, lays down a procedure similar to Section 167 Cr.P.C for situations where the investigation cannot be completed within 24 hours of arrest. Specifically, Sub-Section (3) of Section 187 corresponds to Section 167(2) of the Cr.P.C, and forms the crux of the legal discussion.

When Section 167(2) Proviso (a)(i) of Cr.P.C is read with Section 187(3)(i) of BNSS it may seen that the phrase "……for a term not less than 10 years…" has been replaced with "….. for a term of 10 years or more." So, at this juncture the question arises that whether the effect of new terminology in place of "……for a term not less than 10 years…" to "….for a term of 10 years or more" makes any difference in the application of 90 days period to different offences under Bharatiya Nyaya Sanhita or not? In this connection, a bare reading of both Section 167(2) Proviso (a)(i) of Crpc to Section 187(3)(i) of BNSS show that both remain one and the same with mere slight change of wordings.

In the case of **Hyder Ali v. State of Karnataka,** Writ Petition No. 33526 of 2024 (dated 13th December 2024) Honourable Karnataka High court have observed that this is merely a change in expression, not in substance. In the considered view of Court, it is only a play of words. Both phrases imply that the offence must carry a minimum punishment of ten years to attract the 90-day period. Therefore, the legal effect remains the same under both statutes.

Having arrived at the conclusion that Proviso to Section 167(2)(a)(i) and Section 187(3)(i) are one and the same thing it becomes important to refer to the case of **RAKESH KUMAR PAUL v. STATE OF ASSAM (2017) 15 SCC 67** wherein application of 60 days and 90 days period has been dealt.

• Section 167 (2)(a)(i) of code is applicable only in cases where the accused is charged with (i) offences punishable with death and any lower sentence; (ii) offences punishable with life imprisonment and any lower sentence and (iii) offences punishable with minimum sentence of 10 years.

.• In all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then section 167(2)(a)(ii) will apply and the accused will be entitled to grant of default bail after 60 days in case charge sheet is not filed.

**Relevant Case Laws:**

1. **Sanjay Dutt vs State through C.B.I. Bombay (II) (1994) 5 SCC 410**:

Whether the indefeasible right of the accused to default bail under Section 167 (2) Cr.PC (Section 187 (2) BNSS), if not already availed of, remains enforceable even after filing of charge sheet ?

The Honourable Apex Court answered thus:

48. - The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 (Section 187 BNSS) but by different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC (Section 187 BNSS) ceases to apply.

2. **M Ravindran Vs Intelligence Officer-Directorate of Revenue Intelligence (2021) 2 SCC 485**

Interpreting Section 167(2) CrPC, the Honourable Apex Court has said that the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21. It said,

“The history of the enactment of Section 167(2), CrPC and the safeguard of ‘default bail’ contained in the Proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law.”

3,. State v. T. Gangi Reddy, (2023) 4 SCC 253

Whether a person released on default bail under Section 187 BNSS [167(2) CrPC] can have such bail cancelled on merits after the subsequent filing of a charge sheet disclosing the commission of a serious non-bailable offence, in light of Sections 437(5) Crpc and 439(2) CrPC]?

In the case of **State v. T. Gangi Reddy, reported in (2023) 4 SCC 253,** the Hon’ble Supreme Court dealt with the issue of cancellation of default bail granted under Section 167(2) of the CrPC. holding that if an accused is released on default bail and subsequently a strong case is made out through the charge sheet establishing commission of a non-bailable offence, then the bail can be cancelled on merits under Sections 437(5) and 439(2). However, it cautioned that mere filing of the charge sheet is not sufficient; a strong case must be made out justifying custody.

## BAIL TO UNDER TRIAL PRISONERS

The BNSS has also laid down the maximum period for which the under trial prisoners can be detained. Section 479 of the BNSS (Section 436A CrPC) covers the provisions for the bail to the under trial prisoners,

subjected to a time period for which they have been detained. According to the said Section, if the person is not accused of an offence punishable with death or life imprisonment as one of its punishments, he shall be released on bail if he has been detained for (a) 1/2nd of the maximum punishment or

(b)where the under trial is a first-time offender with no prior conviction, and has undergone detention for the period extending up to one-third of the maximum period of imprisonment for such offence or

(c) where the under trial has undergone the maximum period of imprisonment provided for the said offence.

If there are multiple criminal cases pending against the accused, the court shall not grant bail to the accused but the court shall always consider that no person can be detained for the time period exceeding the maximum punishment given for the offences.

In **Dipak Shubhashchandra Mehta vs. C.B.I., AIR 2012 SC 949** case, the Supreme Court laid down that when the under trial prisoners are detained in jail custody to an indefinite period then it's a violation of Article 21 of the Constitution of India but the court granting bail should exercise its discretion in a judicious manner and not as a matter of course.

**In Policy Strategy for Grant of Bail, In re, (2024) 10 SCC 685**

Honourable Apex Court gave certain directions with regard to cases arose from concerns over under trial prisoners remaining in custody despite being granted bail, mainly due to their inability to furnish bail bonds or comply with conditions.

(1) The court which grants bail to an under trial prisoner/convict would be required to send a soft copy of the bail order by email to the prisoner through the Jail Superintendent on the same day or the next day. The

Jail Superintendent would be required to enter the date of grant of bail in the e-prisons software (or any other software which is being used by the Prison Department).

(2) If the accused is not released within a period of 7 days from the date of grant of bail, it would be the duty of the Superintendent of Jail to inform the Secretary, DLSA who may depute paralegal volunteer or jail visiting advocate to interact with the prisoner and assist the prisoner in all ways possible for his release.

(3) NIC would make attempts to create necessary fields in the e-prison software so that the date of grant of bail and date of release are entered by the Prison Department and in case the prisoner is not released within 7 days, then an automatic email can be sent to the Secretary, DLSA.

(4) The Secretary, DLSA with a view to find out the economic condition of the accused, may take help of the Probation Officers or the paralegal volunteers to prepare a report on the socio-economic conditions of the inmate which may be placed before the court concerned with a request to relax the condition(s) of bail/surety.

(5) In cases where the under trial or convict requests that he can furnish bail bond or sureties once released, then in an appropriate case, the court may consider granting temporary bail for a specified period to the accused so that he can furnish bail bond or sureties.

(6) If the bail bonds are not furnished within one month from the date of grant of bail, the Court concerned may suo motu take up the case and consider whether the conditions of bail require modification/relaxation.

(7) One of the reasons which delays the release of the accused/convict is the insistence upon local surety. It is suggested that in such cases, the courts may not impose the condition of local surety."

## BAIL IN NON-BAILABLE OFFENCE

Bail in non-bailable offenses is covered under Section 480 of the BNSS and Section 437 Cr.PC.. These sections grant discretion to the court other than Honourable High Court or court of sessions to release an accused. While not an absolute right bail can be granted if there are no

reasonable grounds to believe a non bailable offence was committed, or in cases involving women, children, sick, or infirm persons. However,bail is typically refused for offences punishable by death or life imprisonment, unless the accused falls under the specific exceptions or there are insufficient grounds for belief in guilt.

The section also covers the imposition of conditions under which the court may grant bail to the accused of offence effecting the human body or offences against the state or offences against the property or of abetment of said offences

There are also certain special conditions under which the court may grant bail to the accused person. Firstly, if the trial is not concluded within sixty days from the first date fixed for taking evidence and secondly, when the court before passing a judgment believes that the accused person is not guilty of the offence, may grant bail to the accused person.

**Relevant Case Law**

In **Sanjay Chandra Vs CBI, 2012 (1) SCC 40 case**, the Supreme Court laid down that while considering an application for bail under Section 437 Cr.PC and Section 439 Cr.PC, severity of punishment and gravity of alleged offence both needs to be taken into consideration. The court is required to maintain a balance between the right to liberty and securing the presence of an accused at trial. Bail is not a rule but an exception so bail must be refused only in extraordinary circumstances.

In ***Prahalad Singh Bati vs N.C.T, Delhi(2001) 4 SCC 280*** Honourable Apex court held that in cases where the offence is punishable with death or imprisonment for life which is triable exclusively by a court of sessions, the Magistrate may, in his wisdom,refrain to exercise the

powers of granting the bail and refer the accused to approach the higher courts unless he is fully satisfied that there is no reasonable ground for believing that accused has been guilty of an offence punishable with death or imprisonment for life.

## ANTICIPATORY BAIL

Anticipatory bail is given to the person who is apprehending arrest and can only be granted by the Honourable Session court or the Honourable High court. According to Section 482 of the BNSS (Section 438 of Cr.PC), if any person believes that he may be arrested for any non-bailable offence, he may apply to the Honourable 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. Anticipatory bail represents a vital legal mechanism for the protection of individual liberty, allowing a person to seek pre-arrest bail in anticipation of being arrested for a non-bailable offence. Rooted in the recognition that arrest may be misused as an instrument of oppression or harassment, this provision has been a cornerstone of India's criminal jurisprudence system.

In the case of **Pratibha Manchanda v. The State of Haryana, (2023) 8 SCC 181** 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.

In **Balchand Jain v. State of M.P., 1977 SCR (2) 52**, 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…"

It was in the case of **Gurbaksh Singh Sibbia and Ors. v. State of Punjab, (1980) 2 SCC 565,** 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 Honourable Supreme Court laid down the following principles with regard to anticipatory bail:

1) 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

2) 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.

3) Filing of FIR is not a condition precedent to exercise of power under Section 438.

4) Anticipatory bail can be granted even after filing of FIR, as long as the applicant has not been arrested.

5) 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.

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

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

8) 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.

9) 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.

## SPECIAL POWERS OF SESSION COURT

Under Section 483 of the BNSS (Section 439 of CrPC), the Session Court have special powers in the matter of bail. Under the said Section, courts have power,

• To impose any condition if the person is accused of offences affecting the human body or of offences against the state or of offences against property or of abetment of the said offences.

• To set aside or modify any condition imposed by the magistrate while granting bail.

• To notify the public prosecutor regarding the bail application and to seek presence of the informant while hearing bail application for the offence under Section 65 BNS (Sections 376(3) and 376 AB IPC) and 70(2) of the BNS, 2023 (Section 376 DB).

• To direct the arrest of any person released on bail.

### BAIL IN ECONOMIC OFFENCES

Economic offences constitute a class apart having deep rooted conspiracies and involving huge loss of public funds and considered as

grave offence affecting the economy of court as a whole and thereby posing serious threat to the financial health of the country. Relevant considerations such as the gravity of the offence, the object of the Special Act, and the attending circumstances—along with the period of sentence—are all material factors while deciding bail matters in economic offences.

In ***Satender Kumar Antil vs. C.B.I.& Anr. (2022) 10 SCC 51*** Honourable Apex Court discussed that the right to bail is not to be denied merely because of the sentiments of the community against the accused. The Court must not lose sight of the fact that the investigating agency has already completed the investigation and the charge-sheet has been filed before the Special Judge. Therefore, continued custody of the accused may not be necessary for further investigation.

**Bail Under Special Laws:**

Special Sessions Judge are appointed to preside over Special Courts established to deal with specific categories of offences, such as those under the Prevention of Corruption Act, 1988, the Protection of Children from Sexual Offences (POCSO) Act, 2012 or the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985. The powers of special Sessions Judge are often tailored to the specific legislation under which they operate. The Special Laws often contain more stringent bail provisions than the general law. For Example, under the NDPS Act, the Court can grant bail only if it is satisfied that there are reasonable grounds for believing that the accused is not guilty of offence and is not likely to commit any offences while on bail. The Special Sessions Judge has a duty to interpret and apply the bail provisions of special law in a manner that upholds its legislative intent.

# Grounds on which bail can be granted /rejected

## Constitutional Framework and Fundamental Rights

The constitutional foundation for bail jurisprudence rests primarily on Article 21, which has been interpreted expansively by the Honourable Supreme Court to encompass various dimensions of personal liberty. The courts have consistently held that the right to bail, while not explicitly mentioned in the Constitution, derives from the broader guarantee of personal liberty and the presumption of innocence until proven guilty.

The Honourable Supreme Court has emphasized that the object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. This principle establishes that pre-trial detention should serve only the limited purpose of securing the accused's presence during trial proceedings.

## Object and Philosophy of Bail

The Honourable Supreme Court's decision in **Sanjay Chandra v. Central Bureau of Investigation (2012) 1 SCC 40** provides crucial guidance on the fundamental philosophy underlying bail jurisprudence. The Court observed that "In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon". This pronouncement establishes several fundamental principles that guide bail jurisprudence:

## Judicial Considerations for Granting/Rejecting Bail

**Assessment of Crime Gravity and Accused's Role**: Courts must understand the seriousness of the alleged offence and the specific role attributed to the accused before making arrest or bail decisions. This evaluation helps determine whether the circumstances warrant pre-trial detention or whether release on bail would be appropriate.

**Previous Criminal Record**: The court examines any prior convictions, particularly for non-bailable offences, as this history may indicate the likelihood of repeat offences or non-compliance with bail conditions. However, previous accusations without convictions should not automatically prejudice bail considerations.

**Flight Risk Assessment**: Courts evaluate the probability that the applicant might flee from justice, considering factors such as the accused's roots in the community, family ties, employment status, and financial circumstances that might influence their willingness to abscond.

**Potential for Repeat Offences**: The assessment includes evaluating whether releasing the accused might lead to similar or other criminal activities, particularly in cases involving ongoing criminal enterprises or patterns of behaviour.

**Motivation Behind Accusations**: Courts must discern whether the accusations stem from genuine criminal activity or represent attempts to injure or humiliate the applicant through wrongful arrest and detention. This consideration helps prevent misuse of criminal law for personal vendettas.

**Specific Role Analysis**: Beyond general involvement, courts examine the precise role attributed to each accused person, recognizing that different levels of culpability may warrant different bail considerations.

**Evidence Tampering Concerns**: Courts assess reasonable apprehensions regarding the accused's potential to tamper with evidence, intimidate witnesses, or threaten complainants if released on bail.

## Imposition of conditions while granting bail

### Legal Framework Governing Bail Conditions

### Statutory Provisions Under the Criminal Procedure Code and Bharatiya Nagarik Suraksha Sanhita (BNSS)

The Code of Criminal Procedure, 1973 (CrPC) and Bharatiya Nagarik Suraksha Sanhita (BNSS) provides a comprehensive framework for bail-related proceedings through various provisions that delineate the powers, procedures, and limitations governing judicial discretion in bail matters.

**Section 437 of the Cr.PC and Section 480 of BNSS** establishes the foundational principles for granting bail in non-bailable offences. This provision empowers courts to release accused persons on bail while maintaining judicial discretion to impose necessary conditions. The section specifically addresses situations where the accused faces charges carrying potential punishment of seven years or more imprisonment, or offences under specific chapters of the Indian Penal Code.

Sub-section (3) of Section 437 and Sub Section (3) of 480 BNSS and mandates specific conditions for certain categories of offences, requiring that released persons: (a) attend court proceedings in accordance with bond conditions; (b) refrain from committing similar offences; and (c) avoid any direct or indirect inducement, threat, or promise to persons acquainted with case facts that might dissuade them from disclosing information to the court or police, or tampering

with evidence.

**Section 438 of the Cr.PC and Section 482 of BNSS** governs anticipatory bail, enabling individuals who reasonably apprehend arrest for non-bailable offences to seek pre-arrest bail.

**Section 439 of the Cr.PC and Section 483 of BNSS** confers special powers upon the High Court and Court of Sessions regarding bail matters. Under Section 439(1)(b), the High Court or the Court of Sessions can exercise modification and deletion in bail conditions imposed by magistrates when releasing an accused on bail. This provision establishes a hierarchical system of judicial review and ensures that bail conditions remain reasonable and proportionate**.**

The judicial duty encompasses ensuring that bail conditions remain consonant with the statutory framework's intent and provisions. Courts must avoid imposing conditions that are impractical, unfair, or disproportionate to the circumstances of the case and the accused individual.

**Legitimate Purposes for Bail Conditions**

Courts may impose conditions that serve specific legitimate purposes within the criminal justice framework. These include:

**Securing Court Attendance**: Conditions may be designed to ensure the accused's regular attendance at court proceedings, including requirements for periodic reporting to designated authorities or restrictions on travel without court permission.

**Preventing Flight**: Reasonable restrictions on movement to remain within specified geographical boundaries may be imposed to prevent the accused from fleeing jurisdiction.

**Evidence Protection**: Conditions may prohibit direct or indirect contact

with witnesses, complainants, or other persons connected to the case to prevent evidence tampering or witness intimidation.

**Investigation Cooperation**: Requirements for the accused to cooperate with investigating authorities, appear for questioning when summoned, or provide necessary documents may be imposed.

**Limitations on Condition Imposition**

The Supreme Court has established clear boundaries regarding the types and extent of conditions that may be imposed during bail proceedings. In the landmark case of **Munish Bhasin and Others v. State (Government of NCT of Delhi) and Another (2009) 4 SCC 45**, the Honourable Apex Court addressed the issue of onerous bail conditions in a domestic violence case.

The Honourable Apex Court held that “It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all”.

The Honourable Apex Court further emphasized that “While imposing conditions on an accused who approaches the court under Section 438 of the Code, the court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the Code”.

## Power to modify conditions of bail

The fundamental right to life and personal liberty enshrined in Article 21 of the Indian Constitution stands as a cornerstone of individual freedom within the democratic framework. Article 21 declares that “No person shall be deprived of his life or personal liberty except according to procedure established by law”, establishing an inviolable protection for every citizen against arbitrary detention and unwarranted restrictions on personal freedom. This right also forms the basis for judicial scrutiny in matters involving modification and deletion in bail conditions, ensuring that such conditions do not disproportionately infringe on personal liberty.

When an individual transgresses the boundaries of law, the state machinery responds with legal consequences that may involve the curtailment of personal liberty. However, the deprivation of freedom pending trial raises profound constitutional and humanitarian concerns. The criminal justice system recognizes that pre-trial detention should not become a form of punishment before guilt is established, leading to the development of comprehensive bail jurisprudence that balances individual liberty with societal interests, including through mechanisms for modification and deletion in bail conditions when circumstances evolve.

The courts are mandated to consider multiple factors when determining bail applications for non-bailable offences. These considerations encompass the nature and gravity of the alleged offence, the character and antecedents of the accused, the quality of evidence presented, circumstances unique to the accused individual, reasonable apprehension regarding witness tampering or intimidation, broader public interest, and the maintenance of law and order. This multifaceted

assessment ensures that bail decisions are neither arbitrary nor prejudicial to either the accused or the prosecution.

## Modification and Deletion of Bail Conditions

### Statutory Framework Under Section 439 of Cr.P.C. and Section 483 of BNSS

**Under Section 439 of Cr.P.C. and Section 483 of BNSS,** the Court of Sessions or Honourable High Court has the power to modify or set aside certain bail conditions on reasonable grounds. This provision reflects the principle of modification and deletion in bail conditions, recognizing that circumstances may change during the pendency of criminal proceedings, thereby necessitating adjustments to previously imposed conditions in the interest of justice.

The power to modification and deletion in bail conditions serves several important functions within the criminal justice system:

**Adaptation to Changed Circumstances**: As cases progress and new information becomes available, previously imposed conditions may become unnecessary, inappropriate, or unduly burdensome.

**Correction of Excessive Conditions**: Superior courts may review and modify conditions imposed by lower courts that exceed reasonable bounds or serve no legitimate purpose.

**Recognition of Compliance**: If the accused is able to satisfy the court that he has followed all the bail conditions and cooperated with the police or investigating authorities then the court may modify or relax the bail conditions.

### Grounds for Modification and Deletion in Bail Conditions

Courts consider various factors when evaluating applications for modification of bail conditions:

**Demonstrated Compliance**: The accused's track record of adhering to existing bail conditions and cooperating with legal proceedings demonstrates reliability and may justify relaxation of restrictions.

**Changed Personal Circumstances**: Significant changes in the accused's personal, professional, or family circumstances may necessitate modification of travel restrictions or other conditions.

**Progress of Investigation**: As investigations advance and evidence is secured, concerns about evidence tampering or witness intimidation may diminish, justifying relaxation of related conditions.

**Proportionality Assessment**: Courts may reconsider whether existing conditions remain proportionate to the charges and circumstances of the case.

## Travel Restrictions and Their Modification

### Constitutional Right to Travel

The right to travel, both within the country and abroad, has been recognized as an integral component of personal liberty under Article 21 of the Constitution. However, this right is not absolute and may be reasonably restricted in the interests of justice and public order.

Courts often impose travel restrictions as bail conditions to ensure the accused's availability for trial proceedings and prevent flight from justice.

## Judicial Approach to Travel Restriction Modification

Courts have developed a balanced approach to modifying travel restrictions that recognizes both the need for ensuring the accused's presence and their legitimate personal and professional requirements.

**Professional and Business Necessities**: Courts acknowledge that many accused persons have professional obligations or business interests that may require travel. The Honourable Gujarat High Court addressed this issue in **IMTIYAZ ABDULLA CHAKKIWALA & 2 v. STATE OF GUJARAT & 1 (CR.MA/3236/2012)**.

In this case, “the accused had to travel often outside of India for the business purposes, the court held to relax and modify the conditions and held that whenever applicant leaves the country and travels abroad, he will inform the Directorate of Revenue Intelligence in advance and the condition imposed shall remain in abeyance and, thereafter, it will be revived automatically”.

## Contemporary Judicial Trends and Recent Developments

### Supreme Court’s Enhanced Scrutiny of Bail Conditions

Recent Honourable Supreme Court decisions have demonstrated increased vigilance regarding excessive or inappropriate bail conditions. The Apex Court has consistently emphasized that bail conditions must serve legitimate procedural purposes rather than operating as disguised forms of punishment or social engineering.

**Prohibition of Social Engineering**: Courts have rejected attempts to use bail conditions as vehicles for imposing moral or social obligations unrelated to the criminal proceedings. The Supreme Court’s decision in **Aparna Bhat v. State of Madhya Pradesh 2021 SCC Online SC 230** specifically addressed this issue in the context of sexual offence cases.

## Excessive Bail is no Bail – Honourable Supreme Court Relaxes Bail Conditions

The Hon'ble Supreme Court, in its landmark decision in ***Girish Gandhi v. State of Uttar Pradesh & Ors*****,** Writ Petition (CRIMINAL) NO. 149 of 2024 decoded the validity of conditions imposed while granting bail and whether the sureties furnished by the accused can benefit all the cases filed against him.

**Held**

- The Honourable Supreme Court, relying on its decision in the case of ***Hani Nishad @ Mohammad Imran @ Vicky v. The State of Uttar Pradesh*****,** granted partial relief to the petitioner and relieved him from producing local surety in the concerned bail orders.
- The Honourable Apex Court recognized the practical difficulties faced by the petitioner in furnishing multiple sureties across different states. It acknowledged the potential infringement of his fundamental rights under Article 21 of the Constitution of India. The Court directed that for each state, the petitioner would furnish a personal bond of Rs. 50,000 and two sureties of Rs. 30,000 each. This consolidated surety would apply to all FIRs within the respective state, effectively allowing the same set of sureties to cover multiple bail orders in the concerned state. The Court also waived the condition of providing a local surety in Rajasthan, acknowledging the undue burden it placed on the petitioner.
- The Honourable Supreme Court observed that a surety is a person who takes on responsibility for someone else's actions, and finding sureties for criminal cases can be difficult. In this

case, the accused was a resident of Haryana, and thus, producing a local surety in the State of Rajasthan would be an arduous task. Reliance was placed on the case of ***Moti Ram and Ors. v. State of Madhya Pradesh*** and *In* ***Re Policy Strategy for Grant of Bail***, wherein it has been decided that if delays in the release of an accused can be attributed to the condition of a local surety, the courts may not insist upon such a condition.

- The Honourable Supreme Court discussed the principle that excessive bail is no bail, and if onerous conditions are imposed on the bail, then it takes away the freedom granted to the accused. It placed reliance on its own decision in the case of ***Satender Kumar Antil v. Central Bureau of Investigation & Anr.,*** which observed that the imposition of impossible conditions on release orders can defeat the very purpose of such orders.

**Conclusion:**

The powers and duties of Magistrates, Sessions Judges and Special Sessions Judges concerning bail are a cornerstone of Indian Criminal Justice System. The proper exercise of powers, guided by a careful consideration of the facts and law, is essential to balance the fundamental right to liberty with the need for a safe and orderly society.

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# PAPER PRESENTATION ON POWER AND DUTIES OF MAGISTRATE, SESSIONS JUDGES AND SPECIAL SESSIONS JUDGES PERTAIN TO BAILS

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## a) DEFAULT BAIL :-

1.Meaning & object :- Default bail, or compulsive bail, is the indefeasible right of an accused person to be released on bail when the investigating agency fails to complete its investigation and file a charge-sheet within the statutory time limit, typically 60 or 90 days, under Section 167(2) of the Indian Criminal Procedure Code. This right is considered a fundamental right stemming from Article 21 (Right to Life and Personal Liberty) of the Indian Constitution, and it accrues to the accused.

**Sec.167 Cr.P.C :-**

The right to default bail is enshrined in section 167(2) of the Code of Criminal Procedure. It is granted when the police or investigating agency fails to complete the investigation within the stipulated time period and file the charge-sheet. Stipulated period is **60 days**: For offences punishable with imprisonment for less than ten years and **90 days**: For offences punishable with death or imprisonment for ten years or more.

The right to claim default bail under Section 167 is deemed to be an indefeasible right. This was established in the case of **Suresh Kumar Bhikamchand Jain v. State of Maharashtra**. The Apex Court held that in case the 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 charge

sheet being filed would be considered an illegal act. In the case of **Uday Mohan Acharya v. State of Maharashtra**, the Supreme Court observed in Paragraph 17.1 that, “The history of the enactment of Section 167(2) CrPC and the safeguard of ‘default bail’ contained in the proviso thereto is intrinsically linked to Article 21.

The Supreme Court amplified the significance of the right to default bail in its observations in the case of **S Kasi v State**. In this case, the accused was in custody and the police failed to file charge sheet within the stipulated time-frame. Upon the accused person’s application for the grant of default bail, the Madras High Court dismissed the application, reasoning that since during the custody period, there was the imposition of lockdown due to the pandemic, the existing law and the social reality was akin to the proclamation of Emergency. Thus, the non-filing of the charge sheet upon the lapse of time cannot avail the accused the right to default bail as the circumstances were unprecedented. However, the Supreme Court in this case differed from the High Court ruling. The Court held that even in the so-called emergency scenario, the right to default bail cannot be suspended as the same is deemed to be inherently linked with Article 21 of the Constitution, a right which cannot be superseded even after the proclamation of emergency.

