CHAPTER—XXXVI

OF THE MAINTENANCE OF WIVES AND CHILDREN

488. Order for maintenance of wives and children.—(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Metropolitan Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred taka in the whole, as such Magistrate thinks fit. and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintence.

(3) **Enforcement of order.** If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made;

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing;

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or

if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this Section is living in adultery, or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his advocate, and shall be recorded in the manner prescribed in the case of the trial of cases;

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case exparte, Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The Court in dealing with application under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

Scope and application—THE FAMILY COURTS ORD, 1985 (Ordinance NO—XVIII of 1985) has been promulgated to give exclusive jurisdiction to the Family Courts for expeditious settlement and disposal of dispute in all matters relating to marriage, dower maintenance, and custody of Children. The Ordinance also applies to Non Muslim. The Family Court Ordinance came into force on 15.6.85. But the provision of family Courts Ordinance has got no application in the Hilly Districts of Rangmati. Bandarban and Khagrachari. Section 15 of the Family Courts Ordinance 1985 may be read with the provisions of section 17 of the same ordinance. Section 17 is the only section where there is a provision for appeal before

the District Judge within 30 days of the passing of the Judgement, decree order, excluding the time required for obtaining copies thereof. Practically the provisions of Section 488 have outlived the utility after the establishment of Family Courts in view of the provisions of Section 3 of the Ordinance and the Family Courts in view of the provisions of Section 3 of the Ordinance and the Family Courts are manned by Assistant Judges. As regards Jurisdiction section 6 of the Ordinance may be read with Section 488 (8) Cr. P. C.

42 DLR 450—Abdul Khaleque Vs. Selina Begum—Order for maintenance of wife and son—The purpose of the Family Courts ordinance is to provide for speedy disposal of family matters by the same forum. There will be anomaly and multiplicity of proceedings, if in spite of the establishment of family Court. The Magistrate continues to entertain cases for maintenance. Provisions made in the Family Courts Ordinance have ousted the Jurisdiction of the Magistrates to entertain application for maintenance which is a family court matter.

14 BLD 467—Meher Nigar Vs. Md. Mujibur Rahman—The provisions of Family Courts Ordinance 1985 have not ousted the Jurisdication of a Magistrate to order for maintenace to wife and children u/s.488 Cr. P. C. The Provisions of Family Courts Ordinance, 1985 are applicable not only to the Muslim Community but also to the other community which constitutes the populace of Bangladesh.

6 BLD 128 (AD)—Abdul Moneyem Chowdhury Vs. Md. Shamsul Hossain Chowdhury—(a) Maintenace allowance to wife. Whether an application for maintenance allowance filed by the brother of the wife is void. An application for maintenance may be filed by the father or brother of the woman whom her husband neglected to maintain (Ref: 10 DLR 196 (SC), 26 DLR 26 (SC)).

1 BCR 212—Eklasuddin Ahmed Vs. Husne Ara Bagum—For every breach of order to pay maintenace allowance wholly or in part the Magistrate can sentence the defaulter under sub-section (3) of section 488 Cr. P. C for maximum period of one month. Magistrate's power to sentence is not dependent upon the issue of warrants as a condition precedent.

22 DLR 192 (SC)—Ala Din Vs. Mst. Parveen Akhter—Maintenance award given by a Magistrate under section 488 of the Code after the passing of the Family Courts Act but before the Act was made applicable to this area is valid. Mere fact that a revision was than pending before the High Court will not attract the provision of Family Courts Act as a revision is not a continuation of the orginal proceeding like an appeal. Word "maintenance" does not include education at higher levels ad infinitum. A child is to be maintained until the child is able to earn its livelihood by honest and decent means in keeping with its family status (Ref: 11 DLR 396, 20 DLR 104, 17 DLR 42 (WP), 17 DLR 173).

19 DLR 628—Mabua Khatun Vs. Md. Motaleb Biswas—A single instance of adultery does not deprive a wife of her maintenace right. A divorced wife is entitled to maintenance for the period of iddat (Ref: 11 DLR 74 (WP), 16 DLR 36, 106 (WP)).

4 DLR 467—Rahimunnessa Vs. Fazaruddin Bepari—Unless an order is passed by the trying Magistrate that the wife is entitled to maintenance under section 488 from the date of her application to the court, the maintenance shall be payable from the date of the Magistrate's order. Under the provisions of section 488, a wife cannot get separate house from her husband.

Appeal and Revision—No appeal lies, since there is no conviction for an offence. The Code does not authorise a Magistrate to review the final order made by him in a proceeding under this section. Revision lies to the Session Judge or to the High Court Division.

16 BLD (HC) 181—Rezaul Karim Vs. Rahsida Begum and another— Section 3 of the Ordinance envisage that not withstanding anything contained in any other law provisions of this Ordinace shall apply to cases filed under this Ordinance..

17 BLD (HC) 663—Pachan Rissi Das Vs. Khuku Rani Das and others—The combined effect of the provisions of sections 3, 4, 5 and 27 of the Family Court's Ordinance. 1985 is that

the jurisdiction of the Magistrates in dealing with matters contained in section 488 of the Code is ousted after the coming into operation of the Family Courts ordinance, 1985.

48 DLR 416—Rezaul Karim Vs. Rashida Begum and another— Family Courts can entertain, try and dispose of any suit relating to or arising out of maintenance but as section 488 Cr. P. C does not empower the Magistrate to entertain, try and dispose of any suit i.e. any matter of civil nature, power of Magistrate under section 488 Cr. P. C has not been ousted consequent to the establishment of the Family Courts. (Ref: 1 BLC 198).

54 DLR (HC) 175—Kowsar Chowdhury Vs. Latifa Sultana (Civil)—Plaintiffs suit for enhanced maintenance for her daughter under the Ordinance upon fresh cause of action is maintainable notwithstanding the earlier order of the Magistrate in exercise of jurisdiction under section 488 Cr.P.C.

5 BLC 595—Maksuda Akhter Vs. Md Serajul Islam—In view of the provisions of section 16 (3B) of the Family Court Ordinance, 1985 the executing Court may direct for civil imprisonment once again for failure to pay money of the subsequent instalments and this power can also be exercised as a Magistrate while dealing with cases under section 488(1)(3) Cr.P.C.

489. Alteration in allowance.—(1) On proof of a change in the circumstance of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit :

Provided that if he increases the allowance the monthly rate of four hundred taka in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any descision of a competent Civil Court, any order made under section 488 should be concelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Scope and application—This section empowers the magistrate to alter or vary the order of maintence passed by

him because of two factors. The one is a change in the circumstance of the person receiving or paying the monthly allowance, and the other is the decision of a competent civil court. The parties to the proceeding under section 488 Cr. P. C can always move the Magistrate again when there is a change of circumstances (35 Cr. LJ 473).

16 DLR 104 (WP)—The State Vs. Mst. Tauqir Fatema—Magistrate is not legally entitled to make any alteration in allowance without first holding an inquiry under section 485 of the Code into question of divorce.

Revision—A wrong order passed under section 489 can be corrected by the Sessions Judge in revision.

490. Enforcement of order of maintenance.—A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid : and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non payment of the allowance due.

Scope and application—The condition for the enforcement of an order are the identity of the parties and the non payment of the maintenace. So long as cancellation is not obtained the order is enforceable and the fact that there has been any agreement between the parties after the order cannot be considered by the Magistrate. Application for recovery of maintenance may be made either to the Magistrate who passed the original order or to his successor or to a Magistrate having jurisdiction over the place where the person resides (37 Cr. LJ 91).

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CHAPTER—XXXVII

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS

491. Power to issue directions of the nature of a habeas corpus.—(1) The High Court Division may, whenever it thinks fit direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(c) that a prisoner detained in any jail situated within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioner for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively:

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(2) The Supreme Court may, from time, to time frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to person detained under any law for the time being in force providing for preventive detention.

Scope and application—Proceeding, under Section 491 is certainly a Criminal Proceeding. Section 491 is remedial in form but postulates the existence of a right, the right to personal freedom. This right along with other fundamental rights is now guaranted by the Constitution (Article 102). The greatest importance of the writ of habeas corpus is that it confers upon a person, even when he is in public custody, the right to have tested and determine in the High Court Division the legality of the order or warrant by which he is kept in custody. The object is to safegard the liberty of the subject against excesses of the executive and against an abuse of power and to enable the court to inquire into and determined the legality of the detention of the person who is restrained of

his liberty. The underlying principle of every such writ is to ensure the protection and well being of the person brought before the Court. Section 491 is widely worded and entitled the High Court Division to enquire whether the applicant was illegally or improperly detained in public or private custody. An application for habeas corpus may be presented by the person detained or by any friend or relation.

54 DLR 157 (AD)—Bangladesh Vs. Md. Naziur Rahman & others—When there is only an adinterim bail and that too for a limited period this court is not inclined to interfere in the matter.

54 DLR 625 (HC)—Zilaluddin (Md) Vs. Secretary, Ministry of Home Affairs & others—An application under this section cannot be rejected on the ground that no statement has been made as to the locus standi of the petitioner to challenge the order of detention or as to how the petitioner is aggrieved by the order of detention, if full particulars of the detenu and the detention are there.

55 DLR 1 (AD)—Abdul Majid Sarker (Md) Vs. State—An application under section 491 of the Code of Criminal Procedure is maintainable for custody of a minor to see that the minor is not held illegally and in an improper manner.

53 DLR (HC) 135—When a man was put into judicial custody by an order of a competent court of law unless that order is set aside detention cannot be considered as illegal.

46 DLR 112—Nurnnahar Khatun Vs. State—The girl's age at the time of occurrence may be relevant for the alleged offence committed but for the purpose of custody the girl's present age is more pertinent. (Ref : 38 DLR 93, 28 DLR 259).

46 DLR 530—Bakul Miah Vs. Government of Bangladesh—When there has been a judgment and conviction passed by a Court. the High Court cannot interfere under section 491 on the ground of discovery of the irregularities.

45 DLR 643—State Vs. Deputy Commissioner, Satkhira—The High Court Division can exercise its jurisdiction not only in declaring the detention of the detenu illegal but also declaring the proceedings upon which the detenu was held in detention to be illegal and void (Ref : 14 BLD 266).

