

# BAIL IN THE JUSTICE SYSTEM: TYPES, PROCEDURES AND CONSTITUTIONAL RIGHTS

**AUTHOR – SOROKHAIBAM SATYAJYOTI SINGH\* & DR. S. JAMES\*\***

\* PHD RESEARCH SCHOLAR, DEPARTMENT OF LAW, MANIPUR INTRANATIONAL UNIVERSITY, IMPHAL, MANIPUR, INDIA, EMAIL: SATYAJYOTI.SOROKHAIBAM1@GMAIL.COM

\*\* PROFESSOR, DEPARTMENT OF LAW, MANIPUR INTERNATIONAL UNIVERSITY, IMPHAL, MANIPUR, INDIA EMAIL: [DRJAMES835@GMAIL.COM](mailto:DRJAMES835@GMAIL.COM)

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## 1. Introduction

The concept of bail, which is a basic part of the Indian criminal jurisprudence and it is well recognized principle among all the judicial systems of the world. Bail, in law, means 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, known also 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 persons under criminal arrest.

The law lexicon<sup>951</sup> defines bail as the security for the appearance of the accused person on which he is released pending trial or investigation. 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"<sup>952</sup>.

The Criminal Procedure Code, 1973, does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a) Cr.P.C. as follows: "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 enforce, and non-bailable offence means any other offence". Further, ss. 436 to 450 set out the provisions for

the grant of bail and bonds in criminal cases. 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.

In 2011, The Hon'ble Supreme Court of India in **Sanjay Chandra vs CBI**<sup>953</sup> opined that: "The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court,

<sup>951</sup> Law lexicon by Ramanth Iyer, (3rd ed).

<sup>952</sup> Black's Law Dictionary 177 (4th ed.)

<sup>953</sup> (2012) 1 SCC 40;

whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required”.

Recently, the Hon’ble Supreme Court, in **Aasu vs. state of Rajasthan (Criminal Appeal NO.511 of 2017 Dt.09-03-2017)** issued a direction that Bail applications shall be disposed of normally within one week.

## 2. Bail for Bailable offences

According to section 436 of CrPC, If the offence alleged is bailable, then, the Accused is entitled for Bail as a matter of right, may be before Police station itself, or if forwarded to Magistrates Court, before Magistrates court. In bailable offences bail is a right and not a favour. In such offences there is no question of any discretion in granting bail. Bail can be claimed as of right and there is a statutory duty imposed upon the Police Officer as well as the Court to release a person on bail if he is prepared to give bail. Such a person can also be released on his own bond in a fit case. It is only where the accused is unable to furnish bail then he should be kept in detention.

The Hon’ble Supreme Court in a remarkable case<sup>954</sup> held that:

“As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him”.

However, where the offences alleged are both Bailable and Non-Bailable, the offence would be tried as Non Bailable offence, and benefit of securing Bail on the premise of Bailable offence would not be available to the accused.

## Bail u/s 436-A:

There had been instances where under trial prisoners were detained in jail for the period beyond the maximum period of imprisonment provided for the alleged offence. A new section 436A955 is inserted in the Code to provide that where an under-trial prisoner other than the offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It is also provided that in no case the under trial be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence.

## 3. Bail for non-Bailable offences

The provisions of section 437 empower two authorities to consider the question of bail, namely (1) a court and (2) an officer-in-charge of the police station who has arrested or detained without warrant a person accused or suspected of the commission of a non-bailable offence. Although this section deals with the power or discretion of a court as well as a police officer in charge of police station to grant bail in non-bailable offences it has also laid down certain restrictions on the power of a police officer to grant bail and certain rights of an accused person to obtain bail when he is being tried by a Magistrate. Section 437, Criminal Procedure Code, deals with the powers of the trial court and of the Magistrate to whom the offender is produced by the police or the accused surrenders or appears, to grant or refuse bail to person accused of, or suspected of the commission of any non-bailable offence.

The power to release on bail a person accused of a non-bailable offence is conferred upon only one class of police officers, namely an officer-in-charge of the Police Station under section 437 sub-Section (i). Since the power to grant bail is permissive and not obligatory, it has to be exercised with great caution because

<sup>954</sup> Rasiklal V/s Kishore Khanchand Wadhvani (AIR 2009 1341), Cr.P.C 2005 Amendment.