Section 167(2)(ii) brings forth the concept of default bail by stating that upon the lapse of the sixty-day or ninety-day custody period, be it various periods of segregated custody or custody in one run, the non-completion of the investigation by the police would lead to the eligibility of the accused person to apply for default bail. The provision adds a caveat that the accused must be able to furnish the bail surety as the default bail under this Section is to be deemed equivalent to bail under Chapter XXXIII of the Code.

**B. Calculation of the custody period**

**The Apex Court in the case of** Chaganti Satyanarayan **as the court held that the total period of sixty or ninety days has to be calculated from the date of grant of the remand order and not the date**

**of arrest. This was further corroborated in the case of** CBI v. Anupam Kulkarni.

**The Apex Court in the case of Chaganti Satyanarayan as the court held that the total period of sixty or ninety days has to be calculated from the date of grant of the remand order and not the date of arrest.25 This was further corroborated in the case of** CBI v. Anupam Kulkarni**.**

**On the issue of computation of the custody period, which is crucial to determine an accused person's right to claim default bail under Section 167, the Supreme Court in** Enforcement Directorate, Government of India v. Kapil Wadhwa **directed a larger bench of the Supreme Court to quell the conflicting views and to establish an authoritative opinion which can be uniformly applicable. Consequently, the Supreme Court judge-bench ruled that for the computation of the custody period, the date of remand by magistrate authorities must be accounted for.**

**On the other hand, the position is fairly settled with respect to whether to include Government Holidays while computing the period for filing of charge sheet under Section 167. In the Supreme Court case of** CBI v. Nazir Ahmed Sheikh**, the court held that the holidays will be included while calculating the statutory custody period as provisions of Section of the General Clauses Act do not apply.**

**Furthermore, the interpretation of availed of as used in the** Sanjay Dutt **case was attempted to be clarified in the case of** Uday Mohan Acharya v. State of Maharashtra**. The Apex Court holds that availed of means the accused person merely has to file an application for bail before the Magistrate, bringing forth that no charge sheet has been filed within the specified period and that he is ready to furnish**

**the bail. The Magistrate must forthwith dispose of the bail application, after considering the veracity of the accused person's claims in the application. Hereby, even when the filing of the bail application by the accused is followed by the filing of the challan or charge sheet, which is preceded by the grant of the bail, the right to default bail cannot be extinguished**

**The case of** Bikramjit Singh v. State of Punjab **establishes that the application for default bail when it falls in the accused person's favour, may be made in any form, be it oral or written.**

**In another recent case of** C. Parthasarthy v. Director of Enforcement, the Telangana High Court **held that the police or investigative agencies are ordained not only with filing the charge sheet, but also with ensuring that the charge sheet contains complete investigation. Thereby, the court holds that by filing an incomplete charge sheet, the right to default bail cannot be circumvented. The High Court, in this case, placed reliance upon a** Bombay High Court judgment in Sharadchandra Vinayak Dongre v state of Maharashtra.

**Cancellation of default bail :-**

**The Supreme Court case of** Raghubir Singh v. State of Bihar**, in which it was held that mere filing of challan during the time the accused is free by virtue of bail, cannot cause the cancellation of default bail. Default bail under Section 167 is similar to bail under Chapter XXXIII of the Cr.P.C. Hence, provisions for cancellation of any bail under Chapter XXXIII will be applicable for cancelling default bail as well.**

THE PLAYING OUT OF DEFAULT BAIL IN SPECIAL LEGISLATIONS

**The accruing of the right to default bail is toilsome primarily because of two reasons. Firstly, the custody period, after the completion of which the right is accrued, is elongated in case of special legislation. For instance, in TADA, Terrorist and Disruptive Activities (Prevention) Act 1987,. Section 20(4) (bb) stipulates that the period of custody can be extended up to 180 days, provided that certain requirements are duly met. Similarly in the case of offences under UAPA, The Unlawful Activities (Prevention) Amendment Act 2019. even as Section 43D of the Act stipulates that Section 167 of the Cr.P.C shall be applicable to the legislation in the same manner, Section 43D(2) states that the expressions fifteen days, ninety days and sixty days, wherever they occur, shall be construed to refer to thirty days, ninety days and ninety days respectively. In the case of Union of India v. K. A Najeeb, the Supreme Court has emphasized that Article 21 of the Constitution includes under its ambit the right to justice and speedy trial as well. The apex court held that even though there are restrictions imposed by provisions of special legislations like Section 43D(5) of UAPA, such restrictions do not exclude the court's exercise of constitutional powers to grant bail to the accused and thereby preserve his liberty.**

**CONCLUSION**

**Reorganization the instrumental role of default bail in ensuring liberty and justice to accused persons, the right is not bereft of obstacles.**

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**b) Grounds on which bail can be granted and rejected**

Bail can be granted or rejected based on the nature and severity of the offense, the accused's criminal history, the likelihood of the accused tampering with evidence or influencing witnesses, the risk of the accused absconding, and whether the accused has violated previous bail

conditions. Bail is generally denied for grave offenses like murder or terrorism, for repeat offenders, or when there's a significant chance of the accused evading justice or obstructing the legal process.

Courts have discretionary power to grant bail, considering that "bail is the rule, and jail is the exception".

Bail can be granted in bailable offenses, where it is a matter of right, and in non-bailable offenses at the court's discretion.

## CHAPTER XXXV: PROVISIONS AS TO BAIL AND BONDS

In what cases bail to be taken.

Sec.478 BNSS:-

**In what cases bail to be taken.**

*(1)When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail bond from such person, discharge him on his executing a bond for his appearance as hereinafter provided. Explanation.-Where a person is unable to give bail bond within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso:Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 135 or section 492.(2)Notwithstanding anything in sub-section (1), where a person has failed to comply with the conditions of the bond or bail bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond or bail bond to pay the penalty thereof under section 491.*

Sec.479 BNSS:-

**Maximum period for which undertrial prisoner can be detained.**

*(1)Where a person has, during the period of investigation, inquiry or trial under this Sanhita of an offence under any law (not being an offence for*

*which the punishment of death or life imprisonment has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on bail:Provided that where such person is a first-time offender (who has never been convicted of any offence in the past) he shall be released on bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such offence under that law:Provided further that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail bond instead of his bond:Provided also that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.Explanation.-In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.*

*(2)Notwithstanding anything in sub-section (1), and subject to the third proviso thereof, where an investigation, inquiry or trial in more than one offence or in multiple cases are pending against a person, he shall not be released on bail by the Court.*

*(3)The Superintendent of jail, where the accused person is detained, on completion of one-half or one-third of the period mentioned in sub-section (1), as the case may be, shall forthwith make an application in writing to the Court to proceed under sub-section (1) for the release of such person on bail.*

Sec.480 BNSS:- When bail may be taken in case of non-bailable offence.

*(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but less than seven years: Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released*

*on bail if such person is a child or is a woman or is sick or infirm: Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason: Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation or for police custody beyond the first fifteen days shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court: Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.*

*(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 492 and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond for his appearance as hereinafter provided.*

*(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter VII or Chapter XVII of the Bharatiya Nyaya Sanhita, 2023 or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions,-(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter;(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.*

*(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.*

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

*(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.*

*(7) If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond for his appearance to hear judgment delivered.*

**Sec.481 BNSS:- Bail to require accused to appear before next Appellate Court.**

*(1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute a bond or bail bond, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bond shall be in force for six months.*

*(2) If such accused fails to appear, the bond stand forfeited and the procedure under section 491 shall apply.*

**Sec.482 BNSS:- Direction for grant of bail to person apprehending arrest.**

*(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.*

*(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;(iii) a condition that the person shall not leave India without the previous permission of the*

*Court;(iv) such other condition as may be imposed under sub-section (3) of section 480, as if the bail were granted under that section.*

*(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).*

*(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and sub-section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023.*

**Grounds for Bail Grant :-**

- **Low Gravity of Offense:** For offenses that are not considered serious or heinous.
- **No Risk of Flight:** The court is satisfied that the accused will not abscond or flee the country to evade trial.
- **No Tampering with Evidence or Witnesses:** There is no likelihood of the accused interfering with the investigation, tampering with evidence, or threatening witnesses.
- **Clean Criminal Record:** The accused has no prior convictions or a history of similar offenses.
- **Cooperation with Investigation:** The accused has been cooperative with the investigating authorities.

**Grounds for Bail Rejection :-**

- **Severity and Nature of the Offense:-** The offense is serious, heinous, or carries a potential sentence of death or life imprisonment.
- **Risk of Absconding:** There is a significant chance the accused will flee the jurisdiction to avoid trial or legal proceedings.
- **Tampering with Evidence or Witnesses:-** The court fears the accused may attempt to destroy evidence or intimidate witnesses.
- **Criminal History and Repeat Offenses:-** The accused has a previous criminal record, particularly for similar offenses, raising concerns about recidivism.

- **Threat to Public Order or Safety:-**The accused's release could pose a threat to public safety, national security, or communal harmony.
- **Non-Compliance with Bail Conditions:-** A history of violating previous bail conditions can lead to rejection.
- **Lack of Cooperation:-** The accused has not cooperated with the investigation or has obstructed justice.

Bail denial can significantly impact an accused individual's life. Not only does it result in prolonged detention, but it may also harm their mental well-being and social standing. Moreover, a well-prepared bail application can mean the difference between freedom and incarceration during trial proceedings.

Under Indian law, bail is governed primarily by the Code of Criminal Procedure, 1973 (CrPC)/Bharatiya Nagarik Suraksha Sanhita,2023., with additional principles derived from constitutional protections such as Articles 14, 19, and 21 of the Constitution of India.

The Cr.P.C outlines three primary types of bail:

1. Regular Bail (Section 437 and 439 Cr.P.C/Se.480 and 483 BNSS): Granted to a person who is already under arrest and in custody.

2. Anticipatory Bail (Section 438 Cr.P.C/Sec.482 BNSS): Granted when a person apprehends arrest.

3. Interim Bail: Temporary bail granted pending a final decision on a regular or anticipatory bail application.

Despite these provisions, courts exercise considerable discretion when deciding on bail, ensuring that it aligns with the principles of justice and the facts of the case.

Common Grounds for Rejection of Bail

1. **Seriousness of the Offense**

Courts often deny bail in cases involving grave offenses such as murder , rape, terrorism (under UAPA), or narcotics-related crimes (NDPS Act). The rationale is that the severity of the crime raises concerns about societal impact and public safety.

Case Law Example: **State of Gujarat v. Mohanlal Jitamalji Porwal (1987)**

The Supreme Court emphasized that the seriousness of the offense is a crucial factor in bail considerations. The nature of the crime may outweigh other factors, especially if it involves heinous acts.

2. **Likelihood of Tampering with Evidence**

If the court believes the accused may influence witnesses or tamper with evidence, bail is often denied. This risk is particularly relevant in cases involving close personal or professional relationships between the accused and witnesses.

- Case Law Example: **Nimmagadda Prasad v. CBI (2013)**

  The Supreme Court held that granting bail should be avoided if there is a reasonable apprehension of the accused obstructing justice by tampering with evidence.

3. **Risk of Absconding**

Courts reject bail if there is a significant risk that the accused might flee to avoid trial. Factors influencing this decision include the accused's financial status, foreign connections, and previous conduct.

- Case Law Example: **State of U.P. v. Amarmani Tripathi (2005)**

  The court highlighted the need to assess the accused's propensity to abscond before granting bail.

**4. Repeat Offender or Criminal History**

An accused with a prior record of convictions or ongoing criminal cases may find it harder to secure bail. This is because such a history raises concerns about recidivism and public safety.

- Case Law Example: Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav (2005)

  The Supreme Court stated that a history of prior offenses is a valid consideration for denying bail.

**5.** Threat to Public Order or National Security

Cases involving threats to public safety, communal harmony, or national security often lead to bail denial. This includes crimes under special

statutes like the Unlawful Activities (Prevention) Act (UAPA) and National Security Act (NSA).

- Case Law Example: Zahira Habibulla H Sheikh v. State of Gujarat (2004)

  The court observed that societal impact and public peace are vital considerations in bail matters.

- Grounds for Rejection of Bail: Common Reasons and How to Avoid Them

While the rejection of bail is influenced by several factors, a well-prepared application and compelling arguments can significantly improve the chances of success. Below are legal strategies to mitigate the risks of bail denial:

**Crafting a Strong Bail Application**

A bail application is more than a procedural formality—it is the first impression the court has of the accused's case. To strengthen the application:

Highlight Lack of Prima Facie Evidence: Demonstrate that the evidence against the accused is weak or circumstantial. For example, in cases of anticipatory bail, argue that there is no credible evidence linking the accused to the crime.

- Case Reference: Sanjay Chandra v. CBI (2011)

  The Supreme Court granted bail, noting that the evidence presented did not conclusively establish guilt, and the accused's continued detention was unnecessary.

Emphasize the Accused’s Cooperation:

- Include details of the accused’s compliance with investigative authorities, such as attending interrogations and providing necessary documents.

  Establish Community and Family Ties: Strong familial or community ties can demonstrate that the accused is unlikely to abscond. Provide supporting documents like residence proof or affidavits from family members.

<u>Use of Case Laws to Strengthen Arguments</u>

Quoting relevant and recent judgments can reinforce the bail application. Consider using precedents where the courts have upheld the principles of personal liberty:

**For Anticipatory Bail**:

- *Gurbaksh Singh Sibbia v. State of Punjab (1980)*

  The Supreme Court established that anticipatory bail is a right and should not be denied unless there are specific, compelling reasons.

For Regular Bail:

- *Arnesh Kumar v. State of Bihar (2014)*

  The court emphasized that arrest and detention should not be routine and granted bail to the accused in a dowry harassment cases.

NDPS Cases: For minor or non-commercial quantities, highlight procedural lapses or lack of evidence of intent.

- Case Reference: State of Kerala v. Rajesh (2020)

  The Supreme Court held that under NDPS Act cases, bail can be granted if there is no prima facie evidence of commercial quantities.

- Delay in Filing the Charge Sheet: If the investigation has not concluded within the stipulated period (60 days for most offenses and 90 days for serious offenses), the accused is entitled to statutory bail under Section 167(2) of the CrPC.

  Case Reference: Uday Mohanlal Acharya v. State of Maharashtra (2001)

  The Supreme Court held that statutory bail is an indefeasible right once the stipulated period lapses and no charge sheet is filed.

- Failure to Follow Arrest Guidelines: Procedural safeguards such as those outlined in D.K. Basu v. State of West Bengal (1997)should be meticulously checked. Any violation can strengthen the bail plea.

- For Bail in Economic Offenses:

P. Chidambaram v. Directorate of Enforcement (2019). The court clarified that economic offenses, though grave, do not automatically preclude bail unless there is clear evidence of intent to abscond or tamper with evidence.

- For Bail in Cognizable Offenses:

  Jagmohan Bahl v. State (NCT of Delhi) (2014)., The court reiterated that mere registration of an FIR is not sufficient to deny anticipatory bail unless corroborated by prima facie evidence.

- For Juvenile or Women Accused:

  Sheela Barse v. Union of India (1986)., The court emphasized leniency in granting bail to juveniles and women accused, considering their vulnerability.

**Some important Case Studies:-**

**1.** Sanjay Chandra v. CBI (2011)

- Facts: The accused, involved in the 2G spectrum allocation case, sought bail while the trial was ongoing. The prosecution opposed bail, citing the seriousness of the economic offense.
- Court's Decision: The Supreme Court granted bail, emphasizing the principle of proportionality. It held that denying bail solely based on the gravity of the offense, without evidence of tampering or absconding, would violate the accused's right to liberty.
- Key Takeaway: Emphasize proportionality and argue against prolonged pre-trial detention when there is no risk of obstruction of justice.

**2.** Arnesh Kumar v. State of Bihar (2014)**:**

- Facts: The accused was charged under Section 498A of the IPC for alleged cruelty to his wife. The trial court denied bail, citing the offense's cognizable nature.
- Court's Decision: The Supreme Court granted bail, stressing that arrest and custody are not mandatory in every case. The

court also issued guidelines to avoid routine arrests in 498A cases.

- Key Takeaway: Argue that the court should focus on the necessity of custody rather than the cognizable nature of the offense.

**3.** State of Rajasthan v. Balchand (1977):

- Facts: The accused sought bail after being charged with a bailable offense. The prosecution opposed bail, raising concerns about public safety.
- Court's Decision: The Supreme Court granted bail, stating, "Bail is the rule, jail is the exception." It highlighted the presumption of innocence and the importance of personal liberty.
- Key Takeaway: Reinforce the presumption of innocence and use the "bail is the rule" principle to counter opposition.

**4.** Moti Ram v. State of Madhya Pradesh (1978):

- Facts: The accused, unable to afford surety, was denied bail despite the magistrate's approval.
- Court's Decision: The Supreme Court criticized the lower court's decision, stating that bail conditions should be humane and not financially oppressive.

Key Takeaway: Argue for reasonable bail conditions, particularly in cases involving economically disadvantaged individuals.

**Some of the following guidelines given by the Hon'ble High Cour in the Circular No.10/2023 in ROC No.99/SO/2023 dated 19.06.2023.**

i) The bail application of the accused arersted in NBW to be decided without taking him into physical custody, when the offence punishable with imprisonment for 7 years or less.

ii) The right of default bail under Sec.167 of Cr.P.C. cannot be suspended even during a pandamic situation (Ref: **S.Kasi vs State (2021) 12 SCC 1,** and it is the duty of the Court to see that an accused gets the benefit of Sec.167(2) of Cr.P.C.

iii) A Magistrate can take a call even without an application for bail, if he is inclined to do so.

iv) **In Hussainara Khatoon and others vs. Home Secretary, State of Bihar, held that,** if the Court is satisfied that, the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused :-

**(a)** the length of his residence in the community,

**(b)** his employment status, his history and his financial condition,

**(c)** his family ties and relationships,

**(d)** his reputation, character and monetary condition,

**(e)** his prior criminal record including any record of prior release on recognizance or on bail,

**(f)** the identity of responsible members of the community who would vouch for his reliability.

**(g)** the nature of the offence charged and apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and

**(h)** any other factor indicating the ties of the accused to the community or bearing on the risk of willful failure to appear.

v) **In Hussain and another vs. Union of India and Ors. held that,** the bail applications be disposed of normally within one week.

vi) In economic offences, the gravity of the offence, the object of Special Act and attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on part of the court, to categorize all the offences into one group and deny bail on that basis.

vii) The under trial accused may furnish bail by depositing cash equal to the bail amount.

viii) While insisting upon the sureties, the mandate of Sec.440 of Cr.P.C. has to be kept in mind.

ix) Bail applications ought to be disposed of, within a period of 2 weeks, except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

**CONCLUSION:-**

The bail process is a nuanced aspect of criminal law, balancing individual liberty with societal interests. While courts consider multiple factors before granting bail, understanding common grounds for rejection and adopting strategic approaches can significantly improve the likelihood of success.

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

Courts impose conditions during bail to ensure an accused person's compliance with legal processes, such as attending court dates and not tampering with evidence or witnesses. These conditions are case-specific and can include restrictions on travel, reporting to police, or even staying away from particular locations, aiming to balance the accused's freedom with public safety and the integrity of the investigation.

**Common Conditions on Bail**

- **Court Appearance**: The accused must appear in court on scheduled dates.
- **Evidence and Witnesses**: The accused must not tamper with evidence or influence witnesses.
- **Travel Restrictions**: The accused may be prohibited from leaving the country without court permission.

- **Stay-Away Orders**: The accused may be directed to avoid certain localities, especially if there is a risk of conflict or danger.
- **Police Reporting**: The accused might be required to report to the police at specific intervals.

**Purpose of Conditions**

**Conditions are imposed to**:

- **Ensure Compliance**: They ensure the accused cooperates with the legal process.
- **Prevent Recidivism**: They aim to stop the accused from committing further offenses.
- **Protect Victims**: They can safeguard victims and their families from intimidation or harm.
- **Maintain Order**: Conditions can be used to prevent public unrest, such as in cases of communal tensions or group clashes

**Section 483 BNSS. Special powers of High Court or Court of Session regarding bail :-**

(1) A High Court or Court of Session may direct---

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section *(3)* of section 480, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice:

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under section 65 or sub-section *(2)* of section 70 of the Bharatiya Nyaya Sanhita, 2023, give notice of the application for bail to the Public

Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(2) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under section 65 or sub-section *(2)* of section 70 of the Bharatiya Nyaya Sanhita, 2023.

(3) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

**Case laws :-**

**1. Ayub v. State of M.P (2004) 13 SCC 457** :

Grant of bail to accused by imposing a condition to deposit Rs.2,50,000/-, the alleged amount of misappropriation was held to be arbitrary as it vitiated the very nature of trial. The conditional order granting bail by the lower Court was modified.

**2. Moto Ram v. State of Madhya Pradesh AIR 1978 SC 1594** :

It was specifically laid down that condition to deposit a particular amount of money for grant of bail in unjust, irregular and improper.

**3. Motiram v. State of MP 1978 (4) SCC 47** :

There should not be insistence on local surety for accused persons from other states. It was suggested that wherever possible friend or relatives who can be surety should be arranged. The surety system must be effective but not onerous.

**4. Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40** :

It was held that objective of imposing condition is to secure the attendance of accused during pendency of trail and should not be punitive.

**5. Puranmal Jat vs State of Rajasthan (2023) SCC** Online SC 1418 :

Bail in NDPS case was granted by imposing
Location Sharing as a bail Condition.

6. **MURSALEEN TYAGI versus THE STATE OF UTTAR PRADESH 2023 livelaw (SC) 700 :**

Grant of bail can be subject to onerous conditions only in exceptional circumstances and not ordinarily.

**7. Gajanan Dattatray Gore v. State ofMaharashtra, 2025 SCC OnLine SC 1571, decided on 28-07-2025**.

No Trial Court or High Court shall grant regular bail or anticipatory bail based on any undertaking furnished by the accused solely for the purpose of obtaining such relief.

**8. Supreme Court ruling-In Siba Shankar Das @ Pintu vs State of Odisha,**

**It stated that preventing a person from participating in political activities as a bail condition violates their fundamental rights under the Constitution.**

9. In **Ram Govind Upadhya Vs.Sudarshan Singh**., it was held by the Hon'ble Apex court that the power if the court under sec. 437(5) CrPC to cancel bail can be invoked either by the state itself or by any aggrieved party or even suo motu the same was also held in the case of **Puran Vs. Ramvilas**.

10. The Supreme Court, relying on its decision in the case of **Hani Nishad @ Mohammad Imran @ Vicky v. The State of Uttar Pradesh**, granted partial relief to the petitioner and relieved him from producing local surety in the concerned bail orders and facilitated consolidated surety would apply to all FIRs within the respective state, effectively allowing the same set of sureties to cover multiple bail orders in the concerned state. The Court also waived the condition of providing a local surety in Rajasthan, acknowledging the undue burden it placed on the petitioner.

11. In the case of **Moti Ram and Ors. v. State of Madhya Pradesh.,** wherein it has been decided that if delays in the release of an accused can be attributed to the condition of a local surety, the courts may not insist upon such a condition.

12. The Supreme Court discussed the principle that in the case of **Satender Kumar Antil v. Central Bureau of Investigation & Anr**., which observed that the imposition of impossible conditions on release orders can defeat the very purpose of such orders.

13. In **D.Surya prakash venkata rao vs. state of andhra pradesh.,** the Hon'ble High court of AP holds that the condition about the deposit of the passport cannot be imposed by a court while granting bail or for any other reason.

**CONCLUSION :-**

The object of relaxing conditions on a bail order is to ensure the accused's fundamental right to liberty is not undermined by excessively stringent, unrealistic, or punitive bail conditions, thereby upholding the principle that pre-trial detention should be non-punitive and solely for ensuring the accused's appearance in court. Relaxation aims to provide practical relief to the accused, especially from poor economic backgrounds who may be unable to meet burdensome requirements, and to avoid making bail an impossible condition, thus promoting fairness and access to justice.

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d) **POWER TO MODIFY CONDITIONS ON BAIL :**

In India, the High court and the court of Sessions have the power to modify or set aside bail conditions, as provided under Section 439 (1)(b) of the Cr.P.C. The magistrate may have the power to amend or delete some conditions from their own earlier bail order under Section 437(5) of the Cr.P.C, but their power to alter conditions set by a higher court is limited. The primary courts that modify bail conditions are the High Court and the Court of Sessions, often to ensure conditions are fair, reasonable, and proportionate to the accused's situation and the nature of the offense.

In **Pandiyan @ Pandiyarasa Vs. State by the inspector of Police** held that the magistrate does not possess the power to modify or relax bail conditions imposed by a Sessions Court. This was established in a case where the court clarified that the magistrate's rejection of a petition for the return of a vehicle, which was subject to a bail condition set by the Sessions Court, was valid. The magistrate could not alter the conditions set by the Sessions Court.

In **Nagesh Kumar Vs. State by Thalaghattapura Police Station, Bengaluru City**., held that the concurrent jurisdiction under Section 439 allows an accused to approach either the High Court or the Sessions Court

for bail. Once bail is granted, the same court has the authority to modify or relax the conditions imposed by it. This does not constitute a review of its own order but is an exercise of its power to ensure justice

Why are conditions modified?

- **Fairness and Reasonableness:** The primary reason is to ensure bail conditions are fair and reasonable, especially if they are proving to be too onerous or difficult for the accused to meet.
- **Changing Circumstances:** Modification can happen when circumstances change, making the original conditions no longer appropriate or necessary.
- **Proportionality:** To ensure that the conditions are proportionate to the offense and do not unduly infringe upon the fundamental right to freedom of movement.

In **Brijesh Singh and another Vs. State by all women police station, 2002 CRI. L. J. 1362** Karnataka High Court., held that under S.437(5), S.397(2)— Magistrate has power to alter, amend or delete some of the conditions of earlier bail granted by him - Also, grant of bail being inter-locutory order, revision is not maintainable against subsequent order modifying the same. The trial Magistrate had power to pass the subsequent order altering or amending or deleting the conditions of the earlier bail order in any manner whatsoever.

S. 437(5) of Cr.P.C. impliedly confers such power on him. When the Magistrate is conferred with the 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. Also, any bail order passed by a trial court is an interlocutory order

S.437(5), S.397— Magistrate has power to alter, amend or delete some of the conditions of earlier bail granted by him - Also, grant of bail being inter-locutory order, revision is not maintainable against subsequent order modifying the same. The trial Magistrate had power to pass the subsequent order altering or amending or deleting the conditions of the earlier bail order in any manner whatsoever. Therefore the order of magistrate modifying his earlier bail order cannot be made subject to

revision on the ground that the order passed by the magistrate was without jurisdiction.

**CONCLUSION :-**

The fundamental purpose of bail is to ensure the accused's appearance in court and to prevent unnecessary pre-trial detention. So it must be considered during any modification of bail order.

