

# The Right of Getting Bail of an Arrested Person in Bangladesh—A Legal Study of Theories and Practice

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## Abstract

The essential sense of the Bail in Bangladesh is to release a person from the custody of police and deliver him/her into the hands of the sureties who undertake to produce him in court whenever required to do so. The word Bail is derived from the old French verb “Bailer” which means to “give” or to “deliver”<sup>1</sup> (Webster’s Dictionary, 1938). In common Law legal system, it is found that an accused person is to be declared on bail, when he is released from the custody of the officers of the Court. The sureties are bound to produce him to answer at a specified date, time and place, the accusation against him when bail is approved by the competent court. The basic principle regarding release on bail is that an accused person is presumed in law to be entitled to freedom and every opportunity to look after his case, provided his attendance is secured by proper security. However, the paper focuses the idea of releasing an accused on bail in such a case that has been developed as of right of an accused in our country. Therefore, this paper gives emphasis on bail of an accused on legal analysis on theoretical and practical approach and it recommends that the bail granting authority should maintain the principles of law as well as provisions of law properly for the protection rights of an accused.

## Keywords

Bail; Bailable Offence; Non-Bailable Offence; Right of Accused; Release; Bond; Surety; Arrest; Anticipatory Bail; Criminal Justice

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## 1. Introduction

Bail has been recognized as a process of releasing of an accused from the custody of police under certain condi-

<sup>1</sup>Webster’s New International Dictionary (1938), p. 171.

tions temporarily. Generally, bail is some form of property deposited to a court to persuade it to release a suspect criminal from jail, on the understanding that the suspect criminal will return for trial or forfeit the bail (and possibly be brought up on charges of the crime of failure to appear). In some cases bail money may be returned at the end of the trial, if all court appearances are made, regardless of whether the person is found guilty or not guilty of the crime accused. If a bondsman is used and a surety bond has been obtained, the fee for that bond is the fee for the insurance policy purchased and is not refundable. In some countries, granting bail is a common practice in the court. Even in such countries, however, bail may not be offered by some courts under some circumstances; for instance, if the accused is considered likely not to appear for trial regardless of bail. Legislatures may also set out certain crimes to be not bailable, such as capital crimes.

In this sub-continent especially in Bangladesh, bail has been developed as of fundamental rights of an accused.

Bail has been defined by Black's Law Dictionary in the language that "security required by a Court for the release of a prisoner who must appear at a future time". The same dictionary further says that, as verb Bail means "to obtain the release of oneself or another by providing security for future appearance"<sup>2</sup> (Garner, Black's Law Dictionary, 1927). Bail is a safety measures which is given for the due appearance of a person who is arrested or imprisoned to get his or her temporary release from the legal custody (Akkas, 2009).<sup>3</sup>

According to Concise Oxford Dictionary bail means a security for the appearance of prisoner on giving which the accused pending trial. In the same dictionary the meaning of bail as a verb is giving as to admit to bail, to release on security given in appearance.

In the Random House Dictionary bail means—

- 1) Property given, as surety that a person released from custody will return at an appointed time;
- 2) The person giving it; and
- 3) The privilege of being released on bail.<sup>4</sup>

Thus the term bail includes in itself concepts—

**Firstly**, the person who stands surety for appearance of the man in court whose released is the purpose of the bail;

**Secondly**, the amount of money offered as security for appearance of that man; and

**Thirdly**, the position or privilege of being released on bail.

Bail is therefore presupposes a moderation, that is, deprivation of liberty of the person to be released and when he is released from such restraint or custody he is said to be released of on bail.

## 1.1. Categories of Bail

Provisions as regards bail can be broadly classed into two categories: 1) Bailable cases and 2) Non-bailable cases.

### 1) Bailable Cases:

The grant of bail is a matter of course. It may be given either by the police-officer in charge of a police-station having the accused in his custody or by the court. The release may be ordered on the accused executing a bond and even without sureties.<sup>5</sup>

### 2) Non-Bailable Cases:

In non-bailable cases, the accused may be released on bail, but no bail can be granted where the accused may be released grounds to be guilty of an offence punishable either with death or with imprisonment for life. But doesn't apply to

- a) a person under sixteen years of age;
- b) a woman; or
- c) a sick or infirm person.

As soon as reasonable grounds for the guilty cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can be also released, for similar reasons, between the close of the case and the delivery of the judgment.

<sup>2</sup>Brayan A. Garner, Black's Law Dictionary (2009), p. 150.

<sup>3</sup>Dr. Sarkar Ali Akkas, *Law of Criminal Procedure*. (p. 243). Dhaka, Bangladesh, Ankur Prokashani. Cited in A C Sen(1979) (*Mitra's legal & Commercial Dictionary*) Eastern Law House, Kolkata. p. 98.

<sup>4</sup>Random House Dictionary (College Edition), p. 134.

<sup>5</sup>Section 436(1), the Code of Criminal Procedure, 1898.

## 1.2. Categories of Offences

The Criminal Procedure Code has under section 4 (b) categorized offences as bailable and non-bailable.

### 1) Bailable offence

The Criminal Procedure Code provides that in the case of bailable offences the person accused has an indefeasible right to grant of bail subject of course to satisfactory sureties being offered, if sureties are considered necessary.<sup>6</sup> The provisions of the section are mandatory, and the Court or the officer in Charge of the police station, as the case may be, is bound to release the person in custody who is accused of a bailable offence, on bail, provided he is prepared to give it, or on recognizance. The seriousness of the offence is immaterial for the purpose of bail, provided that the offence is bailable. Where the accused is charged with a non-bailable offence but it is found that the offence, if any, made out on the facts was bailable, the accused must bailed out. The Court has no discretion in the matter. Where the High Court ordered that bail may be granted by the Magistrate after recording some evidence and the Magistrate found that the charge against the accused could be only for bailable offence, he was right in admitting the accused to bail without recording any evidence.