<sup>955</sup>

of the risk and stakes involved. Before exercising his power, a station officer ought to satisfy himself that the release on bail would not prejudice the prosecution in bringing home the guilt of the accused. In case the officer in charge admits an accused to bail, it is mandatory for him to record the reasons or special reasons in the case diary and preserve the bail bonds until they are discharged either by the appearance of the accused in court or by the order of a competent court.

For the purpose of bail in non-bailable offence, the Legislature has classified them under two heads:

(1) those which are punishable with death or imprisonment for life; (2) those which are not so punishable.

In case of an offence punishable with death or imprisonment for life a station officer cannot enlarge a person on bail, if there appears reasonable grounds for believing that he has been guilty of such offence. The age or sex or sickness or infirmity of the accused cannot be considered by a police officer for the purpose of granting bail. These matters may be taken in view by a court only. An officer-in-charge of the police station may grant bail only when there are no reasonable grounds for believing that the accused has committed a non-bailable offence or when the non-bailable offence complained of is not punishable with death or life imprisonment.

#### **4. Powers of the High Court or Court of Session in granting bail (section 439 of the Code of Criminal Procedure, 1973):**

According to Section 439(1) of the Code of Criminal Procedure, 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 437, 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.

However, 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 Sessions 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.

As per Section 439(2) of the Code of Criminal Procedure, a High Court or Court of Sessions may direct that any person who has been released on bail under Chapter XXXIII (i.e., relating to bail) be arrested and send him to custody.

The powers of the High Court in granting bail are very wide; even so where the offence is non-bailable, various considerations will have to be taken into account before bail is granted in case of non-bailable offence. Under Section 439(1) of the Code, the High Court can only release the accused in cases pending anywhere in the State on bail or reduce the amount of bail, but cannot order the arrest or commitment to custody of any person who has been released on bail by the lower Court but it can order to arrest the person who had been released on bail under Section 439(2) of the Code.

In a recent judgment<sup>956</sup>, Hon'ble Supreme Court has held that there are no restrictions on the High Court or Sessions Court to entertain an application for bail, provided, accused is in custody. The judgment has put an end to the decades old practice of first filing a regular Bail Application before a Magistrate having jurisdiction, and get it rejected for the purpose of approaching the Sessions Court or High Court for bail.

<sup>956</sup> Sundeep Kumar Bafana vs. State of Maharashtra & anr Criminal appeal no. 689 of 2014 dt.27.03.2014.

## 5. Cancellation of Bail

The Code of Criminal Procedure makes clear provisions for cancellation of bail and taking accused back in custody. Section 437(5) states that any court which has released a person on bail under sub-section (1) or sub-s. (2) of s. 437, may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. Similarly, s. 439 confers on the High Court and the Court of Session power to cancel bail. Section 439(2) The Code of Criminal Procedure makes clear provisions for cancellation of bail and taking accused back in custody.

The power of cancellation of bail can be resorted to broadly in the following two situations:

- (i) On merits of a case mainly on the ground of the order granting bail being perverse, or passed without due application of mind or in violation of any substantive or procedural law; and
- (ii) On the ground of misuse of liberty after the grant of bail or other supervening circumstances.

Bail in the first type of cases can be cancelled by superior courts only, whereas in the second category of cases bail can be cancelled by the very court which may have granted bail. There appears to be confusion galore in the judicial pronouncements on the aspect of cancellation of bail on merits and on the ground of subsequent conduct of accused already on bail or on the ground of supervening circumstances. Sometimes the principles of cancellation of bail on the ground of subsequent conduct or intervention of new circumstances have been wrongly brought in and applied to the cases where cancellation of bail is sought on the merits of the case. It is therefore necessary to clearly understand the aforesaid distinct principles of cancellation of bail operating in these two different fields.

As stated herein above the legal provisions pertaining to cancellation of bail under Cr.P.C

are mainly contained in S.437 (5) and 439(2).