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**WORKSHOP AT HON'BLE PRL. DISTRICT COURT, WEST GODAVARI, ELURU.**

**TOPIC**

Power and duties of Magistrates, Sessions Judges, and Special Session Judges regarding:

a) Default bail
b) Grounds for granting or rejecting bail
c) Imposing conditions while granting bail
d) Power to modify bail conditions

Presented by:
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**Bail- A overview:**

"Bail is the rule, jail is the exception,"

…...Justice Krishna Iyer

(State of Rajasthan vs. Balchand ; (1977) 4 SCC 308)

In Black's Law Dictionary (4th Edn.), bail has been defined as "a security such as cash or bond especially security required by a court for the release of a prisoner who must appear at a future date." The Law Lexicon defines bail as the security for the appearance of the accused person on which he is released pending trial or investigation.

Bail in law means the acquisition of the release from prison of a person awaiting trial or appeal by means of a security deposit to ensure that he is submitted to the legal authority at the time necessary. Bail is the procurement of release from prison of a person awaiting trial or an appeal by the deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security, also known as the bail, or, more accurately, the bail bond, is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security. Courts have greater discretion to grant or deny bail in the case of person's under criminal arrest.

The Criminal Procedure Code, 1973, however, does not define bail, although the terms bailable offence and non-bailable offence have been defined in Section 2 (a) Cr.P.C. Further, Sections 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases.

According to Section 2 (1) (b) of the BNSS, the term "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."

The above discussed definition introduces two essential components i.e., bail bond and bond. The term 'bail bond' means an undertaking with sureties for the release of an accused from the custody while the term 'bond' a personal undertaking or bond without sureties for the release of an accused from the custody.

The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.P.C. Thus, it is the discretion of the court to put a monetary cap on the bond.

The term "bail" comes from the old French verb "baillier," meaning to give or deliver. In Latin, "bajulare" means bearing a burden. The system can be traced back to 377 B.C. when Plato created a bond for Socrates' release. The modern system of bail developed from medieval English laws.

In India, bail history dates back to ancient Hindu jurisprudence, which required prompt resolution of disputes by justice functionaries.

Kautilya's Arthashastra recommended avoiding pre-trial detention. The 17th-century travelogue of Italian traveler 'Manucci' is likely the first recorded instance of bail in India. He was released from prison for a false theft charge by bail granted by the then ruler of Punjab. The Kotwal released him only after he provided a surety.

British institution of bail was statutorily transposed into Indian legal system with the enactment of the Code of Criminal Procedure in 1861, followed by its re-enactment in 1872 and 1898 respectively. However, prior to the England's Bail Act, 1976, India repealed the previous enactment of 1898 and brought its new Criminal Procedure Code, 1973 in which the provision of bail has been enacted in detail.

The Code of Criminal Procedure, 1973 (Cr.P.C.) provides a comprehensive framework for bail-related proceedings. **Section 437**

establishes the foundational principles for granting bail in non-bailable offenses, empowering courts to release accused persons on bail by imposing necessary conditions.

Sub-section (3) of Section 437 mandates specific conditions for released persons, requiring them to attend court proceedings, refrain from similar offenses, and avoid inducements that might dissuade them from disclosing information to the court or police.

**Section 438 of the Cr.P.C.** governs anticipatory bail, allowing individuals who reasonably apprehend arrest for non-bailable offenses to seek pre-arrest bail.

**Section 439 of the Cr.P.C.** confers special powers on the Hon'ble High Court and Court of Sessions on bail matters, to modify or delete bail conditions imposed by Magistrates.

**Authorities empowered to grant bail under the BNSS:**

The power to grant bail under the Bharatiya Nagarik Suraksha Sanhita (BNSS) is closely tied to the classification of offenses as bailable or non-bailable, influencing the discretion and authority of different entities in the criminal justice system.

A bailable offense is one specified as bailable in the First Schedule or made bailable by any other prevailing law, while all other offenses are considered non-bailable. This distinction determines the rights of the accused and the discretion available to authorities granting bail. In bailable offenses, the accused has a legal right to bail, and both the police and the court can grant bail with limited discretion. Section 47 of the B.N.S.S (Section 50 of Cr.P.C) requires the arresting police officer to inform the person of their right to bail when arrested without a warrant for a bailable offense.

In contrast, non-bailable offenses do not confer a right to bail. The discretion to grant bail lies predominantly with the courts, but Section 480(2) of the B.N.S.S (Section 437(2), Cr.P.C) permits both the police and the court

to release an accused on bail if there are no reasonable grounds to believe that he/she committed a non-bailable offense.

The B.N.S.S confers bail-granting powers on both the police and the courts, depending on the nature of the offense. Bailable cases involve limited discretion and a near-automatic right to bail, while non-bailable cases require careful judicial consideration and broader authority in deciding whether to grant bail.

**SPECIAL POWERS OF HON'BLE HIGH COURT AND SESSION COURT:**

Under Section 483 of the B.N.S.S (Section 439 of Cr.P.C), the Hon'ble High Court and the Sessions Court have special powers in the matter of bail. Under the said Section, the above- mentioned courts have power,

*To impose any condition if the person is accused of offences affecting the human body or of offences against the state or of offences against property or of abetment of the said offences.

* To set aside or modify any condition imposed by the magistrate while granting bail.

*To notify the public prosecutor regarding the bail application and to seek presence of the informant while hearing bail application for the offence under Section 65, BNS (Sections 376(3) and 376 AB, IPC) and Sec.70(2) of BNS, 2023 (Section 376 DB of IPC).

* To direct the arrest of any person released on bail.

* To set aside or modify bail conditions imposed by the Magistrate.

*To notify the public prosecutor about the bail application and seek the presence of the informant during bail hearings for Section 65 BNS (Sections 376(3) and 376 AB IPC) and 70(2) of the BNS, 2023 (Section 376 DB).

* To direct the arrest of any person released on bail.

**Types of bail:**

1. **Anticipatory bail**: Anticipatory bail, also known as pre-arrest bail, is a legal provision that allows a person to seek bail in anticipation of arrest, specifically for non-bailable offenses. It is granted by the Hon'ble High Court and Sessions Court. The Hon'ble Supreme Court in Pratibha Manchanda v. The State of Haryana; (2023) 8 SCC 181 held that the High Court and Sessions Court should consider the nature and gravity of the alleged offense and its impact on society while granting anticipatory bail.

2. **Default bail**: Default bail, also known as statutory bail or compulsory bail, is a right to release on bail granted to an accused person when the investigating agency fails to file a charge sheet within the stipulated period. It is a delicate equilibrium between investigative efficiency and individual liberty, arises when the investigating agency fails to complete the investigation within the prescribed period, triggering the accused's right to seek release on bail. It is governed by Section 167(2) of the Criminal Procedure Code, 1973 (CrPC) and Section 187 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), this provision has evolved legislatively and judicially.

3. **Regular bail in non-bailable offenses** exclusively **triable by** the **Special Court or Sessions Court** is granted by the Special Court or Sessions Court.

4. **Regular bail in non-bailable offenses** exclusively **triable by** the **Judicial Magistrate** is granted by the Judicial Magistrate of First Class Court.

5. **Interim bail** is granted by the court when the proceedings of regular or anticipatory bail are not concluded. The Hon'ble Supreme Court in ***Kamlendra Pratap Singh vs. State of U.P.***, 2009 (4) SCC 437, reaffirmed that a Judge can grant interim bail while the regular bail application is pending. In ***Arvind Kejriwal v. Directorate of Enforcement,*** (W.P. (CRL) 985/2024 &

CRL.M.A. 9427/2024), the Hon'ble Apex Court granted interim bail to the then Chief Minister of Delhi to allow him to campaign for the Lok Sabha elections of 2024.

**DEFAULT BAIL/STATUTORY BAIL:**

**A Historical Perspective**

Section 167 of the CrPC, 1973, aimed to limit arbitrary and prolonged detention during the investigation stage. It stipulated that upon failing to complete the investigation within 24 hours, the police must produce the accused before a Magistrate. The Magistrate could then authorize either police custody (maximum 15 days) or judicial custody (up to 60 days for lesser offenses, 90 days for offenses punishable with death, life imprisonment, or imprisonment not less than ten years). Upon expiry of these limits, the accused acquires an unqualified right to be released on bail under Section 167(2) proviso.

The Hon'ble Supreme Court in ***CBI v. Anupam J. Kulkarni;*** 1992 (3) SCC 141, held that police custody was limited to the initial 15 days after arrest. Once the accused was sent to judicial custody, they could not be remanded back to police custody. This interpretation safeguarded liberty and prevented misuse of custodial power.

Subsequent jurisprudence followed the Kulkarni precedent, reinforcing the 15-day period of police custody must be exercised within the first 15 days of remand. For instance, in ***Budh Singh v. State of Punjab***; (2000) 9 SCC 266, a three-judge bench reiterated this position.

However, in ***CBI v. Vikas Mishra*** (Criminal Appeal No. 957/2023), the Court hinted at reconsideration of the rigid interpretation, especially in light of complex economic offences. This landmark shift came in ***V. Senthil Balaji v. The State;*** 2023 SCC OnLine SC 934, wherein the Hon'ble Supreme Court held:

> ***"The period of 15 days being the maximum period would span from time to time with the total period of 60 or 90 days as the case may be… the proviso merely reiterates the maximum period of 15 days, qua a custody in favor of the police while there is absolutely no mention of the first 15 days alone for the police custody."***

The above decision permitted split custody, allowing the 15-day police custody to be availed in non-continuous spells within the overall remand period (60/90 days), departing from the earlier restrictive interpretation.

**The BNSS, 2023**, introduced Section 187(2), encapsulating the logic of split custody. Section 187(2), BNSS provides that:

> ***"The Magistrate to whom an accused person is forwarded under this section may, irrespective of whether he has or has no jurisdiction to try the case, after taking into consideration whether such person has not been released on bail or his bail has been cancelled, authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, or in parts, at any time during the initial forty days or sixty days out of detention period of sixty days or ninety days, as the case may be, as provided in sub-section (3), and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction."***

This statutory language, reflecting the reasoning in Senthil Balaji's case (Supra), legitimizes non-continuous and staggered police custody within the 60/90-day investigation period. It extends the 15-day window beyond the initial 15 days post-arrest. Section 187 (2), BNSS now permits 15 days of police custody to be spread over 40 or 60 days.

**Section 167 (2) Proviso (a) (i) of the Cr.P.C., as amended by** the BNSS, laid down the maximum period of detention during investigation as 90

days for offenses punishable with death, life imprisonment, or imprisonment for a term of not less than ten years, and 60 days for other offenses.

Application of this Section 167(2) proviso (a)(i) to different offenses in the IPC is crucial since only after 60 or 90 days, as the case may be, the accused could obtain default bail with sureties.

The newly enacted BNSS under Section 187 follows a similar procedure to Section 167 CrPC for situations where the investigation cannot be completed within 24 hours of arrest. Sub- Section (3) of Section 187 of BNSS corresponds to Section 167(2) of the CrPC, central to the legal discussion.

When Section 167(2) Proviso (a)(i) of Cr.P.C. is compared to Section 187(3)(i) of BNSS, the phrase "……for a term not less than 10 years…" is replaced with "……for a term of 10 years or more." This raises the question of whether the new terminology affects the application of the 90- day period to different offenses under BNSS. A careful reading of both sections shows that while earlier, a minimum of 10 years imprisonment was required due to the words "……for a term not less than 10 years…", the concept of Section 167(2) proviso (a)(i) has been retained in BNSS. Similarly, Section 187(3)(i) of BNSS still requires that the offense be punishable with imprisonment of ten years or more to complete an investigation in a maximum period of 90 days. Therefore, Section 167(2) proviso (a)(i) and Section 187(3)(i) of BNSS remain essentially the same with minor wording changes.

However, it is important to note that a prima facie reading suggests that the changes do not alter the application of the 90-day period. Nevertheless, as BNSS is a newly enacted legislation, there is a possibility of constitutional courts interpreting it differently.

The conclusion is that the changes do not effectively alter the application of the 90-day period. The Karnataka High Court's judgment in ***Hyder Ali v. State of Karnataka*** (Writ Petition No. 33526 of 2024) found that the changes are merely a play of words, not a change in substance.

Both phrases imply that the offense must carry a minimum punishment of ten years to attract the 90-day period, so the legal effect remains the same under both statutes.

Since Proviso to Section 167(2)(a)(i) and Section 187(3)(i) are the same, we refer to Rakesh Kumar Paul V. State Of Assam; (2017) 15 SCC 67, wherein the application of 60 days and 90 days periods was clearly spelled out, deferring with ***Bhupinder Singh & Others vs. Jarnail Singh & Another;*** (2006) 6 SCC 277.

The law separates offenses into two categories: Those with a minimum sentence of 10 years or more, requiring more serious investigation, and those with a minimum sentence lower than 10 years, allowing for a shorter investigation period.

Only offenses with a minimum sentence of 10 years fall under the stricter 90-day investigation rule. If an offense carries death or life imprisonment, the 90-day period applies regardless of the minimum sentence.

For offenses in the third category, the law uses the phrase “not less than ten years,” meaning the minimum punishment must be at least 10 years. This does not apply to offenses where 10 years is the maximum, but not the minimum.

If the minimum sentence is less than 10 years and the offense is not punishable with death or life imprisonment, only 60 days are given for investigation. There upon, the accused gets default bail.

Any law that restricts a fundamental right like personal liberty must be interpreted strictly. If there are two possible interpretations, courts should favor the one that protects liberty.

Offenses with a minimum sentence of 10 years and a maximum below life imprisonment, like NDPS Act Sections 21(c) and 22(c), fall under the 90-day rule because they meet the minimum threshold.

Further, the Karnataka High Court in ***Hyder Ali v. State of Karnataka*** (dated December 13, 2024) referred to ***Dharmasingh v. State of Karnataka*** (ILR 1992 KAR 3137) to explain the term “for a term of 10 years or more” in

Section 187(3) of BNSS. The court interpreted it to mean a minimum punishment of 5 years, not just an upper limit. If the legislature intended to include offenses with lesser minimum sentences, it would not have qualified the provision with “5 years or more.”

This interpretation aligns with the phraseology in sub-clause (i) of Section 187(3) of BNSS, where “ten years or more” indicates a minimum threshold of 10 years, establishing a clear legislative intent to limit procedural safeguards to more serious offenses.

**Relevant Case Laws regarding default bail:**

**1. Sanjay Dutt vs State through C.B.I. Bombay (II); (1994) 5 SCC 410:**

Whether the indefeasible right of the accused to default bail under Section 167 (2) Cr.PC (Section 187 (2) BNSS) remains enforceable after filing of the charge sheet?

**The Hon’ble Supreme Court answered:**

The indefeasible right accruing to the accused is enforceable only prior to the filing of the challan. It does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan is filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan.

The custody of the accused after the challan has been filed is governed by different provisions of the Code of Criminal Procedure. If the right had accrued to the accused but remained unenforced till the filing of the challan, it is extinguished the moment the challan is filed because Section 167 CrPC (Section 187 BNSS) ceases to apply.

**2. Uday Mohanlal Acharya vs State of Maharashtra; (2001) 5 SCC 453:**

Does the right to default bail under Section 167 (2) Cr.PC (Section 187 (2) BNSS) survive if a chargesheet is filed during the pendency of a bail application?

An indefeasible right accrues to the accused if the prosecution fails to file the challan within the specified period under Section 167 (Section 187(2) BNSS). This right can be availed of by offering bail and adhering to its terms and conditions. However, this right does not survive if the challan is filed, as held in the Sanjay Dutt case; [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433].

The crux of the matter is the meaning of "if already not availed of". Does it mean filing an application for bail or passing a bail order? In our opinion, it would be more in line with the legislative mandate to hold that an accused has availed of their indefeasible right when they file an application for bail and agree to abide by its terms. So long as the accused files an application indicating their willingness to offer bail, the right to be released on bail cannot be frustrated if the Magistrate is unavailable and the matter is not moved to higher forums. The challan can be filed in the meantime.

In respect of offences punishable with imprisonment up to ten years, whether the accused will be entitled to grant of "default bail" after 60 or 90 days?

The accused was arrested for an offence under Section 13(1) of the PC Act, punishable with imprisonment for a term not less than four years but which may extend to ten years and fine. The State argued that the date for applying for "default bail" would commence on the expiry of 90 days, while the petitioner contended that it would commence on the expiry of 60 days.

The Supreme Court interpreted the expression "punishment with imprisonment of not less than 10 years" as used in Section 167 (2) of the Code of Criminal Procedure. The majority view, delivered by Justice Madan B. Lokur and Justice Deepak Gupta, held that the period of detention under Section 167 (2) (Section 187(2) BNSS) for offences punishable with

imprisonment up to 10 years would be 60 days only.

**Justice Madan B. Lokur:**

"19. To answer the primary question, we must first determine the meaning of the expression 'punishable with imprisonment for not less than ten years' occurring in clause (i) to proviso (a) of Section 167(2) CrPC…"

"25. While a minimum sentence in a statute does not mean only that sentence can be imposed, nor does it mean only the maximum sentence. Either punishment can be imposed, or something in between. The court decides what sentence should be imposed given the available range.

If the minimum sentence is set, the sentencing judge must give a sentence "not less than" that sentence. Therefore, the words "not less than" in clause (i) to proviso (a) of Section 167(2) CrPC (and other provisions) must be given their natural meaning, which is not below a minimum threshold. In the case of Section 167 CrPC, these words must relate to an offense punishable with a minimum of 10 years' imprisonment.

**Justice Deepak Gupta:**

While agreeing with Justice Madan B Lokur's decision that the detention under Section 167(2) CrPC would only be 60 days, as follows:

71. A bare reading of Section 167 of the Code indicates that if the offense is punishable with death or life imprisonment or with a minimum sentence of 10 years, Section 167(2)(a)(i) applies, and the accused can apply for "default bail" only if the investigating agency does not file a charge- sheet within 90 days. However, if the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment, Section 167(2)(a)(ii) applies, and the accused can be granted "default bail" after 60 days if the charge-sheet is not filed.

Even if two views are possible and the third category envisaged in Section 167(2)(a)(ii) is ambiguous, as suggested by learned Brother Pant, J., I firmly believe that a statute curbing liberty must be read strictly. Section 167 of the Code establishes the legal procedure for depriving a person of their personal liberty guaranteed by Article 21 of the Indian Constitution. If two meanings can be attributed to such a provision, the courts should lean towards liberty and accept the interpretation that upholds citizen liberty and preserves the spirit of liberty. Even if words are ambiguous, the court should be reluctant to accept an interpretation that curtails a human being's right to freedom.

In ***M Ravindran Vs Intelligence Officer-Directorate of Revenue Intelligence;*** (2021) 2 SCC 485, the Supreme Court interpreted Section 167(2) CrPC (Section 187(2) BNSS). It stated that the courts cannot adopt a rigid approach when considering rights under Article 21. The Court noted that the enactment of Section 167(2) and the safeguard of 'default bail' are intrinsically linked to Article 21 and are a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with the rule of law.

The Court analyzed the legislative intent of Section 167(2) (Section 187(2) BNSS). It provided time limits for the remand of the accused, proportionate to the seriousness of the offense, failing which the accused acquires the indefeasible right to bail. The Court aimed to balance the need for sufficient time for investigation with the need to protect the civil liberties of the accused.

Section 167(2) (Section 187(2) BNSS) mandates that the investigative agency collect the required evidence within the prescribed time period, or the accused can no longer be detained. This ensures swift and efficient action without misusing the prospect of further remand. It also ensures the Court takes cognizance of the case promptly, preventing society from losing faith in

the criminal justice system. Therefore, “Section 167(2) should be interpreted to ensure a fair trial, expeditious investigation and trial, and a rationalized procedure protecting the interests of indigent sections, which are subsets of the fundamental right guaranteed under Article 21.”

In case of ambiguity in a penal statute, the Courts should favor the interpretation that protects the rights of the accused, given the power disparity between the accused and the State machinery. This applies to substantive penal statutes and procedures curtailing liberty.

**The Court concluded as follows:**

Once the accused files an application for bail under the Proviso to Section 167(2) (Section 187(2) BNSS), he is deemed to have enforced his right to be released on default bail after the stipulated time limit for investigation. If the accused applies for bail under Section 167(2), CrPC (Section 187(2) BNSS) read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, the Court must release him on bail forthwith without delay after obtaining necessary information from the public prosecutor. This prompt action ensures the prosecution does not frustrate the legislative mandate to release the accused on bail in case of default by the investigative agency.

The right to be released on default bail remains enforceable even if the accused has applied for such bail; pending the bail application, subsequent filing of the chargesheet or a report seeking extension of time by the prosecution, or filing of the chargesheet during the interregnum when a challenge to the rejection of the bail application is pending before a higher Court.

However, if the accused fails to apply for default bail when the right accrues to him and subsequently files a chargesheet, additional complaint, or a report seeking extension of time before the Magistrate, the right to default bail is extinguished. The Magistrate can take cognizance of the case or grant

further time for investigation, though the accused may still be released on bail under other provisions of the CrPC.

The actual release of the accused from custody is contingent on the competent Court granting bail, as per Explanation I to Section 167(2) (Section 187(2) BNSS). If the accused fails to furnish bail or comply with the bail terms within the stipulated time, his continued detention is valid.

**3. State v. T. Gangi Reddy; (2023) 4 SCC 253:**

Can a person released on default bail under Section 187 BNSS [167(2) CrPC] have such bail been cancelled on merits after the subsequent filing of a charge sheet disclosing a serious non- bailable offence, under Sections 480 BNSS [437(5) Cr.P.C] and 483 BNSS [439(2) Cr.P.C]?

In State v. T. Gangi Reddy; (2023) 4 SCC 253, the Supreme Court addressed the issue of canceling default bail granted under Section 167(2) of the CrPC. In para 21.1, the Court reiterated that default bail is not based on the merits of the case but on the investigating agency's failure to file the charge sheet within the stipulated time. In para 21.2, the Court clarified that such bail is under Chapter XXXIII of the CrPC, which includes Sections 437(5) and 439(2). In para 21.3, the Court held that while mere filing of a charge sheet cannot cancel default bail, it can be canceled upon special and strong grounds that the charge sheet discloses a non-bailable offense.

In para 22, the Court cited Abdul Basit v. Mohd. Abdul Kadir Chaudhary (2014) 10 SCC 754, reiterating that default bail is not merit-based but a consequence of procedural failure. It can be canceled if the accused commits a serious offense, and the charge sheet discloses such an offense.

The grounds for bail cancellation include misuse of liberty, interference with investigation, tampering with evidence, or threat to witnesses, and these are not exhaustive. In the case of Section 167(2) bail, cancellation can be sought if there are reasonable grounds to believe the accused committed a non-bailable offense, but very strong grounds are necessary.

In para 27, the Court clarified that filing a charge sheet alone cannot cancel default bail. However, if a strong case is made out after the investigation and charge sheet filing, the bail can be canceled under Sections 437(5) and 439(2), along with other grounds for bail cancellation.

In para 28, the Court rejected the High Court's interpretation that a person released on default bail cannot be canceled on merits. It warned that accepting this would reward lethargy or deliberate dereliction by the investigating agency. The Court stated that allowing such an interpretation would enable serious offenders, including those under laws like NDPS or accused of murders, to secure release due to procedural delays, which could be due to collusion or manipulation. The Court emphasized that such release is not based on merits and that courts must evaluate the gravity of the offense disclosed in the charge sheet once the defect is cured. Holding otherwise would frustrate justice. Therefore, the courts retain the power to cancel bail in such cases.

In para 31, the Court affirmed that if an accused is released on default bail and a strong case is made out through the charge sheet establishing a non-bailable offense, the bail can be canceled on merits under Sections 437(5) and 439(2). However, it cautioned that mere filing of the charge sheet is insufficient; a strong case must be made out justifying custody.

In State v. T. Gangi Reddy, (2023) 4 SCC 253, the Supreme Court held that granting default bail under Section 167(2) CrPC does not confer an absolute right of liberty. Such bail is granted due to procedural lapses and may be canceled if new developments reveal serious non-bailable offenses. Extending this principle, where an accused is released on bail for a particular offense and the charge sheet discloses additional non-bailable offenses, they cannot be deemed to be on bail for those new offenses. Instead, they must seek separate bail for each new offense. Failure to do so amounts to unauthorized liberty and violates Chapter XXXIII of the CrPC. Separate bail ensures judicial scrutiny and prevents abuse of process, upholding criminal justice.

**4. Hyder Ali v. State of Karnataka, Writ Petition No. 33526 of 2024:** (dated 13th December 2024) “SUMMARY OF FINDINGS :

(i) The new regime, as per 187(3) of BNSS, does not change the purpose of the provision.

(ii) The phrase ‘ten years or more’ in Section 187(3) of BNSS means the minimum punishment for an offense under the BNS should be ten years.

(iii) The offense in the case doesn’t have a minimum sentence of ten years, but it can be extended to ten years, giving the court discretion to impose punishment up to ten years.

(iv) Completion of investigation for a punishment up to ten years takes 60 days, while for other offenses like death or life imprisonment of ten years and more, it takes 90 days.

(v) If the investigation is completed within 60 days, the police custody period starts from the day of registration of the crime. If it is 90 days, it starts from the day of registration. In both cases, the maximum police custody period is 15 days.

(vi) Since the offense is punishable up to ten years, the police custody period is from the day of registration of the crime to day 40.

Since the prosecution failed to file the charge sheet within 60 days, the petitioner claimed statutory bail. The State opposed the plea, arguing that the offense falls under the 90-day limit as per Section 187(3)(i) of BNSS, which applies to offenses punishable with imprisonment for “ten years or more,” and suggested that this phrase was distinct from the CrPC’s “not less than 10 years.”

The Kerala High Court rejected the State’s narrow interpretation, holding that Section 187(3)(i) of BNSS was similar to Section 167(2)(a)(i) CrPC, as interpreted by the Supreme Court in ***Rakesh Kumar Paul v. State***

***of Assam*** (2017). The Court ruled that when the maximum sentence is up to 10 years and no commercial quantity is involved, the 60-day limit applies. Emphasizing the principle that ambiguities in penal provisions must be resolved in favor of the accused, the Court concluded that the petitioner was entitled to default bail. It also clarified that the presence of criminal antecedents cannot defeat the statutory right to such bail.

In ***Hitendra Vishnu Thakur vs. State of Maharashtra***; AIR 1994 SC 2623, the Apex Court held that Parliament amended Section 167(2) CrPC to prescribe the outer limit for completing the investigation. If the investigation is not completed, the accused acquires the right to be released on bail, which is deemed to be under Chapter XXIII of the Code.