### 2) Bail by Police-Officer

An officer-in-charge (OC) of a police station is bound to grant bail in bailable cases, and in improper refusal to do so will amount to a violation of duty. A person arrested by the police under the Criminal Procedure Code, 1898 should be given the option of release on reasonable bail being provided.<sup>7</sup> The bail should not be excessive, and no needless impediment should be placed in the way of being admitted to bail. The intention of the law is that in such a case the man is ordinarily to be set at liberty and it is that in such a case the man is ordinarily to be set at liberty and it is only when he is unable to furnish such moderate security, if any, required of him, as is suitable for the purpose of securing his appearance before the Court pending inquiry, that should remain in detention.

### 3) Non-Bailable Offence

Whenever a Court requires an accused person to furnish a bail bond, the terms of the bail should normally be for attendance and other conditions should not be imposed. This would be more in case where the accused is called upon to be of good behavior; since there is a separate and distinct provision of law for this purpose. It would be improper to impose such condition in a bail bond and to ignore the provisions of the Code, which provide for such cases. But in the case of non-bailable offences, a court may, while granting bail to the accused, impose conditions other than fixing of bail for the attendance of the accused. Such conditions will not be illegal. An order imposing a condition that the accused should confine their movements to the municipal limits of the town as long as the Sessions case was pending and report themselves twice a day to the police station was held to be not illegal. Where a Magistrate while releasing the accused on bail stated that besides executing the bond with sureties their release was subject to a condition that the accused would not enter upon the land in dispute for a particular period and that they would not commit any breach of peace. Where a woman is accused of a non-bailable offence and the situation was such that all her relations within prohibited degrees were arrayed against her and the court ordered that she should furnish surety of one of such relatives. It was held that it could not be morally justified to compel such women to choose as sureties those very men who were her sworn enemies and who were determined to put her on a road that leads to sin and crime? So the safest course for a Court to adopt is to release the woman on a surety of her own choice and leave the law to take its own choice and leave the law to take its own course so that if there is repetition of the offence, nothing prevents either the Court from canceling the bail or the complainant from initiating a second case. But that doesn't mean that the Court can't at all impose any condition while granting bail. The matter has to be considered on the facts of the case. The law doesn't contemplate the incorporation of powers while granting bail to make sure that they do not repeat the offences allegedly committed by the accused persons.

## 2. Law Regarding Disposal of Bail Application

The law regarding to disposal of bail application is as under—

1) When an accused surrenders in the Court and applies for bail, the subordinate Court have jurisdiction to release him on personal bond.

2) The Courts should be liberal in this matter, but the facts and the circumstances of each case should be con-

<sup>6</sup>Section 496, *ibid.*

<sup>7</sup>Section 55, *ibid.*

sidered and taken into account.

3) In case of person in jail could apply for bail after taking signature of the Jail authority on “*vocalatnama*”.

4) In cases of women and children Courts should prefer to release them on personal bonds pending the disposal of their bail applications as there is always a fear of sex abuse and the child abuse in jail as well as police custody and no one likes to report such outrages to the authorities out of shame or other reasons.

5) The bail applications should be decided as expeditiously as possible and should not be allowed to remain pending for long. If practicable the bail application should be considered the sum up.

## 2.1. Condition for Granting of Bail

On the language of the Code Sessions Judges and Magistrates have no power whatever to impose any condition at all when they grant bail.<sup>8</sup> It was held in the case of *Lakhi Narayan vs. Crown (1952)* that neither the Sessions Judge nor the Magistrate is competent to accept any conditions, which an accused person may like to suggest him.<sup>9</sup> Under the Code of Criminal Procedure the Court can grant bail on condition that the person shall attend at the time and place mentioned in the Bail-bond before the police station twice daily, in the morning and in the evening, to give report before the police-officer.<sup>10</sup> A person arrested in a bailable offence, no needless impediments should be placed in the way of his or her getting bail (*Akkas, 2009*).<sup>11</sup>

While granting the bail the High Court should not impose such condition, which would amount to denial of bail. In the case of *Keshab Narayan vs. The State (1985)* the court held that where, therefore, bail was granted by the High Court to the accused on furnishing security of Rs 1 lakh in cash or in fixed deposit in nationalized bank with due sureties residing in the State for like amount, the Condition amounted to denial of bail and is liable to be set aside.<sup>12</sup> The conditions should not be harsh, oppressive and virtually resulting denial of bail. This is because, it was held in the case of *Anwar Hossain vs. The State of Orissa (1995)* that an accused prosecuted for offence relating to illicit distilled liquor. He was directed to be released on bail by depositing security-distilled liquor. He was directed to be released on bail by depositing security with one surety in addition to bail bond.<sup>13</sup> It was decided in the case of *Afsar Khan vs. The State (1992)* on the other hand, that the present approach of the Sessions Judge in insisting upon the petitioner to deposit a cash security of Rs. 750/ in each case, to totaling Rs. 6750/= is not only harsh and oppressive but indirectly denial thus depriving the persons individual liberty.<sup>14</sup>

However, the following conditions may be practiced to the grant of bail, such as living at a particular address or having someone act as surety, if the court considers that this is necessary:

- 1) To protect and prevent the defendant/accused absconding;
- 2) To protect and prevent the defendant committing further offences while on bail;
- 3) To protect and prevent the defendant interfering with witnesses;
- 4) For the defendant’s own protection (or if he is a child or young person, for his own welfare or in his own interests).

Failing to comply with bail conditions is not an offence, but may lead to the defendant being arrested and brought back to court, where they will be remanded into custody unless the court is satisfied that they will comply with their conditions in future.

## 2.2. Reasonable Grounds for Granting Bail

It was not acceptable to permit that bail to an accused person where reasonable grounds to believe that he was committed an offence were shown to exist. Conversely where the Court was satisfied that no reasonable ground existed to connect the accused with the liability it was free to enlarge him on bail. In the case of *Sheikh Shahidul Islam vs. State (1993)* the court held that the actual test for grant or refusal of bail rested on availability of reasonable grounds.<sup>15</sup>

<sup>8</sup>Section 499, *ibid*.