45 DLR 197—Dr. Kazi Mozammel Hoque Vs. State—Judicial custody—Dispute over custody of alleged victim girl—father is refused to have her custody—A girl has been kept now in judicial custody though she is neither an accused or a witness in the relevant case. The custody or detention of a victim girl is different from that of a criminal or a political detenu. Judicial custody has the complexion of the custody of the guardian. This custody is necessary for giving the a chance to make up her mind and develop her independent opinion free from external influence. The facts and circustances of each case will determine as to how and the inherent discretion of the court for judicial custody is to be exercised (Ref : 35 DLR 315, 4 BCR 239).

44 DLR 603—Pearu Md. Ferdous Alam Khan Vs. State—Directions of the nature of a Habeas Corpus, scope of—The argument that the Scope of—section 491 Cr. P. C. is narrower than that of Article 102 of the Constitution has no force. Its scope is not hedged by constitutional limitation. In constitutional provision it is to be seen whether the detenu is being held without any lawful authority and in a matter under section 491 it is only required to be seen whether the detention order is illegal and or improper (Ref : 36 DLR 77 (SC), 3 BCR 213, 28 DLR 172).

23 BLD 28 (HC)—Hedayet Ali Vs. Govt. of Bangladesh—The order of detention detaining the detenu for more than 90 days as issued by the Govt. under section 3(1)(a) of the Special Powers Act, 1974, without supplying the grounds of deten-tion is illegal and improper for which the detenu should be released from detention.

14 BLD 156—Mallick Tarikul Islam Vs. The Secretary of Home Affairs—The Suprame Court being the guardian of the Constitution and protector of the liberty of the citizens, sub-section (3) of section 491 Cr. P. C does not debar the High Court Division from examining the case of a detenu to satisfy itself if the detenue is illegally or improperly detained or that he is being detained without any lawful authority for non-compliance of any mandatory provision of law or for colourable exercise of power and to declare his detention illegal if materials on record do not justify it (Ref : 27 DLR 622).

43 DLR 71—Monindra Lal Malakar Vs. Secretary Minstry of Home Affairs—Determination of age of a person in custody for

the purpose of her guardianship—isolated statement of her father in such a case in respect of her age cannot be accepted as true unless it is supported by corroborative evidence. If a girl is found below 16 and taken away without the consent of the guardian then it will be an offence and the guardian will be entitled to her custody, Even if it is presumed that at time of occurrence of her kidnapping the detenu was minor but now when she is found major the Court has no jurisdiction to compel her to go with her father.

42. DLR 79—Sukhendra Chandra Das Vs. The Secretary, Minstry of Home Affairs—Production of victim girl before the Upazila Court for determination of age and also in the matter of her custody. The girl is minor aged about 17 years born on 11.9.71—Petitioner father being the greatest well wisher of the victim girl, it is in her best interest that she remains in her father's custody and she will be at liberty to go anywhere she likes when she attains the age of majority.

42 DLR 98—Alam Ara Huq Vs. The Govt. of Bangladesh—It is the detention of the detenu itself against which relief is sought in a habeas corpus writ—It is not the question of order of detention—Constitutional power vested by the Government in the High Court Division cannot be limited or taken away by a sub-consitutional legislation. Fourth order of detention dated 8.7.89 declared illegal and malafide. Detenue ordered to be released by the Court on two occasions in the past but fresh orders of detention were served upon the detenu without complying with the Court's order—Corpus of the detenu ordered to be brought before the Court in view of the exceptional Section in order to ensure that the Court's order is carried out if the detenue is decided to be released—Detenue released from court premises by courts order.

41 DLR 235—Sirin Begum Vs. District Magistrate—Grounds of detention having been not placed within 120 days before the Advisory Board from the date of order of detention, the mandatory provision of law has been violated, as such detention order is illegal and invalid (Ref : 27 DLR 567, 40 DLR 319, 40 DLR 21, 38 DLR 60 (AD)).

40 DLR 364—Mrs. Rama Rani Bashak Vs. Government of Bangladesh—All the grounds mentioned are so vague that the detenu cannot be expected to have any scope to make an effective representation and consequently the service of

grounds does not fulfil the purpose of the law. Case Cited:—(1) AIR 1966 (SC)1140 (2) 31 DLR (AD) (1979) 1. The Senior Assistant Secretary, Government of Bangladesh, Minstratry of Home Affairs, passed a fresh order under Memo No. 445/MHA/ Section (1) dated 29.6.86. The Government which passed an independent detention order omitted all other grounds of prejudicial acts except the one defined in section 2 (f) (iii) of the Act in the original detention order passed by the A. D. M.— This shows non-application of mind (Ref : 30 DLR 131, 28 DLR 259).

40 DLR 353—Md. Khair Ahmed Vs. Bangladesh—The order of detention must co exist with the facts and materials of detention contained in the grounds of detention. There is no nexus between order of detention and the facts and reasons disclosed in the detention order. Since the grounds of detention are vague and indefinite, detention of the detenu cannot be sustained in law. Grounds of detention to be served within 15 days from the date of order of detention—order of detention passed and served on 24.1.87 and grounds of detention served on 14.2.87 after 21 days from the date of detention—Order of detention suffers from legal infirmity (as amended). Government did not supply any fresh grounds of detention as required in every case of detention under the law. All subsequent detention orders passed after (18.5.87 extending the period of illegal detention have no legal foundation. Moreover, no law empowers the detaining authority to pass an order of detention at a subsequent date after a gap of 21 days giving it retrospective effect.

Rules of Business of the Government—Subsequent Orders dated 12.8.87 and 12.12.87 made and signed in the name of the Government are contrary to the provisions of the Constitution and the Rules of Business. It does not emanate from the designated authority (Ref : 1 BSCD 119, 39 DLR 59, 8 BCR 89 (AD), 40 DLR 439).

40 DLR 439—Mansur Moazzem Vs. People's Republic of Bangladesh—There being no nexus between the initial order of detention and the ground served, the order detention is without lawful authority (Ref : 26 DLR 241).

40 DLR 207—Mrs. Saleha Chowdhury Vs. Government of Bangladesh—Detention order under section 3 (2) remains in

force for 30 days after the making thereof unless in the meantime is approved by the Government. After the expiry of 30 days on 17.4.87, the detention order is without any lawful authority as it was not extended within 30 days. Computation of the time-limit of detention order—Whether the time of limitation of 30 days should be computed from the date of passing of the detention order or from the date of service of the order upon the detenu. The period of limitation of 30 days occuring in sub section (3) of Section 3 of the Act will begin to run from the date of making of the order. Detention of the detenu after the expiry of 30 days (From 18.3.1987 to 17. 4. 87) cannot be extended by an order dated 5.10.1987 when the said detention order was not legally in existence on and from 18.4.1987—Detenu is entitled to be released (Ref : 11 DLR 1 (SC), 7 DLR 8 (WP)).

36 DLR 77 (SC)—Dabiruddin Ahmed Vs. Dr. Chitaranjan Deb Nath—Section 491 Cr. P. C is a summary procedure for enquiry as to whether a person is illegally or improperly detained in public or private custody and it is so found the court would direct the release of such a person (Ref : 3 BCR 213).

30 DLR 103—Kripa Sindhu Hazra Vs. The State—Section 491 Cr. P. C is a preconstitutional piece of legislation and it has nothing to do with fundamental rights conferred by Constitution in 1972. Its scope is much wider and at the same time restricted. The expression "Whenever it thinks fit" in section 491 confers an absolute discretion on the court to exercise its power there under or not to do so, having regard to the circumstances of each case, Under section 491 of the Code there is neither a right in the person detained to move the High Court for inforcement of the fundamental right nor there is an obligation on the part of the High Court to give the relief. It is only a discretionary jurisdiction conceived as a check on arbitrary action.

22 DLR 404 (SC)—Mozaher Hossain Vs. province of East pakistan—Illegal detention of a convict being a continuing wrong, there is no bar to the making of a fresh petition under section 491 for setting right that wrong.

20 DLR 694—Azizul Huq Vs. East pakistan—Application challenging detention order of a detenue should be moved by a detenue's relation or where there is no relation available, by

person who is close to the detenue and knows all facts and circumstances of the case (Ref : 18 DLR 107 (WP)).

8 DLR 700—Sardar Fazlul Karim Vs. Government—Orders of detention cannot be challenged if the order under which a detenue is being kept are legal : even though previous orders was illegal, petition submitted to the High Court through the Government challenging detention order should be forwarded to the High Court quickly (Ref : 17 PLD 585).

48 DLR 300—Hasina Begum Vs. State and another—Judicial custody of victim girl— As soon as the girl attains the age of 18 years from 1-12-1978 she must be released from the judicial custody on her own bond even if the criminal case in which she is kept in custody remains pending.

49 DLR 360—Tarapada Sarker Vs. State—When it is found from materials on record that the alleged victim girl is aged above 16 and not an accused in the case, the order of her judicial custody is set aside and the Deputy Commissioner is directed to set her at liberty. (Ref: 1 BLC 315).

51 DLR (AD) 238—Bashu Dev Chatterjee Vs. Umme Salma and others—The Judges were not sitting in appeal or revision as would entitle them to proceed with the matter even in the absence of the parties. The only course open was to dismiss the Miscellanceous Case for default of the petitioner.

51 DLR (AD) 238—Bahsu Dev Chatterjee Vs. Umme Salma and others—Having considered all aspects of the matter it will be in the best interest of the girl if she is released from custody and given to the care of her father. It is also necessary to see that the accused does not feel prejudiced at the trial because of the girl remaining under the care of the informant. The accused will be at liberty to pray before the trial Court for her production in Court if it is found necessary.

50 DLR 399—Pranajit Barua Vs. State and another—If after examining the material on the basis of which executive authority detained a person under the provisions of any law this court finds that there is no justification for detention, sub-section (3) of section 491 of the Code will not stand as a bar to declare the detention of the detenu as illegal.