Though the accused becomes entitled to enlarge on bail, in a situation contemplated by Section 167, however, it is essential that the following conditions are met:

The accused can be released on bail if the charge-sheet has not been filed within the prescribed period of 60 or 90 days. However, they must file an application before the court for default bail. The court cannot grant default bail without an application. The Advocate of the accused may inform the court about the expiry of the remand period and request default bail, but Section 167 requires the Advocate to file an application stating that the accused is liable to be released on bail since the period of remand has expired and no charge-sheet has been filed. Default bail is an indefeasible right, but the accused must follow the prescribed procedure to obtain it. Mere expiry of the period does not suffice for granting default bail; the accused must file an application before the magistrate.

The Supreme Court in the Hitendra Thakur case observed that if the charge-sheet period expires and no extension is granted, the accused can apply for bail under Section 20(4) and Section 167 of the Code. The court will release the accused on bail if he/she seeks it and provide the required sureties. The court cannot grant bail on its own motion without an application from the accused. The accused persons must apply for bail if they want to be

released due to the prosecution's default in filing the challan within the prescribed time. Mere oral submission of the expiry period and non-filing of the challan will not suffice. The application for default bail should be filed before filing the charge-sheet. If not, the accused's right to default bail is extinguished when the charge-sheet is filed.

The Supreme Court clarified this in the landmark judgment of Sanjay Dutt vs. State. The accused's indefeasible right to default bail is enforceable only before filing the challan. It does not survive or remain enforceable after filing the challan, unless it was already availed of. Once the challan is filed, the question of granting bail must be considered and decided based on the merits of the case under the provisions for granting bail to an accused after filing the challan. The custody of the accused after filing the challan is governed by different provisions of the Code of Criminal Procedure, not Section 167.

If the right had accrued to the accused but remained unenforced until filing the challan, it is extinguished the moment the challan is filed because Section 167 ceases to apply.

The Court clarified that the accused's right to bail under Section 20(4)(bb) of the TADA Act and Section 167(2) of the Code of Criminal Procedure is enforceable only from the time of default until the filing of the challan. It does not survive the filing of the challan. If the accused persons apply for bail after the 180-day period, they must be released immediately. The right to bail after filing the challan is governed by the bail grant provisions at that stage.

When the period of remand expires (61 or 91 days), the accused must apply under Section 167(2),Cr.P.C., if the charge-sheet has not been filed. If they fail to do so and the charge-sheet is filed on the 62nd day, their right to bail under Section 167(2) is extinguished. After filing the charge- sheet, the accused's remand is taken under Section 309 of the Code, and the benefit under Section 167 cannot be re-visited.

In ***State vs. Mohd. Asrafat Bhat;*** (1996)1SCC 432, the Apex Court

reiterated that the right to default bail is enforceable only before the filing of the charge-sheet. If the accused does not avail themselves of this right and the charge-sheet is filed, their right to obtain statutory bail under Section 167(2) proviso (a) or (b) is extinguished.

Furthermore, the filing of the charge-sheet does not automatically cancel the default bail.

The law regarding bail cancellation must be satisfied for cancellation.

The Hon'ble Supreme Court held in ***Mohammed Iqbal Madar and others vs. State of Maharashtra;*** (1996) 1 SCC 722 that an accused released on bail due to the investigating agency's default in completing the investigation cannot have their bail canceled simply because the charge-sheet is filed. The bail can only be canceled if the charge-sheet has been submitted against the accused for an offense under TADA. For cancellation, the well-settled principles in respect of bail cancellation must be made out.

An accused must be held to have availed of his indefeasible right to be released on bail when he files an application for bail and offers to abide by the bail terms. Interpreting "availed of" to mean actual release after providing the required bail would cause injustice and defeat the purpose of Section 167 (2) of the Criminal Procedure Code. When an accused files an application for bail without a challan filed within the specified period, the Magistrate must only determine if the period has elapsed and if a challan has been filed. An accused must be held to have availed of his right if he files an application after the stipulated period alleging that no challan has been filed. If no challan has been filed within the prescribed period from the date of arrest, the Magistrate must find that the accused has availed of his right.

The Hon'ble Supreme Court reiterated this interpretation in ***Union of India Through CBI vs. Nirala Yadav @ Raja Ram Yadav@Deepak;*** (2014) 9 SCC 457. When an accused persons files an application for default bail within the permissible time, is willing to furnish bail bonds, and no charge-sheet has been filed, they have availed their right to default bail. However, if a charge- sheet is filed after this, the accused's right does not extinguish.

**Both application for default bail and charge sheet on the same day:**

If an application and a charge-sheet are filed on the same day, the accused persons have not availed their right to default bail. The Magistrate must ensure that the statutory period for filing the charge-sheet has expired and that the charge-sheet has not been filed before granting default bail. The provision of Section 167 ceases to apply once the charge-sheet is filed.

The Magistrate cannot ignore the charge-sheet in order to grant default bail. If both an application for release on bail and a prayer for extension of time to complete the investigation are filed on the same day, they should be considered together.

The application for extension will be considered, even if the bail application is filed. If the charge-sheet and bail applications are filed on the same day, the court cannot ignore the charge- sheet and proceed with the bail application. The court must consider the charge-sheet as the stage for applying for bail has expired. However, if the accused files the charge-sheet on the same day, the application fails to satisfy the conditions for bail.

The Hon'ble Justice B.N Agrawal's dissenting opinion in ***Uday Mohalal Acharya case*** stated that if an application for bail is filed on the 61st day due to default in filing the challan by the 60th day, and the challan is also filed on the 61st day, the application must be dismissed. The stage for applying for bail under Section 167(2) has expired, and the right is extinguished when the challan is filed.

Even if the majority view is that the accused has availed of his right by filing the application, the dissenting opinion argues that the stage for entertaining the application is over in such circumstances.

However, this is only when both applications and charge sheets are filed on the same day. If the application for bail is filed and the charge sheet has not been filed, the application should be disposed of promptly. It is not intended to keep the application pending to frustrate the accused's right until filing of a charge sheet later. Subsequent filing of the charge sheet does not

affect default bail if it has already been granted.

**GROUNDS FOR GRANTING OR REJECTING BAIL:**

The grant of bail requires consideration of various factors specific to each case. While there is no straight jacket formula, certain important factors will have to be considered while considering the bail petitions and they include prima facie involvement, nature and gravity of the charge, severity of punishment, etc.

At the stage of granting bail, the Court need not analyze the evidence, as it can be done at trial. Once bail is granted, the Appellate Court will usually be slow to interfere with it, as it pertains to an individual's liberty.

In ***Bihar Legal Support Society v. Chief Justice of India; (1986) 4 SCC 767***, the Constitution Bench of the Hon'ble Apex Court observed that the Supreme Court should not ordinarily, save in exceptional cases, interfere with orders granting or refusing bail or anticipatory bail, because these are matters in which the High Court should normally be final arbiter and that it should interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by it, or where there is grave, blatant or atrocious miscarriage of justice.

In ***Prasanta Kumar Sarkar v. Ashis Chatterjee; (2010) 14 SCC 496,*** the Hon'ble Apex Court reiterated the factors to be considered while considering an application for bail. They are:

(i) whether there is a prima facie or reasonable ground to believe that the accused committed the offense;

(ii) the nature and gravity of the accusation;

(iii) the severity of the punishment in the event of conviction;

(iv) the danger of the accused absconding or fleeing if released on bail;

(v) the accused's character, behavior, means, position, and standing;

(vi) the likelihood of the offense being repeated;

(vii) the reasonable apprehension of the witnesses being influenced; and

(viii) the danger of justice being thwarted by granting bail.

The Hon'ble Apex Court further held in the above case that if an order is passed without considering the above factors and in a mechanical manner, the order will be illegal.

In ***Mahipal v. Rajesh Kumar; (2020) 2 SCC 118,*** the Hon'ble Apex Court held that an appellate court may set aside an order granting bail if the court failed to consider relevant factors. The appellate court must assess whether the order suffers from a non-application of mind or is not supported by the evidence. It must also consider whether there was a prima facie or reasonable ground to believe that the accused committed the crime, taking into account the seriousness of the crime and the punishment.

A three-judge bench of the Hon'ble Apex Court in ***Jagjeet Singh & Ors. V. Ashish Mishra @ Monu & Anr;*** 2022 SCC OnLine SC 453, reiterated the factors the court must consider when granting bail under Section 439 CrPC and highlighted the circumstances where the court may interfere when bail has been granted in violation of the section.

In ***Brij Nandan Jaiswal v. Munna***; (2009) 1 SCC 678, this Hon'ble Apex Court reiterated and held thus:

> ***"12… The order lacked reasons for granting bail, suggesting a mechanical approach without considering pros and cons. While granting bail, especially in serious cases like murder, justifying the grant is necessary."***
>
> (emphasis supplied)

From the above analysis, it is abundantly clear that the order granting or refusing bail should not to cryptic, and the relevant factors as enlisted above should be considered and discussed in such an order.

**“BAIL, NOT JAIL” IS THE BASIC RULE:**

The basic rule is “bail, not jail,” except where the petitioner may flee from justice, thwart its course, or create trouble by repeating offenses or intimidating witnesses, as held by the Hon’ble Apex Court in *State of Rajasthan, Jaipur vs. Balchand; MANU/SC/0152/1977:*

**Considerations while granting bail:**

The courts while considering the petition for bail should consider the nature of the offense, which is a crucial factor. More heinous crimes have a higher chance of bail rejection, though dependent on the facts. Other relevant considerations may exist, but they are illustrative and not exhaustive. While granting bail, the Court must consider the nature of the accusations, the severity of the punishment, the evidence supporting the charges, and reasonable apprehensions of witness tampering or threats to the complainant. While the entire evidence establishing guilt beyond reasonable doubt is not accepted, there must always be a prima facie satisfaction of the Court in support of the charge. Frivolity in prosecution should be considered, and only genuineness should be considered in granting bail. In case of doubt, the accused is entitled to an order of bail.

**ORDER GRANTING BAIL IF PASSED IN A CASUAL AND CRYPTIC MANNER, IS LIABLE TO BE SET ASIDE:**

***Manoj Kumar Khokhar vs. State of Rajasthan and Ors.; MANU/SC/0028/2022***

A Court does not need elaborate reasons to grant bail, especially when the case is new and the charges against the are not clear. An order should not imply a conviction or acquittal. However, the Court cannot ignore material aspects like the accused’s allegations, the severity of the punishment if proven, the witnesses’ potential influence, evidence tampering, the prosecution’s frivolity, the accused’s criminal history, and a prima facie case against the accused.

**Common grounds for rejecting bail:**

**The following are the common grounds for rejection of bail:**

1. **Seriousness of the offense:** Courts often deny bail in cases involving grave offenses like murder, rape, terrorism, or narcotics-related crimes. The severity of the crime raises concerns about societal impact and public safety.

2. **Likelihood of tampering with evidence:** If the court believes the accused may influence witnesses or tamper with evidence, bail is often denied, especially in cases involving close personal or professional relationships between the accused and witnesses.

3. In ***Nimmagadda Prasad v. CBI*** *(2013),* the Hon'ble Supreme Court held that granting bail should be avoided if there is a reasonable apprehension of the accused obstructing justice by **tampering with evidence**.

4. In ***State of U.P. v. Amarmani Tripathi*** *(2005), the Hon'ble Apex Court* emphasized the need to assess the accused's propensity to **abscond** before granting bail.

5. In ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav*** *(2005), the* Supreme Court stated that a **history of prior offenses** is a valid consideration for denying bail.

6. In ***Zahira Habibulla H Sheikh v. State of Gujarat*** (2004), the Hon'ble Apex Court observed that **societal impact and public peace** are vital considerations in bail matters.

7. **Risk of Absconding:** Courts reject bail if there is a significant risk of the accused fleeing to avoid trial, considering factors like financial status, foreign connections, and previous conduct.

8. **Repeat Offender or Criminal History:** An accused with a prior record of convictions or ongoing criminal cases may find it harder to secure bail due to concerns about recidivism and public safety.

9. **Threat to Public Order or National Security:** Cases involving threats to public safety, communal harmony, or national security often lead to bail denial, including crimes under special statutes like the **Unlawful Activities (Prevention) Act (UAPA)** and **National Security Act (NSA)**.

**IMPOSING CONDITIONS WHILE GRANTING BAIL:**

When **granting bail**, the Court can impose conditions, but this power must be exercised judiciously to ensure that conditions serve legitimate procedural purposes without becoming unduly burdensome or punitive. The judicial duty is to ensure bail conditions align with statutory intent and provisions. Courts must avoid impractical, unfair, or disproportionate conditions.

The Hon'ble Supreme Court established clear boundaries for bail conditions. In ***Munish Bhasin and Others v. State (Government of NCT of Delhi) and Another; (2009) 4 SCC 45***, the Hon'ble Apex Court addressed onerous bail conditions in a domestic violence case.

The Hon'ble Apex Court held that while exercising discretion to release an accused under Section 438 of the Code, the High Court or Sessions Court cannot impose freakish conditions. The court can impose necessary, just, and efficacious conditions while enlarging an accused on bail. However, the accused cannot be subjected to irrelevant conditions.

The Court emphasized the court's caution in imposing conditions and not transgressing its jurisdiction. Conditions under Section 438 of the Code cannot be harsh, onerous, or excessive to frustrate the grant of bail.

The Hon'ble Supreme Court in ***Kunal Kumar Tiwari v. State of Bihar; (2018) 16 SCC 74*** clarified the scope of conditions under Section 437(3)(c) of the CrPC. The Court noted that clause (c) allows courts to impose conditions in the interest of justice, but such conditions cannot be arbitrary, fanciful, or extend beyond the provision's end. The phrase "interest of justice" means "good administration of justice" or "advancing the trial process," and broader interpretations should be avoided due to purposeful interpretation.

This interpretation narrows the phrase "interest of justice" to conditions genuinely advancing the trial process or promoting good administration of justice, rather than arbitrary restrictions.

***Excessive conditions to be avoided while granting bail:***

In ***Guddan @ Roop Narayan vs State of Rajasthan*** (Criminal Appeal No. 120 of 2023 @ SLP (Criminal) No. 9756 of 2022), the Hon'ble Apex Court held that imposing excessive conditions amounts to effective refusal of bail.

**Common conditions in bail matters:**

1. **Standard Conditions:** Appearance in court, non-interference, travel restrictions, surrender of passport, regular reporting, and avoiding criminal activity.

2. **Additional Conditions:** Residence, curfew, electronic monitoring, surety or bail bond, and treatment programs.
3. **Case-Specific Conditions:** Asset restrictions (financial cases), firearm surrender (violence cases), and no-contact orders (involved individuals).

4. **Revocation of Bail:** If conditions are violated, the court may revoke bail and order custody until trial.

Factors considered in determining bail conditions include the severity of the crime, flight risk, past criminal history, and potential danger to the public. The goal is to balance individual rights with community safety and legal process integrity.

**Permissible restrictions for conditional bail include:**

1. **Personal Conduct Restrictions:** Travel restrictions, reporting requirements, and avoiding certain individuals.

2. **Supervision and monitoring:** electronic monitoring, regular meetings, third-party supervision, and house arrest.

3. **Surrender of documents or items:** Passport surrender and firearm surrender.

4. **Financial assurances:** Bail bond or surety and financial restrictions.

5. **Specific case conditions:** Treatment programs and rehabilitation.

6. **Residency requirements:** Specify the address and consent if the residence is elsewhere.

7. **No contact orders:** Forbid contact with the victim at home and at work.

**Some of the landmark decisions of the Hon'ble Apex Court regarding bail conditions:**

1. Ayub v. State of M.P.; (2004) 13 SCC 457: The bail conditions should be reasonable and not arbitrary.

2. Moti Ram v. State of Madhya Pradesh; AIR 1978 SC 1594: Bail conditions must not be unjust, irregular, and improper. Accused from other states should not be insisted on local surety. The surety system must be effective but not onerous.

4. Sanjay Chandra v. Central Bureau of Investigation; (2012) 1 SCC 40: Bail conditions should secure the accused's attendance during trial and not be punitive.

5. Puranmal Jat vs State of Rajasthan; (2023) SCC Online SC 1418: Bail in NDPS cases was granted with a Location Sharing condition.

6. Mursaleen Tyagi Vs. The State of U.P.; 2023 livelaw (SC) 700: Bail conditions can only be onerous in exceptional circumstances, not ordinarily.

**POWER TO MODIFY BAIL CONDITIONS:**

**Statutory framework under Section 439.**

Under Section 439, the Court of Sessions or High Court can modify or set aside bail conditions on reasonable grounds. This reflects the principle of modifying bail conditions, recognizing that circumstances may change during criminal proceedings, necessitating adjustments for justice.

The power to modify bail conditions serves several important functions:

- **Adaptation to changed circumstances**: As cases progress and new information becomes available, previously imposed conditions may become unnecessary, inappropriate, or unduly burdensome.
- **Correction of excessive conditions**: Superior courts may review and modify conditions imposed by lower courts that exceed reasonable bounds or serve no legitimate purpose.

- **Recognition of compliance**: If the accused satisfies the court that they have followed bail conditions and cooperated with authorities, the court may modify or relax conditions.

**Courts consider various factors while considering modification of bail conditions:**

- **Demonstrated compliance**: The accused's track record of adhering to existing conditions and cooperating with legal proceedings demonstrates reliability and may justify relaxation of restrictions.

- **Changed personal circumstances**: Significant changes in the accused's personal, professional, or family circumstances may necessitate modification of travel restrictions or other conditions.

- **Progress of investigation**: As investigations advance and evidence is secured, concerns about evidence tampering or witness intimidation may diminish, justifying relaxation of related conditions.

- **Proportionality assessment**: Courts may reconsider whether existing conditions remain proportionate to the charges and circumstances of the case.

## CANCELLATION OF BAIL:

The Code of Criminal Procedure provides for bail cancellation and custody of accused. Section 437(5) allows any court that released a person on bail under sub-sections (1) or (2) of Sec. 437 of Cr.P.C. to arrest and commit them to custody if necessary. Section 439 confers the power to cancel bail on the High Court and the Court of Session.

**Bail can be canceled in two situations:**

1. **On merits of a case**, mainly due to the order granting bail being perverse, passed without due application of mind, or violating substantive or procedural law.
2. **On the ground of misuse of liberty** after the grant of bail or other supervening circumstances.

Higher Courts can cancel bail in the first type of cases, while any court that granted bail can cancel it in the second type. Section 437(5) of Cr.P.C., (Sec. 480(5) of BNSS) gives the power to cancel bail to any court other than the High Court or Sessions Court, allowing magistrates to arrest and commit released individuals if subsequent circumstances justify it.

Section 439(2) of CrPC (Sec.483(3) of BNSS) grants the Hon'ble High Court and Sessions Court the power to re-arrest and commit an accused released on bail, even if a lower court had granted bail. This power is broader than Section 437(5), CrPC, which only allows the Hon'ble High Court and Sessions Court to cancel bail orders.

The Hon'ble High Court or Sessions Court can cancel bail orders when the accused misuses their liberty or there is a substantial change in the case.

In ***Daulat Ram and Others vs. State of Haryana;*** 1995 (1) SCC 349, the Hon'ble Supreme Court held that bail cancellation requires strong circumstances and should not be done mechanically.

The grounds for cancellation of bail under Sections 437(5) and 439(2) of CrPC are:

- Misusing liberty by committing similar crimes
- Interfering with the investigation
- Attempting to tamper with evidence
- Threatening witnesses or hindering the investigation
- Attempting to flee to another country
- Attempting to make oneself scarce
- Attempts to evade his surety. These are illustrative but not exhaustive.

The Apex Court dealt in detail with the issue of bail cancellation in ***Ram Govind Upadhyay vs. Sudarshan Singh and Ors***.; AIR 2002 SC 1475.

Relevant paragraphs:

*"2. While liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals - but this protection can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stand qualified depending upon the exigencies of the situation. It is on his perspective that in the event of there being committal of a heinous crime it is the society that needs a protection from these elements since the latter are having the capability of spreading a reign of terror so as to disrupt the life and the tranquility of the people in the society. The protection thus to be allowed upon proper circumspection depending upon the fact situation of the matter."*

*"8.While it is true that availability of over-whelming circumstances is necessary for an order as regards the cancellation of a bail order, the basic criterion, however, being interference or even an attempt to interfere with the due course of administration of justice and/or any abuse of the indulgence/privilege granted to the accused....."*

*"9.Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non-consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on to the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge-sheet have already been issued - the Court ought to take note of*

*the facts on record rather than ignoring it. In any event, the discretion to be used shall always have to be strictly in accordance with law and not de-hors the same. The High Court thought it fit not to record any reason far less any cogent reason as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago. The consideration of the period of one year spent in jail cannot in our view be a relevant consideration in the matter of grant of bail more so by reason of the fact that the offence charged is that of murder under Section 302 IPC having the punishment of death or life imprisonment - it is a heinous crime against the society and as such the Court ought to be rather circumspect and cautious in its approach in a matter which stands out to be a social crime of very serious nature."*

**IMPORTANT CASE LAWS RELATING TO BAIL JURISPRUDENCE:**

**Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273:**

In Arnesh Kumar v. State of Bihar, the petitioner sought anticipatory bail. He married Sweta Kiran on July 1, 2007. Years later, she alleged her husband's parents demanded dowry, including a car, TV, AC, ₹8,00,000, and household items. She claimed he sided with them and threatened to remarry if her family failed to meet the demands. The harassment compelled her to leave the home.

Arnesh Kumar denied the allegations and sought bail to avoid arrest. The Sessions and High Courts rejected his plea.

The Hon'ble Supreme Court expressed serious concern over the misuse of Section 498A of the Indian Penal Code, as disgruntled wife is using it as sward to initiate criminal proceedings against husband and relatives without adequate evidence.

The Hon'ble Apex Court emphasized that mechanical arrests based on

mere allegations violate Article 21 of the Constitution and should not be automatic or routine, especially for offenses punishable by imprisonment for less than seven years or up to seven years. The Court directed police to act in accordance with Section 41 of the Code of Criminal Procedure and Magistrates to exercise judicial discretion in authorizing detention, supporting their orders with cogent reasons.

To curb arbitrary arrests, the Hon'ble Supreme Court issued the following guidelines:

1. Arrests under Section 498A IPC should not be routine. Police must conduct a preliminary investigation to verify the report.

2. If arrest is deemed necessary, the officer must record reasons and forward them to the Magistrate.

3. The arresting officer must follow a detailed checklist to determine the necessity of arrest.

4. Where no arrest is made, the investigating officer must document the reasons and submit the report to the Magistrate within two weeks.

5. The Magistrate must be satisfied that the arrest was necessary before authorizing further detention.

In case of violation of these directions, disciplinary proceedings may be initiated against the erring police officers by the jurisdictional High Court, and they shall be liable for contempt of court.

Further, if the Judicial Magistrate fails to apply judicial mind while ordering detention keeping the above guidelines in mind, he/she shall be liable for departmental action by the High Court.

These guidelines apply to all offences punishable with imprisonment for a term less than seven years or extending upto seven years, not just those under Section 498A IPC or Section 4 of the Dowry Prohibition Act.

The decision in ***Arnesh Kumar v. State of Bihar*** safeguarded individual liberty and prevented the misuse of criminal law provisions, especially in matrimonial disputes. The Court recognized legitimate concerns over dowry harassment while addressing potential abuse of Section 498A IPC

and Section 4 of the Dowry Prohibition Act. By issuing structured guidelines, the Court upheld fairness, reasonableness, and due process.

**Siddharth v. State of U.P., (2022) 1 SCC 676:**

The Hon'ble Apex Court had an occasions to decide the controversy arose in relation to the interpretation of Section 170 of the Code of Criminal Procedure, 1973 (CrPC), which stipulates that where the investigating officer, upon completion of investigation, is of the opinion that sufficient grounds exist to proceed against the accused, the accused shall be forwarded to the Magistrate empowered to take cognizance of the offence.

In the instant case, the trial court construed Section 170 to imply that the charge-sheet could not be taken on record unless the accused was taken into custody. As a consequence, the appellant was compelled to apply for anticipatory bail, which was denied, leading to the issuance of an arrest warrant.

Aggrieved by this, the appellant approached the Hon'ble Supreme Court.

**Issues Raised Before the Apex Court:**

1. Whether the appellant should be granted an anticipatory bail or not?
2. Merely because an arrest can be made lawfully does it mandate that it must be made?

**Observations of the Supreme Court:**

Upon considering judicial precedents from various High Courts, the Supreme Court clarified the objective of Section 170 CrPC, emphasizing that its purpose is merely to secure the presence of the accused before the court at the time of filing of the charge-sheet, and not to mandate arrest or custody.

The Hon'ble Supreme Court held that the term "custody" under Section 170 is not to be interpreted narrowly as police or judicial custody, but should be understood to mean the production or appearance of the accused before the court at the time of filing the final report.

**Legal Principles Affirmed:**

1. Issuance of Non-Bailable Warrants:

The Court reiterated that non-bailable warrants are to be issued only when there is a reasonable apprehension that service of summons or bailable warrants would not suffice. This is essential to preserve the individual's liberty under Article 21 of the Constitution of India.

2. Accused's Cooperation with Investigation:

Where the accused has cooperated with the investigation, there is no justification for compelling arrest or issuance of non-bailable warrants. This principle was reaffirmed in Satender Kumar Antil v. CBI and other similar rulings.

3. Arrest Not Mandatory for Filing Charge-Sheet:

The Court clarified that, under Section 170 CrPC, if the investigating agency does not seek custodial interrogation, the accused need not be arrested solely for the purpose of filing the charge-sheet.

4. Charge-Sheet Must Be Accepted Regardless of Arrest Status:

The Supreme Court categorically held that a Magistrate cannot refuse to accept a charge-sheet on the ground that the accused has not been taken into custody.

5. Bail Should Be Favoured When Custody is Unnecessary:

The Court endorsed the view that bail ought to be granted when the accused is not required to be taken into custody and has fully cooperated with the investigating agency.

This ruling in Siddharth v. State of Uttar Pradesh underscores the constitutional emphasis on personal liberty, reinforces the principle that arrest is not a procedural formality, and affirms that custody is not a precondition for filing a charge-sheet. It acts as a crucial reminder for law enforcement and trial courts to respect procedural safeguards and interpret statutory provisions

in a rights-centric manner.

**Satender Kumar Antil v. CBI; AIR 2022 SC 3386:**

According to the guidelines of the Hon'ble Apex Court, all the offences are to be categorized under the following four types. They are:

A. Offences punishable with imprisonment of 7 years or less and not falling in Category B and D.

B. Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C. Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), Unlawful Activities (Prevention) Act, (Section 43-D(5), Companies Act, Section 212(6), etc.