<sup>9</sup>4 DLR (1952) 352.

<sup>10</sup>Section 499 of the Code of Criminal Procedure, 1898.

<sup>11</sup>Dr. Sarkar Ali Akkas, *Law of Criminal Procedure*. (p. 245). Dhaka, Bangladesh, Ankur Prokashani.

<sup>12</sup>AIR (1985) SC 166 = (1985) Cr.LJ 1857.

<sup>13</sup>Cr. LJ (1995) 863 (Ori).

<sup>14</sup>Cr. LJ (1976) at 1681 (Kant).

<sup>15</sup>1992 P. Cr. LJ 2597, BLD (1993) (AD) 190.

Granting bail on reasonable grounds is an expression which that the grounds be such as would appear sufficient to a reasonable man for connecting the accused with the crime with which he is alleged. If such grounds exist tending to connect the accused with the crime, bail should be refused, without the need to go into a deeper appreciation of the merits of those grounds and the evidence on which they rested, which functions was to be assumed at the trial stage.<sup>16</sup> It is not the *prima facie* case against the accused but the reasonable grounds for believing that he has been guilty which prohibits granting bail. It is found that the responsibility is on the prosecution to disclose those reasonable grounds.<sup>17</sup>

Court exercising the jurisdiction for granting bail should refrain from indulging in detailed in their orders in rationalization of grant or non-grant of bail. However, the court observed in the case of *Kashi Nath Roy vs. The State of Bihar* (1996) that giving reasons disclosing his mind while granting bail could not be considered a glaring mistake or impropriety to pass condemning remark and initiate action against concerned officer.<sup>18</sup> Courts do not have to prove the merit of the case. They have only to look at the material placed before them by the prosecution to see whether some substantial evidence is available against the accused, which if left un rebutted, may lead to the inference of guilt. Reasonable grounds are not be confused with mere allegations or suspicions, nor with rested and proved evidence, which the law requires for a person's conviction for an offence.<sup>19</sup> As for example, where it is a case of accidental and unintended death caused by simple hurt, the limitation of the courts discretion is removed which must then freely exercise in favour of granting bail.

Similarly where reasonable grounds are not disclosed but grounds do exist for a further investigation and inquiry into the guilt of an accused person, the case will fall under section 497 (2), in which case again bail should be withheld.<sup>20</sup> Under the Cr. P.C. the words, if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or in the alternative with imprisonment for life, but include offences merely punishable with imprisonment for life.<sup>21</sup> The expression should be read disjunctively.<sup>22</sup>

In order to ascertain the "reasonable grounds" for believing that accused has been guilty of specified offences it would be seen if a *prima facie* case is disclosed against the accused on the basis of FIR, statements of prosecution witness recorded according to CrPC.<sup>23</sup> And the court also held in the case of *Muhammad Sadiq vs. Muhammad Arshad* (1997) that other incriminating material including the medical evidence collected by the prosecution would be also considered.<sup>24</sup>

The established position in law appears to be that in cases of murder bail cannot be granted unless the court comes to the conclusion that there are no reasonable grounds for believing the accused to be guilty of that offence. It was held in the case of *Younus Ali vs. Yousuf* (1974) that what are reasonable grounds would be higher than suspicion but certainly lesser than proof. If the offence is proved, the accused would incur conviction but during the pendency of the trial Court has got to see in whether there reasonable grounds to connect an accused person with a crime and believe in his complicity on the basis of evidence available on the record or proposed to be offered by the prosecution.<sup>25</sup>

The Court cannot hold a preliminary trial at the bail stage.<sup>26</sup> Where a bail prayer was moved before the High Court by an accused who was sent for trial under section 302/34, Penal Code, and it was contended that on the facts of the case he was not constructively liable for the offence of murder Therefore, it was held in the case of *Maheram Ali vs. The State*, the High Court Division held that the decision of refusing bail was correct and HCD also pointed out that to determine the circumstances for granting bail at this stage was very difficult. Where the allegation against the accused is that he is simply order giver, he is entitled to be released on bail.<sup>27</sup> It was observed in the case of *Abdul Kader Faruque alias Mohd. Farukue vs. The State* (1997) that seriousness of the of-

<sup>16</sup>20 DLR (SC) 295.

<sup>17</sup>44 DLR (AD) 192.

<sup>18</sup>1996 Cr. LJ (SC).

<sup>19</sup>1982 SCMR 668.

<sup>20</sup>20 DLR (SC) 295.

<sup>21</sup>Section 497 of the Code of Criminal Procedure, 1898.

<sup>22</sup>21 DLR (SC) 199.

<sup>23</sup>Section 161 of the Code of Criminal Procedure, 1898.

<sup>24</sup>1997 P. Cr. LJ 866.

<sup>25</sup>1974 P. Cr. LJ Note 85 at P. 53; *Khalid Saigol vs. The State* PLD 1962 SD 495; *Nadir vs. The State* PLD 1968 SC 10; *Abdul Malik vs. The State* PLD 1968 SC 349 and *Manzoor vs. The State* PLD 1972 SC 11.

<sup>26</sup>1973 P. Cr. LJ 913; PLD 1962 SC 495.

<sup>27</sup>2 BLC 401.

fence by itself is no ground to refuse bail to an accused when the prosecution fails to place any material on record to connect him with the alleged offence.<sup>28</sup> When *prima facie* case against petitioners made out under section 302/149/148 of the Penal Code on the basis of preliminary evidence recorded in a complaint case, bail cannot be granted.<sup>29</sup> Where specific part is assigned to accused in first information report in the commission of two murders and murderous assault own three persons High Court was justified in rejecting bail of the accused.<sup>30</sup>

In the case of *Nurul Huda v State*,<sup>31</sup> the court held that the grant of bail is the discretion of the court and the court could consider the exercise of discretion if it is satisfied in the facts and circumstances of the case that the trial cannot be concluded within the specified time (Haque, 2007).