16 BLD (AD) 124—Khairunnessa Vs. Illy Begum—In deciding the custody of a victim girl in an application under Section 491 Cr. P. C. if the High Court Division finds that the victim is major about 18 years old, there remains nothing for

the trial court to decide the question of age of the victim. In such a case the High Court Division should make it expressly clear that its finding on the age of the victim was only tentative in nature and it was only for the purpose of deciding the custody of the victim girl and the trial court was free to take its own decision on the question on the basis of evidence before him.

16 BLD (AD) 124—Khairunnessa Vs. Illy Begum — When the school certificate and the doctor's opinion show that the victim is a minor girl below the age of 18 years, prima facie there is no reason to disbelieve the mother's statement that she is a minor and she is a victim of abduction. In a case like this, it is difficult to appreciate how can a ward's statement be preferred to that of his or her parents on the question of his/or her age.

16 BLD (AD) 263—Badiur Rahman Chowdhury Vs. Nazrul Islam and another— When a young girl lives with the accused after the alleged abduction she is generally prone to undue influence which is brought to bear upon her by the accused aiming at encountering the case of the lawful guardian. The statement of the victim girl under such cricumstances should be received with reservations. The Court should give more importance to the words of the parents to those of a wayward daughter who is currently enamoured with romanticism.

17 BLD (AD) 33—Sree Mongal Chandra Nandi Vs. Bangladesh and others— The real welfare of a minor girl lies with her custody being given to her father, who is her best well-wisher. The High Court Division after having found the victim girl to be a minor was not right in refusing to give her to the lawful custody of her father. The refusal of the minor to go with her father is of no legal consequence. (Ref : 2 MLR (AD) 62).

17 BLD (HC) 379—Sree Tarapada Sarker Vs. The State and others— The S.S.C Certificate produced by the father of the victim girl shows that her date of birth is 8.6.1979 and from this it appears that she is around 18 years. In such cricumstances, judicial custody of the victim girl was not found to be lawful and proper. (Ref : 4 BLT (AD) 1).

19 BLD (AD) 137—Bashu Dev Chatterjee Vs. Umme Salma and another—It is entirely unacceptable that a young girl who is an innocent victim of the alleged offence should remain in an wholesome atmosphere of a Jail for an indefinite period.

The young girl cannot be alowed to walk away from the prison house of her own, because she had no independent place to stay. The welfare of the girl, should be deciding factor in such a situation. The appellant produced a certificate from the school where the girl was reading which corroborates the statements of the appellant that his daughter was a minor at the relevant time. The radiologist's opinion also supports the appellants case. From the above circumstances and having considered all aspects of the matter it will be fit and proper and in the best interest of the girl if she is released from custody and given to the care of her father. (Ref : 51 DLR (AD) 238).

7 BLT (AD) 242—Jharna Rani Shaha Vs. Kh. Zayedul Haque & Anr.—Primary evidence being there that the girl is minor and that she is the victim to the custody of her parents from where she was abducted as contended by the learned Advocate for the Appellant Mother.

Held : We think it is right and proper that the girl should stay with her parents rather than be given to the family of the accused. The girl cannot be allowed to make her own choice because, prima facie, it appears that she is a Minor. (Ref : 52 DLR (AD) 168).

4 BLT (AD) 112—Khairunnessa Vs. Illy Begum & Ors.—A Mother was complaining that an offence of kidnapping/ abduction was committed by the accused persons in respect of her minor girl who is a victim of the offence and she should be rescued from the offenders and given to her custody—**Held :** In any event having regard to the fact in this particular case that all the available materials so far, supported the claim of the mother that the girl was aged about 15/16 years except the Statements of the herself the High Court Division cannot be said to have acted judiciously and properly in ignoring the said materials and relaying solely on the statement of the girl herself and their own observation of the girl and in making a finding thereupen that she was a major above 18 years. We are of the opinion that the mother has a reasonable grievance to make against the impugned judgment which does not seem to have been passed upon a proper appreciation keeping in view the welfare of the victim girl who is alleged to be minor appeal is allowed.

5 BLT (AD) 1—Sree Mongal Chandra Nandi Vs. Bangladesh—Custody of the minor girl who is a victim of an offence of abduction and the opinion of a minor girl—High Court Division disposed of with the direction that."Hence it is ordered that if the victim girl is willing to go with her father, she may be allowed to go with her father. But if She does not want to go with her father then she will be kept in judicial custody till the disposal of the Criminal case as well as till she attains majority that is the age of 18 years"—**Held :** The learned judges having found the victim girl to be a minor ought to have given the minor in the lawful custody of the father. The opinion of the minor is irrelevant and the same cannot be a condition precedent for giving her custody to the father. The learned Judges failed to consider that a minor's refusal to go with her father is not at all a material consideration regarding her custody. Father being the best well-wisher of a minor daughter is entitled to custody and in her own interest she should be given in her father's custody.

8 BLT (AD) 168—Bashu Dev Chatterjee Vs. Mrs. Umme Salma & Anr.—Prima facie—it appears that the victim girl is a minor and she is a victim of an offence under Section-9 (Kha) and (Ga) of Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain, 1995. She was put to judicial custody by the learned Magistrate in April, 1997. When she was produced before him.

Since then she has been staying in a prison house except for a few days when she came out there from on getting adinterim bail from the High Court Divison. It is entirely unacceptable that a young girl who is an innocent victim of the alleged offence should remain in an unwholesome atmosphere of a jail for an indefinite period. It is not known when the trial will conclude which, we have been informed, has, however, started. The young girl cannot be allowed to walk away from the prison house of her own. Because she has not independent place to stay. The parties have not been able to provide any answer to our query whether she could be put in a safe neutral home pending disposal of the case. The welfare of the girl, in our opinion, should be the deciding factor in such a situation. The appellant produced a certificate

from the school where the girl was reading which corroborates the statement of the appellant that his daughter was a minor at the relevant time. The rodiologist's opinion also support the appellant's case. Having considered all aspects of the mater we are satisfied that it will be fit and proper and in the best interest of the girl if she is released from custody and given to the care of her father.

53 DLR 135—Tarun Karmaker Vs. State and ors (Criminal)—In view of the provisions of section 491(1)(b) the present application under section 491 is not maintainable as the detenu was put into custody by an order of the Sessions Judge and as the same order is still in force.

53 DLR 135—Tarun Karmaker Vs. State and ors (Cri.—There are five clauses under sub-section(1) and there are 3 sub-sections in this section but none empower the Court to determine the question of custody of any minor.

6 BLC (HC) 65—Monsur Ali Vs. State and another (Criminal)—The High Court Division is empowered under section 491(1)(b) of the Code to set at liberty a person who is found to be detained illegally or improperly but when the order of custody of a detenu is passed by a competent court, it cannot be said that his custody is illegal or improper unless or until that order is set aside by a superior Court which is also the consistent view of the apex Court of this subcontinent.

7 BLC (AD) 61—Arun Karmaker Vs. State represented by the DC, Satkhira and another (Criminal)—Notwithstanding that a person may have a right to move before higher Court challenging legality of the order rejecting the prayer for releasing the victim girl to his custody, he could approach the High Court Division under section 491 of the Code of Criminal Procedure for a direction that his minor ward having been detained in judicial custody illegally or in a improper manner be made over to the custody of her natural guardian in the best interest of her welfare.

54 DLR 392—Abul Member and Abul Hassain Vs. Secretary, Ministry of Home Affairs and others (Criminal)—The detenu Rahat having been detained to abstain himself from

perpetrating torture/repression in the locality of Kamrangirchar under Nadim Group terrorists the detention order is well-grounded in the fact and circumstances of the case.

54 DLR 266—Aftab Hossain (Md) Vs. Secretary, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Secretariat, & ors. (Criminal)—An order of detention passed on fictitious vague and indefinite grounds and founded on colourable satisfaction affecting the right of a citizen, and not in the larger interest of the society and public at large, must be quashed,

22 BLD (AD) 76—Arun Karmaker Vs. The State—An application under the section is maintainable for custody of a minor to see that the minor is not held in custody illegally and/or in an improper manner.

491A. Omitted.

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PART IX

SUPPLEMENTARY PROVISIONS

CHAPTER—XXXVIII

OF THE PUBLIC PROSECUTOR

492. Power to appoint Public Prosecutors.—(1) The Government may appoint, generally, or in any case, or for any specified class of power to appoint public cases, in any local area, one or more officers to be called public prosecutors.

(2) The Chief Metropolitan Magistrate or the District Magistrate, or. subject to the control of the District Magistate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no public prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Government may prescribe in this behalf to be public prosecutor for the purpose of any case.

Scope and application— In criminal cases, the State is the prosecutor. The state by the public is party and not the complainant. Appointment of public prosecutor is an executive function of the Government. The Government may appoint a special public prosecutor to conduct a prosecution in a particular case and he has all the powers of a public prosecutor for the purposes of that case. An advocate privately engaged to represent a complainant should have no other place than one strictly subordinate to an officer who prosecutes on behalf of the State, for the State stands not necessarily for a conviction, but for justice. The purpose of a criminal trial is not to support a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent not the police but the State, and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. Those who appear on behalf of the prosecution must be made to realese that it is no part of their duty to try by hook or by the crook to obtain conviction.

56 DLR 131—Secretary, Ministry of Law, Justice and Parliamentary Affairs and ors Vs.Md Borhan Uddin and orthers(Civil)—The terms of appointment of the writ petitioner was solely based on confidence and satisfaction of the Govt. as to service he was rendering. The moment there is absence of confidence and satisfaction, it was within the domain of the Govt. to terminate the appointment.

42 DLR 138—Dr. S. M. Abu Taher Vs. The State—Appointment of Public Prosecutor and authority of the Public Prosecutor to conduct a case before any Court without written authority of the Govt. Intepretation of Statute—Public Prosecutor occupies a solemn and unique position in the Code of Criminal prosecutor.

Appointment of public prosecute or-charge of Responsibility of investigating police officer does not end with the submission of charge-sheet u/s 173 of Cr.P.C. on completion of investigation but continues till the conclusion of trial during which it is his duty to produce the prosecution witness. When there are persistent allegations against the p.p. about his lack of interest and honesty in conducting the prosecution the charge of the P.P. becomes imperative in the interest of fair trial.