Section 437(5) provides for the cancellation of bail by a court other than a High Court or a Sessions Court. Meaning thereby it confers power of cancellation on the Magistrate court. It states that a court other than High court or Sessions Court, may, if it considers necessary to do so, direct that a person released on bail by it be arrested and committed to custody. By judicial pronouncements this provision has been interpreted to mean that any court that has released the accused on bail has power to direct arrest of such person and commit him to custody if subsequent to the release on bail, the circumstances justify to do so. Ordinarily the court would be entitled to exercise this power only where the person released on bail is guilty of the liberty granted by the court or where there is new development in the investigation or recovery of cogent material prima facie involving accused with heinous crime. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

## 6. Cancellation of bail- certain grounds

The grounds for cancellation of bail under ss. 437(5) and 439(2) are identical, namely, bail granted under S.437(1) or (2) or s.439(1) can be cancelled where 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.

Section 439(2) confers powers on the High Court and the Sessions Court to direct re-arrest of the accused who might have been released on bail by any court and commit him to custody. A comparison of s. 439(2) and s. 437(5) makes it clear that the powers of cancellation of bail vested in the High Court and the Sessions Court are very wide vis--vis the powers of the Magistrate court.

s. 439(2) confers powers of cancellation of bail on the High Court and the Sessions Court in respect of orders of bail passed itself as well as by any court subordinate to it also. The power to cancel an order of bail passed by itself by the High Court or the Sessions Court as the case may be, can usually be exercised only where the person released on bail is guilty of misuse of the liberty granted by the court or there is substantial change in the facts of a case. However so far as the cancellation of bail order passed by a court subordinate to it is concerned no such restricted interpretation is justified. Section 439(2) clearly provides that any person who has been released on bail under this Chapter may be arrested and committed to custody by a High Court or Court of Sessions. So it is legally permissible to a High Court or a Court of Session to review and examine an order of bail passed by a court subordinate to it on merits and decide whether such order is legally sustainable or not.

Magistrate has power to pass the subsequent order altering or amending or deleting the conditions of the earlier bail order in any manner whatsoever. Section 437 (5) of Cr.P.C. impliedly confers such power on him. 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<sup>957</sup>.

It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if

once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also<sup>958</sup>. Bail already granted cannot be cancelled on the ground that police needs custodial interrogation of the accused.

#### 7. Anticipatory bail (Section 438 Cr.P.C):

The post-emergency year has witnessed a spate of petitions for anticipatory bail. The petitioners were in many cases influential persons who had wielded enormous powers during emergency and who were, in the post-emergency era, apprehensive of arrests on the charges of corruption, misuse or abuse of official positions, etc. The persons involved in the anticipatory bail proceedings being rich and mighty, they made every effort to use the law and its machinery to their maximum advantage. In this process the courts were required to interpret the law discreetly and with great precision and circumspection. The law relating to anticipatory bail has received, thereby, impetus in the process of its growth and sophistication.

Right to life and personal liberty is an important right granted to all the citizens under Article 21 of the Indian Constitution and it is considered as one of the precious right. Under Indian criminal law, there is a provision for anticipatory bail under Section 438 of the Criminal Procedure Code 1973.

The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory bail". This provision allows a person to seek bail in anticipation of an arrest on accusation of having committed a non-bailable offence. The very basic purpose of insertion of this provision was that no person should be confined in any way until and unless held guilty.

<sup>957</sup> Brijesh Singh v. State of Karnataka 2002 Cr LJ 1362

<sup>958</sup> Brij Nandan Jaiswal v. Munna & Co. AIR 2009 SC 1021

## 8. Anticipatory bail under criminal code of procedure

Where any person has a 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 the court shall provide him anticipatory bail after taking into consideration the following factors, namely-

1. the nature and gravity of the accusation.
2. 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
3. the possibility of the applicant to flee from justice.
4. where 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.

Where the High court or court of session grants interim bail to the applicant then the court forthwith a show cause notice attested with a copy of such order, served to 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.

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.

## 9. Who is eligible to obtain anticipatory bail?

When any person has a reason to believe that there is a chance to get him arrested on false or trump up charges, or due to enmity with someone, or he fears that a false case is likely to be built up against him, he has the right to move the court of Session or the High Court under Section 438 of the code of Criminal Procedure for grant of bail in the event of his arrest, and the court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Accused who has been declared as an absconder/proclaimed offender in terms of Section 82 of the Criminal Procedure Code and not cooperated with the investigation should not be given an anticipatory bail.