D. Economic offences not covered by Special Acts.

If the accused had cooperated throughout the investigation including appearing before investigating officer whenever called, then there is no need to forward such an accused along with the charge sheet, as held by the Hon'ble Apex Court in Siddharth V. State of U.P; reported in 2021 SCC OnLine SC 615.

On filing of charge sheet, if the accused was already released on bail, the courts should not issue NBW. Instead, the Court should follow the following procedure:

**First:** Issue ordinary summons. At that stage, the accused even be permitted to appearance through a lawyer.

**Secondly:** If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.

**Thirdly:**Issue NBW on failure to appear despite issuance of bailable warrant.

**Fourthly:** 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 physically on the next date/s of hearing.

**Fifthly:** Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

With regard to the offences falling under category A, the Hon'ble Bench held that one would expect a better exercise of discretion on the part of courts in favour of the accused. Coming to category B, the Hon'ble Bench said that these cases will have to be dealt with on a case-to-case basis, again keeping in view the general principle of law and the provisions as laid down in the instant judgment. In so far as category C is concerned, the bench refused to deal with individual enactments as *each special Act has got an objective behind it, followed by the rigour imposed*. However, the Hon'ble Bench held that the general principle governing delay would apply to these categories also.

The Hon'ble Bench made it clear that the more the rigour, the quicker the adjudication ought to be. In these types of cases, the bench added, the number of witnesses would be few and there may not be any justification for prolonging the trial.

For the last category, that is economic offences, the Hon'ble Bench held that whether it should be treated as a class of its own or otherwise has already been decided in P. Chidambaram *V. Directorate of Enforcement (2019),* that is, they are class of their own. The Hon'ble Bench opined that the gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence.

**Offences with punishment of seven years or less**

The Hon'ble Bench observed that despite the Supreme Court's decision in ***Arnesh Kumar versus State of Bihar (2014)***, no concrete step has been taken to comply with the mandate of section 41A of the CrPC. It held that notwithstanding the existence of a reason to believe that the suspect committed the offence, the satisfaction for the need for arrest shall also be present.

The Hon'ble Bench thus directed that t*he investigating agencies and their officers are duty- bound to comply with the mandate of Section 41 and 41A of the [CrPC] and the directions issued by the Court in* Arnesh Kumar case. *Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.* It further directed that *courts will have to satisfy themselves on the compliance of Section 41 and 41A of the CrPC and any non- compliance would entitle the accused for grant of bail.*

In addition, it directed state governments and Union Territories to facilitate standing orders for the procedure to be followed under sections 41 and 41A of the CrPC. The bench also stated that it would expect courts to come down heavily on officers effecting arrest without due compliance with sections 41 and 41A as these provisions are a facet of Article 21.

**Section 87 and 88 of the CrPC:**

The Hon'ble Bench observed that despite the clear law laid down by the Supreme Court in Inder Mohan Goswami V. State of Uttaranchal (2007), non-bailable warrants are issued as a matter of course without due application of mind and against the tenor of the above provisions, which merely facilitate a discretion; this is obviously to be exercised in favour of the person whose attendance is sought for, particularly in the light of liberty enshrined under Article 21 of the Constitution. In *Inder Mohan Goswami*, it was held that courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued, if so warranted.

**Default bail:**

The Hon'ble Bench reiterated that this provision is also a limb of Article 21.

**On delayed trial**

The Hon'ble Bench noted that despite the various directions issued by the Supreme Court not to give unnecessary adjournments resulting in the witnesses being won over, the non- compliance of section 309 continues with gay abandon. The Hon'ble Bench reiterated that the right to a fair and speedy trial is yet another facet of Article 21.

**Pending appeals by convicts:**

On the aspect of pending appeal by a convict, the bench held that the power **e**xercisable under Sec. 389 of the CrPC is different from those under Sections 437 or 439 of the CrPC because 'presumption of innocence" and "bail is the rule and jail is the exception" may not be available to the convict who has suffered a conviction. Thus, mere pendency of an appeal, *per se,* would not be a factor.

However, it noted that delay in taking up the main appeal or revision, coupled with the benefit conferred under section 436A of the CrPC, among other factors, ought to be considered for a favourable release on bail.

**On Section 436A of CrPC**

Section 436A of the CrPC sets out the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the accused during the investigation, inquiry and trial. The bench held that the word 'trial' should be given an expanded meaning, particularly when an appeal or admission is pending.

Consequently, in a case where an appeal is pending for a longer time, to bring it under section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision. Under this provision, when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offence, they shall be released by the court on their personal bond, with or without sureties.

The Hon'ble Bench observed that under section 436A, there is not

even a need for a bail application in a case of this nature, particularly when the reasons for delay are not attributable to the accused. It affirmed that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21.

**When bail may be taken in case of non-bailable offence**

Section 437 deals with grant of bail in case of non-bailable offences by a court other than the High Court or a Court of Sessions. The Hon'ble Bench held that in such cases also, the principle remains the same, that is, bail is the rule. Bail can be denied when the court is satisfied that there are reasonable grounds that the accused has been guilty of the offence punishable either with death or imprisonment for life.

Similarly, if the said person is previously convicted of an offence punishable with death or imprisonment for life or imprisonment for seven years or more, or convicted previously on two or more occasions, the accused shall not be released on bail by the Magistrate.

The Hon'ble Bench also asked courts to duly take care of the proviso to Section 437, which speaks of an accused under the age of 16 years, or who is sick or infirm, or is a woman.

**Special powers of High Court or Court of Session regarding bail:**

Section 439 confers power upon the High Court or a Court of Sessions regarding bail. The appeal against the order of the judicial magistrate exercising power under section 437 of the CrPC or in a case triable by the Court of Sessions exclusively, lies under section 439.

The Hon'ble Bench directed that the time-limit mentioned in the second proviso to section 439 prescribing for the notice of an application to be served on the public prosecutor within a time limit of 15 days, and the proviso to sub-section (1)(a) of section 439 making it obligatory to give notice of the application for bail to the public prosecutor as well as the informant or any other person authorized by him at the time of hearing the application for bail, should

be complied with.

**Avoid Excessive Conditions**

The Hon'ble Bench held that under Sec. 440 of the CrPC, the amount of every bond executed under Chapter XXXIII of the CrPC is to be fixed with regard to the circumstances of the case, and shall not be excessive. This is a salutary provision which has to be kept in mind, it added.

**Need for law to streamline bail**

The Hon'ble Bench referred to the Bail Act of the United Kingdom, which is a comprehensive law dealing with bail by following a simple procedure. The Hon'ble Bench said it would call upon the Union Government to introduce an Act specifically meant for granting bail as done in various other countries like the United Kingdom.

***Policy Strategy for Grant of Bail, In re*,; (2024) 10 SCC 685:**

The Hon'ble Apex Court, inter alia, issued the following guidelines in the matter of release of prisoners after grant of bail:

*"9. With a view to ameliorate the problems a number of directions are sought. We have examined the directions which we reproduce hereinafter with certain modifications:*

*"(1) The court which grants bail to an undertrial prisoner/convict would be required to send a soft copy of the bail order by email to the prisoner through the Jail Superintendent on the same day or the next day. The Jail Superintendent would be required to enter the date of grant of bail in the e-prisons software (or any other software which is being used by the Prison Department).*

*(2) If the accused is not released within a period of 7 days from the date of grant of bail, it would be the duty of the Superintendent of Jail to inform the Secretary, DLSA who may depute paralegal volunteer or jail visiting advocate to interact with the prisoner and assist the prisoner in all ways possible for his release.*

*(3) NIC would make attempts to create necessary fields in the e-prison software so that the date of grant of bail and date of release are entered by the Prison Department and in case the prisoner is not released within 7 days, then an automatic email can be sent to the Secretary, DLSA.*

*(4) The Secretary, DLSA with a view to find out the economic condition of the accused, may take help of the Probation Officers or the paralegal volunteers to prepare a report on the socio-economic conditions of the inmate which may be placed before the court concerned with a request to relax the condition(s) of bail/surety.*

*(5) In cases where the undertrial or convict requests that he can furnish bail bond or sureties once released, then in an appropriate case, the court may consider granting temporary bail for a specified period to the accused so that he can furnish bail bond or sureties.*

*(6) If the bail bonds are not furnished within one month from the date of grant of bail, the Court concerned may suo motu take up the case and consider whether the conditions of bail require modification/relaxation.*

*(7) One of the reasons which delays the release of the accused/convict is the insistence upon local surety. It is suggested that in such cases, the courts may not impose the condition of local surety."*

**Gajanan Dattatray Gore Vs. The State Of Maharashtra & Anr, 2025 INSC 913:**

The Hon'ble Apex Court held that no Trial Court or High Court shall grant bail based on monetary undertakings. Bail applications must be decided strictly on merits, not on promises of financial deposit. Courts must not pass conditional bail orders linked to monetary assurances.

# STUDY MATERIAL ON
# "POST CONVICTIONAL BAIL".

By

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## Introduction:-

The grant of post-conviction bail is a matter of judicial discretion that demands careful and meticulous evaluation of the facts and circumstances of each case. As observed by the Supreme Court in **Siddharam Satlingappa Mhetre v. State of Maharashtra**, (2011) 1 SCC 694, the decision to grant or refuse bail must be based on the available material and the specific context of the case, with particular attention to whether the accused has cooperated with the investigation and is unlikely to abscond. The Court emphasized that arrest, whether at the pre-conviction or post-conviction stage, carries significant ignominy, humiliation, and consequences not only for the accused but also for their family and community (paras 89-90). Importantly, the law of bail seeks to balance two conflicting interests: the need to protect society from the dangers posed by offenders and the risk of recidivism while on bail, and the fundamental principle of presumption of innocence and the sanctity of individual liberty. The order granting or refusing bail must, therefore, reflect a perfect equilibrium between these competing considerations, recognizing that every criminal offence is ultimately an offence against the State and that

society has a vital stake in the outcome of bail decisions.

**Concept, Philosophy, and Judicial Approach to Bail:-**

Bail, as defined under Section 2(b) of the Nagarik Suraksha Sanhita, 2023, refers to the release of a person accused or suspected of committing an offence from the custody of law, subject to certain conditions imposed by an officer or court, upon execution of a bond or bail bond. Conceptually, bail is understood as a right to assert freedom against State-imposed restraints, rooted in the principles of human rights since the UN Declaration of Human Rights, 1948, to which India is a signatory. The term "bail" etymologically derives from the Old French "bailer" (to give or deliver) or the Latin "baiulare" (to bear a burden), and is generally regarded as a conditional liberty. According to Stroud's Judicial Dictionary (4th Edn., 1971), bail involves the accused offering sureties for his appearance before the court, thereby being set at liberty until the appointed date. Bail thus serves as a mechanism by which the State entrusts the community with the responsibility of ensuring the accused’s presence, involving the community in the administration of justice. The fundamental right to personal liberty, as emphasized in **A.K. Gopalan v. State of Madras,** 1950 SCC 228, can only be restricted by due process of law, and must be balanced against the need for community security and the investigational rights of the police. The law of bail, therefore, seeks to harmonize the conflicting demands of protecting society from crime and

upholding the presumption of innocence until proven guilty.

The philosophy of bail is integral to the administration of justice, as it mediates between the police power to restrict liberty and the presumption of innocence in favor of the accused. As held in **Vaman Narain Ghiya v. State of Rajasthan,** (2009) 2 SCC 281 : (2009) 1 SCC (Cri) 745, the purpose of detention is not to punish the accused on the mere assumption of guilt. Courts must exercise their discretion judiciously when granting bail, and not as a matter of routine. While a detailed examination of evidence is not required at the bail stage, courts should provide reasons for their prima facie satisfaction, especially in serious offences. Relevant factors include the nature and gravity of the accusation, severity of potential punishment, supporting evidence, risk of tampering with witnesses, threat to the complainant, and the likelihood of the accused fleeing justice. This approach was reiterated in **Dipak Shubhashchandra Mehta v. CBI,** (2012) 4 SCC 134, where the Supreme Court emphasized the need to consider these factors, particularly in non-bailable offences. Ultimately, bail is a legal mechanism—applicable in both civil and criminal cases— whereby a person is set at liberty on the assurance of appearance, with the sureties having the legal power to ensure compliance and protect the accused from unnecessary incarceration.

**1. Post Convictional Bail:- What it is?**

Post convictional bail refers to the release of a convicted person on bail while their appeal against conviction is pending before a higher court. The relevant provision is Section 389 of the Code of Criminal Procedure, 1973, which empowers the appellate court to suspend the execution of the sentence and release the convict on bail during the pendency of the appeal. The Supreme Court in **Kashmira Singh v. State of Punjab** (1977 AIR 2147) clarified that courts should be liberal in granting bail in cases where the appeal is not likely to be heard soon, to prevent undue hardship to the convict. The rationale is to balance the presumption of innocence during the appeal process with the interests of justice, especially when the convict has already undergone a substantial part of the sentence or when the appeal raises substantial questions of law.

Post convictional bail refers to the discretionary release of a convicted person on bail while their appeal is pending, primarily governed by Section 389 of the Code of Criminal Procedure, 1973. The principles guiding this relief have been shaped by several key precedents, including the Privy Council's decision in **Emperor v. Hutchinson** (AIR 1931 PC 89), which emphasized judicious exercise of discretion, and the Supreme Court's ruling in **State of Uttar Pradesh v. Lala Ram** (AIR 1955 SC 216), which held that such bail should be an exception. In **Kashmira Singh v. State of Punjab** ((1977) 4 SCC 291) and **Babu Singh v. State of Uttar Pradesh**

((1978) 1 SCC 579), the Court underscored that bail should ordinarily be granted if the appeal is unlikely to be heard soon, unless exceptional circumstances exist. Other important cases such as **Bhagwan Rama Shinde Gosai v. State of Gujarat** ((1999) 4 SCC 421), **State of Maharashtra v. Madhukar Wamanrao Smarth** ((2008) 13 SCC 568), **Atul Tripathi v. State of UP** ((2014) 9 SCC 177), **Sunil Kumar v. State of Punjab** ((2017) 4 SCC 268), **Siddharam Satlingappa Mhetre v. State of Maharashtra** (2011) 1 SCC 694), and **Niranjan Singh v. Prabhakar Rajaram Kharote** ((1980) 2 SCC 559) further clarified that factors such as the seriousness of the offence, conduct of the accused, likelihood of absconding, and the balance between the convict's liberty and the interests of justice must be considered. Collectively, these rulings establish that post convictional bail is not a matter of right but a matter of judicial discretion, to be exercised with careful consideration of the circumstances. of each case, accused

**Mercy petition in death sentence cases:-**

Section 472 of BNSS, 2023, has been inserted to provide a time bound disposal of the mercy petitions filed before the President and Governor. (Article 72 or the Governor of the State under Article 161 of the Constitution within a period of thirty days from the date on which the Superintendent of the jail...)

**Post-Conviction Bail Principles:**

There exists a clear distinction between the grant of bail under Section 439 of the Criminal Procedure Code (CrPC) in cases of pre-trial arrest and the suspension of sentence under Section 389 CrPC, which pertains to bail after conviction. In pre-trial situations, the presumption of innocence is a fundamental tenet of criminal jurisprudence, and courts are generally more liberal in granting bail, guided by the principle that "bail is the rule and jail is the exception," as affirmed by the Supreme Court in **Dataram Singh v. State of Uttar Pradesh,** (2018) 3 SCC 22. However, after conviction, this presumption no longer applies, and the principle favoring bail does not automatically extend to post-conviction scenarios. When considering an application for suspension of sentence and grant of bail under Section 389 CrPC, the court must assess the prima facie merits of the appeal and other relevant factors. The grant of bail in such cases requires strong and compelling reasons, which must be expressly recorded in the order, as mandated by Section 389(1) CrPC. This distinction and the principles governing post-conviction bail were comprehensively summarized by the Supreme Court in **Preet Pal Singh v. State of U.P.,** (2020) 8 SCC 645 : 2020 SCC OnLine SC 645 : (2020) 3 SCC (Cri) 897 : AIR 2020 SC 3995 (paras 35 and 36).

**Principles Governing Pre-Conviction Detention:-**

In **Shoma Kanti Sen v. State of Maharashtra**, (2024) 6 SCC 591 : 2024 SCC OnLine SC 498, the Supreme Court reiterated that pre-conviction detention serves several critical purposes, including facilitating the collection of evidence during investigation, maintaining the integrity of the trial process, preventing the accused from absconding, and averting the possibility of further offences by the accused. The Court emphasized that the necessity for such detention, both at the investigation and post charge-sheet stages, is sanctioned by law, particularly in cases involving grave and serious offences. However, the Court cautioned that any deprivation of personal liberty, as protected under Article 21 of the Constitution, must be justified as reasonable, adhere to a just and fair procedure, and be proportionate to the facts of the case. These overarching principles must guide courts when assessing the prosecution's request for pretrial detention, ensuring that the restriction on liberty is not arbitrary but grounded in legal necessity and fairness. The Court relied on the precedent set in **Union of India v. K.A. Najeeb**, (2021) 3 SCC 713, to reinforce these constitutional safeguards (para 46).

**Pre-conviction and Post-conviction Bail:**

In **Somesh Chaurasia v. State of Madhya Pradesh,** (2021) 19 SCC 480 : 2021 SCC OnLine SC 480, the Supreme Court (per Dr D.Y. Chandrachud and Hrishikesh Roy, JJ.) addressed the principles governing

cancellation of bail granted by suspending sentence under Section 389(1) and the second proviso, as well as Section 439(2) of the Criminal Procedure Code, 1973, particularly in cases involving serious offences such as murder under Section 302 IPC. The Court held that cancellation of bail is warranted when the accused poses a threat to society, as evidenced by the respondent-accused committing another murder while on bail, evading arrest despite summons under Section 319 CrPC, and ignoring arrest warrants and proclamations under Section 82 CrPC. The accused, being highly influential, also managed to evade arrest, causing the Additional Sessions Judge to express concerns about interference in judicial work and personal safety. The Supreme Court criticized the High Court for denying cancellation of bail merely due to the pendency of further investigation into the accused's plea of false implication, and for directing that the investigation be completed within a specified period, thereby obstructing fair investigation and ignoring police complicity in shielding the accused. The Court clarified that invocation of inherent powers under Section 482 CrPC was unnecessary, as the second proviso to Section 389(1) adequately provides for cancellation of bail. Furthermore, the judgment reiterated the distinction in procedure for grant of bail pre- and post-conviction, emphasizing that the conduct of the accused must be considered at the post-conviction stage. The Court also reaffirmed that suspension of sentence in cases involving conviction under Section 302 IPC should be granted only in exceptional circumstances, and all relevant

factors must be carefully weighed before granting such relief (**Somesh Chaurasia v. State of M.P.**, (2021) 19 SCC 480 : 2021 SCC OnLine SC 480).

There are distinct doctrinal concepts in criminal as namely:

(i) the grant of bail before trial or, what is described as the "pre-conviction" stage;

(ii) setting aside an order granting bail when the principles which must weigh in the decision on whether bail should be granted have been overlooked or wrongly applied;

(in) the post-conviction suspension of sentence under the provisions of Section 389(1); and

(iv) the cancellation of bail on the ground of supervening events, such as the conduct of the accused during the period of bail, vitiating the continuance of bail. (Para 39)

The present case falls in the last of the above genres where bail was sought to be cancelled on the ground that the second respondent was implicated in an offence under Section 302 during the period when his sentence was suspended. (Para 40)

Typically the following conduct of the accused would result in the cancellation of bail:

(i) misuse of liberty by engaging in similar criminal activity;

(i) interference with the course of investigation; iii) tampering of evidence or witnesses;

(iv) threatening of witnesses or engaging in similar activities which would hinder the investigation;

(v) possibility of fleeing to another country;

(vi) attempts to become scarce by becoming unavailable

for investigation or going underground; and

(vii) being out of the reach of their surety.

Similar considerations govern the cancellation of bail at the post-conviction stage under the second proviso to Section 389(1) CrPC. If the accused misuses their liberty by committing other offences during the suspension of sentence under Section 389(1) CPC, they are not entitled to the privilege of being released on bail. (Paras 41 to 44)

The present case was a fit case for the cancellation of bail by the High Court in view of the following facets:

(i) The registration of FIR No. 143 of 2019 implicating the second respondent in the murder of the appellant's father during the period when the sentence of the second respondent was suspended after his conviction of a prior offence under Section 302.

(ii) The criminal antecedents of the second respondent. (iii) The strong likelihood of the second respondent using his political clout to prevent a fair investigation of FIR No. 143 of 2019.

(iv) The truth in the apprehensions of the appellant having become evident by the abject failure of the police to properly investigate the FIR lodged against the second respondent on the allegation that he had committed the murder of the appellant's father on 15-3-2019 after his sentence was suspended by the High Court.

(v) The submission of a closure report by the police against the second respondent absolving him.

(vi) The order of the ASJ dated 8-1-2021 summoning second respondent under Section 319 CrPC.

(vii) The second respondent having evaded arrest despite the issuance of a warrant of arrest and a proclamation.

(viii) The failure of the law enforcement authorities to effectuate the arrest of the second respondent in spite of the order of the Supreme Court dated 12-3-2021.

(ix) The peremptory directions issued by the Supreme Court on 26-3-2021 requiring the DGP to take necessary steps for compliance with the previous order failing which the Court would be constrained to take coercive steps in accordance with law.

(x) The eventual arrest of the second respondent on 28-3-2021 ostensibly from a bus stand.

(xi) The apprehension expressed by the ASJ in his order dated 8-2-2021 that he was being targeted at the behest of a politically influential accused.

(xii) The provision of security to the second respondent by the State Government at the behest of his spouse who is an MLA despite a prior conviction under Section 302 IPC. (Para 44)".

Further, Article 50 of the Constitution of India enshrines the principle of independence of the judiciary, which does not imply that judges have the freedom to act according to their personal preferences, but rather ensures that the judiciary is free from external interference and pressures. This independence is essential for creating a judicial atmosphere where judges can work impartially and uphold the cause of justice and constitutional values. The concept encompasses both the independence of individual judges and the judiciary as an institution or organ of the State, reflecting the broad scope of judicial independence. Political pressure must not be exerted on the judiciary, as a system susceptible to such influence allows wrongdoers to operate with impunity and encourages criminality within the political apparatus. The independence of the district judiciary is particularly crucial, as it forms the backbone of the entire judicial system and functions under the supervision of the High Court, which has a duty to secure and enhance its autonomy from external influences. Instances where pressure is put on judicial officers, such as an Additional Sessions Judge being harassed by the accused and even the Superintendent of Police for orders

passed under Section 319 CrPC, highlight the urgent need for inquiry and protective directions from higher courts to safeguard judicial independence and integrity at all levels.

**Distinction Between Pre-Conviction and Post-Conviction Bail:—**

In **Omprakash Sahni v. Jai Shankar Chaudhary**, (2023) 6 SCC 123 : 2023 SCC OnLine SC 551 : (2023) 2 SCC (Cri) 728 : (2023) 247 AIC 133 (SC) : AIR 2023 SC 2202, the Supreme Court clarified the distinction between bail at the pre-conviction and post-conviction stages under Sections 437, 438, 439, and 389(1) and (3) of the Criminal Procedure Code. The Court reiterated that the foundational principle of criminal jurisprudence in India is the presumption of innocence, which remains with the accused until proven guilty by a competent court. Once a conviction is recorded, this presumption is erased, whereas an acquittal further strengthens it (para 23). Upon examining Section 389 CrPC, the Court observed that, except for matters under sub-section (3), there is no specific legal principle or fixed criteria for considering a convict's bail application post-conviction. The judgment of conviction removes the presumption of innocence that favored the accused prior to conviction, thereby creating a fine distinction between the considerations for bail at the pre-conviction stage (under Sections 437, 438, and 439) and at the post-conviction stage (under Section 389(1)) (para 24).

**Suo Moto Writ Petition (Crl) No. 4/2021, In Re: Policy Strategy for Grant of Bail, 2022 SCC OnLine SC 1487 (Supreme Court of India, decided on September 14, 2022).**

In the landmark case of Suo Moto Writ Petition (Crl) No. 4/2021, In Re: Policy Strategy for Grant of Bail, the Supreme Court of India, comprising Justices Sanjay Kishan Kaul and Abhay S. Oka, addressed the persistent issue of undertrial prisoners and the need for a systematic approach to bail (2022 SCC OnLine SC 1487). The Court took cognizance of consolidated data prepared by Under Trial Review Committees (UTRCs), which identified 47,618 undertrial prisoners eligible for release out of a total of 74,107 undertrials, pursuant to earlier judgments in In re-inhuman conditions in 1382 Prisons (2022 SCC OnLine SC 1487, ¶5). The Court noted that a campaign by NALSA had already resulted in the release of 24,789 such prisoners, but emphasized the urgency of addressing the remaining cases.

To expedite the process, the Supreme Court directed all District Legal Services Authorities (DLSAs) to ensure that bail applications for the remaining eligible undertrials are filed within 30 days, extending the previously suggested 15-day period. Furthermore, the Court instructed trial courts to endeavor to dispose of these bail applications within three weeks of filing. NALSA was tasked with submitting a report to the Supreme Court

within ten weeks, summarizing the progress made (2022 SCC OnLine SC 1487, ¶8). The Court underscored the importance of cooperation from all State Governments, recognizing that overcrowding in jails is a nationwide issue requiring collective action (2022 SCC OnLine SC 1487, ¶10).

The judgment also provided significant suggestions for convicts serving fixed-term sentences. The Court approved a mechanism whereby convicts sentenced to ten years or less, with no other criminal antecedents, and who have served at least 40% of their sentence, could be considered for plea bargaining. The DLSA, in coordination with the High Court Legal Services Authority, would facilitate counseling and legal advice for such convicts. If the convict agrees to accept guilt solely for the purpose of closing the matter, an application could be made to the High Court for sentence reduction or release on probation, provided that such plea bargaining is not available for offences with mandatory minimum sentences or those notified by the government (2022 SCC OnLine SC 1487, ¶11).

In addition, the Supreme Court addressed the remission of sentences for convicts undergoing fixed-term imprisonment. The Court suggested that first-time offenders sentenced to up to ten years, who have completed at least half of their sentence, could be considered for commutation under Section 432 of the Code of Criminal Procedure as a one-time measure.

The Court referenced the Model Prison Manual, 2016, particularly Chapter XX on premature release, as a guiding framework for State Governments. The Court also acknowledged a letter from the Government of India dated 10 June 2022, which fixed the benchmark for remission at two-thirds of the completed sentence, but opined that 50% completion would suffice, leaving States the discretion to extend benefits as appropriate (2022 SCC OnLine SC 1487, ¶13-14).