### 2.3. Circumstances Where Bail Not Be Granted

In the following circumstances bail should not be granted:

1) The court held in the case of *Mang Karai vs. The State* (1967) that when there is a chance of tampering, but the mere allegation is not enough. There must be material to prove that the witnesses may be tampered with.<sup>32</sup>

2) When there is likelihood of the accused absconding. In proof of absconding the past conduct of the accused has to be seen.

In the case of *State vs. Surider Singh* (1966) the court held that when bail application is opposed on ground of witness being intimated and their being tampered with; State has to give evidence, which may be tested by cross-examination. At least the affidavit of witnesses said to be intimated should be filed.<sup>33</sup>

3) It was held in the case of *Venakataramanappa vs. K. R. Subramany Setty* (1991) When there is *prima facie* case of accused in grave offences and apprehension of tampering with evidence if released on bail; bail can't be granted even is accused suffering from heart trouble or is the only earning member in the family.<sup>34</sup>

In the case of *Mohammad Kasim Abdul Latif Memon vs. The State of Gujrat* (1992) the court held that where there was *prima facie* case that petitioner if released would tamper with the evidence; they cannot be released on bail.<sup>35</sup>

4) When the overt act on the part of the accused alleged in the F.I.R is corroborated by post-mortem report, the rejection of the bail application is justified.

In the case of *Muhammad Ali vs. The State* (1976) the court held that accused along with his companions came with deadly weapons and forcibly abducted his wife and when intervened by deceased, him mother-in-law, stabbed her to death, the accused was named in F.I.R and all prosecution witness, excepting one fully implicated him in the crime.<sup>36</sup> Subsequently, Bail was declined.

In the case of *Meah Mahmud Ali Qasuri vs. State*,<sup>37</sup> the court observed that in bailable offences, the person accused has the indefeasible right to grant of bail subject to satisfactory sureties being offered if necessary. The condition is that the accused admitted to bail shall be deist from repetition of offence and imposition of such condition & its incorporation in the bail bond cannot be considered to be ancillary to power to grant bail under section 497 of the Code (Huq, 2010).

**Provisions in the Code of Criminal Procedure:** The power to grant bail under section 498 of CrPC is not additional or independent of section 497 of CrPC. and the provision contained in section 497 CrPC have to keep in view, while passing an order under section 498. The policy of the law, in respect of person accused of non-bailable offences is laid in section 497 of CrPC and the same policy is applicable in respect of granting bail under section 498 of the same Code. After all judicial discretion has to be exercised while grant bail and the power conferred by the section 498 of the Code cannot be construed to be purely arbitrary. In this respect, therefore, section 498 of the Code seems to be “ancillary or subsidiary” to sections 496 and 497 of the Code. In other respect, however section 498 occupies position of a supplementary provision in so far as it confers not only

<sup>28</sup>1997 BLD 148.

<sup>29</sup>1994 P. Cr. LJ 437; *Shah Alam Chowdhury vs. The State* 42 DLR (1990) (AD) 10.

<sup>30</sup>1985 SCMR 2082(1).

<sup>31</sup>55 DLR (AD) 33.

<sup>32</sup>AIR 1967 Tri 32 = 1967. *State vs. Mahbub Ali*, AIR 1957 Bom, 548.

<sup>33</sup>1966 Cr. LJ 863.

<sup>34</sup>1991 (2) Crimes 648 (Kar).

<sup>35</sup>1992 (1) Crimes 1109.

<sup>36</sup>1976 P. Cr. LJ. 683.

<sup>37</sup>15 DLR (SC) 429.

concurrent but revisional powers on the High Court and the Sessions Court in respect of grant or refusal of bail by subordinate courts the police enables these Courts to exercise the power to grant anticipatory bail in suitable cases. Therefore, the power of High Court to grant bail under section 498 of CrPC is subservient and ancillary to section 497 of CrPC, while limits the power to grant bail in a case punishable with death or transportation for life to old age, physical infirmity or sex.

### 3. Refusal of Bail

Bail was refused, where three of the injuries were declared to be grievous, having been caused by sharp-edged weapon in the abdomen. In the absence of anything else, local and nature of three injuries *prima facie* indicated their being grievous and dangerous to life within section 320, to Penal Code and punishable with imprisonment extending up to 10 years. Bail was not granted. Section 409, Penal Code falls within the mischief of the prohibition contained in sub-section (1) of section 497 CrPC. Therefore, power to grant bail limited to the conditions laid down in the exception clause and proviso thereto. It is however, to be noted that where the offences with which the appellant is charged do not fall within the exception clause and proviso thereto. It is however noted that where the offences with which the appellant is charged do not fall within the exception clause, his prayer for bail could be refused only for good and sufficient reasons and not on whimsical grounds. The Judges of the High Court having found that there was no material in support of the findings by the Sessions Judge that if the appellant be released on bail he will tamper with evidence, the only proper order to pass in the case was to accept the application for bail, but they proceed to speculate that the changes of tampering could not be ruled out as the witness in the case had worked under the appellant. In this they failed to exercise the discretion vested in the High Court according to the rule of reason and justice. The court of Magistrate who grants bail of the accused person, only that court of Magistrate can cancel the bail of an accused. The other court of Magistrate cannot cancel the bail<sup>38</sup> (Hossain & Rahman, 2011).

### 4. Powers of High Court Division

The power of the High Court Division to grant bail is entirely unfettered by any conditions, and the limitations and considerations guiding the Court in granting bail under section 497 or section 496 do not apply to it.

The Jurisdiction of the High Court to grant bail under section 498 of CrPC is not merely revisional but concurrent with that of the subordinate Magistrate trying the case. But section 498 of CrPC has to be construed to extend the powers of the High Court or the Sessions Court to grant bail in cases where those Courts would not to be competent to grant bail under section 497.