493. Public Prosecutors may plead in all Courts in cases under his charge. Advocates privately instructed to be under his direction.—The public prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs an advocate to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the advocate so instructed shall act therein, under his direction.

Scope and application—Any person engaged and briefed by a private person to instruct the public prosecutor can only so instruct and act under the direction of the public prosecutor and the prosecution shall be conducted by the public prosecutor himself. It is improper that a public prosecutor should be allowed to sit back, handing over the

conduct of the case to complainant advocate. The privately engaged Lawyer and the Public Prosecutor can work together in harmony, the privately engaged lawyer is strictly subordinate to the Public Prosecutor (PLD 1972 Lah 1182). In availing himself of such assistance the Public Prosecutor by no means deprives himself of the management of the case. The word "act" means a privately employed advocate may do everything in the case provided it is done under the control and direction of the Public Prosecutor (1959 Pak. Cr. LJ 1058).

47 DLR 255—Taheruddin Vs. State—Public Prosecutor has authority to file an application for revival of a case, proceeding of which were stopped for failure to conclude trial within the time limit.

52 DLR (HC) 81—Borhan Uddin (Md), Advocate Vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs and others (Spl. Original)—When imputation is made directly or indirectly for removal of a public prosecutor natural justice requries that he must be given an opportunity to explain.

4 BLC 346—Rashel Kabir alias Roman Vs. State—Although this section provides for appointment of pleader in any Court by a private person to assist the Public Prosecutor regarding enquiry, trial or appeal but the instant application for addition of party has been filed by the informant in the Miscellaneous case arising out of an application for bail is neither an enquiry proceeding nor trial nor appeal and hence such application for addition of party merits no consideration in spite of his interest in the result of the case in the absence of any laches or negligence from the side of the prosecution in the present case.

494. Effect of withdrawal from prosecution.—Any Public Prosecutor may, with the consent of the Court, before the Judgement is pronounced withdraw from the prosecution, of any person either generally or in respect or any one or more of the offence for which he is tried: and upon such withdrawal.—

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) If it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

Scope and application—Section 494 gives a general executive direction to the Public Prosecutor to withdraw from prosecution subject to the court's consent which may be determined on many possible grounds (42 CWN 1261). The withdrawal is an executive and not a judicial act like the tender of pardon under section 337. The Public Prosecutor can withdraw in his own right and not on behalf of Government. That he has acted under the directions of Government is no concern of the court. The reasons for withdrawal must satisfy the Judicial conscience of the court. The complainant has no locus stand in the matter of withdrawal of a prosecution.

56 DLR 199 (HC)—Loskar Md. Mostan Billah Vs. State—The Court is required to exercise Judicially the function of accor-ding consent for withdrawal of any accused from prosecution-The consent should not be given mechanically.

42 DLR 138—Dr S. M. Abu Taher—Vs. Stats—In a case of revival under section 339D, the Court is not to determine anything judicially—Court not to search for Government instruction which prompted the Public Prosecutor to file application for revival.

40 DLR 259—Abdul Hakim Chowdhury Vs. Ruhul Amin—Withdrawal from prosecution of any person (before charge is framed or after charge is framed) before pronouncement of the judgement-effect of—Words "Consent of the Court" occuring in section 494 Cr. P. C.—Interpretation of—Court is to see whether the Public Prosecutor who has a duty under section 494 Cr.P.C to file an application for withdrawal from prosecution has in fact placed cogent and relevant meterials for consideration of a Court of law—The Court granting "consent" must not accord its consent as a matter of course but must apply its mind to the ground taken in the application for withdrawal by the public prosecutor. Court's supervisory function stressed—Court's duty only is not to

reappreciate the ground judicially but it has a special duty in the scheme of the section 494 Cr.P.C as it is the ultimate repository of legislative confidence in granting or with holding consent to withdraw a case—the term "consent" is a legal term and is of wider import which means "acquiesce in" or "agree to"—Withdrawal refused.

24 BCR 163 (AD)—In order to withdraw any accused from prosecution the consent of the court is essential and such consent should not be given mechanically nor it should be refused in a routined fashion or mechanically without applying mind- To give consent or not for withdrawal of an accused from prosecution is a descretion of the Court. Exercise of such discretion cannot ordinarily be questioned when it is exercised judicialy. When the accused persons are absconding the discreation ought not to have been exercised.[Ref: 24 BLD 291 (AD)].

7 BCR 228—Ramu Bhuiyan Vs. Md. Abu Hanif Dewan—Order under section 494 of the Code of Criminal Procedure, 1889 is a judicial and not a mechanical one. Practice and Procedure—It is not incumbent upon the Court to record reason in discharging accused under section 494 of the Code of Criminal Procedure, but as a matter of prudence the relevant materials should be brought on record. Even at the inquiry stage of an offence before the Court of the Magistrate, which is triable exclusively by the Court of Session provision of section 494 is applicable.

38 DLR 282—A.B.M. Tofayel Ahmed Vs. Sheikh Aminuddin—Public Prosecutor alone is competent to file an application for withdrawal from prosecuting a case. Under section 494 Cr. P. C it is only the Public Prosecutor who is alone competent to file an application for withdrawal of the State from prosecution. Magistrate allwoing withdrawal on the basis is illegal. In this case there was no such application from the Public Prosecutor but the Magistrate allowed the withdrawal on perusal of the order of the Government forwarded through the Deputy Commissioners. This is clearly illegal : the Magistrate must act according to his judicial discretion and law. Moreover, the Government's order as to withdrawal did not

show any reason for withdrawal (Ref : 36 DLR 131, 4 BLD 202).

37 DLR 306—Md. Habibur Rahman Vs. Mosfiqur Rahman—Withdrawal of prosecution. Principle laid down by the Appalate Division (in DLR Volumes 30, 31 and 35) to be followed in the matter of allowing withdrawal from prosecution by the Public Prosecutor, at the instance of the Government. Supreme Court gave further consideration as to the extent and scope of judicial function in exercise of the jurisdicion in according or refusing consent to the prayer for withdrawal, under section 494 Cr. P. C in the cases reported in 30 DLR 228 and 278 (SC) respectively. We say with respect that the principles enunciated therein continue to govern the field and neither the decision reported in 31 DLR 135 (AD) nor the one reported in 35 DLR 329 (AD) can be said to be a departure from the principles enunciated in the aforesaid case. In 31 DLR case reference was made to the principles enunciated in the cases reported in 30 DLR and something more has been said in the case of a Government decision which is taken at the highest level of administration. It has been said that such a decision is prima facie a good ground for according consent to withdraw a criminal case. Accord of consent by the Court must be based on some reasonable grounds. Court's function in according or refusing permission to withdraw vis-a-vis decision of the Government at the highest level. When the Government at the highest level decides on the basis of the record of the case that the evidence in the case is weak and instructs the public prosecutor to withdraw the case primarily on that ground, it is not ordinarily required of the Court to refuse consent for withdrawal unless, of course, any malafide is alleged and found to be proved upon the materials on record in the said Goverment decision. (Ref : 30 DLR 22 (SC), 278 (SC), 31 DLR 134 (AD), 135 (AD) 228 (AD), 35 DLR 329 (AD), 27 DLR 67, 6 DLR 225 (WP)).

4 BCR 214 (AD)—Md. Firdusi Vs. The State—Leave was granted to consider the question whether the High Court Division was correct in refusing to quash the proceeding

without examining the question whether the Session Judge acted in accordance with law is not allowing the withdrawal of the case on the basis of the decision of the Government which was duly communicated to the Deputy commissioner, Khulna. Sessions Judge committed mistake in taking the view by passing the entire matter in saying that the case has become non existent and therefore, the prayer for withdrawal has become redundant. The revival by way of Naraji petition comes within the mischief of withdrawal order passsed by the Government. The proceeding must be quashed.

34 DLR 55 (SC)—Habibur Rahman Vs. The State—Effect of withdrawal of a criminal case under section 494 Cr. P. C amounts to acquittal and fresh trial on the self-same charge as per section 403 Cr. P. C is barred (Ref : 12 DLR 823 Contra).

32 DLR 271—Abul Hossain Khan Vs. Tayab Ali—Decision of the District Control Cell presided over by the Deputy Commissioner for withdrawal of the prosecution against the accused is sufficient to enable the Magistrate to allow withdrawal of prosecution.

29 DLR 145—Md. Sher Ali Vs. Special Tribunal—Special Tribunal under Act XIV of 1974 is competent to accord consent for withdrawal of a case. Special Tribunal constituted under the Special Powers Act is competent to entertain an application filed by the Special Public Prosecutor to accord consent to the prayer for withdrawal of the case. Section 494 provides that if withdrawal is permitted before a charge has been framed the accused shall be discharged in respect of such offence or offences; and if it is made after a charge has been framed or when under this Code no charge is required, the accused shall be acquitted in respect of such offence or offences.

28 DLR 386—Surab Ali Vs. The State—Order of withdrawal under section 494(a) is a discharge order and fresh prosecution on the same facts competent (Ref : 20 DLR 518, 18 DLR 107 (WP), 8 DLR 120 (WP), 7 DLR 216, 12 DLR 324).

26 DLR 326—Abdul Hakim Molla Vs. Lutfur Rahman—In warrant cases wihdrawal is permissible only on prayer of the

Public Prosecutor. No discharge under is valid unless the accused are before the court.

26 DLR 133—Abdur Rob Howladar Vs. Syed Ahmed—Trying Mgistrate's action in discharging the accused, on the opinion of the P. P. without his own assessment of the facts and circumstance of the case disapproved. Withdrawal, held, unauthorised and not lawful.

25 DLR 174—Taskinuddin Talukdar Vs. The State—When the Public Prosecutor, who is appointed as such under Act XL of 1958, under the direction of the Government files an application for withdrawal of such a case pending before the Special Judge, the latter has no alternative but then and there to record an order of withdrawal and stop further proceeding. The investigating authority has no say in this matter.

22 DLR 109—Abdur Rashid Vs. The State—An accused not legally discharged or tendered pardon either under section 373 or 494 continues to be an accused in the clutches of law. He cannot be administered oath and examined as witness in the case.