The Hon'ble APEX Court in **State of M.P vs. Pradeep Sharma (criminal Appeal No.2049 of 2013 dt.06-12-2013)** held that "when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail".

### Conditions for obtaining the anticipatory bail:

The High Court or the court of the session may include such conditions in the light of the facts of the particular case, including:

- a condition that the person shall make himself available for interrogation by the police officer as and when required;
- 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;
- a condition that the person shall not leave India without the previous permission of the court.

Hon'ble Supreme Court while dealing the case

of **Siddharam Satlingappa Mhetre**<sup>959</sup> held certain conditions imposed by High Court to be not required & contrary to provisions of anticipatory bail.

An accused is free on bail as long as the same is not cancelled. The High Court or Court of Session may direct that any person who has been released on bail to be arrested and commit him to custody on an application moved by the complainant or the prosecution.

In **Gurbaksh Singh Sibbia v. State of Punjab**<sup>960</sup>, the Hon'ble Supreme Court held that "The distinction between an ordinary order of bail and an order of anticipatory bail is that where the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is, therefore, effective at the very moment of arrest".

#### **No Regular Bail shall be granted When Interim Anticipatory Bail Is Granted by Higher Courts and Matter Is Pending**

Recently, Hon'ble Supreme Court, in **Rukmani Mahato vs. state of Jharkhand (S.L.P Criminal no.2411 of 2016 dt.03-08-2017)** has directed Trial Courts to not grant regular bail to an accused, if he/she has already obtained an interim anticipatory bail by a superior Court and the matter is still pending before the higher Court. The Court held that:

"Once a regular bail is granted by a subordinate Court on the strength of the interim/pre-arrest bail granted by the superior Court, even if the superior Court is to dismiss the plea of anticipatory bail upon fuller consideration of the matter, the regular bail granted by the subordinate Court would continue to hold the field, rendering the ultimate rejection of the pre-arrest bail by the superior Court meaningless," a Bench comprising Justice Ranjan Gogoi and Justice Navin Sinha explained.

#### **10. Mandatory bail**

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.

Section 167(2) lays down: -

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused person in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; 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.

Provided that:

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding:

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so

<sup>959</sup> (2011) 1 SCC 694

<sup>960</sup> AIR 1980 SC 1632

released under the provisions of Chapter XXXIII for the purposes of that Chapter.

(b) Section 167(2) deals with powers of the magistrate to detain the accused in custody and release him on bail on expiry of the statutory period. It is quite clear that power is conferred on the magistrate to release the accused on bail under the proviso. The position is well settled by the Supreme Court judgment<sup>961</sup>. The prevalent impression in some judicial circles that in case of offences that are required to be tried by sessions court, it is only the sessions court which has power to release the accused on bail under section 167(2) is not correct. Restrictions imposed on the powers of the magistrate with regard to grant of regular bail under section 437 of the Code would not be applicable when magistrate exercises power under section 167(2).

In *Natbar Parinda*<sup>962</sup> Hon'ble Supreme Court noted that the accused has a right to be released on bail under this provision even in serious and ghastly types of crimes.

The period of 90 or 60 days would begin to run from the day on which the accused is remanded to custody by the magistrate at the first instance. Since person arrested is to be produced before a magistrate within 24 hours of arrest, date of remand to custody may not necessarily be the same as the date of arrest. The period of 90/60 days is the total period of custody - police custody and/or judicial custody - that can be authorized by the magistrate.

In the case of **Union of India V Nirala Yadav**<sup>963</sup> our Hon'ble Apex court held that Magistrate should decide the application for statutory bail on the same day it is filed.

In **Thangavel Ravi Vs. State of A.P**<sup>964</sup> our Hon'ble High Court opined that where the petitioner therein was alleged to have committed the offence punishable under

Section 307 IPC and did not cause any hurt, held that case falls under the first part of Section 307 IPC and the prescribing imprisonment which may extend to ten years and the maximum period of detention in custody would be 60 days as contemplated under the proviso (a) (ii) of Section 167(2) of Cr.P.C Accordingly, if the charge sheet is not filed within 60 days of date of detention, petitioner is entitled to be released on bail.