The power to grant bail under section 498 of CrPC is not additional or independent of section 497 of CrPC and the provision contained in section 497 have to keep in view, while passing an order under section 498. The policy of the law, in respect of person accused of non-bailable offences is laid in section 497 of CrPC and the same policy is applicable in respect of granting bail under section 498 of the same Code. After all judicial discretion has to be exercised while grant bail and the power conferred by the section 498 of the Code cannot be construed to be purely arbitrary. In this respect, therefore, section 498 of the Code seems to be “ancillary or subsidiary” to sections 496 and 497 of the Code. In other respect, however section 498 occupies position of a supplementary provision in so far as it confers not only concurrent but revisional powers on the High Court and the Sessions Court in respect of grant or refusal of bail by subordinate courts the police enables these Courts to exercise the power to grant anticipatory bail in suitable cases. Therefore, according to the CrPC the power of High Court Division for granting bail under section 498 of CrPC is subservient and secondary to section 497 of CrPC this section limits the power to the High Court Division to grant bail in the case punishable offences with death or imprisonment for life to old age, physical infirmity or sex.

#### 4.1. Form and Contents

An application for bail or an affidavit supporting such application should state clearly the grounds on which bail is asked for and the reasons for such grounds.

*Application to High Court Division:*

An application for bail to the High Court should not include defamatory allegations containing attacks on the

<sup>38</sup>7 DLR 637 (DB).

trying Magistrate or the officers in the service of the Government, which are irrelevant and improper in them. It is the duty of the defence counsel to satisfy him about the correctness of the allegations made by him in the application. It is inconsistent with the responsibility of a counsel to make averments of the fact in the application and petitions, on information receive through undisclosed sources. It is not proper for the officer to receive applications in which averments of fact are made, when those averments are not supported by a solemn deposition of someone who says that those averments are true.

#### 4.2. Presence of Accused at Hearing

Where an application for bail admitted for hearing the Sessions Judge was obliged to dispose of their bail application on merits and could not reject the same summarily on account of their non-appearance. It was not necessary for a person to be present on the date of confirmation or otherwise of his bail; unless the Court insists for that or otherwise it is so directed by the Court.

Present situation: There is no doubt that the Additional Session Judge had directed that petitioners to appear in the Court on every date, but if they were absent on account of their illness on a particular date, then their appearance on a later date could be insisted upon by the Additional Sessions Judge, failing which their bail bonds could be cancelled.

#### 4.3. Abscondence of Accused

It was held in the case of *Muhammad Shafiq vs. Muhammad Arshad (1997)* that abscondence is to be taken into account while considering the matter of bail of an accused involved in a non-bailable offence<sup>39</sup>. Accused who had not surrendered to police after the occurrence would be deemed to have remained in abscondence.<sup>40</sup> The court also observed in the case of *Md. Rashid vs. State (1197)* that facts of absconsion of accused put Court on further alert while considering question of bail.<sup>41</sup> In a case of *Khairujjaman vs. State (1999)* the court decided that gruesome murder where there is chance of absconsion of the accused and tampering with the evidence, bail can well be refused.<sup>42</sup>

When it was clear that accused was absconder and fugitive from law and *challan* had been submitted and proceedings and section 512 of CrPC were taken, he should be remanded to custody to face the trial.<sup>43</sup> But where there is nothing on the record to show that they had been declared proclaimed offenders. It cannot be said that they had “absconded” merely because they were not readily available to the place.<sup>44</sup>

In the case of *Jagabandhu Bhowmik vs. State (1960)*<sup>45</sup> it was held that where accused did not surrender though his close associates were charged for the crime along with hi, and he knew the allegations against him. Discretion exercised by High Court in canceling bail allowed to accused by Sessions Court did not call for interference by Supreme Court. Courts should not pressure on the appearing on the appearing accused to produce and absconding accused.

### 5. Main Conditions for Anticipatory Bail

The main conditions to be satisfied before exercise of jurisdiction to allow pre-arrest bail under CrPC are<sup>46</sup>—

- 1) that there should be a genuine apprehension of imminent arrest with the effect of virtual restraint on the petitioner;
- 2) that the petitioner should physically surrender to the Court;
- 3) that on account of ulterior motives particularly on the part of the police, there should be apprehension of harassment and under irreparable humiliation by means of unjustified arrest;
- 4) that it should be otherwise a fit case on merits for exercise of discretion in favor of the petitioner for the purpose of bail. In this behalf the provisions contained in section 497 of CrPC would have to be kept in mind.

<sup>39</sup>1997 P. Cr. LJ 867.

<sup>40</sup>1989 P. Cr. LJ 2026.

<sup>41</sup>1997 P. Cr. LJ 1499.

<sup>42</sup>1999 MLR 75.

<sup>43</sup>PLD 1987 Kar. 384.1

<sup>44</sup>1989 SCMR 1987; PLD 1987 Kar. 275.

<sup>45</sup>12 DLR (1960) 458.

<sup>46</sup>Section 498 of the Code of Criminal Procedure, 1898.



5) that unless there is reasonable explanation, the petitioner should have earlier moved the Sessions Court for the same relief under section 498 of CrPC.<sup>47</sup>

Ordinarily an application for bail before arrest should be presented to the Sessions Judge<sup>48</sup>. The anticipatory bail may be granted when the offence are bailable or non-bailable and non-cognizable.<sup>49</sup>

The petitioner did not approach the High Court with clean hands and applied for bail when their petitions were pending before the lower Court, and made false statements to justify that course<sup>50</sup>, or where the accused made a misstatement before the Sessions Court in proceedings for bail, bail was not granted.<sup>51</sup> Ordinarily the High Court does not directly entertain bail applications unless in the first place remedy before the Court of Session is exhausted.<sup>52</sup> The Sessions Judge and the High Court have concurrent jurisdiction in the matters of bail and the ordinary principle, where concurrent jurisdiction are involved, is that the Court of inferior jurisdiction should be moved first.