To say in short, the Hon'ble Supreme Court's directions in this case represent a significant step towards decongesting prisons and ensuring the rights of undertrial prisoners and convicts are protected. By mandating time-bound action from legal services authorities and trial courts, and by endorsing progressive measures such as plea bargaining and sentence remission, the Court has sought to balance the imperatives of justice, rehabilitation, and prison reform. The judgment underscores the need for coordinated efforts by all stakeholders, including the judiciary, executive, and legal services institutions, to address systemic issues in the criminal justice system (2022 SCC OnLine SC 1487).

**Procedural Safeguards for Post-Conviction Bail:-**

In **Atul Tripathi v. State of U.P.**, (2014) 9 SCC 177 : (2014) 6 SCC (Cri) 19 : AIR 2014 SC 3062, the Supreme Court explained the distinction between the procedures for consideration of bail under Sections 439 and

389 of the Criminal Procedure Code. The Court clarified that Section 439 CrPC pertains to the pre-conviction stage, where, before granting bail to a person accused of an offence triable exclusively by the Court of Session or punishable with life imprisonment, notice to the Public Prosecutor is required unless it is impractical. In contrast, Section 389 CrPC deals with post-conviction bail, and in cases involving serious offences punishable with death, life imprisonment, or imprisonment for a term not less than ten years, it is mandatory for the appellate court to give the Public Prosecutor an opportunity to show cause in writing against the release of the convict (paras 11-13). Merely serving a copy of the appeal and bail application on the Public Prosecutor does not satisfy the requirement of the first proviso to Section 389(1) CrPC. If the appellate court is inclined to grant bail, the Public Prosecutor must be given a chance to submit written objections, ensuring the court is fully apprised of all relevant factors such as the gravity of the offence, the manner of commission, the convict's age and criminal antecedents, and the impact on public confidence in the justice system. If no written objections are filed, the court must record this fact in its order. This procedure is designed to promote transparency, prevent allegations of collusion, and ensure the State assists the court with accurate and relevant information when considering bail for serious offences at the post-conviction stage (para 14). Summarizing the legal position, the Court held that the appellate court must: (1) provide the Public Prosecutor an opportunity to show cause in writing; (2) require the

State to file written objections if any; (3) record in its order if no objections are filed; and (4) judiciously consider all relevant factors, whether specified in the objections or not, before granting bail (paras 15-16).

**Subsistence Allowance and Rights of Suspended Civil Servants - Post-conviction:-**

In **State of Maharashtra v. Chandrabhan Tale**, (1983) 3 SCC 387 : 1983 SCC (L&S) 391, the Supreme Court held that a civil servant under suspension is entitled to receive the normal subsistence allowance while his appeal against conviction is pending, and this right should not be contingent upon whether he is released on bail or remains in prison following conviction by the trial court. The Court clarified that the second proviso to Rule 151(1)(ii)(b) of the Bombay Civil Services Rules does not require the civil servant to be actually lodged in prison for the entitlement to subsistence allowance; the phrase "sentenced to imprisonment" after "convicted by a competent court" does not equate to "condemned to prison on conviction." Justice Chinnappa Reddy, in his concurring opinion, further declared the second proviso to Rule 151(1)(ii)(b) void as it violates Articles 14, 16, and 21 of the Constitution of India. He rejected the notion that the right to equal opportunity in public employment could be treated as a new form of private property, emphasizing that the abolition of the fundamental right to property was intended to advance the constitutional goals of

justice and equality. The Court cautioned against reintroducing concepts akin to private property that could undermine the principles of a socialist democratic republic and perpetuate inequality under the guise of efficiency (**State of Maharashtra v. Chandrabhan Tale**, (1983) 3 SCC 387).

**Difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC:-**

The observations in paragraphs 35 and 38 of the decision in Preet Pal Singh vs State of U.P., (2020) 8 SCC 645, read as under:—

"35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in **Dataram Singh V. State of U.P.,** (2018) 3 SCC 22. However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal,

coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC. See also. Jeetu Khatik... Appellant(s); Versus State of Chhattisgarh, 2022 SCC OnLine SC 1356.

**Mandatory Procedure for Post-Conviction Bail under Section 389 CrPC:-**

In **Ali Ahmad v. State of Bihar,** 2021 SCC OnLine SC 3440, the Supreme Court reiterated the mandatory procedure that appellate courts must follow when considering bail applications for convicts sentenced to death, life imprisonment, or imprisonment for ten years or more under Section 389 of the Criminal Procedure Code. The Court summarized the legal position, emphasizing that before granting such bail, the appellate court must first provide the Public Prosecutor an opportunity to show cause in writing against the release. If the State wishes to object, it must file written objections, and if no objections are filed, the court must record this fact in its order. The court is also required to judiciously consider all relevant factors, such as the gravity and nature of the offence, the convict’s age and criminal antecedents, and the impact on public confidence in the justice system, before passing an order for release.

The Supreme Court noted that the procedure outlined in the first proviso to Section 389(1) is distinct from the process for granting bail to undertrial prisoners under Section 439 CrPC, especially in serious offences like those under Section 302 IPC. The Court found that the High Court, in the present case, had not adhered to the mandatory procedure, as the impugned orders did not reflect compliance with the first proviso. The argument that the second proviso (regarding cancellation of bail) could substitute the initial mandatory process was rejected, as the second proviso is intended for situations arising after bail has already been granted.

Consequently, the Supreme Court set aside the impugned orders and directed the High Court to reconsider the bail applications strictly in accordance with the mandate of Section 389, including the first proviso, within six weeks. The Court further clarified that the second respondent need not surrender during the pendency of the applications, but their fate would depend on the High Court's fresh consideration. This decision underscores the importance of procedural safeguards and judicial scrutiny in post-conviction bail matters, ensuring both fairness to the convict and protection of societal interests (**Ali Ahmad v. State of Bihar,** 2021 SCC OnLine SC 3440).

**The Supreme Court's Divergent Approaches to Bail: From Pappu Yadav to Sanjay Chandra: Understanding earlier view:**

The Hon'ble Supreme Court's early jurisprudence strongly emphasized the constitutional guarantee of life and personal liberty under Article 21, advocating the liberal principle of 'bail, not jail' (**State of Rajasthan v. Balchand,** (1977) 4 SCC 308). However, this approach has not always been consistently applied. In **Rajesh Ranjan @ Pappu Yadav v. C.B.I.,** (2007) 1 SCC 70, the Court faced the case of a former Member of Parliament accused of conspiracy to murder. Despite the accused being incarcerated for over seven years with the trial far from completion, the Supreme Court prioritized societal interests and the gravity of the allegations over the presumption of innocence, holding that it would be inappropriate to grant bail when the trial was ongoing and the charges were serious. The Court effectively used pre-trial detention as a punitive measure, disregarding both the completion of prosecution evidence and the significant delay in trial, and even ousted the jurisdiction of subordinate courts by directing all future bail applications to itself. This approach limited recognition of the consequences of prolonged incarceration and its impact on the accused's right to a fair defence, and stood in contrast to the Cr.P.C., which empowers higher courts to grant bail even in capital offences.

A marked shift occurred in **Sanjay Chandra v. C.B.I.,** (2012) 1 SCC 40, which arose from the high-profile 2G spectrum scam. Here, the Delhi High Court had denied bail to the accused, citing the magnitude of the economic offence and the potential impact on society, despite the completion of investigation and absence of evidence of witness tampering. The High Court's decision effectively eroded the presumption of innocence, focusing instead on public sentiment and shifting the burden onto the accused to prove their innocence at the pre-trial stage. However, the Supreme Court reversed this order, underscoring that the right to life and personal liberty is the "most basic of all fundamental rights" and that bail should not be denied merely due to public sentiment or the seriousness of allegations. The Court recognized the completion of investigation, the delay in trial, and the six-month incarceration as compelling grounds for bail, thus reaffirming the principle of presumption of innocence. Notably, while the Supreme Court in Sanjay Chandra referred to Pappu Yadav, it did so only in the context of establishing a prima facie case, highlighting the inconsistency in the application of bail principles. This divergence in judicial reasoning underscores the need for a more consistent and principled approach to bail law by the Supreme Court.

**Principles Governing Grant of Bail to Convicts Based on Categorization of Prisoners:-**

In **Mossa Koya KP v. State** (NCT of Delhi), (2022) 17 SCC 545: 2021 SCC OnLine SC 3110 at page 547, it was observe as follows:

5. In taking the above view, the High Court relied on the following extract from the judgment of the Punjab and Haryana High Court in **Daler Singh v. State of Punjab Daler Singh v. State of Punjab**, 2006 SCC OnLine P&H 1591]: (SCC OnLine P&H para 29)

"29. We, therefore, feel that keeping in view the spirit of Article 21, the following principles should be adopted for the release of the prisoners (convicts) on bail after placing them in different categories as under:

(i) Where the convict is sentenced for more than ten years for having in his conscious possession commercial quantity of contraband, he shall be entitled to bail if he has already undergone a total sentence of six years, which must include at least fifteen months after conviction.

(ii) Where the convict is sentenced for ten years for having in his conscious possession commercial quantity of the contraband, he shall be entitled to bail if he has already undergone a total sentence of four years, which must include at least fifteen months after conviction,

(iii) Where the convict is sentenced for ten years for having in his conscious possession, merely marginally more than non-commercial quantity, as

classified in the table, he shall be entitled to bail if he has already undergone a total sentence of three years, which must include at least twelve months after conviction.

(iv) The convict who, according to the allegations, is not arrested at the spot and booked subsequently during the investigation of the case but his case is not covered by the offences punishable under Sections 25, 27-A and 29 of the Act, for which in any case the aforesaid clauses (1) to (iii) shall apply as the case may be, he shall be entitled to bail if he has already undergone a total sentence of two years, which must include at least twelve months after conviction."

**Distinction Between Bail, Parole, and Furlough:-**

A bail-bond is an instrument prepared in the sheriff's office after an arrest, executed by two sufficient sureties and the person arrested, and conditioned for the accused to provide special bail in the court from which the arresting process was issued (Wharton). Similarly, a bail-piece is a piece of parchment containing the names of special bail and other particulars, which, once signed by a judge, is filed in the court where the action is pending. with notice of the bail having justified then given to the opposite party (Wharton).

Bail, parole, and furlough, though all mechanisms for the release of a person from custody, have distinct legal meanings and implications. Bail is

a well-established concept in criminal. jurisprudence, governed by Chapter XXXIII of the Code of Criminal Procedure, 1973. It is granted to a person who has been arrested for a non-bailable offence or has been convicted after trial, with the effect of releasing the accused from custody while the court retains constructive control through sureties or bond conditions. The literal meaning of "bail" is surety. In contrast, "parole" refers to a form of temporary release from custody that does not suspend the sentence or period of detention but provides conditional release and changes the mode of undergoing the sentence. Notably, in India, there are no statutory provisions specifically dealing with parole (**Sunil Fulchand Shah v. Union of India,** (2000) 3 SCC 409: 2000 SCC (Cri) 659). "Furlough," another term used in jail manuals, is distinct from parole; when a prisoner is on parole, the period of release does not count towards the total sentence, whereas on furlough, the period of release is counted towards the sentence undergone (**State of Haryana v. Mohinder Singh,** (2000) 3 SCC 394). Thus, while all three terms relate to the release of prisoners, they operate under different legal frameworks and have varied consequences for the computation of sentence and the nature of liberty granted.

**Conclusion:**

To conclude in short, meaningful reform of bail jurisprudence in India requires both legislative and judicial reconsideration. A legislative amendment to the existing bail provisions-incorporating explicit safeguards

and a clear policy against unnecessary detention and excessive bail-would provide much-needed clarity and direction. This could be achieved either within the Cr.P.C. itself or through an Explanatory Note or Statement of Objects and Reasons accompanying any amendment. The core issue is not the absence of rules, but rather the inconsistent application of existing legal standards and Supreme Court precedents by the courts. Clear articulation of the objectives of bail would serve as a practical benchmark for judicial decision-making. Comparative insights, such as the American standard under the Bail Reform Act, which requires "clear and convincing" evidence for revocation of bail, offer valuable alternatives for consideration.

Judicial orders on bail must be grounded in specific reasons, such as the nature of the crime and the accused's potential to interfere with the judicial process, rather than on vague notions of public interest. Courts should be required to periodically review whether continued detention is justified, especially in protracted trials, thus preserving judicial discretion while protecting the presumption of innocence. The prosecution must bear the burden of demonstrating that public interest considerations outweigh the accused's right to liberty. Furthermore, in cases where an accused is acquitted, the law should provide for adequate compensation for wrongful detention and reputational harm, as seen in Article 5(5) of the European Convention on Human Rights. The current cap on compensation under Section 358 Cr.P.C. is inadequate and warrants reconsideration. The

Supreme Court's decision in Sanjay Chandra marks an important step toward reinforcing the presumption of innocence and substantive due process under Article 21. Ultimately, both the judiciary and the legislature must work together to ensure that bail law in India robustly protects personal liberty and upholds the fundamental principles of justice.

# POWERS OF SESSIONS COURT TO GRANT ANTICIPATORY BAIL

By

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## Introduction:-

Under Section 438 of the Criminal Procedure Code, 1973, a person apprehends arrest non-bailable offence has the right to apply for anticipatory bail before the Court of Session or the High Court, even prior to being arrested. This legal position was affirmed by the Supreme Court in **Siddharam Satlingappa Mhetre v. State of Maharashtra**, (2011) 1 SCC 694, where it was held that anticipatory bail serves as a safeguard for individuals who reasonably fear arrest on accusation of having committed a non-bailable offence, allowing them to seek protection from unnecessary detention at the pre-arrest stage.

## Distinction Between Bail and Anticipatory Bail

The term "anticipatory bail" does not appear in the text of the Criminal Procedure Code, 1973 (CrPC), but was introduced by the Law Commission of India in its 41st Report to describe a bail application made in anticipation of arrest, i.e., before the arrest actually occurs. As explained in **Sushila Aggarwal v. State (NCT of Delhi),** (2020) 5 SCC 1, the essential distinction ordinary bail and and anticipatory bail lies in their

timing and purpose. Ordinary bail is granted after a person has been arrested, resulting in their release from police custody. In contrast, anticipatory bail is granted before arrest and becomes effective immediately upon arrest, thereby preventing applicant from being taken police custody for the specific offence.

According to Wharton's Law Lexicon, and as cited in **Gurbaksh Singh Sibbia v. State of Punjab**, (1980) 2 SCC 565, bail means "to set at liberty a person arrested or imprisoned, on security being taken for his appearance." An order of anticipatory bail, therefore, acts as a safeguard or "insurance against police custody following arrest for the offences in question. Unlike post-arrest bail, anticipatory bail is a pre-arrest rest legal process that directs the release of the person on bail it arrested for the specified offence. Section 46(1) CrPC, which outlines the manner of arrest, requires the police officer to "actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action." A direction under Section 438 CrPC, however, confers conditional immunity from such physical custody or confinement, thereby protecting the individual's liberty at the pre-arrest stage (**Sushila Aggarwal v. State (NCT of Delhi,** (2020) 5 SCC 1, para 49, 5-Judge Bench ruling).

**Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have.**

The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden".

Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states: "... when a man is taken or arrested for felony, suspicion of felony, indicted of felony or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed.

...that is to say, set at liberty until the day appointed for his appearance." Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners and at the same time involves participation of the community in

administration of justice. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community.

**Bail-What it is?**

Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints.

Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights.

**In earlier (Code, 1973), "Bail" is Not defined.**

Of course, now, it is defined.

Sec. 2 (1) (b) BNSS - Bail

Sec. 2 (1) (d) BNSS - Bail bond

Sec. 2 (1) (e) BNSS - Bond

The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term

"baiulare", meaning "to bear a burden". Bail is a conditional liberty. See. **Vaman Narain Ghiya v. State of Rajasthan**, (2009) 2 SCC 281.

In **Sanjay chandra vs. CBI**-(2012) 1 SCC 40, what factors to be considered by Magistrate while granting or refusing to grant Bail are clearly explained.

In **Siddhram S. Mhetre vs. State of Maharashtra** (2011) 1 SCC 694, the scope of Anticipatory Bail is explained. See. **Gurbaksh Singh vs. State of Punjab** AIR 1980 SC 1632.

**Corresponding Provisions (CR.P.C - BNSS):-**

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) has introduced corresponding provisions to the bail and bond-related sections of the Code of Criminal Procedure, 1973 (CrPC), ensuring continuity and clarity in the law. Specifically, Section 436 CrPC corresponds to Section 478 BNSS, Section 436A CrPC to Section 479(1) BNSS, Section 437 CrPC to Section 480 BNSS, and Section 437A CrPC to Section 481 BNSS. Similarly, Section 438(1) CrPC aligns with Section 482(1) BNSS, Section 438(2) CrPC with Section 482(2) BNSS, Section 438(3) CrPC with Section 482(3) BNSS, and Section 438(4) CrPC with Section 482(4) BNSS. Further, Section 439(1) CrPC is paralleled by Section 483(1) BNSS, Section 439(1A) CrPC by Section 483(2) BNSS, and Section 439(2) CrPC by

Section 483(3) BNSS. The provisions relating to bonds and sureties are also mapped, with Section 440 CrPC corresponding to Section 484 BNSS and Section 441 CrPC to Section 485 BNSS. This structured alignment ensures that the substantive and procedural safeguards regarding bail and bonds under the CrPC are preserved and updated within the BNSS procedure.

In S. 53 of BNSS, 2023, additional medical examination of the arrested person in police custody is specifically included.

Sec. 54 Cr.P.C - Corresponding Law: S. 154(3) Cr.P.C.

In S. 173(1) of BNSS, 2023, the provision of filing of Zero FIR has been introduced. In S. 173(3) of BNSS, 2023, the concept of 'preliminary enquiry' in offences punishable with 3 years or more, but less than 7 years imprisonment, has been introduced.

Sec. 51(3) of BNSS, 2023 has been newly inserted to cast a duty on the registered medical practitioner to forward the examination report to the investigating officer without any delay. Corresponding Law: S. 53(2) Cr.P.C

**INTERIM BAIL**

**Prathvi Raj Chauhan vs Union of India** Dt:10.02.2020 of Hon'ble Supreme Court. As far as the provision of Section 18A and anticipatory bail are concerned in SC & ST (POA) Act cases, where no prima facie

materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

**Aditya Kumar vs The State of Bihar and Another** Dt: 22.11.2023 of Hon'ble Supreme Court.

Factors for non-entitlement of pre-arrest bail are discussed in this citation

Government of Andhra Pradesh - Home (Legal-II) Department G.O.Ms No.39 Dt: 15.02.2023 regarding inclusion of new standing order 448-A.

**Rajendra Bharti vs State of Madhya Pradesh** Dt: 07.12.2021 of Hon'ble Apex Court. The judgment of Pruthvi Raj Chauhan was relied upon in this case and anticipatory bail was granted as the vehicle dispute between the parties was compromised and defacto complainant was not objecting to the prayer of anticipatory bail.

**Rukmini Mahato vs The State of Jharkhand** dt: 03.08.2017 of Hon'ble Apex Court which is circulated to all including Judicial Academies pertains to misuse of interim order of granting pre-arrest bail.

**Direndra Singh Yadav & Others vs CBI** case dated 06.05.2022 of the Hon'ble Apex Court. (In this case, the interim bail was granted for three weeks to enable the accused to attend the wedding of his daughter on

terms and conditions).

**2. Powers of Sessions Court to Grant Anticipatory Bail:**

Anticipatory bail legal provision that allows a person to seek bail in anticipation of arrest for a non-bailable off Section 438 of the Code of Cr Criminal Procedure, 1973 empowers the Sessions Court and the High Court to grant anticipatory bail to any person who apprehends arrest. The term "anticipatory bail" is not defined in the CrPC, but it essentially means an order of bail issued before the arrest. In **Gurbaksh Singh Sibbia v. State of Punjab** (1980 AIR 1632), the Supreme Court held that the power to grant anticipatory bail is extraordinary and should be exercised judiciously, considering the nature and gravity of the accusation, the applicant's antecedents, and the possibility of fleeing from justice. The provision aims to protect individuals. from arbitrary and unwarranted arrest and to ensure their liberty until proven guilty.

**Satender Kumar Antil v. CBI,** (2023) 1 SCC (Cri) 1, at page 103

1. Bail applications be disposed of normally within one week.

2. In **Sanjay Chandra v. CBI** [**Sanjay Chandra v. CBI,** (2012) 1 SCC 40], has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account. (a) seriousness of the charge, and (b) severity of punishment.

**Satender Kumar Antil v. CBI,** (2023) 1 SCC (Cri) 1, at page 103

To determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into account the following factors concerning the accused:

1. The length of his residence in the community,

2. his employment status, history and his financial condition,

3. his family ties and relationships,

4. his reputation, character and monetary condition,

5. his prior criminal record including any record of prior release on recognizance or on bail,

6. the identity of responsible members of the community who would vouch for his reliability,

7. the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non-appearance, and

8. any other factors indicating the ties of the accused to the community or bearing on the risk of willful failure to appear.

If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond.

Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years.

Efforts be made to dispose of all cases which are five years old by the end of the year.

As a supplement to Section 436-A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the trial courts concerned from time to time.

The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time.

The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in Harish Uppal [**Harish Uppal v. Union of India,** (2003) 2 SCC 45].

**Satender Kumar Antil v. CBI,** (2023) 1 SCC (Cri) 1, at page 103

**Categories/Types of Offences - A, B, C, & D.**

(A) Offences punishable with imprisonment of 7 years or less not falling in Categories B & D. (Needless to say that Category A deals with both police cases and complaint cases.)

(B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

(C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act, [Section 212(6)], etc.

(D) Economic offences not covered by Special Acts.

**Categories - A**

After filing of charge-sheet/complaint taking of cognizance

(a) Ordinary summons at the 1st instance/including permitting appearance through lawyer.

(b) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.

(c) NBW on failure to appear despite issuance of bailable warrant.

(d) 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 physically on the next

date/s of hearing.

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

**Categories - B/D**

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

**Categories - 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, etc.

**REQUISITE CONDITIONS:-**

(1) Not arrested during investigation.

(2) Cooperated throughout in the investigation including appearing before investigating officer whenever called.

(No need to forward such an accused along with the charge-sheet (**Siddharth v. State of U.P.** [**Siddharth v. State of U.P.,** (2022) 1 SCC 676: (2022) 1 SCC (Cri) 423]).

## ANTICIPATORY BAIL:

**Interim bail:**

**Important citations:**

1. Gurbaksh Singh Sibbia-State (1980), Adri Dharan Das- WB (2005), Sushila Agrawal- NCT Delhi (2020), Sumitha Pradeep -Arun Kumar (2022) - Anticipatory Bail

2. Lal Kamlendra Pratap Singh -UP, Sukhwant Singh-Punjab Interim Bail.

**Gurbaksh Singh Sibbia Etc vs State of Punjab** dt: 09 Apr 80, Hon'ble Supreme Court.

(The operation of an order passed U/Sec. 438(1) Cr.P.C. need not necessarily be limited to a particular point of time. FIR is not a condition precedent to exercise power of Sec.438).

Bail applications to be disposed of in 03 to 07 days from first hearing - In **Re to issue certain guidelines vs State of A.P.** Dt: 20.04.2021 of Hon'ble Supreme Court.

**Satender Kumar Antil vs CBI and Another** Dt:11.07.2022 of Hon'ble Apex Court- 2022 Livelaw (SC) 577. This lengthy judgment reflects the march of law relating to bails by touching every aspect.

**Saubhagya Bhagat vs State of Uttarakhand** Dt: 24.08.2023 of Three Judge Bench of Uttarakhand High Court. Majority view of the Three Judge Bench of Hon'ble Uttarakhand High Court is that No where it is mentioned in Antil's case that Anticipatory Bail applications shall not be entertained for offences falling under category "A" and against those persons against whom charge sheet is filed and cognizance is taken. There are no restrictions as regards the stage upto which an application for anticipatory bail can be entertained.

**Siddharam Satlingappa Mhetre vs State of Maharashtra & Others** (2011) 1 SCC 694. AND **Rakesh Prahladram Joshi & others vs State of Gujarat** dt: 12 May 11, Hon'ble High Court of Gujarat **Sushila Aggarwal and others vs State** (NCT of Delhi) and another dt: 29 Jan 2020, Hon'ble Supreme Court. (The above three cases are referred in Sushila Aggarwal case which is the latest judgment regarding Anticipatory Bail and the reference is answered regarding the following points in the light of the conflicting judgments:

1) Whether the protection granted to a person U/Sec.438 Cr.P.C should be limited to a fixed period so as to enable the person's to surrender before the Trial Court and seek regular bail.

2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

After answering the reference, clarification is given regarding dealing with applications U/Sec.438 Cr.P.C. vide point nos. 01 to 08. Now the observations in **Siddharam Satlingappa Mhetre vs State of Maharashtra & Others** (and other similar judgments) that no restrictive conditions at all can be imposed. while granting anticipatory bail are overruled.

## ANTICIPATORY BAIL

**Juveniles in conflict with law - Maintainable?**

**Mohammed Bin Ziyad vs The State of Telangana & Another** Dt:21.06.2021 of Hon'ble Telangana High Court is relevant case on the aspect of Anticipatory Bail for Juveniles in conflict with law. By relying upon several judgments and particularly, Division Bench of Madras High Court in Vignesh case that anticipatory bail application for juvenile is not maintainable, it is held that the juvenile has to avail the remedy U/Sec.12 of J.J Act.

The power of the Sessions Court to grant anticipatory bail is provided under Section 438 of the Code of Criminal Procedure, 1973, which enables a person apprehending arrest for a non-bailable offence to seek bail in anticipation of such arrest. The foundation for judicial discretion in bail matters was was laid by the Privy Council in **Lala Jairam Das v. Emperor** (AIR 1945 PC 94), which recognized the importance of

safeguarding personal liberty through judicial oversight. The Supreme Court in **Baichand Jain v. State of Madhya Pradesh** (1976) 4 SCC 572] clarified that anticipatory bail is not to be granted as a matter of right but only on sound judicial principles. The landmark judgment in **Gurbaksh Singh Sibbia v. State of Punjab** [(1980) 2 SCC 565) established that the power under Section 438 is extraordinary and must be exercised with caution, considering factors such as the nature and gravity of the accusation, the applicant's antecedents, and the possibility of misuse of liberty. In **Siddharam Satlingappa Mhetre v. State of Maharashtra** [(2011) 1 SCC 694), the Court emphasized the need to balance individual liberty with the interests of investigation and justice. The Constitution Bench in **Sushila Ag Aggarwal v. State (NCT of Delhi)** [(2020) 5 SCC 1] held that anticipatory bail can continue till the end of trial unless limited by the court. In **Arnesh Kumar v. State of Bihar** (2014) 8 SCC 273], the Supreme Court cautioned against routine arrests and highlighted the preventive role of anticipatory bail. **Jai Prakash Singh v. State of Bihar** (2012) 4 SCC 379] reiterated that the Sessions Court must consider the seriousness of the offence and the likelihood of the applicant absconding or misusing bail. In Nathu Singh v State of Uttar Pradesh (2021) 6 SCC 64], the Court clarified that if an application is rejected by the Sessions Court, a fresh application can be moved before the High Court. In Dr. **Subhash Kashinath Mahajan v. State of Maharashtra** (2018) 6 SCC 454], the Court held that anticipatory bail may be granted even in cases

under special statutes like the SC/ST Act, subject to judicial scrutiny. In **Satender Kumar Antil v. Central Bureau of Investigation** ((2022) 10 SCC 51], the Supreme Court issued comprehensive guidelines to ensure that arrest and detention are not used as punitive tools and emphasized the need for courts to apply the law. bail, including anticipatory bail, in a liberal and rights-oriented manner. Finally, in **P. Chidambaram v. Directorate of Enforcement** [(2019) 9 SCC 24], the Supreme Court reaffirmed that the discretion under Section 438 CrPC must be exercised on a case-by-case basis, considering all relevant facts and circumstances. Collectively, these precedents affirm that the Sessions Court has wide but carefully regulated discretion to grant to grant anticipatory bail, ensuring both the protection of individual liberty and the effective administration of criminal justice.