Recently, Hon'ble Apex Court in **Rakesh Kumar Paul vs. State of Assam**<sup>965</sup> (16-08-2017), held that an accused is entitled to statutory bail (default bail) under Section 167(2)(a)(2) of Code of Criminal procedure if the police failed to file the charge-sheet within 60 days of his arrest for the offence punishable with 'imprisonment up to 10 years.

The main question in this case was 'whether in a case regarding offence for which the punishment imposable may extend upto ten years, the accused is entitled to bail under Section 167(2) of the Code of Criminal Procedure 1973 due to default on the part of investigating agency in not filing the charge sheet within sixty days?

Hon'ble Apex Court answered this question that "Offences punishable with imprisonment of not less than ten years have been kept in one compartment equating them with offences punishable with death or imprisonment for life. This category of offences undoubtedly calls for deeper investigation since they provide for a lesser minimum sentence, even though the maximum punishment could be more than ten years imprisonment".

II. **Bail After conviction:** (Section 389 of the Cr.P.C)

**Suspension of sentence pending the 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

<sup>961</sup> State of U.P. v. Laxmi Brahman, AIR 1983 SC 439

<sup>962</sup> Natabar Parinda v. State of Orissa, AIR 1975 SC 1465

<sup>963</sup> AIR 2014 SC 3036

<sup>964</sup> 2017(1) ALD (Cri.)449

<sup>965</sup> SPECIAL LEAVE TO APPEAL (CRL.) NO. 2009 OF 2017 dt.16.08.2017



execution of the sentence or order appealed against be suspended and, also, if he is in confinement, he be released on bail, or on his 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 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, -

a. where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

b. 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.

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) deals with a situation where the trial court itself can grant a bail to convicted accused enabling him to prefer an appeal. Since we are concerned with the power of the trial Court to suspend the sentence, section 389(3) must be taken into account.

### **Section 389(3) is applicable only in the following conditions**

1. The Court must be the convicting Court
2. The accused must be convicted by the Court
3. The convict must be sentenced to imprisonment for a term not exceeding three years
4. The convict must express his intent to present appeal before the appellate Court
5. The convict must be on bail on the day of the judgment.

### **Trial Court's Powers u/s 389(3) of Cr.P.C. :-**

1. Trial Court has power to release such convict on bail,
2. Trial Court has power to refuse the bail if there are "special reasons",
3. Trial Court has power to release such convict for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court.

### **Features of section 389(3)-**

1. The convict shall not be released on bail "as of right" but he will have to satisfy that he is "eligible" to be released on bail;
2. If the trial Court is satisfied that there are "special reasons" for not releasing the convict on bail, then the Trial Court can very well do;
3. The sole purpose of this provision is to enable the convict to present appeal to the appellate Court;
4. No maximum period is prescribed for releasing the convict on bail;
5. Under this section 389(3) suspension of sentence is "deemed" suspension;
6. Suspension of sentence is by product of the

accused being released on bail;

7. The Trial Court has no power to suspend the sentence and then order the release of the convict on bail

### **Difference in operations of Sub-section (1) and (3) of Sec.389 Cr.P.C:**

1. Sub-section (1) comes into play when appeal is pending. But Sub-section

(3) comes into play when the convict expresses his intention to present appeal.

2. Sub-section (1) tells “suspension” first and then talks of “release on bail” or “own bond” But Sub-section (3) tells “release on bail” first and then “suspension” is then the “automatic” effect.

3. Sub-section (1) does not prescribe that the accused must be on bail but Sub-section (3) can be used only if the accused is on bail on the day of judgment.

4. Sub-section (1) gives option to release the convict on “bail” or “his own bond” but Trial Court vide Sub-section (3) does not have power to release the convict on “his own bond”. However trial Court can also release accused on his own bond if the accused is poor etc.

5. In nutshell, vide subsection (1) suspension is cause and bail is effect and vide Sub-section (3) bail is cause and suspension is effect.

The Patna High Court in **Suddu Kumar vs. State of Bihar**<sup>966</sup> 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 Vs. State of UP** discussed the scope and ambit of Section 389 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.

The personal liberty is of utmost importance in our constitutional system recognized under Article 21. Deprivation of personal liberty must be founded on the most serious considerations relevant to welfare objectives of the society as specified in the Constitution. Even though the law of the land and Hon'ble Higher courts in various cases have tried to intervene and also have laid down certain guidelines to be followed but unfortunately nothing has been done about it. There is also a strong need felt for a complete review of the bail system keeping in mind the socio-economic condition of the majority of our population. While granting bail the court must also look at the socio-economic plight of the accused and must also have a compassionate attitude towards them. A proper scrutiny may be done to determine whether the accused has his roots in the community which would deter him from fleeing from the court.

