

Reform in law of bail after Hon'ble Apex Court's decision in Satender Kumar Antil vs. Central Bureau of Investigation¹

Guidelines with respect to different categories of offences

The judgment has categorised offences into four different categories and has observed that these guidelines would operate upon the satisfaction of two conditions i.e., (a) that the accused was not arrested during the investigation and that (b) the accused co-operated throughout in the investigation including appearing before the Investigating Officer ("IO") whenever called. These four categories are:

- A. *Offences punishable with imprisonment of 7 years or less not falling in category B & 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 (s.37), PMLA (s.45), UAPA (s.43D(5)), Companies Act, 212(6), etc.*
- D. *Economic Offences not covered by Special Acts.*

With respect to Category A, the Guidelines appear to be comparatively lenient to the Accused, given the lesser gravity of the offences involved. Here, after filing of the charge sheet or the complaint taking cognizance, ordinary summons must be issued at the first instance including an appearance through lawyer. However, if the accused does not appear despite service of summons, then a Bailable Warrant for physical appearance may be issued. Again, if the accused fails to appear despite issuance of bailable warrant, a non-bailable warrant will be issued. Such non-bailable warrant may be converted by the Magistrate into a bailable warrant/summons without insisting on physical appearance of the accused, if the accused moves an application before execution of the non-bailable warrant on an undertaking to appear physically on the next date of hearing. Once an appearance is made in Court, bail applications may be decided without taking such accused into custody or by granting interim bail till the bail application is decided.

With respect to Categories B and D, the bail application will be decided on merits on appearance of the accused in Court pursuant to process being issued. Furthermore, as far as economic offences are concerned, the Supreme Court observed that to determine whether or not to grant bail, two aspects need to be considered i.e., seriousness of the charge and severity of the punishment. In the context of white-collar crimes, the aforementioned factors are usually considered to decide on bail applications.

Finally, with respect to Category C, the guidelines are the same as Categories B and D with the additional condition of compliance with strict bail provisions under Section 37 of the Narcotics Drugs and Psychotropic Substances Act, 1985; Section 45 of the Prevention of Money Laundering Act, 2002; Section 212(6) of the Companies Act, 2013; Section 43(d)(5) of the Unlawful Activities (Prevention) Act, 1967 and the provisions under the Protection of Children from Sexual Offences Act, 2012.

¹ (2021) 10 SCC 773

OTHER BROADER GUIDELINES AS REGARDS THE GRANT OF BAIL

In addition to the abovementioned guidelines, the Supreme Court also conducted a broader analysis of provisions of the Code of Criminal Procedure, 1973 ("CrPC") and laid down certain other guidelines on the grant of bail ("CrPC") as analysed herein under:

i. Section 41/41A Notice and bail on its non-compliance

As regards Section 41 of the CrPC, the Supreme Court has significantly observed that even for a cognizable offence, an arrest of the accused is not mandatory and that an arrest in offences punishable with imprisonment below seven years or extending to seven years can only be made if the IO is satisfied that there is a reason to believe that the accused committed the offence and that there is necessity for such an arrest. Pertinently, Section 41 mandates the IO to record the reasons while choosing to arrest/or not choosing to arrest.

However, this is not required if the offence alleged involves imprisonment for more than seven years. The Supreme Court relied on its judgment in *Arnesh Kumar* wherein it was held:

"In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object will it serve? It is only after these questions are addressed that the power of arrest needs to be exercised... Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC".

Furthermore, the Court also held that in addition to the reason to believe, the satisfaction for the need to arrest shall also be present. As regards Section 41A CrPC, it requires the IO to issue a notice to 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, and arrest is not required under Section 41(1). In this regard, the Court held that Sections 41 and 41A are facets of Article 21 of the Constitution and that any arrest in non-compliance of Section 41/41A CrPC would entitle the accused to bail. Further, the Court mandated all States and Union Territories to facilitate standing orders to comply with Section 41/41A and observed that the directions laid down in the *Arnesh Kumar* judgment had not been followed. These guidelines clearly underline the intent of the Supreme Court to ensure procedural safeguards are complied with and any non-compliance is sufficient to grant bail to the accused.