14 DLR 263—Mohsinuddin Ahmed Vs. The State—Withdrawal of summons, cases results in the acuqittal of the accused even though the word used is "Discharged". (Ref : 2 PLD 1 Lah).

16 BLD (HC) 418—Altab Hossain Vs. Kobed Ali and others—Withdrawal from prosecution—A Court may consent for withdrawal of a case against any accused if it is satisfied with the reasons assigned by the Public Prosecutor in his application for withdrawal. In the instant case the learned Magistrate acted illegally in according permission for withdrawal simply on the ground that the Government had instructed the Deputy Commissioner concerned for withdrawal of the case. Law does not contemplate such a mechanical order of withdrawal.

49 DLR 589—Altab Hossain Vs. Kobed Ali and others—The Magistrate accorded permission for withdrawal simply on the ground that the Government had instructed the Deputy Commissioner concerned for taking steps for withdrawal of the

case. Such mechanical order of withdrawal is contrary to the provision of section 494 of the Code. The Magistrate is directed to proceed with the case in accordance with law.

49 DLR (AD) 134—Abdul Khalequ and others Vs. Md Hanif and others—The trial Court having not accorded sanction for withdrawal of the case it cannot be said that the petitioners have acquired a vested right. Further, section 494 of the Code gives the authority only to a public prosecutor to file an application for withdrawal and as such the accused have no right to file an application for withdrawal. Apart from this the Tribunal after recording proper reasons have refused to accord consent for withdrawal of the case and as such no lawful grievance can be made on the merit as well.

49 DLR (AD) 143—Sorbesh Ali and another Vs. Jarina Begum and another—The offence under section 376 is not compoundable and, as such, there is no question of withdrawal.

Revision—Consent to withdrawal improperly given without judicial consideration and the order which followed such consent may be revoked by the Session Judge and the High Court Division in revision. If the case withdrawn under clause (a) the accused will be disharged, and further inquiry may be directed under section 436 Cr. P. C.

4 MLR (HC) 18—Ayen Ali (Md) Vs. Shah Obaidul Mannan and others—Withdrawal from prosecution—The Court is not to act mechanically to allow withdrawal from prosecution merely on the applicaion to the Public Prosecutor. While according permission to withdraw the court must assign cogent ground therefor, a duty cast upon the court by section 494 of the Code of Criminal Procedure. When no reason is assigned by the court, such order of withdrawal is not sustainable in the eye of law.

3 MLR (HC) 404—Abdul Khaleque and others Vs. Hanif and others—The accused has no locus standi to file an application for withdrawal of a criminal case. The public Prosecutor only can file application for such withdrawal subject to the permission of the court.

20 BLD (AD) 54—Sreemati Prativa Rani Dey Vs. Dr. Mohammad Yousuf, Chittagong—Withdrawal from prosecution—The consent mentioned in section 494 of the Code is not to be given mechanically. The court is to exercise its function judicially before giving such consent which implies that the court will have to examine the materials on which the Government decides withdraw of a case.

20 BLD (AD) 54—Sreemati Prativa Rani Dey Vs. Dr. Md Yousuf, Chittagong—Discretion of court—withdrawal from prosecution—Withdrawal from prosecution is subject to consent by the trial Judge and when the accused persons are still absconding the discretion ought not to have been exercised.

8 BLT (AD) 42—Shah Obaidul Mannan & Anr. Vs. The State & Anr.—Without application of mind on the materials on record and without assigning any cogent grounds withdrawal under Section-494 of the Code is not permissible.

4 BLT (AD) 171—Abdul Khaleque & Ors. Vs. Md Hanif & Ors.—For filling an application under section 494 of the code two conditions must be fulfilled. The application must be filed by the public prosecutor on behalf of the state and the court is to accord consent—section 494 of the code of criminal Procedure gives the authority only to a public prosecutor to file an application for withdrawal and as such the accused persons have no right to file an application for withdrawal under section 494 of the code of criminal procedure.

52 DLR (AD) 8—Sreemati Prativa Rani Dey (Tirtha) Vs. Dr. Mohammad Yousuf, Chittagong Medical College and others (Criminal)—The consent mentioned in section 494 of the Code is not to be given mechanically. The Court is to exercise its function judicially before giving such consent which implies that the Court will have to examine the materials on which the Government decides withdrawal of a case.

4 BLT (AD) 244—Md. Lutfur Rahaman Vs. The State & Anr.—The Case was started on the basis of a complaint, alleging, interalia, that the complainant had been raped by the Petitioner and another one co-accused. Held : Offence under

section 376 Penal Code is not compoundable—The learned Judges of the High Court Division upon Consideration of the relevant records rightly held that the learned sessions Judge having found sufficient materials took cognizance of the alleged offence against the petitioner and as such he did not commit any illegality in rejecting the petition for withdrawal of the case.

4 BLT (AD) 242—Imon @ Omar Mohammad Ashraf Vs. The State & Anr.—The case was started on the basis of an F. I.R and the charge sheet has been submitted under section 302/323/34 of the Penal Code—The accused-Petitioner remained absconding and his father filed an application for withdrawal of the prosecution against him—the Government has decided to withdraw the prosecution of the the accused petitioner—under instructions of the Public prosecutor, Assistant Public prosecutor filed an application for withdrawal of the prosecution against the accused petitioner—Learned sessions Judge by an order, rejected the petitioner for withdrawal on the grounds inter alia that there was no material before the Government for withdrawal from the prosecution that the petitioner was at that time a fugitive from law, that the order of the Government was malafide—Held : It appears that both the High Court Division and the learned sesions Judge applied their independent minds in considering whether in the circumstances of the case the Government's decision to withdraw from prosecution is immune from interference or not. Cogent reasons have been given by both the two courts below—petition is dismissed.

3 BLC 572—Ayen Ali Vs. Shah Obaidul Mannan and others—As the order of withdrawal of the case against the accused opposite parties has been passed by the learned Additional Sessions Judge without assigning any is set aside.

495. Permission to conduct prosecution.—(1) Any Magistrate inquiring into or trying any case may permit the prosection to be conducted by any person other than an officer of police below the rank to be prescribed by the Government in this behalf, but no person other than the Attorney General, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the

Government in this behalf, shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by Section 494 and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by an advocate.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

7 DLR 4 (WP) (FB)—Pir Baksh Vs. Golam Rasul—Government advocate was neither in charge of the case nor entered appearance to withdraw the case cannot under the law withdraw from the prosecution of the accused by simply writing a yadasht to the trying Magistrate.

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CHAPTER—XXXIX

OF BAIL

496. In what cases bail to be taken.—When any person other than a person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any state of the proceedings before such Court to give bail, such person shall be released on bail : Porvided that such officer or Court, if he or it thinks fit, may, instead of taking bail form such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4) or section 117, sub section (3).

Scope and application—The basis conception of the word "bail" is release of a person from the custody of police and delivery into the hands of sureties, who undertake to produce him in court whenever required to do so. The Code makes a distinction between bailable and non-bailabile offences. The grant of bail to a person accused of a non-bailable offence is discretionary and the person released on bail may again be arrested and remanded to custody by an order of the Court granting the bail. The Court of Session and High Court Division may release any person on bail and by a subsequent order cause him to be re-arrested and remanded to custody. But a person accused of a bailable offence is treated differently. He has a right to be released on bail and only the High Court Division has the Power to cause him to be arrested and remanded to custody in bailable offences. There is no question of discreation in granting bail as the words of the section are imperative. Accused of bailable offence can not be taken into custody unless they are unable or unwilling to offer bail or to execute personal bonds. In every bailable offence, bail is a right and not favour. The intention of the law is that in such a case the man is ordinarily to be at liberty and it is only when he is

unable to furnish moderate security. If is required of him he should remain in detention (19 Cr LJ 329). The object of demand of security is not to penalise the accused but to ensure his presence in Court. The amount of security must be fixed with due regard to the means of the accused and the nature of the offence and should not be excessive (31 Cr LJ 289). The law does not contemplate or authorise a Magistrate to demand cash deposit as a condition to the release of an accused on bail. There is admittedly no provision in the code permitting cancellation of bail in bailable offence. If, of course, the person enlarged on bail suborns witness there may be other remedies at law open against him, e, g, contempt proceedings or conceivably even proceedings to bind him over to keep the peace or be of good behaviour. There is no provision for cancellation of bail by he Session Judge or the High Court Division under section 561 A.

41 DLR 291—Abdus Samad Vs. The State—To be released on bail a person must be in custody or in some sort of confinement. Therefore a person to be released on bail need to be in some sort of confinement or custody or otherwise it is not understood from what confinemnt or custody he would be released.

25 DLR 45 (SC)—Chowdhury Muhammad Khan Vs. Sanaullah—First Judge of the High Court refused bail. Later on a fresh application for bail was moved before another Judge of the same High Court, who grants bail. Extreme impropriety that results from such a course. (Ref : 12 BLD 507).

19 DLR 38 (SC)—Md. Ayub Vs. Md. Yakub—Bail before convictions dealt with section 496 and 498. The wrod "appear" does not mean voluntary appearance but means appearnace in answer to a process of court. (Ref : 18 DLR 393 (SC))

15 DLR 429 (SC)—Meah Mahmud Ali Qasuri Vs. The State—In bailable offences, the person accused has the indefeasible right to grant of bail subject to satisfactory sureties being offered if necessary. Condition that the accused admitted to bail shall desist from repetition of offence with which he is charged cannot be incorporated in bail bond. The

imposition of such a condition and its incorporation in the bond cannot be considered to be ancillary to power to grant bail under section 497 of the Code (Ref : 4 PLD 25 Bal).

8 BLR 184—Kafiluddin Vs. The Crown—Provisions of section 496 are not applicable in the case of a certificate debtor who is arrested under section 26 of the Public Demands Recovery Act and therefore proceedings under section 614 of the Code cannot be drawn up against his surety.

5 DLR 148 (FC)—The Crown Vs. Khushi Md.—Under section 496 and 497 bail can be granted only to person who are in some sort of restraint and not to those who are at liberty. The basic conception of the word "bail" is release of a person from the custody of police and delivery into the hands of sureties who undertake to produce him in court whenever required to do so. (Ref : 7 DLR 8 (WP), 2 PCR 183).