“Society has a vital interest in grant or refusal of

<sup>966</sup> Criminal Appeal (DB) 583 of 2015 dt. 09-03-2017. 17 CrL Appeal No.NO.1516/2014 Dated.22-07-2014

bail because every criminal offence is an offence against the state. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society”.

**Justice Dalveer Bhandari** in *S.S. Mhatre vs. State of Maharashtra* (2010)

## 12. The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023

Bail is a fundamental aspect of the judicial system that ensures the rights of individuals while balancing the need for societal protection. The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, aims to reform the bail system, providing clearer guidelines and addressing contemporary challenges encountered under the previous Code of Criminal Procedure, 1973. This paper explores the types of bail, the procedures involved in obtaining it, and the constitutional rights concerning bail.

### Types of Bail

Bail typically falls into three categories:

1. **Regular Bail:** This form of bail is sought by an accused who has been arrested and is in police custody. It is usually requested when the accused believes that the evidence against them is insufficient for conviction.
2. **Anticipatory Bail:** This bail is sought in anticipation of arrest. It allows individuals to seek protection from arrest based on a reasonable belief that they may be arrested for a bailable offense. The BNSS, 2023, emphasizes timely resolutions to anticipatory bail applications to prevent the misuse of authority.
3. **Interim Bail:** Given under special circumstances, interim bail provides temporary release to the accused until a formal hearing takes place. The BNSS encourages judges to consider interim bail to avoid unnecessary detention and ensure justice.

### Procedural for obtaining Bail

#### Under the BNSS, 2023

**Application Process:** The process for obtaining bail under the BNSS has been streamlined to make it more accessible. Individuals can file bail applications through online platforms as well as in person. The use of technology aims to reduce delays and promote transparency in the judicial process.

**Hearing and Decision:** Once a bail application is filed, the court conducts a hearing where both the prosecution and the defense present their arguments. The judge considers factors like the severity of the crime, the accused's criminal history, community ties, and the likelihood of fleeing.

#### Key Features of the BNSS

- **Time-Bound Decisions:** The BNSS mandates that bail applications be decided within a specific timeframe, ensuring efficiency and reducing the backlog of cases related to bail.
- **Rights of Victims:** The act recognizes the rights of victims throughout the bail process, allowing them to present their concerns and impact statements, which the court must consider while deciding bail.

#### Constitutional Rights Regarding Bail

The right to bail intersects with several constitutional provisions:

1. **Article 21 - Right to Life and Personal Liberty:** This article safeguards individual liberty. Detaining a person for an indefinite period without trial infringes upon this fundamental right, emphasizing the need for a clear and fair bail process.
2. **Article 14 - Right to Equality:** This constitutional guarantee ensures that individuals are treated equally before the law. A fair bail process must not discriminate based on caste, creed, or socio-economic status.
3. **Article 22 - Protection Against Arrest and Detention:** This article outlines the rights of

individuals regarding arrest and detention, ensuring that every arrested person is informed of the grounds of arrest and has the right to consult a legal practitioner of their choice. The BNSS reinforces these rights by advocating for timely hearings for bail applications.

## CONCLUSION

Bail is a critical component of the justice system, directly impacting the rights of the accused and the pursuit of justice. The Bharatiya Nagarik Suraksha Sanhita, 2023, presents a significant reform, addressing the complexities of the bail process with a focus on technology, victim rights, and constitutional guarantees. By reinforcing the principles of fairness and efficiency, these reforms aim to uphold the integrity of the justice system and protect the rights of all individuals.

While the **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023** is aimed at replacing the **Code of Criminal Procedure (Cr.PC), 1973** in India, it is important to note that full implementation and complete banning of the CrPC could take time. As of now, the CrPC may still be in effect in various jurisdictions until the BNSS is fully enacted and operationalized.

The BNSS introduces new provisions and reforms intended to modernize the criminal justice system, but the transition from the Cr.PC to the BNSS includes regulatory, procedural, and administrative steps.

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