## 5.1. Conditions Enumerated to Grant Anticipatory Bail

The considerations which weigh with the Court while granting bail under section 497 or section 498 of CrPC are—

- 1) the nature and gravity of the circumstances in which the offence is committed;
- 2) the position and the status of the accused with reference to the victim and the witnesses;
- 3) the likelihood of the accused fleeing from justice;
- 4) of repeating the offence;
- 5) of jeopardizing his own life being faced with a grim prospect of possible conviction in the case;
- 6) of tampering with witness;
- 7) the history of the case as well as of his investigation; and
- 8) The court held in the case of *Sajjan Kumar vs. State (1991)* that other relevant grounds which may apply to the facts and circumstances of a particular case.<sup>53</sup>

## 5.2. Duration of Anticipatory Bail

In *Gurbaksh Singh vs. State*, the Court made it clear that the operation of an order passed under section 438 (1) of CrPC needs not necessarily be limited in point of time. The Court may, if there are reasons for governed by Terrorist Areas (Special Courts) Act, 1984.<sup>54</sup>

In the case of *H. S. Manjunath vs. The State (1995)*, the court held that anticipatory bail under section 438 CrPC can be granted to a person accused of offences under the Forest Act, 1963 and apprehending arrest by the Range Forest Officer.<sup>55</sup>

## 6. Bail on Special Laws: Preventive Detention

### 6.1. Special Law Providing for Bail

Where a special law makes provision for disposal of bail applications, the High Court has no jurisdiction to grant bail in contravention of those provisions. There is no question of disputing with a special enactment or permitting it to govern the field for which it is meant, or it caters; but it cannot be stretched too far to enable it to travel outside its scheme and to disturb the continuance of the normal law of the land; much less to allow it to occupy the field for which it does not provide. Therefore, the accepted principle is that special enactments transgressing into the field in occupation of the laws universally applied and accepted in a country deserve strict interpretation so that they are confined to that field alone in which departure was intended by the legislature due to any expediency.

<sup>47</sup>PLD 1973 Lah.256.

<sup>48</sup>PLJ 1973 Lah. 524.

<sup>49</sup>NLR 1983 Cr. LJ. 43 (1).

<sup>50</sup>NLR 1983 Cr. L. J. 19 = 1982 P. Cr. L.J. 587.

<sup>51</sup>PLJ 1981 Cr. C. 456.

<sup>52</sup>PLD 1970 Kar. 57 = 22 DLR (WP) 216 = 1970 P. Cr. LJ. 188 = 1973 P.Cr.LJ. 163.

<sup>53</sup>1991 Cr. LJ. 645 at 653 (Delhi).

<sup>54</sup>Promode Khare 1982 Cr. LR 344 (MP).

<sup>55</sup>1995 Cr. LJ 179 (Kant) DB.

## 6.2. Special Court or Tribunal Not Constituted

Where an offence is triable by a Special Court, and the Special Court has not been constituted when a pre-arrest bail application is made to the High Court, the Court can exercise jurisdiction under this section even when the Special Court is constituted after the application is made.

## 6.3. Prevention of Corruption Act

Where the petitioner was charged for offences under section 161 of CrPC, and section 5 of the Prevention of Corruption Act, punishable with 3 years and 7 years' Rigorous Imprisonment respectively. Prohibitory clause as given in section 497 of CrPC was not attracted to the petitioner's case. He was enlarged on bail on such sole consideration. Where in a case under the Act the accused petitioner was no longer required by the police for investigation, he was released on bail.

## 6.4. Customs Act

Where an offence has been committed under Customs Act bail may be granted under the Criminal Procedure Code. Where the petitioner a carrier for the owner, was charged under Custom Act for smuggling narcotics, he was not granted bail even when the offences was punishable with ten years' R.I. only. But where the accused was only a carrier and he had no reason to doubt that goods sought to export out of Bangladesh were contraband or the company for which they acted was a fictitious firm. On the contrary the accused on getting suspicious made inquires and finding the export documents forged got in touch with the Customs Authorities and informed them what he had discovered at a time when goods had no idea that an attempt was being made to export narcotics out of Bangladesh. The possibility that the accused might be victims instead of being privies could not ruled out. Bail was granted.

## 6.5. Special Law Not Specially Providing for Bail

Where the special or the local law does not specially provide for bail, provisions of CrPC code would apply and ordinary Courts may grant bail. As there is nothing in foreign Exchange Regulation Act to regulate matters of bail, the powers of the High Court under section 498, to admit a person accused of an offence under the Act to bail has not been restricted or taken away and the High Court has jurisdiction to admit persons accused under the Act, to bail.

## 6.6. Appeal Filed under Special Law

Where an accused is convicted under a special law and he files an appeal to a tribunal set up under that the law but there is no provision under which the tribunal may enlarge him on bail pending the disposal of the appeal, it will be presumed that such appellate tribunal has the power to pass interim orders, including an order to release the convicted person on bail pending the decision of the appeal.

## 6.7. Provision of Bail to Preventive Detention

### General Provision

Where the proceeding are in the nature of "preventive action" the underlying object of which is to ensure that the detainees will not commit any offences or offences and not to punish them, for having committed any offence, they not being accused persons charged with the commission of any offence cannot lay claim to the application of provisions of section 496, 497 or 498 of Cr. P. C. and apply for bail under any of these sections. Provisions of these sections are not applicable to persons detained under preventive laws who are sent up before "Special Tribunals" especially not for trial for specified offences but in order to adjudicate whether orders of a certain kind, particularly preventive could or should properly be passed against them.