**IMPORTANT PROVISIONS, CIRCULARS AND CITATIONS REGARDING BAILS:**

**Satender Kumar Antil v. CBI**, (2021) 10 SCC 773: (2022) 1 SCC (Cri) 153 2021 SCC OnLine SC 922 at page 774.

**Categories/Types of Offences**

(A) Offences punishable with imprisonment of 7 years or less not falling in Categories B and D.

(B) Offences punishable with death, imprisonment for life, or imprisonment

for more than 7 years.

(C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act [Section 212(6)], etc.

(D) Economic offences not covered by Special Acts.

**Requisite Conditions**

(1) Not arrested during investigation.

(2) Cooperated throughout in the investigation including appearing before investigating officer whenever called.

(No need to forward such an accused along with the charge-sheet **Siddharth v. State of U.P. Siddharth v. State of U.P.,** (2022) 1 SCC 676)

**Category A**

After filing of charge-sheet/complaint taking of cognizance

(a) Ordinary summons at the 1st instance/including permitting appearance through lawyer.

(b) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.

(c) NBW on failure to appear despite issuance of bailable warrant.

(d) 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 physically on the next date/s of hearing

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

**Category B/D**

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

**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, Pocso, etc."

Needless to say that the Category A deals with both police cases and complaint cases.

Bail applications ought to be disposed of within a period of two weeks

except if the provisions mandate otherwise, with the exception being an intervening application.

Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

**Mohd. Asfak Alam v. State of Jharkhand,** (2023) 8 SCC 632.

UPHELD: Arnesh Kumar case [**Arnesh Kumar v. State of Bihar**, (2014) 8 SCC 273: (2014) 3 SCC (Cri) 449 (2014) 8 SCR 128], SCC p. 281, paras 11-12.

**Lalita Kumari v. Govt. of U.P.,** (2014) 2 SCC 1.

The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case.

In Re: Expeditious Trial of Cases under Section 138 N.I. Act, 2021 SCC Online 325.

**Some Legislations For Women and Children safety:**

1. The Penal Code, 1860, [Now, Bharatiya Nyaya Sanhita, 2023].

2. The Commission of Sati (Prevention) Act, 1987;

3. The Immoral Traffic (Prevention) Act, 1956;

4. The Indecent Representation of Women (Prohibition) Act, 1986;

5. The Dowry Prohibition Act, 1961;

6. The Protection of Women from Domestic Violence Act, 2005;

7. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013;

8. The Hindu Marriage Act, 1955;

9. The Prohibition of Child Marriage Act, 2006;

10. The Commissions for Protection of Child Rights Act, 2005; and

11. The Protection of Children from Sexual Offences Act, 2012

12. Juvenile Justice (Care and Protection of Children) Act, 2015

**Crime against Children:**

1. S. 315 IPC - infanticide - Sec. 91 of BNS, 2023

2. S. 302 IPC-murder - Sec. 103 (1) of BNS, 2023

3. S. 376 IPC-rape-Secs. 64 BNS, 2023.

4. Ss. 363, 369, 371, 372, 373 IPC

5. S. 315-316 IPC- feticide

6. S. 305 IPC-abetment

7. S. 317 IPC-exposure and abetment

8. S. 366-A-in procuring minor girls for prostitution

9. S. 373 IPC-buying girls for prostitution

10. S. 372 IPC-selling girls for prostitution

11. Under Prohibition of Child Marriage Act

12. The incidence of other crimes against children.

Sec. 375 IPC Rape - 63 BNS, 2023.

Sec. 376 (1) (2) IPC - Punishment for Rape Section 64 of BNS, 2023

Sec. 376 (3) IPC Punishment for Rape - Sec. 65 (1) BNS, 2023.

Sec. 376A IPC - Punishment for Causing death or resulting in persistent vegetative state of victim Sec. 66 BNS, 2023.

Sec. 376AB IPC - Punishment for Rape on woman under twelve years of age - Sec. 65 (2)BNS, 2023

Sec. 376B IPC-Sexual intercourse by husband upon his wife during

separation - Sec. 67 BNS, 2023.

Sec. 376 C IPC - Sexual intercourse by a person in authority -Sec. 68 BNS, 2023.

Sec. 376 D IPC-Gang Rape - Sec. 70 (1) BNS, 2023.

Sec. 376 DA IPC - Punishment for Gang rape on woman under sixteen years of age - Sec. 70 (2) BNS, 2023.

Sec. 376 DB IPC - Punishment for Gang rape on woman under twelve years of age Sec. 70 (2) BNS, 2023.

Sec. 376 E IPC-Punishment for repeat offender - Sec. 71 BNS, 2023

Secs. 363 IPC-Punishment for kidnapping - Sec.137 (2) BNS, 2023

Sec. 363 A-Kidnapping or maiming a minor for purposes of begging - Sec.139 BNS, 2023

Sec. 364 IPC-Kidnapping or abducting in order to murder - Sec.140 (1) BNS, 2023

Sec. 364 A IPC-Kidnapping for ransom, etc - Sec.140 (2) BNS, 2023

Sec. 365 IPC- Kidnapping or abducting with intent secretly and wrongfully to confine person - Sec.140 (3) BNS, 2023

Sec. 366 IPC-Kidnapping, abducting or inducing woman to compel her marriage, etc. - Sec.87 BNS, 2023.

Sec.366 A IPC - Procuring of minor girl - Sec.96 BNS, 2023

Sec. 366 B IPC-Importing of girl from foreign country - Sec. 141 BNS, 2023

Sec. 367 IPC-Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. - Sec. 140 (4) BNS, 2023

Sec. 368 IPC-Wrongfully concealing or keeping in confinement, kidnapped or abducted person - Sec. 142 BNS, 2023

Sec.369 IPC-Kidnapping or abducting child under ten years with intent to steal from its person - Sec. 97 of BNS, 2023.

Sec. 370 IPC-Trafficking of person Sec. 143 BNS, 2023.

Sec. 370 A IPC-Exploitation of a trafficked person -Sec. 144 BNS, 2023

Sec. 371 IPC- Habitual dealing in slaves - Sec. 145 BNS, 2023

Sec. 372 IPC - Selling minor for purposes of prostitution, etc. Sec. 98 of BNS, 2023

Sec. 373 IPC-Buying minor for purposes of prostitution, etc. - Sec. 99 of BNS, 2023.

Section 304-B IPC - Dowry death - Sec. 80 of BNS, 2023

Section 498-A IPC-Husband or relative of husband of a woman subjecting her to cruelty - Sec. 85 of BNS, 2023

Section 354 IPC-Assault or criminal force to woman with intent to outrage her modesty - Sec. 74 of BNS, 2023

Section 509 IPC - Word, gesture or act intended to insult the modesty of a woman - Sec. 79 of BNS, 2023.

S. 366-B IPC-Kidnapping, abducting or inducing woman to compel her marriage, etc. - Sec. 87 of BNS, 2023

Under Immoral Traffic (Prevention) Act, 1956

Under Indecent Representation of Women (Prohibition) Act, 1986

Under Dowry Prohibition Act, 1961

**A day-to-day Case Diary:**

**Section 172**

A police officer shall maintain a day-to-day case diary.

Police records must be kept with scrupulous completeness

**Section 173 of Cr.P.C** which imposes further record-keeping duty on the police officer. See **Bhagwant Singh vs. Commissioner of police, Delhi**, (1983) Crl.L.J1081 = (1985) SC 1285.

**Danger of illegal detention and torture of accused - Strict compliance of Sec.57 Cr.P.C:-** Article 32 and 226 of the Indian Constitution provide for compensation from the State for contravention of fundamental rights.

See **Nilabati Behera vs. Nilabati Behera State of Orissa**, AIR 1993 SCC page 13.

**To avoid unnecessary arrest :- Section 41A Cr.PC**

**Arnesh Kumar vs. State of Bihar & Anr**, (2014) 8 SCC 273

- The Law explains the duties of Magistrate/Police.

- Magistrate/Police shall follow the guidelines given in Arnesh Kumar's case.

**Arrest of accused to be informed to his friend or relative:-**

Section 50-A of Code, 1973 **Joginder Kumar v. State of Uttar Pradesh,** 1994 SCC (4) 260 **D.K. Basu v. State of West Bengal**, 1997 (1) SCC 416.

**Rights of an arrested person:-** Section 50 provides that any person arrested without warrant shall immediately be informed of the grounds of his arrest.

**Production of accused before a Judicial Magistrate within 24 hours of arrest:-** Section 57 of Cr.P.C. and Article 22(2) of Constitution provide that a person arrested must be produced before a Judicial Magistrate within 24 hours of arrest.

**State of Punjab vs. Ajaib Singh,** AIR 1953 SC 10

**Section 2 (1) (1)**

"investigation" includes all the proceedings under this Sanhita for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

Corresponding Law: S. 2(h) of Cr.P.C, 1973

Bailabale offence Sec. 2 (1) (c)

Corresponding Law: S. 2(a) of Cr.P.C

Complaint-Sec. 2 (1) (h) - S. 2(d) Cr.P.C. Offence - Sec. 2 (1) (q) - S. 2(n) Cr.P.C. Police report - Sec. 2 (1) (t) - S. 2(r) Cr.P.C. Victm - Sec. 2 (1) (y) - S. 2(wa) Cr.P.C.

Summons case - Sec. 2 (1) (x) - S. 2(w) Cr.P.C. Warrant case- Sec. 2 (1) (z) S. 2(x) Cr.P.C.

Corresponding Law: S. 2(y) of Act 2 of 1974.

S. 2(1)(a), S. 2(1)(b), S. 2(1)(d), S. 2(1)(e), S. 2(1)(i) of BNSS, 2023 are newly inserted definitions of "audio-video electronic means", "bail", "bail bond", "bond", electronic communication, respectively. Explanation to S.2(1)(1) of BNSS, 2023 provides for the prevalence of a special Act over this Sanhita, in case of inconsistency

There is no change in Sections 4, 5, 6, 7:- Section 4. Trial of offences under Bharatiya Nyaya Sanhita, 2023 and other laws. (1) All offences under the Bharatiya Nyaya Sanhita, 2023 shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

Section 5 Saving. Nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

**DELETED SECTIONS:-** Old Cr.P.C sections such as Secs. 2 (f), 2 (k), 2 (q) 2 (t), 8, 10, 16, 17, 18, 19, 27, 144A, 153, 355, 404 are deleted.

Earlier 484 Sections in Cr.P.C; Now 531 sections in BNSS.

**SECTION 15 OF BNSS**

S. 15 of BNSS, 2023 (Earlier sec. 21 of CrPC) has widened the State Government's power to appoint any police officer not below the rank of Superintendent of Police or equivalent, as Special Executive Magistrates.

**Principles for grant of BAIL** In Criminal Justice System ...

Satendra Kumar antil-CBI, Siddharth-UP, Sonadhar-Chhattisgarh, Saudhan Sigh-UP, Sanjay chandra-CBI, SC LAC-UOI, Gopisetti Harikrishan-AP, In Re:Policy Stategy for Grant of Bail (2022), Prahlad Singh Bhati-NCT Delhi, Vijay Mandalal Choudary-UOI, Aparna Bhat-MP, Arnab Manoranjan Goswami-MH, Kadra Pahadiya-Bihar.

**Right of Accused Persons** In Criminal Justice System ...

**D.K.Basu v. WB, Arnesh Kumar v. State of Bihar, Social Action Forum Manav adhikar vs. UOI, Sheela Barse vs. State. Maharashtra; Amandeep vs. NCT Delhi.**

**LEGAL AID** In Criminal Justice System ...

**Ramanand vs. State of UP; Rajoo vs. MP, Mohd. Ajmal Kasab's case, Hussainar Khartoon vs. Bihar, MH Hoskote vs. MP, and Clr vs. Kerala**

**Default BAIL**

Enf.Dir of **Govt. of India vs. Kapil Wadhawan, Qamar Ghani Usmani vs. Gujarat, Uday Mohanlal Acharya vs. Maharashtra, Ritu Chhabaria vs. UOI, Rakesh kumar vs. Assam, Sanjay Dutt vs. CBI, Chitra Rakrishna vs. CBI**

Anticipatory bail, under Section 438 CrPC, empowers the Sessions Court and High Court to grant bail to persons apprehending arrest for non-bailable offences. The term is not defined in CrPC but has been judicially interpreted in **Gurbaksh Singh Sibbia v. State of Punjab,** (1980) AIR 1632, as an extraordinary power to be exercised judiciously. The Supreme Court in **Satender Kumar Antil v. CBI,** (2023) 1 SCC (Cri) 1, emphasized that bail applications should normally be disposed of within one week, considering factors such as seriousness of the charge, severity of punishment, community ties, employment, family, reputation, prior record, and risk of non-appearance. Other significant cases include **Balchand Jain v. State of Madhya Pradesh,** (1976) 4 SCC 572; **Siddharam Satlingappa Mhetre v. State of Maharashtra,** (2011) 1 SCC 694; **Sushila Aggarwal v. State (NCT of Delhi),** (2020) 5 SCC 1; **Arnesh**

**Kumar v. State of Bihar,** (2014) 8 SCC 273; **Jai Prakash Singh v. State of Bihar,** (2012) 4 SCC 379; **Nathu Singh v. State of Uttar Pradesh**, (2021) 6 SCC 64; **Dr. Subhash Kashinath Mahajan v. State of Maharashtra,** (2018) 6 SCC 454; and **P. Chidambaram v. Directorate of Enforcement,** (2019) 9 SCC 24. The Supreme Court in Satender. Kumar Antil (2022) 10 SCC 51, issued comprehensive guidelines for bail, categorizing offences (A, B, C, D) and stipulating timelines for disposal of bail and anticipatory bail applications. Notably, anticipatory bail for juveniles is not maintainable as per **Mohammed Bin Ziyad v. State of Telangana** (2021), and the remedy lies under Section 12 of the Juvenile Justice Act.

**Important Provisions, Circulars, and Citations:-**

Key Supreme Court judgments and guidelines, such as in **Arnesh Kumar v. State of Bihar**, (2014) 8 SCC 273, and **Lalita Kumari v. Govt. of U.P.,** (2014) 2 SCC 1, have shaped the law on arrest, investigation, and bail. The Supreme Court in In Re: Expeditious Trial of Cases under Section 138 N.I. Act, 2021 SCC Online 325, emphasized speedy trials. Legal aid and rights of accused persons have been reinforced in cases like **D.K. Basu v. State of West Bengal,** (1997) 1 SCC 416, and **Hussainara Khatoon v. State of Bihar.** The BNSS and CrPC also contain provisions for women and children's safety, with specific laws and corresponding sections for offences such as rape, dowry death, trafficking, and crimes against

children.

**Conclusion:-**

In **Satender Kumar Antil v. CBI,** (2023) 1 SCC (Cri) 1, the Supreme Court provided comprehensive guidelines to ensure that the process of granting bail is fair, consistent, and rooted in the protection of personal liberty under Article 21 of the Constitution. The Court emphasized that, when determining whether an accused is likely to abscond, courts must consider factors such as the length of residence in the community, employment status, family ties, reputation, prior criminal record, and the presence of responsible community members who can vouch for the accused. If, upon considering these factors, the court is satisfied that the accused has strong community ties and poses no substantial risk of non-appearance, release on personal bond should be favored. Furthermore, the Court directed that magisterial trials where the accused is in custody should ordinarily be concluded within six months, and sessions trials within two years, with efforts to dispose of cases pending for over five years. In line with Section 436-A CrPC, if an undertrial has already spent a period in custody exceeding the likely sentence upon conviction, such undertrial must be released on personal bond, and trial courts are required to periodically assess this situation.

The judgment also categorizes offences (A, B, C, D) and prescribes specific procedures for each, ensuring that the process for securing the appearance of the accused is gradual and proportionate, starting from summons to bailable and non-bailable warrants, and emphasizing that bail applications should be decided without unnecessary custodial detention. For offences under special statutes with stringent bail provisions (such as NDPS, PMLA, UAPA), compliance with those specific requirements is mandated. The Supreme Court further clarified that anticipatory bail applications are not barred for Category "A" offences or after the filing of the charge sheet, as reaffirmed in **Saubhagya Bhagat v. State of Uttarakhand** (2023). The Court also reiterated the need for prompt disposal of bail applications (within 3 to 7 days of first hearing) and for the High Courts to actively monitor the expeditious investigation and trial of cases. These directions, together with the principles laid down in earlier landmark cases such as **Siddharam Satlingappa Mhetre v. State of Maharashtra,** (2011) 1 SCC 694, **Sushila Aggarwal v. State (NCT of Delhi),** (2020) 5 SCC 1, and **Gurbaksh Singh Sibbia v. State of Punjab,** (1980) 2 SCC 565, collectively reinforce the presumption of innocence, the right to liberty, and the need for a humane and rational approach to bail in the Indian criminal justice system.

## TOPIC

## Session-4

**e) POST CONVICTIONAL BAIL**

**f) POWERS OF SESSIONS COURT TO GRANT ANTICIPATORY BAIL**

**BY**

**GINJALA GANGA RAJU,**
**CIVIL JUDGE, (SENIOR DIVISION),**
**NARSAPUR**

**INTRODUCTION:**

'Bail' is derived from the old French verb 'baillier' means to 'give or deliver'. The term bail has not been in Criminal Procedure Code ( herein after referred to as Cr.P.C), or in Bharatiya Nagarik Suraksha Sanhita, 2023 (herein after referred to as B.N.S.S ). The word 'Bail' has been used in the B.N.S.S (Cr.P.C) several times and remains one of the vital concepts of criminal justice system in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution along with the protection of human rights as prescribed under International treaties/ covenants.

Wharton's Lexicon and Stroud's Judicial Dictionary defines bail as "the setting free of the defendant (accused) by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time."

According to Halsbury's Laws of England "..the effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize

their principal at any time and may discharge themselves by handing him over to the custody of the law and he will then be imprisoned.

The literal meaning of the word “bail” is surety. Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance either one’s own assurance (also called personal bond / recognizance) or through third party sureties. The Supreme Court has also reiterated this definition in the Moti Ram Case (1978) 4 SCC 47.

According to Black’s Law Dictionary, what is contemplated by bail is to “procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court”.

The bail, in lay man’s term, means a guarantee or assurance given by a person arrested to appear before a competent court at a specified time at a specified place.

The provisions of law which govern the bail are provided under Chapter XXXIII of CrPC, which is the premier statute laying down criminal procedure in India, Chapter XXXV of B.N.S.S under section 478 to 496.

The concept of the bail involves two conflicting concerns- an individual’s right to liberty and his right to be presumed innocent until proven guilty against the society’s interest in maintaining law, order and security. The custody of a person pending the completion of trial may cause great hardships to that person which may include loss of liberty, livelihood during that period. The object of keeping an accused person in detention prior to or during the trial is not punishment but (1) to prevent repetition of offence with who is charged (2) to seek the presence of the accused during the trial and (3) to prevent destruction of evidence.

## OBJECTIVE OF BAIL

The objective of bail or purpose of bail has been put forth by various scholars, most of them being on similar lines that firstly, it helps assure reappearance of the accused and secondly it prevents the un-convicted individuals from suffering unnecessary imprisonment. However the leading authority which could be referred to for explaining the objective of bail in detail is Sanjay Chandra v CBI. It defined the objective of bail as follows-

In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper

for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

## LEGAL PROVISIONS

The provisions relating to the grant of bail are enshrined in Chapter XXXIII, under sections 436- 450 of Cr.P.C and Chapter XXXV under Sections 478 to 496 of B.N.S.S, 2023. Offences have been classified into bailable and non bailable and “cognizable” and “non-cognizable”. Officer-in-charge of police station, Magistrate, Sessions Court and High Court are empowered under Cr.P.C. to deal with bail, imposing conditions on bail, cancellation of bail or anticipatory bail.

## TYPES OF BAIL

The Code of Criminal Procedure, 1973 and B.N.S.S 2023 contains elaborate provisions relating to bails. Code provide different kinds of bail :-

1. Bail in Bailable offence (Section 436 Cr.P.C) (under Section 478 of B.N.S.S)

2. Bail in Non bailable offene (section 437 Cr.P.C) (under Section 480 of B.N.S.S)

3. Anticipatory bail (section 438 Cr.P.C) (under Section 482 of B.N.S.S.)

4. Ad interim bail

5. Bail after conviction (section 389 Cr.P.C) (under section 430 of B.N.S.S)

6. Bail on default (section 167(2) Cr.P.C) (under Section 187 of B.N.S.S)

**1. BAIL IN BAILABLE OFFENCE :**

Under Section 478 of B.N.S.S and Section 436 provides for the release on bail of a person accused of a bailable offense. Section 436 of Cr.PC is mandatory in nature and the court or the police has no discretion in the matter. Any accused person arrested for a bailable offence willing to provide bail must be released. The only discretion available with the police is to release the accused either on a personal bond or with sureties.

**2. BAIL IN CASE OF NON-BAILABLE OFFENCE :**

Provision, as to bail in case of non-bailable offence, is laid down under Section 480 of B.N.S.S and Section 437 of the code. This section gives discretionary power to the Court (other than High court or Court of Session) to release an accused on bail in a non-bailable case. It list down circumstances when bail will not be granted or when shall bail be granted with specific condition in the provisions under Section 437(i) (ii) CrPC, Section 437(iii) CrPC.

**3. BAIL ON DEFAULT :**

Under Section 187 (2) of B.N.S.S 2023 and Section 167 (2) of the Criminal Procedure Code, 1973 empowers judicial magistrates to authorize custody of an accused person in cases wherein investigation cannot be completed in twenty-four hours. It provides for the maximum period of custody that can be authorized. It further contains a mandate that if the investigation is not completed within the stipulated maximum period, the accused is to be released on bail whatever may be the nature of accusation against him.

**4. INTERIM BAIL :**

There is no express legal provision of ad-interim or interim bail. Section 439 Cr.P.C is on the High Court's and the Sessions Court's power to release the accused on bail in custody. Evident as it is that Sections 436, 437 and 439 are repository of powers of the court to release the accused in custody on bail. That's post-arrest. As seen above, the newly substituted Section 438 expressly provides for interim bail pending disposal of the plea for anticipatory bail. It's a important provision as the accused faces the threat of arrest before his application for the bail is decided. Also, it's consistent with the concept of fundamental right to life and liberty under Article 21 of the Constitution of India. However, this kind of bail may be granted at any stage of a case by way of court's inherent powers.

In Siddharam v State, Court held that there is no express provision for interim bail in Sections 437 or 439 CrPC. Of course Section 437(2) hints at such a power, but not in explicit terms. Even to exercise the power there under, the Magistrate may order notice to the prosecution in which case the accused under arrest can't avoid detention in jail. Thus, the interim bail regime becomes relevant even in post-arrest matters, leaving alone the interim bail provision in Section 438 CrPC. Life bereft of liberty is without honour and dignity.

## e). POST CONVICTION BAIL

Under Section 430 of B.N.S.S 2023, (Section 389 (1) and (2) of Cr.P.C) deals with a situation where convicted person can get a Bail from appellate court after filing the criminal appeal. Section 389 (3) Cr.P.C deals with a situation where the trial court itself can grant a bail to convicted accused enabling him to prefer an appeal. Section 430 of Bharatiya Nagarik Suraksha

Sanhita, 2023 relates to suspension of sentence pending the appeal, release of appellant on bail.

It inter alia provides 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 is in confinement, that he be released on bail, or on his own bond or bail bond subject to given exceptions.

**Section 430. Suspension of sentence pending appeal; release of appellant on bail.-**

(1) 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 is in confinement, that he be released on bail, or on his own bond or bail bond:

Provided that the Appellate Court shall, before releasing on his own bond or bail bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release.

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall.-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years; or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail.

Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

The Patna High Court in Suddu Kumar vs. State of Bihar in Criminal Appeal (DB) 583 of 2015 dated 09-03-2017 has observed that :

" if a prayer for suspension of sentence and release of an appellant on bail, convicted of a capital crime and sentenced to undergo imprisonment for life, it is to be considered favourably and he is ordinarily allowed bail if he has completed seven years of incarceration in connection with such case before conviction and after conviction, taken together when his appeal is not likely to be heard on merits in near future, on the ground of possible delay in the disposal of the appeal."

A Two Judge Bench of the Supreme Court, in Atul Tripathi V. State of UP in Crl.Appeal No. 1516/2014 dated 22-07-2014 discussed the scope and ambit of Section 389 of Cr.P.C and issued the following Guidelines regarding the suspension of Sentence during the pendency of Criminal Appeal.

a. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the public prosecutor to show cause in writing against such release.

b. On such opportunity being given, the State is required to file its objections, if any, in writing.

c. In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court.

d. The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release

**f) POWER OF SESSIONS COURT AND HIGH COURT REGARDING THE BAIL**

Under section 483 of B.N.S.S 2023, (Section 439 Cr.P.C) gives Special powers to High Court or Court of Session regarding bail. It may direct that any person accused of an offence and in custody be released on bail. It may impose any condition which it considers necessary for the purposes mentioned in that sub-section. It may impose or set aside any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.

Provided that the High court or the Court of Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under section 65 or sub section (2) of Section 70 of the Bharatiya Nyaya Sanhita, 2023, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(2) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under section 65 or sub section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023.