2 PCR 89—Md. Hasan Vs. The Crown—III defined fear that the accused would temper with prosecution evidence cannot hamper grant of bail, Mass of documentary evidence produced by prosecution which only the accused could explain and advise his counsel, is valid ground for bail (Ref : 2 PCR 28).

18 BLD (HC) 680—K.M. Jahangir Alam Vs. The State—There is no inherent power of the High Court Division or the Court of Sessions to grant bail at the Stage. Therefore status in life, affluence or otherwise are irrelevant while considering the prayer for granting anticipatory bail. [Ref : 3 BLC 564].

18 BLD (HC) 680—K.M. Jahangir Alam Vs. The State—Section 498 like sections 496 or 497 does not require a person to place himself in custodian lagis, to be dealt with in accordance with law. Therefore, if he is allowed anticipatory bail then upon furnishing bond he will subject himself really to one form of custody. If the prayer is rejected or adinterim bail is allowed, but is subseqently cancelled, then the matter ends there and does not entail the consequence that he has to be given into the police or jail custody. His position cannot be worse than before the refusal of his prayer for/or cancellation of anticipatory bail. [Ref : 3 BLC 564].

497. When bail may be taken in case of non-bailable offence.—When any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficent grounds for further inquiry into his guilt, the accused shall pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

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

(4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgement is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accued, if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgement delivered.

(5) The High Court Division or Court of Session and in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

Scope and application—The main points for consideration in the application for bail are : (a) whether there is any likelihood of the accused absconding : (b) whether there is any likelihood of the accused tempering with the evidence by

threatening the witnesses. It is the duty of the court ot see that both sides are not hampered. The court must see that the Government does not get a free hand, the accused are not looked up or are hampered in the defence simply on the ground that it is alleged or feared that they will temper with the evidence. It is important to note that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or imprisonment for life, unless reasonable ground appear to exist to disclose their complicity. Bail in non-bailable cases is a matter within the discretion of the courts, which has to be exercised with due care and caution on the facts and circumstances of each case. In the case of non-bailable offences, which are not punishable with death or imprisonment for life, grant of bail should be the rule and the refusal thereof should be an exception to that rule. The practice of Magistrate or Judge to send bail applications to the police for report and then acting on such report is absolutely illegal and against all canons of criminal jurisprudence. The policy of law is that very young persons, woman accused should be granted bail. Bail may be granted only when the nature of ailment is serious enough to endanger a person's life. Successive applications for bail on the same facts are not competent. But with a view to prevent also of process of court or meet the ends of justice, a second application for bail could be made even in the absence of fresh material (PLD 1980 Lah 127). A fresh bail application can be moved on the ground that particular circumstance has either not been brought to the notice of the judge or it has not been considered by the Judge. There are five cases where a person granted bail may have the bail cancelled and recommitted to jail : (i) Where the person on bail during the period of bail commits the very same offence for which he is being tried or has been convicted, (ii) If he hampers the investigation, (iii) if he tempers with the evidence, (iv) if he runs away to a foreign country, or goes underground or beyond the control of his sureties and (v) if he commits acts of violence in revenge.

53 DLR (AD) 43—Section 497 of the Cr.P.C is a procedural law and the accused having alleged to have committed a substantive offence of Murder his liberty is entailed.

42 DLR 10 (AD)—Shah Alam Chowdhury Vs. State—Prima facie case made out against the petitioner U/ss. 302/109 P. C—Not entitled to bail. (Ref : 25 DLR 119, 23 DLR 36 (SC), 22 DLR 91 (WP)).

13 BLD 190 (AD)—Shaikh Shahidul Islam Vs. State—The prohibiton under the Section, whether is that a person accused of any non-bailable offence shall not be released on bail if there is reasonable ground for believing that he is guilty of an offence punishable with death or imprisonment for life, **Held:** The prohibition under the Section is that a person accused of any non-bailable offence shall not be released on bail if there appear reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life. (Ref : 40 DLR 506, 20 DLR 295 (SC), 245 (SC), 23 DLR 41 (SC), 11 BLD 106 (AD)).

13 BLD 367—The State Vs. Auranga @ K. M Hemayetuddin—An accused who is not under the age of 16 years or any woman or any sick or infirm person can not be released on bail if there appear reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life. The fact that the accused has become a member of the Parliament is no ground at all for releasing him on bail since his case does not come within the purview of proviso to Section 497 (1) Cr. P. C.

12 BLD 175 (AD)—A. K. M. Mosharaf Hossain Vs. State—The Section, whether enjoins upon the Court to exercise Judicial discretion in the matter of granting bail. **Held :** Section 497 Cr. P. C enjoins upon the Court to exercise judicial discretion in the matter of granting bail for ascretaining whether the materials placed before the Court by the prosecution are of such a tangible nature that if left unrebutted, they may lead to the inference of guilt of the accused.

10 BLD 451 (AD)—Ahmed Ali Vs. State—Special powers Act (XIV of 1974) Schedule—Penal Code (XLV of 1860)—Sections

366 and 376 read with Section 4C of the Cruelty to Women (Deterrent Punishment) Ordinance No. (LX of 1983)—Cancellation of bail suo motu by the learned Special Tribunal Judge in the absence of any allegation of the abuse of privilege of bail or any material whatsoever on record is arbitrary in nature which offends the principle of natural justice (Ref : 7 BCR 63 (AD)).

16 DLR 12 (WP)—Syed Ghulam Ali Shah Vs. State—Bail grant of bail before arrest. Section 497 not applicable to the High Court—Seriousness of the offence not a ground to refuse bail—Applicability of section 497—The policy of law is to grant bail, rather than refuse it is the case of under trial prisoners. and the court should be lenient until they are convicted.

41 DLR 291—Abdus Samad Vs. The State—To be released on bail a person must be in custody or in some sort of confinement. In the instant case when the petitioner moved the application and obtained the Rule he was a fugitive from justice and also when he obtained bail from another Single Bench of this Court. He was not in custody to be released on bail but again obtained the bail as a fugitive from justice which, I am constrained to hold, have been obtained by suppression of facts, the presence of which vitiates every thing obtained, The petitioners have unclean hands and deserve no hearing. Vokaltnama was not executed by the petitioners from jail. They initially were not entitled to any protection of this Court. A fugitive from justice is not entitled to protection of the Court.

40 DLR 290 (AD)—Sree Kalyan Kumar Chy. Vs. The State—The appellant submits that when he was not named in the F. I. R and the police could not gather any material against him althoguh the investigation has been going on for over a year the High Court Division in the facts and circumstances of the case ought to have enlarged him on bail. This contention is not opposed by State. The appeal is allowed (Ref : 9 BLD 12 (AD)).

40 DLR 244 (AD)—Nurul Islam Vs. The State—High Court Division failed to get the facts correctly that the appellant who

was an examinee in 1986 was prevented from appearing in examination in 1987, else the High Court Division decision would have been otherwise. Order sheet of the case shows that appelant did not absent himself from trial. He voluntarily surrendered to the Court within 7 days. The appellant will continue on the same bail granted earlier by the Court till disposal of appeal. Appellant's bail prayer on the gound of being a. B. A Examinee allowed (Ref : 8 BCR 190 (AD)).

7 BLD 154 (AD)—Sajalendu Das Vs. The State—Bail of accused—Cancellation when is not proper—The Special Judge did not exercise his discretion properly in cancelling the bail of the appellant merely upon the apprehension expressed by the prosecution as to his possible abscondence particularly when he did not do so during the last six years when he had been on bail—In the circumstances of the case the High Court Division was also not justified in rejecting the application for bail summarily.

36 DLR 21—Harun Howladar Vs. The State—Circumstances which permit release of an accused on bail, even though charged with an offence of murder. Though the names of the petitioners have been mentioned in column 2 of the charge sheet but it has not been stated by the I/O as to what part they played in the alleged occurrence. The report submitted by the officer in charge of kotwali police station is vague and does not mention when and how the accused persons thereatened the witnesses. Ordinarily in a case under section 302 bail should not be granted. Ends of justice in the present case demand that the accused petitioner should be granted bail.

52 Cr.LJ 358—Ouasim Vs. The Crown—Practice of Magistrate of sending bail application to police for report and then acting on such report to cancel bail is absolutely illegal and against all canons of criminal jurisprudence. The sooner this practice is stopped the better it will be.

35 DLR 167—Khair Fakir Vs. The State—Session Judge without service of notice as to bail cancellation application cancelled the bail. **Held :** Bail unjustly cancelled. Bail is a very valuable right granted to an accused by the Court and once it

is granted it should not and ought not be interfered with lightly except upon valid grounds and cogent reasons.

3 BCR 86 (SC)—Md Abdul Hamid Vs. The State—Refusal of bail by High Court Division to grant bail without considering that the appellant was suffering from serious deseases and needed medical treatment by specialists which is not available in jail. Want of better medical treatment entails likelihook of risk of life. Bail prayer rejected by High Court Division without application of mind on grounds stated in application under section 497 Cr. P. C. Order of High Court Divison set aside (Ref: 18 DLR 390 (SC)).

3 BCR 170 (SC)—Haibat Ali Vs. The State—There is no material to discriminate the case of the appellant from those of the co-accused who have been enlarged on bail High Court Division has not exercised discretion judicially. Bail allowed (Ref : 35 DLR 279 (SC), 7 BLD 91 (AD)).

2 BCR 405 (SC)—Ful Meah Vs. The State—Rejection of bail—Whether correct principle was followed by High Court Division in view of the fact that FIR did not indicate any actual participation by appellant (Ref : 19 DLR 357 (SC), 2 BCR 316).

33 DLR 77—State Vs. Nazir Ahmed—Cancellation of bail at the biding of an army officer followed by warrant of arrest is illegal.

33 DLR 13—Iftekhar Bhuiya Vs. The State—Taka two lacs sixty thousand was looted away in broad day light by armed miscreants killing an armed guard of the Bank yet all the accused persons were allowed to go on trial even before investigation of the case was complete. We find no valid ground to allow the petitioner to remain on bail any further. We, accordingly cancel the ad-interim bail granted to him.