## 6.8. Arrest by Police

Section 151 of CrPC deal with an emergent situation and authorizes a police officer to prevent an apprehended offence by arrest of a person designing to commit the same, without a warrant or without waiting for the order of

a Magistrate. The application of section 107 along with section 151 of CrPC would clearly indicate that the offence designed to be committed related to the breach of public peace. Obviously, therefore, the procedure laid down in Chapter VIII of CrPC must be followed to deal with the situation, which by implication denies the power of immediate release to the police officer even on offering sureties. In the circumstances, therefore, the omission in the second proviso of CrPC, which does not deal with any particular offence, is wholly immaterial.<sup>56</sup>

### 6.9. Arrest of Vagabonds, Habitual Offenders Etc.

The police may arrest without warrant as a preventive measure, any person covered by section 55 of CrPC. This section is intended for suppression of habitual bad characters whom an officer-in-charge of a police station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under section 122 of CrPC. When the police act under this section they are bound to give the person arrested the option of bail, and that bail should not be excessive but in accordance with the position in life occupied by the person arrested.

### 6.10. Bail under Terrorist and Disruptive Activities

The Terrorist and Disruptive Activities (Prevention) Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under section 439 of the Code or by recourse to its inherent powers under section 482.

### 6.11. Bail under Narcotic Drugs and Psychotropic Substances Act, 1985

The powers of the High Court to grant bail under section 439 of CrPC are subject to the limitations contained in section 37 of the Narcotic Drugs and Psychotropic Substances Act and the restrictions placed on the powers of the Court under the said section are applicable to the High Court also in the matter of granting bail.

## 7. Malpractices Relating to Bail

### 7.1. Not a Right for Persons Accused of Non-Bailable Offence

Bail cannot be claimed as right by person's accused of non-bailable offences that are more serious in nature. Murder, attempt to murder, culpable homicide, kidnapping, abduction, rape, robbery, dacoity, receiving stolen property are some examples of non-bailable offence. The CrPC suggest that a person accused of committing a non-bailable offence may not be released on bail if there is reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.<sup>57</sup> (For example, murder and rape). Section 496, however, allows the court to grant bail to disadvantaged people like children, women and the sick and persons who appear to be innocent. It must be stressed here that granting bail even to the above persons is not mandatory for the courts and as observed by the Supreme Court of India in *R. G. Upadhyay v. S. Sing*, discretion in granting bail in such cases should be exercised "in a judicious manner". As principle, the courts should decide not to grant bail if there is a reasonable apprehension that: 1) the accused may abscond if he is released on bail and/or 2) the accused if released on bail would tamper with the witnesses.

### 7.2. In Practice Also Granted to Notorious Criminals

Quite contrary to the legal provisions and principles, in the recent years bail has often been granted to the most notorious offenders and rejected to the women and children. For example: between 1994 and 2001, 1047 cases have been instituted against 97 persons whom the Dhaka metropolitan police, in 2002, had listed as "the notorious terrorists involved in sensational cases in the Dhaka Metropolitan Areas". Among these 1047 cases, bail related information could be obtained about 659 cases. Out of these 659 cases, the said "terrorists" in total obtained bail in 512 cases (76 from the High Court Division), which means in more than 77 percent cases, their bail prayer succeeded. The above-mentioned list included some more renowned terrorists and gang leaders whom the government has later declared as the "top terrors" and announced reward for information that may fa-

<sup>56</sup>Section 151 of the Code of Criminal Procedure, 1898.

<sup>57</sup>Section 496, *ibid*.

cilitate their arrest. For example, Subrata Bain obtained bails in eight cases involving non-bailable offences; Harris Ahmed obtained 10, Hannan 6 and Tokai Sagar 7 bails in similar cases. Until the 17 August bombing of last year all over the country, bail had very generously been offered to the religious extremists as well. Bail to notorious terrorists often led to unavailability of witnesses, or absconding of the accused. For example, in 442 cases against the aforesaid 97 notorious terrorists, the reason for delay in the disposal of cases is unavailability of witnesses. Out of these 442 cases, the accused got bail in 296 cases and remained absconding in 72 cases. There are examples where the absconders were later sentenced to life imprisonment or capital punishment, but could not be arrested again. Bail even led to the death of attempted victim or witness quite in a few cases. Although law expects bail to be granted to the women and children, often it is they or the poorest section of the society who are denied bail.

In *BLAST vs. Bangladesh*<sup>58</sup> (Petition number 7578 of 2003), it was revealed that out of 7402 under trial prisoners in the Dhaka Central Jail, 118 were women and 214 were children below the age of 18 years and others were mostly of very poor background. These indicate that the legal and institutional lacuna in the bail regime could be exploited only or mostly to the advantage of moneyed and influential offenders.

### 7.3. Role of Major Players

As statutory and case laws always warn against granting bail to persons who might abscond or tamper with witnesses, the great number of bails to those persons clearly indicate that their bail prayers were not examined very judiciously or opposed properly. The major players, in this regard, include the following:

**Police facilitates obtaining bail:** Failure of police, in particular the investigation officers, in preparing the FIR, case docket and investigation report properly and in conducting thorough investigation or in producing witness to the court may dilute a case substantially or delay the hearing of a case for an indefinite period. In the former case, under section 497(2) of CrPC, and in the latter case, utilizing its authority under section 339C of the same Code, the Court normally releases an offender on bail. In addition, police may facilitate bail for a habitual criminal by omitting to mention previous cases against that offender in P.C.P.R. column in the charge sheet or by discarding the non-bailable sections from the charge sheet.

**Public prosecutors not performing properly:** The public prosecutors or Court Sub Inspectors can contribute to the granting of a bail in various ways. These includes 1) by not objecting to the bail prayer or 2) by not doing it properly or 3) by absenting himself from the hearing or 4) by repeatedly claiming that he had not received case docket or other necessary papers.

**Less seriousness or leniency of judges:** The judges enjoy wide discretion in deciding whether or not bail should be given in non-bailable cases. There are allegations that they often do not or cannot do it properly may be due to inexperience, heavy work load, insincerity, or because of political pressures on them or their involvement in corruption. The High Court and the Session judge very rarely exercise their revision jurisdiction to inquire or monitor the appropriateness of granting bails by the subordinate judges to notorious criminals.