(3) A High Court of Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

**ANTICIPATORY BAIL :**

Anticipatory bail means bail in anticipation of an arrest. Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (under section 438 of Cr.P.C) relates to direction for grant of bail to person apprehending arrest. It provides that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that

court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail under given conditions

Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 which reads as follows:

**482. Direction for grant of bail to persons apprehending arrest.-**

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court of the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required,

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) a condition that the person shall not leave India without the previous permission of the Court,

(iv) such other condition as may be imposed under sub-section (3) of section 480, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he

shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in confirmity with the direction of the Court under sub-section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and sub-section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023.

**Scope and ambit of Anticipatory Bail:**

The court in the case of Siddharam Satlingappa Mhetre v. State of Maharashtra, AIR 2011 SC 312 discussed the scope and ambit of anticipatory bail and said that principles regarding it has been laid down in the Sibbia's case should be followed by the court.

a. Section 438 (1) is to be interpreted in light of Article 21 of the Constitution of India.

b. Filing of FIR is not a condition precedent to exercise of power under Section 438.

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

d. Conditions mentioned in Section 437 cannot be read into Section 438.

e. 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.

The expression “anticipatory bail” is also not defined in Cr.P.C. However, the Supreme Court in Balchand Jain v. State of M.P. AIR 1977 SC 2447 has characterized anticipatory bail to mean ‘a bail in anticipation of arrest’. The expression is a misnomer as it represents a futility that bail may be granted by the court in apprehension of an arrest. When a competent court grants “anticipatory bail”, it issues an order that in case of an arrest, the person shall be released on bail.

It has been held in the Gurbaksh Singh Sibbia v. State of Punjab, AIR 1980 SC 1632 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 (1995) 3 SCC 221 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., (2004) 7 SCC 558 Protection in terms of Section 438 is limited that is it can be seek only till the time person is not in custody.

In Adri Dharamdas v State of West Bengal, AIR 2005 SC 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, (2005) 8 SCC 21 this Court held as under:

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 Vs. State of Maharashtra, AIR 2011 SC 312 has 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 Balchand Jain v. State of M.P and Gurbaksh Singh Sibbia case.

In Lalita Kumari v State of U.P (2014) 2 SCC 1 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, 2016 Crl.LJ 2217 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.”

In Dr Subhash Kashinath Mahajan Vs. The State Of Maharashtra And Anr Criminal Appeal No. 416/2018, Exercise of jurisdiction under Section 438 Cr.P.C 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.

**CANCELLATION OF BAIL:**

The basic criteria for cancellation of bail are interference or even an attempt to interfere with due course of Justice or any abuse of indulgence/ privilege granted to the accused.

In Ram Govind Upadhya Vs. Sudarshan Singh, 2002 Cr.L.J 1849 (S.C.) The power of the Court under the section to cancel bail can be invoked either by the state itself or by any aggrieved party or even suo motu as held in the case of Puran vs. Ramvilas, AIR 2001 SC 2013.

As per Section 437 (5) of Cr.P.C. any Court which has released a person on bail may, if it considered it necessary so to do, cancel the bail and direct that such person be arrested and committed to custody. In R.J Sharma Vs. R.P. Patankar, 1993 Crl,L.J 1993 (Bombay), it is held that Magistrate ought to pursue the application for cancellation of bail and afford an opportunity to accused to be heard.

In Dolat Ram v. State of Haryana (1955) 1 SCC 349, The Hon'ble Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances.

Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that warrant cancellation of bail, such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner.

Bail granted to an accused with reference to bailable offence can be canceled only if the accused

(1) misuses his liberty by indulging in similar criminal activity,

(2) interferes with the course of investigation,

(3) attempts to tamper with evidence of witnesses,

(4) threatens witnesses or indulges in similar activities which would hamper smooth investigation,

(5) attempts to flee to another country,

(6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,

(7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard.

## CONCLUSION

The Criminal Procedure Code, gives only an outline of the provisions of bail, but most of the work is done by the courts themselves. The judicial principles laid-down by the courts may be changed by the courts also. As far as the meaning and definition of bail is concerned it has not been statutory defined. Consequently, it continues to be understood as a right for assurance of freedom against State imposed restrains of security of appearance of a person for his release. Bail is generally a matter of judiciary discretion. While considering whether to grant or not to grant bail, conflicting claims of undoubtedly liberty of the accused and the larger interest of the society have to be taken note of. As far as the evolution and history of bail is concerned it has gradually evolved in India. This is a very important instrument. The importance of instrument of bail can be imagined from the fact that from the initial stage of accusation at police level to Apex Court and right from direction for anticipatory bail to special powers of High Court and Court of Session to

grant bail and writ of Habeas corpus and certiorari have been provided to restore the liberty of the individual. For the purpose of granting bail offences have been classified into Bailable and non-bailable offences under Section 2 of the Criminal Procedure Code. The basic distinction in these offences is that in bailable offences Bail can be claimed as a matter of right, whereas in non-bailable offences it is at the discretion of the Courts whether to grant bail or not. While granting bail in case of non-bailable offences various factors are to be taken into account by the Courts Today the horizon of Human Rights is expanding. At the same time, the crime rate is also increasing. Observing this, Supreme Court has been held that there is urgent need to make a balance between personal liberty and investigation powers of Police. There can be no gain saying that freedom of an individual must yield to the security of the state. However, no right can be absolute and reasonable restrictions can be placed on them.

Submitted by

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# Post convictional Bail and powers of sessions court to grant Anticipatory Bail:

**Paper Presented by Smt. N.Jyothi, Civil Judge(JD),**
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## I. INTRODUCTION:

Bail is a fundamental aspect of Criminal Jurisprudence, balancing the right to personal liberty with the interest of justice. Generally, bail is granted before conviction when the presumption of innocence operates in favour of the accused. However, after conviction, the situation changes. Post-conviction bail refers to the legal mechanism by which a person who has been convicted of a crime may be released from custody while awaiting the outcome of an appeal or further legal proceedings. After a conviction, the presumption of innocence no longer applies, and courts are generally more cautious in granting bail. However, post-conviction bail may be granted under specific circumstances, such as when there is a strong likelihood of a successful appeal, the sentence is relatively short, or there are exceptional grounds like serious health issues or significant delays in the appeal process. The purpose is to balance the convicted individual' s rights with the need to uphold justice and public safety. **Simply,the concept of post-conviction bail arises when a person, already convicted and sentenced by the trial court, seeks suspension of sentence and release on bail pending appeal or revision.**

**2.** The criteria for granting post-conviction bail vary by jurisdiction but typically include factors like the nature of the offense, the likelihood of the appeal succeeding, the risk of the individual absconding, and the potential danger to the community.

## 3. What Does Bail Mean?

Bail is a legal process that allows a person accused or convicted of a crime to be released from custody, typically by providing a financial guarantee (bail amount) or meeting certain conditions, ensuring they will appear for future court proceedings. **Bail serves as a mechanism to balance an individual's right to liberty with the state's interest in ensuring justice is administered.** It can be granted at various stages, including pre-trial, during trial, or post-conviction.

## 4. Grant of Bail is a Rule:

The Supreme Court of India observed that “grant of bail is a rule and refusal to bail is an exception”. In ***State of Rajasthan Vs Bal Chand, AIR 1977 SC 2447; (1977) 4 SCC 308; (1978) 1 SCR 535***, the Supreme Court had observed that “ the normal rule is bail and not jail”, The judicial discretion exercised in granting bail is neither perverse nor erroneous rather they are based on relevant considerations supported by the reasons.

## 5. Distinction from Pr-Conviction Bail

- **Pr-conviction bail** (regular or anticipatory) is guided by presumption of innocence.
- **Post-conviction bail** is guided by considerations of justice during pend-ency of appeal, delay in disposal, or special circumstances.

## 6. Post Convectional Bail :

Post convectional bail is nothing but suspension of sentence. What is suspended is not the conviction or sentence; it is only the execution of the sentence or order which is suspended during the pend-ency of the appeal. It is suspended and not obliterated.

## 7. Section 389 of Code of Criminal Procedure 1973 / 430 of Bharatiya Nagarik suraksha sanhitha -2023,deals with the concept of post conviction l Bail.

***Section 389 :*** *Suspension of sentence pending the appeal : Release of Appellant on bail :*

*i) 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 is in confinement, that he be released on bail, or on his own bond.*

*(Provided that the Appellate Court shall before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the public prosecutor for showing cause in writing against such release.*

*Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail )*

*2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.*

*3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall :*

*i) Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or*

*ii) where the offence of which such person has been convicted is a bailable one, and he is on bail.*

*Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.*

*4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced*.

It is the privilege of the accused to insist for a bail even after the order of conviction and sentence under section 389 (3) Cr.PC (section 430 of BNSS) if the amount of fine has been paid and quantum of punishment is less than especially when there is no other reason to refuse the discretionary relief.

**8. Bail to convicts:-** power under section 389(3), Cr.PC (Section 430(3), BNSS)- empowers the Trial Court to grant bail to a convicted accused under the following conditions. Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall :-

**(i)** Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years; or

**(ii)** where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(**iii)**It is the privilege of the accused to insist for bail even after the order of conviction and sentence under section 389(3), Cr.PC 1973 (Section 430(3), BNSS) if the amount of fine has been paid and quantum of punishment is less than three years especially when there is no other reason to refuse the discretionary relief. ***Vijay Kumar Shantilal Tadvi Vs State of Gujarat, 2008 Crl.L.J.935.***

(**iv)**Section 439(2) Cr.PC (Section 483, BNSS) for cancellation of bail cannot be invoked where accused convict has been granted bail in criminal appeal under section 389(1), Cr.PC (Section 430,BNSS). The bail can be can-celled under section 482, Cr.PC (Section 528, BNSS) where pending appeal

prosecution witness was murdered by the accused convict, bail was cancelled. **Rajpal Singh Vs.State of UP 2002 Crl.L.J.4267(All).**

(**v)**During the pend-ency of an appeal, an Appellate court is empowered under section 389, Cr.PC (Section 430,BNSS) to release the convict/ appellant on bail and may also, for the reasons to be recorded in writing, suspend the judgment of conviction and order of sentence passed by the Lower Court. The relevant considerations for releasing the convict/appellant on bail under section 389, Cr.PC (Section 389, BNSS) are as under:

(i) Nature of accusations made against he accused.

(ii) Manner in which the offence was committed.

(iii) Gravity of the offence desirability of releasing the accused on bail keeping in view the seriousness of the offence committed by him. ***Ramji Prasad Vs Rattan Kumar Jaiswal, (2002) 9 S.C.C.366; Vijay Kumar Vs.Narendra (2002) 9 SCC 364 and State of Haryana Vs.Hasmat, (2004) 6 SCC 175.***

**9.** The appellate Court must bestow special concern in the matter of suspending the sentence so as to make the right of appeal meaningful and effective. Of course, Appellate Court can impose similar conditions when bail is granted. The sentence of imprisonment as well as the direction for payment of fine or capable of being executed. ***Bhagwan Rama Shinde Gosai Vs. State of Gujarat, AIR 1999 SC 1859.***

A person convicted may have filed an appeal. A court of appeal is empowered under section 389, Cr.PC (Section 430,BNSS) to order that

pending an appeal by a convicted person the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond.

**10.** A person seeking stay of conviction under section 389 should specifically draw the attention of the Appellate Court to the consequences, if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of conviction, the person convicted cannot obtain an order of stay of conviction. ***Navjot Sidhu Vs.State of Punjab, A.I.R.2007 S.C.1003.***

**Conclusion**

Post-conviction bail represents a delicate balance between the **right to liberty of the convict** and the **societal interest in ensuring punishment for crime**. Courts exercise this discretion cautiously, guided by Section 389 Cr.P.C and principles laid down in judicial precedents. While liberty remains a constitutional value, once guilt is established, bail is no longer a rule but an exception, granted only when justified by strong reasons.

## ANTICIPATORY BAIL

### 1. Introduction

The concept of **anticipatory bail** is a unique provision in Indian criminal law. It is a pre-arrest legal remedy that protects a person from unnecessary or false arrest. Unlike regular bail (which comes after arrest), anticipatory bail is applied for **before arrest** when a person apprehends that they may be arrested on accusation of committing a non-bailable offence.

This provision reflects the principle that **"bail is the rule and jail is the exception"** and ensures protection of individual liberty under **Article 21 of the Constitution of India**.

**Anticipatory Bail** means an **order of bail granted in anticipation of arrest**.

- It is dealt with under **Section 438 of the Code of Criminal Procedure, 1973 (CrPC)**.
- The section empowers the High Court or Court of Session to grant bail to a person apprehending arrest in a non-bailable offence.

The purpose of granting Anticipatory bail is to protect individuals from **false, frivolous, or motivated criminal cases; and that t**o safeguard the right to liberty and prevent harassment or misuse of police powers. **In *Gurbaksh Singh Sibbia v. State of Punjab* (1980 SC) –** Landmark judgment of Hon'ble Apex Court where it was held that anticipatory bail is an extraordinary remedy, not to be granted as a matter of right but on judicial discretion considering the facts of each case.

***2. Section 438: Direction for grant of bail to person apprehending arrest*** *: (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may; after taking into considering the following factors, namely*

*i) the nature and gravity of the accusation;*

*ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*

*iii) the possibility of the applicant to flee from justice; and*

*iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail;*

*Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.*

*(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the public prosecutor and the superintendent of police, with a view to give the public prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.*

*(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public prosecutor, the court considers such presence necessary in the interest of justice. )*

*(2) When the High Court or the Court of Sessions makes a direction under sub-section (1), it may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including*

*(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;*

*(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;*

*(iii) a condition that the person shall not leave India without the previous permission of the Court;*

*(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.*

*(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section(1)*

*4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376 AB or section 376 DA or section 376 DB of the Indian Penal Code (45 of 1860)]*

**3.** The power conferred under section 438 of the Court can be described as, an extraordinary character but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an ex ordinary character. Nonetheless, the discretion under section has to be exercised with due care and circumspection depending on circumstances justifying it's exercise. The Hon'ble Apex court held that, wide discretionary power conferred by the legislature on the higher echelons in the criminal justice delivery system cannot be put in the form of straight jacket rules for universal application as the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which

must enter into the judicial verdict. A circumstance which, in a given case, turns out to be conclusive, may or may not have any significance in another case.

**4. Anticipatory bail in the court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail subject to certain exceptions. Section 438 of the Code of Criminal Procedure, 1973 also does not confer any absolute licence to grant anticipatory bail to all and section 438(2) itself incorporates some conditions which may be imposed when an order of anticipatory bail is passed**

**5. In Bal Chand Jain v. State of Madhya Pradesh, AIR 1977 SC 366: (1976) 4 SCC 572: (1977) 2 SCR 52: (1977) Cr LJ 225,** Hon'ble Supreme Court has discussed the utility and significance of this provision. In paragraph 15 of the judgment the Supreme Court has also referred to the Statement of Objects and Reasons published in Gazette of India, Extraordinary, Pt.II-Relevant portion is reproduced below: *"As recommended by the Commission a new provision is being made enabling the Supreme Court to grant anticipatory bail, i.e. a direction to release a person on bail, issued even before the person is arrested-with a view to avoid the possibility of the person hampering the investigation, special provision is being made that the court granting anticipatory bail may impose such conditions as it thinks fit."*

**6. Conditions While Granting Anticipatory Bail:**

The condition imposed may be that a person shall make himself available to the investigating officer as and when required and shall not do anything to hamper investigation.

**7. Guidelines for Granting Anticipatory Bail**

The Supreme Court in Gurbaksh Singh Sibba v. State of Punjab, AIR 1980 SC 1632: (1980) 2 SCC 565: (1980) 3 SCR 383: 1980 Cr LJ 1125, laid down the following guidelines/propositions:-

**(a) The distinction between an ordinary bail and anticipatory bail is that the former being after the arrest means release from custody of Police, the latter being in anticipation of arrest is effective at the very moment of arrest.**

(b) The High Court and the Sessions Court have been given wide powers-discretionary to grant bail on the facts and circumstances of the case.

(c) The court must apply its own mind and decide the question without leaving it to be decided by the Magistrate under section 437 as and when occasion arises.

**(d) Not blanket order: The applicant must show by disclosing specific facts and events that he has reasons to believe, the existence of which is sine qua non of the exercise of power by the court and not vague apprehension that he may be arrested for a non-bailable offence so that the court may take care to specify the offence or offences in respect of which alone the order will be effective and not a blanket order.**

(e) An order of bail can be passed conforming to the requirements of the section and imposing suitable condition without notice to the Public Prosecutor but notice to him should be issued forthwith and the question of bail be examined in the light of respective contentions of the parties.

**(f) The operation of the order should not be limited to a period of time.**

**(g) If the proposed accusation appears stern(very serious) from some ulterior motive to injure and humiliate the applicant the order for anticipatory bail would generally be made. If it appears likely that he will flee from justice, order would not be made.**

**(h) Filing of an F.I.R. is not a condition precedent to the exercise of power under section 438, which can however, be exercised even after filing of the F.I.R. so long applicant is not arrested.**

(i) An order of anticipatory bail does not in any way directly or indirectly take away from the police the right to investigate. One of the usual conditions imposed is that the applicant shall make himself available for interrogation by a police officer.Bail: Law and Procedures. **Savitri Agarwal v. State of Maharashtra, AIR 2009 SC 3173: 2009**

**8. Appropriate court for grant of anticipatory bail :**

**a)** As bails are against arrest and detention, an appropriate court within whose jurisdiction the arrest takes place or is apprehended or is contemplated will also has jurisdiction to grant bail to the person concerned. If

the court of sessions or high court has jurisdiction to grant anticipatory bail will emanate from the same jurisdiction.

**b)** Both the Hon'ble High Court as well as Sessions court have the competent jurisdiction to entertain the anticipatory bail application. It is for the applicant or the petitioner to choose either of these court's jurisdiction. ***Onkar Nath Agrawal Vs State, 1976 Cr LJ 1142; (1976) 2 All LR 149: 1976 All LJ 223*).** Therefore, section 438 has given a choice, to the applicant, of selecting the forum for filing the petition for anticipatory bail, though both courts i.e, High Court and Sessions Court have been made forum for the approach of the applicant. So the section gives right to party with restricted choice. Section 438 does not require that the offence must have been registered. All that is contemplated that the applicant has reasonable belief that he apprehends to be arrested for commission of non bailable offence.

**9.** Bail under section 438 of the Code, will be valid and operative for those offences only for which it is granted which would last till the conclusion of the trial unless it is cancelled under section 437(5) of the Cr.PC, it was held in,***Ramsevak Vs State of Madhya Pradesh, 1979 Cr LJ 1485; 1979 Jab LJ 593.***

**10. Anticipatory bail whether a matter of Right ?**

**No,** it cannot be invoked as a matter of Right. It cannot be used to frustrate investigation by the police. Courts can exercise discretion to issue a

direction of anticipatory bail under section 438 of Cr.PC when the actions of the police is prejudicially inclined against a party whose individual and personal is liberty likely to be in danger without anyjurisdiction of Law. The discretion is to be determined by seriousness and graveness of acquisition. It has been often noticed that due to political rivalries also false cases are made against each other.

**11. Though the Hon'ble Supreme court had not been in favor of the blanket grant of anticipatory bail, yet they laid down certain principles and guidelines to be kept in mind while deciding anticipatory bail applications.**

Broadly speaking the two basic principles, which must be kept in view while considering the question of grant of anticipatory bail, are

**(i) that there should be no likelihood of the accused absconding, and**

**(ii) there should be no likelihood of the accused misusing his liberty.**

For finding out the first part, it has to consider and see if the accused has deep links / roots in community. While testing this fact, the following factors may be kept in mind:-

a) the length of his residence in community

b) his employment, status, history and financial condition

c) his family ties and relationships

d) his reputation, character and monetary condition

e) his prior criminal record including any record of prior release on re-cognizance or on bail,

f) the identity of the responsible members of the community who would vouch for his reliability

g) the nature of the offence charged, and the apparent probability of conviction and the likely sentence in so far as these facts are relevant to the risk of non-appearance and

h) any other factor indicating the ties of the accused to the community or bearing the risk of willful failure to appear.

**12.**The judicial discretion exercised in granting anticipatory bail is neither perverse nor erroneous on the other hand they are based on relevant considerations supported by the reasons**. Sumit Mehta Vs State of NCT of Delhi, (2013) 11 SC ALE 374.**

**13.**While exercising power under section 438 of the Code, the Court is duly bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under section 438(1), appropriate conditions can be imposed under section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation.

**14.** The Law presumes an accused to be innocent till the guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including **the right to liberty guarantied under article 21 of the constitution**. In case of ***Siddaram Satlingappa Mathtre Vs State of Maharashtra, AIR 2011 SC 312,*** the Hon'ble Apex Court, in respect of grant of anticipatory bail for limited period, observed as follows: " Grant of bail for limited period is contrary to legislative intention. Section 438, Cr.PC does not mention anything about the duration to which the discretion for release on bail in the event of arrest can be granted. The Order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. One such discretion of anticipatory bail is executed by the accused and he is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail."

***15. Cancellation of anticipatory bail*** **illegality:**

The provision under section 438 cannot be invoked after the arrest of accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. The expression "reason to believe" is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith; it cannot merely be a pretense. In the same case, it was held that it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section.

Section 26 of the IPC, defines the expression “reason to believe” as sufficient cause to believe a thing and not otherwise.**Joti Prasad v State of Haryana,**Referring to section 26 of the IPC, has observed:“Reason to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reason to believe” is a higher level of state of mind. Likewise “knowledge” will be slightly on a higher plane than “reason to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words “reason to believe” thus:

> “26. ‘Reason to believe’.— A person is said to have ‘reason to believe’ a thing, if he has sufficient cause to believe that thing but not otherwise.” In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing…”

A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant’s apprehension that he may be arrested is genuine. Normally, a direction should not issue to the effect that the applicant shall be released on bail “**whenever arrested for whichever offence whatsoever**”. Such “blanket order” should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under section 438 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. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of section 438 of the Code can be passed.

***16. In case of HDFC Bank Limited Vs J.J.Mannan, AIR 2010 SC 618***, it was held that a blanket order of anticipatory bail would lead to an absured situation that charge gets framed against the accused in his absence.

17. **In Moni Roy @ PB Roy Vs State Allahabad Criminal cases Vol. 58 August, 2007 Part 8,** it was held that application for relaxation of conditions imposed at the time of granting anticipatory bail was misconceived and thus thereby rejected.

**18.1)** ***In Mannu Koushik Vs State of CG 2006(2) MPHT 39(CG)*** an application for anticipatory bail was sought for alleged offence under SC/ST Act. It was observed that the bar under section 18 of the Act was attracted only where the FIR prima facie shows the commission of an offence under the Act.

Section 18 of the Schedule castes and scheduled Tribes (Prevention of Atrocities,Act,1989 bars the application ofSec.438 of the Code of Criminal Procedure (CrPC) to cases involving accusations of offences under the Act, effectively prohibiting anticipatory bail under normal circumstances. However, the Hon'ble Supreme Court has clarified that anticipatory bail may still be

granted if the First Information Report (FIR) shows that no prima facie case has been made out.

**18.2) So the Key Points of Section 18 are that there is a Bar on Anticipatory Bail:**

The primary function of Section 18 is to exclude the provisions of Section 438 Cr. P.C from cases registered under the SC/ST Act. This bar was introduced by Parliament to prevent the commission of atrocities against vulnerable Scheduled Castes and Scheduled Tribes communities and to protect them. This is a type of bail granted before arrest, allowing a person to avoid potential arrest by a court order. The Supreme Court has ruled that the bar on anticipatory bail under Section 18 applies only when a prima facie case of an offence under the Act is disclosed in the FIR or complaint. The only **Exception is that** If the FIR clearly shows no prima facie case or that the allegations are baseless, courts may still exercise discretion and grant anticipatory bail.

**18.3)** ***In Kiran Vs Raj Kumar Jivraj Jain and another decided on 1-9-2025, 2025 INSE 1067*** wherein Hon'ble Apex court held that, if an FIR discloses prima facie offence under the SC/ST Act, anticipatory bail under section 438 of Cr.PC is barred by section 18 of the Act. The court must not conduct mini trial while considering the bail.

**19.Some of the following illustrations :** Application of section 438 of the code of Criminal procedure, **1973:**

**(a)** ***Kusum Rani Bansal v. State of Punjab, 1978 Cur LJ (Cr) 235 (236) (P&H):***The investigation was on and over eight months had passed but nothing incriminating had been discovered. The conditional pre-arrest bail to

the petitioners was granted. The condition was that they will/would be available for investigation as and when required.

***(b) In Chand Mohd. v. State, Cr LR 507 (508) (Raj),*** **i**t was observed that it would not be unreasonable to enlarge the accused on bail where it appeared that the condition of the injured had been improved and injuries caused by a sharp object were not sufficient to cause death.

***(c) In Dilbag Singh Deleka v. State, 1977 Cur LJ 237 (247)*****, i**t has been held that vague allegations in the FIR and the same remained unsubstantiated up to the date of hearing of the petition, is a fit case for the grant of anticipatory bail.

**(d) I*n Jai Lal v. State of Himachal Pradesh,*** it was held that the fact that the petitioner would co-operate with the investigation and interrogation and the other reason being that the other co-accused have been granted bail cannot be sufficient ground to grant anticipatory bail under section 438 of Cr. P.C. as it would be fatal in the interest of justice.

**20.Condition precedent for grant of anticipatory bail:**

An application under section 438 of the Code of Criminal Procedure, 1973 can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the concerned court either under section 434 or section 439 of the Code of Criminal Procedure, 1973. In the

very nature of the direction which the court can issue under section 438 of the Code of Criminal Procedure, 1973, it is clear that the direction has to be issued only at the Pre-arrest stage. The direction becomes operate only after arrest.

**21.** Distinction between an ordinary order of bail and an order under section 438 of the Code of criminal Procedure, 1973 has been drawn. The former is grante dafter arrest and therefore means release from custody of the police, the latter is granted a bail in anticipation of arrest and is therefore, effective at the very moment of arrest.

**22. It** is well settled by the Hon'ble Supreme Court that while exercising discretion to release an accused under section 438 of the Code neither the High court nor sessions court would be justified in imposing freakish(strange or very unusual) conditions. Undoubtedly the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail and Section 438 of the Code. The conditions to be imposed under section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail. ***In Sohanlal Juneja Vs. State of Punjab, AIR 2007 SC 136: 2007 Cr.LJ 303 (2006) 12 SCALE 210***, it was observed : the FIR pertains against appellants and others for their alleged involvement in misappropriation of stock.

**23.** At the out set It is not necessary for the accused/Applicant to approach the sessions court in the 1st instance as a rule, before approaching the Hon'ble

High court seeking anticipatory bail. The Hon'ble Apex court has reiterated that it is not mandatory for an accused to first approach the sessions court before moving the High Court for anticipatory bail.

********** The End **********