32 DLR 169—Government of Bangladesh Vs. Khalilur Rahman—Grant of bail is discretionary with court and the discretion has to be exercised judicially, (High) official status is no ground to be dealt with in a manner other than what is provided by the Constitution declaring that all are equal before law and entitled to equal treatment. When an accused

surrenders, he can leave court only when his bail prayer is granted by the court; otherwise he continues to remain in court's lawful custody.

29 DLR 167—Mizanur Rahman Gazi Vs. The State—When a case is under investigation under MLR the question is whether the cognizance is taken and whether the matter is pending before the Martial Law Court and if not then section 497 Cr. P. C comes into play. Question of granting bail cannot be decided by reference to matters not envisaged in the Cr. P. C. Section 497 which provides that if there are sufficient grounds for further inquiry into the guilt of the accused pending such inquiry be released on bail (Ref : 28 DLR 441, 10 DLR 179 (SC)).

27 DLR 665—Abdul Motalib Vs. The State—A private complainant is not entitled to a notice when bail application is being moved. Bail application in case in which offence alleged is punishable with death or imprisonment for life. Court concerned should see if there is some tangible evidence as regard the guilt of the person with the offence charged. Sessions Judge can cancel a bail earlier granted by the said Court.

27 DLR 32—Taher Ali khan Vs. The State—Refusal to grant bail by Sessions Judge (the appellate authority)—Magistrate can inspite of such refusal, on a subsequent occasion, in proper circumstance, grant bail.

25 DLR 119—Abdus Sukkur Vs. The State—In case. of bail application of an accused who committed offence punishable with death etc : court is required to be satisfied before rejecting the application that a prima facie case exists as to the involvement of the accused in the offence (Ref : 23 DLR 36 (SC), 22 DLR 91 (WP), 18 DLR 117 (WP), 6 DLR 72 (WP)).

20 DLR 339 (SC)—Reasat Ali Vs. Golam Mohammad—Undue delay in holding the trial, due to the prosecution procrastination will be a valid ground for granting bail and question of granting bail in such a case need be considered with care. Notice of application by prosecution for cancellation

of bail is to be served on the accused well in advance (Ref : 22 DLR 91 (WP)).

19 DLR 276 (SC)—Abdur Rahman Vs. Fazal Qadim Khan—Order of bail before arrest is valid, (Ref : 19 DLR 945 (SC).

14 DLR 321 (SC)—Khalid Saigal Vs. The State—Where a court is called upon to exercise its judicial discretion. it will not be discharging its functions properly if it were to proceed upon any prior assumption that in all case where an offence punishable with death is alleged, bail must as a matter of course be refused, nor can there be any rule of practice upon the basis of which such a discretion can be judicially exercised. To act upon a rule of practice may, therefore, will constitute an arbitrary exercise of a discretionary power, for, the exercise of a discretion vested by law in a court must be upon sound judicial principles after taking in to account the facts and circumstances of each case.

12 DLR 458—Jagabandhu Bhowmik Vs. The State—Courts should not put pressure on the appearing accused to produce an absconding accused. On the day fixed for appearance, one of the accused A was absent without taking any steps.

10 DLR 179 (SC)—Abdul Hayee Khan Vs. State—Magistrate's power to grant bail is derived from section 497 itself and no restriction upon that power can be recognised.

7 DLR 637—Abdul Kader Vs. The Crown—Under section 497 (5) Cr. P. C : the Magistrate granting the bail can alone cancel it.

19 BLD 189 (AD) —The State Vs. Abdul Wahab Shah Chowdhury—Granting of anticipatory bail is an extraordinary remedy and as such in the case of accusations of non-bailable offences anticipatory bail should not be granted and the person should be directed to seek bail under section 497 of the Code. [Ref : 4 BLC (AD) 195].

19 BLD (HC) 137—K. M. Obaidur Rahman Vs. The State—Reading the statement of co-accused Taheruddin Thakur recorded under section 164 of the Code and the statement of some of the witnesses recorded under section 161 of the Code it appears that there appears reasonable grounds for believing

that they may be a party to a criminal conspiracy as alleged by the prosecution and accordingly the prayer for bail is rejected with a direction the State to take all necessary steps for medical care and attention of the petitioners, who are aged and said to be suffering from various ailments.

51 DLR 199—Sohail Talukdar and others Vs. State—As soon as the accused appears or brought before the Court and prays for bail the Sessions Judge should dispose of his application. If the Sessions Judge fails to dispose of the same there is no scope for allowing the accused to continue on the bail granted by the Magistrate, he is to be sent to jail custody.

51 DLR 99—Sohail Thakur and others Vs. State—Additional Sessions Judge is not bound by the bail granted by the Sessions Judge. If he refuses bail to an accused who was earlier granted bail by the Sessions Judge that cannot be construed as cancellation of bail granted by the Sessions Judge.

20 BLD (AD) 289—The State Vs. Faisal Alam Ansari—Section 497 of the Code speaks that when there is a reasonable ground for believing that a person is guilty of offence punishable with death or imprisonment for life, he should not be granted bail. Section 497 of the Code is a procedural law and the accused having alleged to have committed a substantive offence of murder his liberty is curtailed and as such the argument with regard to violation of fundamental right cannot be accepted in the facts of the instant case as law permits of such arrest and detention in custody.

6 MLR (AD) 51—Bail cannot be granted to an accused involved with direct complicity in offence punishable with death or imprisonment for life. If it is done by the court that may be set aside by the apex court.

5 MLR (HC) 105—Anwar Hossain @ Mohasin @ Anar Vs. The State—Bail in case of non-bailable offence when can be granted—When there is unusual delay in holding trial and the accused is in custody for long time knowing not when the trial

will be concluded, the accused in view of uncertainty of trial is granted bail even though he is charged with offence under section 19(A) and (f) of the Arms Act, 1878.

53 DLR (AD) 43—State Vs. Faisal Alam Ansari (Criminal)—Save in accordance with law' as mentioned in Article 32 not only refers to criminal law but also civil law which provides for arrest and detention, namely, for recovery of decretal dues and public dues.

53 DLR (AD) 43—State Vs. Faisal Alam Ansari (Criminal)—Section 497 of the Code of Criminal Procedure is a procedural law and the accused having alleged to have committed a substantive offence of murder his liberty is curtailed.

6 MLR (HC) 166-168—Momtaz Begum Vs. The State & others—Sections 497 and 498—Bail granted by the Sessions judge under section 497 cannot be cancelled except on ground of misuse of privilege of bail- Bail granted by the Sessions judge under section 498 of the Code of Criminal Procedure, 1898 before arrest can be cancelled by the High Court Division if it is found that there was no reasonable ground for granting such bail. But when bail to the accused in custody is granted under section 497 Cr.P.C. by the Sessions Judge it can only be cancelled on the ground of abuse of the privileges of bail under sub-section (5) of section 497 Cr.P.C. and not otherwise.

6 MLR (HC) 194-200—Nurul Islam Monzoor Vs. The State—Grant of bail on ground of illness-Not always an absolute rule-Section 339C(4)-Right to bail when trial not concluded within statutory period- Dependent on discretion of court- Working days of a court are to be counted taking into account the days on which the judge holds the court-

In a case of grave offence punishable with death or imprisonment for life bail to the accused may be refused even on ground of serious illness. The Court in that case can direct for arranging proper treatment of the accused.

21 BLD (HC) 323—Captain (Rtd.) Nurul Huda Vs. The State—Sub-section (1) of section 497 of the Code postulates that an accused may not be released on bail if there appears reasonable ground for believing that he is guilty of an offence

punishable with death or imprisonment for life. The proviso to the sub-section is an exception to the cases of a person being under the age of 16 years, a woman or a sick or infirm. The discretionary power of the High Court Division to grant bail under section 498 of the Code is, subservient and ancillary to section 497 of the Code, which limits the power to grant bail in a case punishable with death or imprisonment for life.

5 BLC 348—Momtaz Begum Vs. State and others—Section 497 (5) and 498 -When bail is granted by the Court of Session to an accused person in custody exercising its power under section 498, Cr.P.C after hearing the parties such bail can be cancelled only on some definite allegations of abuse of the privileges of the bail or in the ground that the accused to whom bail is granted in taking preparation to leave the jurisdiction of the Court but such bail cannot be cancelled on the ground that bail was wrongly granted.

497A. Omitted.

498. Power to direct admission to bail or reduction of bail.—The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive : and the High Court Division or Court of Sessions may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

Scope and application—This section gives the High Court Division and the Court of Sessions very wide powers to admit an accused person to bail in any case even when he is charged with a non-bailable offence. The powers of the High Court Division or the Court of Session given by this Section are not controlled by the statutory limitation laid down in section 497 of refusing bail if there appear reasonable grounds for believing the accused to be guilty of an offence punishable with death or imprisonment for life. The powers in this section are not fettered by any rules defining the limit within which they would be exercised. Where the proceding are in the nature of a "preventive action" the underlying object of which is to ensure

that the applicants will not commit any offence or offences and not to punish them for having committed any offence. The applicant not being accused persons charged with the commission of any offence cannot lay claim to the provisions of section 496, 497 or 498 Cr. P.C. and apply for bail under any of these three Sections. Where a special law makes provision for the disposal of bail applications, the High Court Division has no jurisdiction to grant bail in contravention of those provisions. All the ordinary criminal Courts while trying a case whether under the ordinary law or any Martial Law Regulation or order are competent to entertain a bail application. So long as there is no order transferring a case covered by Martial Law orders or Regulations to Military Courts, the Sessions Court and the High Court Division can exercise jurisdiction under this section (PLD 1959 Pesh 49).

52 DLR 298 (HC)—Kawsar Alam Khan Vs. State—When on the face of it prose-cution case appears to be absurd and preposterous it would be unjust to refuse bail however serious and grave the allegation may be, because in a free and civil society liberty of a citizen can neither be circumscribed nor made subservient to of capricious enforcers of law, more so, when incarceration without trial stretches over a year and a half, without any date for hearing in sight.