**Government influence:** The government, in particular the Home Ministry through the police and Law Ministry through the Session Judges and Establishment Ministry through the Magistrates may influence granting of bail to politically loyal criminals. Such allegations suggest need for establishing an independent, transparent and accountable judiciary for stopping or minimizing political or monetary influence in the bail system.

## 8. Reform Needs

### 8.1. Determining Sureties

Lawyers who become sureties often do it for monetary benefit and in case of forfeiture of the bail bond, punishment like payment of penalty are not generally enforced and punishment of civil jail had never been executed against them. It is suggested these punishment should be strictly enforced at least in cases involving murder and rape. Alternatively, tough and more effective measures must be introduced for enforcing appearance of the accused released on bail. For example: it may be made mandatory for the accused to deposit documents of his immovable property, if any, to the court as a guarantee for appearing to the court.

<sup>58</sup>55 DLR (2003) pp. 363, 374.

## 8.2. Stringent Laws for Certain Offences

It is also proposed that before releasing “apparently innocent” accused under section 497(2) CrPC, the court itself or through a subordinate official, would undertake an inquiry to be satisfied that there are not reasonable grounds for believing that the accused has committed that offence.

## 8.3. Witness Protection Laws

A Special Police Force should be set up who would have necessary training and facilities for ensuring protection of witnesses. Once the protection could be ensured, obtaining bail by the habitual criminals would be much more difficult and administration of criminal justice would be immensely strengthened.

## 8.4. Specialized Investigation Cell

Such cell with adequate legal training should be developed within the police personnel. The cell members would do only investigation of criminal cases and they would not be transferred to any other department of Police, unless it is absolutely necessary for public purpose. They would be attached with a Police Station, but their works would be regularly monitored by designated Magistrates or by the Solicitor wing of the Law Ministry or by any other appropriate authority. The charge sheet or final report produced by them in relation to serious non-bailable offence like murder and rape must be double-checked by the monitoring authority before its submission to the court concerned. Pre-trial stage should be strengthened to limit number of suits.

## 8.5. Strengthening Public Prosecution

In order to ensure such service, salary and facilities to the prosecutors must be raised to an extent that could attract good and honest Lawyers to join the PP Office, adequate and high standard training must be instructed to them and an efficient and fully computerized documentation and information centre must be established and regular and rigorous monitoring over them by the solicitor wing must be put in place.

## 8.6. Monitoring the Judges

Monitoring over the Subordinate Judges must be strengthened, particularly in cases where bail is granted to a person accused of serious offences punishable with death sentences. The revisional and monitoring authority of the Superior Courts should be increased, if the existing one is not sufficient. Access to information to the reasons for granting or rejecting bails in non-bailable offences must be established for public scrutiny.

## 8.7. Other Measures

Though Judiciary is separated, but free from political pressure of Independent Judiciary and Judicial Magistrates would also result into more efficient and less corrupt bail process. Transparency and in-house accountability must be established. There are many other measures, which may contribute to strengthening of the present bail regime. For example, strengthening legal aid, strengthening and streamlining of court support staff, promulgation of Right to Information Act, creation of Judiciary Ombudsman, reform in case management and court management system.

## 9. Recommendations

In the perspective of our statutory law, here we follow adversarial judiciary system. Where the judges remain silent and observe only the evidences provided by the lawyers and the Police Officer. So, here I made recommendations in the following way—

1) Govt. should direct the police officer to do their duty properly and not on bias because, in our country, Judges can't go beyond the evidence produced by the party and police officer. And, if the police officer does his duty perfectly then justice will be ensured. And, Judge can undoubtedly decide when bail can be granted or when not.

But before expectations of this type of duty from the police, Govt. has also a duty that is Govt. must increase the salary scale of a police. This is because, money makes any person dishonest. So, if the police have no mone-

tary problem then, he has no bar to do his job properly.

2) In our practical experience, it is found that some Magistrates/Judges give his decision or exercise his discretionary power for granting bail to an accused on the basis of Medical Certificate. But, there are some particular topics e.g. grievous hurt, rapes etc that are totally different in Medical Science & Law. So, before exercising the discretionary power Judges/Magistrates have to observe very carefully the Medical Certificate, and the statement given by the Doctor, in order to do justice. So after scrutinizing various law points the Judges should do the following things-

3) Judges should order to the law enforcing agencies i.e. Police, RAB, CID, Ansar, etc. to do their duties properly;

4) In case of woman, aged person, sick or infirm person bail should be given;

5) In cases of overt act, that is where the accused does not take any leading or active part of the offence, bail should be given;

6) On the basis of Medical Certificate a Judge should not refused the bail of an accused;

7) Co-accused should be released on bail, where their offences are in the same footing;

8) In cases of heinous offences i.e. Rape, Acid Throwing, offences under Narcotics Control Act (Exclusive Possession), offences under Explosive Substance Act, bail should not be given;

9) In case of Murder bail should be given upon the nature of Murder.

10) In case of pre-plan murder bail should not be given.

In case of hostile enemy bail should not be given.

## 10. Conclusion

Bail is a fundamental issue in administration of criminal justice system. An accused is said to be admitted to bail when he is released from the custody of police or court. In turn, the sureties accept the responsibilities to produce the accused to answer, at a specified time and place, the charge against him. Although bail ensures avoidance of unnecessary sufferings of presumably innocent person, it may conversely hamper administration of justice by enabling the accused person to abscond or to threaten the victims and witnesses. Granting or rejection of bail may also result into economic and social difficulty for the families of victim and witnesses.

Therefore, it must be emphasize here that reforms in the bail related steps towards ensuring early identification and speedy trial of an exemplary punishment for instituting false and frivolous cases should accompany criminal systems. A massive awareness programme against false cases should also be undertaken for reducing and preventing institution of such cases. Otherwise use of bail process against the weaker sections of society might flourish and that would *jeopardise* the objectives of aforesaid reforms to practice of bail.

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