ii. Default bail under Section 167(2) CrPC

Section 167 of the CrPC pertains to the procedure when an investigation cannot be completed in twenty-four hours and also provides the maximum period of time to complete an investigation i.e., ninety days when the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years; or sixty days where the investigation relates to any other offence. In this regard, the Court held that a failure by the IO to complete the investigation within the prescribed time would enable the release of the accused and such right is absolute and indefeasible and that such right cannot be taken away even during unforeseen circumstances such as the pandemic. At this juncture, it may be pertinent to point out the observations of the Supreme Court in *Rakesh Kumar Paul*:

“The legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged and indefinite period.”

iii. Execution of bond under Section 440 CrPC

Section 440 of the CrPC provides that the amount of a bond executed under Chapter XXXIII CrPC is to be fixed with regard to the circumstances of each case and shall not be excessive. As regards Section 440, the Court held that the conditions imposed for grant of bail such as a bond shall not be mechanical and uniform and that imposing a condition that is impossible of compliance would be defeating the very object of the release of the accused. Further, the Court observed that the High Courts must enquire into the conditions of the undertrials who are not able to comply with the bail conditions and that the mandate of Section 440 CrPC must be kept in mind while insisting upon sureties for grant of bail. The Supreme Court relied on its judgment in *Hussainara Khatoon* wherein it held that the object of a bond is only to ensure that the undertrial does not flee or hide from trial.

iv. Role of the Court and timelines for deciding bail applications:

One of the most important observations in the judgment is that the Supreme Court reiterated the principle that bail is rule and that jail is the exception and that the purpose of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. Further, the Supreme Court relied on its judgment in *Nikesh Tarachand Shah* to observe that an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody and that a presumably innocent person must have his freedom to enable him to establish his innocence. Further, the Court reiterated the principle that innocence of an accused is presumed through a legal fiction and that it is for the prosecution to establish that the guilt of an accused before the Court.

Importantly, the Supreme Court has proceeded to analyse the approach adopted by Courts wherein, given a low rate of conviction and given the possibility of conviction being rare, they tend to decide bail applications contrary to legal principles and understandably, deny bail to an accused. The Supreme Court rightly warned Courts against mixing up a bail application, which is not punitive in nature, with that of a possible adjudication by way of trial. While doing so, the Court has stressed on the need to protect constitutional liberties of citizens and reiterated its judgment in *Arnab Manoranjan Goswami*:

“Courts must be alive to the need to safeguard the public interest in ensuring that due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum- the district judiciary, the High Courts, and the Supreme Court- to ensure that the Criminal Law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum- the need to ensure the proper enforcement of criminal law on the one hand, on the other, of ensuring that the law does not become a ruse for targeted harassment.”

Based on the aforesaid observations, the Supreme Court has ultimately laid down the guidelines requiring bail applications to be disposed of within a period of two weeks, and for anticipatory bail applications to be disposed of within six weeks with the exception of any intervening applications.

CONCLUSION AND KEY TAKEAWAYS

While the judgment in *Satender Kumar Antil* reiterates long-standing principles pertaining to bail, it is significant considering the current backdrop and context in which it has been passed. It cannot be clearer that as far as the principles for grant of bail are concerned, the Court has emphasized the need for the investigative agencies and Magistrates to ensure greater procedural compliances and safeguard of the rights of the accused in a criminal investigation, inquiry and trial. Importantly, the judgment proceeds on the foundation that more than two-thirds of inmates in prisons constitute under trial prisoners and that majority of such prisoners may not even be required to be arrested despite registration of a cognizable offence punishable with seven years or less. It further reiterates the rule that bail is the rule and jail is the exception and that arrest is a draconian measure resulting in curtailment of liberty. Consequently, the Supreme Court has directed the Courts to decide on bail applications within a time bound manner.

In essence, the judgment goes a long way to protect constitutional liberties and the right to presumption of innocence of the accused persons and cements these salubrious principles into the realm of criminal jurisprudence. While the Supreme Court has prominently reiterated that the burden vests on the investigative agencies to comply with procedural safeguards, the real test is in its practical application especially by the Magistrates and the investigative agencies to implement these guidelines in its letter and spirit and accordingly, strike a balance between the rights of the accused and the interest of a criminal investigation.

Stressing a 'pressing need' for reform, the Supreme Court has called on the government to consider a special legislation on bail.