55 DLR 6 (AD)—K.M. Obaidur Rahman Vs. State—A member of Parliament being enlarged on bail cannot avoid appearance before the trial court simply on the plea that the parliament is in session.

55 DLR 33 (AD)—Captain (Rtd) Nurul Huda Vs. State—The Question of granting or refusing bail depends upon the particular circumstances of each case and the mere fact that an offence is punishable with death or life impri-sonment is not by itself sufficient to refuse bail.

55 DLR 33 (AD)—Captain (Rtd) Nurul Huda Vs. State—The grant of bail is the descretion of the court and the court could consider the exercise of discretion if it is satisfied in the facts and circums-tances of the case that the trial cannot be concluded within the specified time.

47 DLR 33 (AD)—State Vs. M.A. Malik—Anticipatory bail—The spouses are at longer-heads both having taken recourse to court—There is possibility of the respondent husband being harassed. It is therefore difficult to hold that the High Court Division has granted him bail unreasonably or unfairly (Ref : 14 BLD 220 (AD), 13 BLD 952).

46 DLR 315—Jahanara Imam Vs. State—Anticipatory bail—Bail by the High Court Division directly is not granted as a matter of course except in exceptional cases such as physical inability to appear before the court of first instance, fear and lack of personal safety, lack of confidence and like circumstances (Ref : 12 BLD 314, 19 DLR 39 (SC)).

45 DLR 8 (AD)—A.H.M Siddique Vs. State—Order for conditional bail is illegal and not proper (Ref : 13 BLD 1 (AD)).

45 DLR 227—Mustafizur Rahman Vs. State—Bail—Incriminating facts disclosed in the FIR after due enquiry by the inspecting team are reasonable grounds for believing that the petitioner is guilty of criminal breach of trust. The Sessions Judge has rightly rejected the petition for bail.

44 DLR 192 (AD)—Sheikh Shahidul Islam Vs. State—Bail—It is not the prima facie case against the accused but reasonable grounds for believing that he has been guilty which prohibits granting of bail—The onus is on the prosecution to disclose those reasonable ground. Court has examined the data available in the case to find out whether reasonable ground exists to connect with the crime alleged (Ref : 20 DLR 271).

44 DLR 8 (AD)—Abdul Matin Vs. The State—Considering the statements under section 161 Cr.P.C wherein no specific overt act involving the appellant with the killing of the victim is found the appellants are granted bail and if the trial starts, the Sessions Judge will be free to take them into custody during trial.

44 DLR 209—Dulal Meah Vs. State—Bail—Inordinate delay in trial has been found to be a good ground for enlarging the

accused on bail even in a case of murder and the same principle equally applies in a case under the Special Powers Act (Ref : 20 DLR 339 (SC), 14 BLD 604).

43 DLR 151 (AD)—Md. Saimuddin Vs. State—Sentence for one year—The court ought to have exercised discretion in granting bail to the appellants in view of the short sentence of imprisonment.

43 DLR 14 (AD)—Bakul Howlader Vs. The State—High Court Division in Criminal Revision cancelled the appellant's bail when there was no new material before it and no allegation of tampering with the evidence. Co-accused against whom cognizance of a murder case has already been taken is already on bail. High Court Division did not exercise its judicial discretion properly in cancelling the appellant's bail-appellants to remain on bail already granted by Upa-zila Magistrate.

43 DLR 312—Zulfiqar Ali Bhutto Vs. State.—Anticipatory Bail-circumstance when such bail was granted by the High Court Division. The police went to the residence of the petitioner to arrest him on the basis of a case started upon a newspaper report. He was a candidate for the National Assembly election. His political rivals and enemies were bent upon defeating him by putting him in confinement through the help of the police. In such circumstances, the prayer for anticipatory bail was granted.

42 DLR 223 (AD)—M.A. Wahab, Advocate Vs. State—Successive bail petition, propriety of—The Judges were not right in taking the view that once a petition for bail is rejected no further application can be made and the remedy lies only in an appeal. It is also not right to say that an application for bail could not be filed before the Vacation Judge and that he had no jurisdiction to grant interim bail (when he was himself a party to the rejection of bail for the same accused earlier by the Division Bench). At the most, it may be said that it was indiscreet on the part of the Vacation Judge to grant bail in the facts of the case. In the application for bail before the Vacation Bench, it was not mentioned that prayers for bail

had been refused earlier. For this suppression of fact alone the ad-interim bail could have been cancelled (Ref : 10 BLD 50 (AD)).

42 DLR 183 (AD)—Nizamuddin Vs. State—Bail Matter—Interim bail granted by the Appellate Division during pendency of criminal revision case in the High Court Division against trial Court's order of conviction and sentence of Three years R. I. under section, 325/34, Penal Code—Interim bail not to be allowed to continue for indefinite period when the sentence of imprisonment is hanging-interim bail allowed to continue further on specific terms. (10 BLD 124 (AD)).

42 DLR 178 (AD)—Abdul Hakim Howlader Vs. State—Bail matter—Ad-interim bail granted by the Appellate Division during the pendency of a criminal appeal in the High Court Division against an order of conviction and sentence of five years R. I. with fine under section. 304 P. C. Ad-interim bail cannot be allowed to continue simply because an appeal against conviction is pending in the High Court Division—Interim bail to continue further on specific terms only. (Ref : 10 BLD 126 (AD)).

42 DLR 52 (AD)—Serajul Hoque Vs. State—Bail—Confirmation of—Appellant deposited the amount for which he was charged for misappropriation-Co-accused having been already released on bail the bail of the appellant should not have been refused—Appeal allowed and appellant allowed to remain on ad-interim bail granted by the Appellate Division.

42 DLR 8 (AD)—Ashraf Ali Mondal Vs. State—Bail—Court's attention was drawn to the fact that in the F.I.R. appellant No. 1 was not alleged to have done any overt act nor his name was there in the dying declaration—Trial had not yet begun even though charges had been framed more than a month before. Copy of the trial Court's order produced in Court indicating that trial may be delayed further—Appellants allowed to remain on bail, (Ref : 42 DLR 10 (AD), 8 BLD-21 (AD)).

42 DLR 394—Shahidulla Vs. State—Bail—There was a free fight between the parties; the accused are in jail for 9 months,

the case has not been sent to proper Court for trial as yet and both sides have cases against each other on the self-same matter-hence it will not be unreasonable to enlarge the petitioners on bail till the trial starts when the trial Court will see whether they should continue on the same bail.

42 DLR 76—Majeda Khatun Vs. State—Bail—The case of the petitioner who is a woman deserves special consideration—Merely becuse charge sheet has been submitted against her under section. 302/109/120B/34 P. C. she is not automatically debarred from getting bail.

15 BLD 167—Md. Abul Kalam Vs. State—When an application for bail in a case involving offences under the Special Powers Act is filed before the Sessions Judge before the submission of charge-sheet, the learned Judge decides the bail matter as the Sessions Judge and not as the Special Tribunal in as much as cognizance is yet to be taken under the Special Powers Act. No appeal against the rejection of the prayer for bail in such a case lies to the High Court Division under section 30 of the Special Powers Act.

41 DLR 291—Abdus Samad Vs. The State—A fugitive from justice is not entitled to protection of the court. A convicted person against whom there stands a judgment and order of conviction will have to comply with the order by surrendering before the Court. To be released on bail a person must be in custody or in some sort of confinement. Vokalatnama was not executed by the petitioners from jail. They initially were not entitled to any protection of this Court when the Rule was issued and therefore not entitled to any hearing in this Revision case.

40 DLR 244 (AD)—Nurul Islam Vs. The State—Appellant's bail prayer on the ground of being a B. A. Examinee-allowed. High Court Division failed to get the facts correctly that the appellant who was an examinee in 1986 was prevented from appearing in examination in 1987, else the High Court Division decision would have been otherwise (Ref : 8 BCR 190 (AD), 5 BCR 16 (AD)).

40 DLR 290 (AD)—Sree Kalyan Kumar Vs. The State—Appellant's name not mentioned in the F.I.R. not any material could be gathered against him by police—bail was allowed on this contention (Ref : 9 BLD 12 (AD)).

40 DLR 506—Liaqat Sharif Vs. The State—Bail is not to be witheld as a punishment PLD 1972 (SC) 81 (84). There is no legal compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death unless reasonable grounds exist to disclose their complicity.

15 BLD 14 (AD)—Md. Atiqullah Khan Masud Vs. State—Section 498 Cr. P. C gives extended and wider powers to the High Court Division for granting bail in non-bailable offences but this power must be exercised in a reasonable and judicial manner so that the normal practice founded on justice and equity is not disregarded, barring exceptional circumstances. Considering the facts that the two accd persons were earlier refused bail by the Ld. Magistrate and the offending aritcle, being on print, is not likely to be tempered with and there being little chance of the appellant's jumping the bail, the appellate Division allowed bail to the petr.

15 BLD 376—Sultan Ahmed Vs. State—The chargesheet having contained no allegation of any specific overt act against the accused-petitioners, they being in custody for a pretty long time, co-accused being on bail and there being no prospect of an early trial and the petitioners being fairly advanced in age are considered mitigating circumstances for allowing bail to them.

14 BLD 604—Manjurul Hoque Vs. The State—In view of the amended provision of Section 339C by Act No. 42 of 1992, when the trial of a case cannot be concluded within 360 days, the accused, if in custody, should be released on bail even in a case of non-bailable offence unless for special reasons the Court directs otherwise. Inordinate and unreasonable delay in holding the trial provides a good ground for considering an application for bail even in a case involving grave offences.

13 BLD 492—Mizanur Rahman Vs. State—Whether prayer for bail should be allowed in a case in which there are good

grounds for success of the appeal along with other grounds. **Held :** In a case in which the accused is aged and respectable person and there are good grounds in the appeal arising out of conviction and sentence of 5 years R. I. and that there is no immediate prospect of getting the appeal heard the prayer for bail should be allowed.

13 BLD 123—Major (Rtd) Md. Matiur Rahman Vs. State—Bail not to be withheld as a punishment. Reasonableness to grant bail in case of apprehension that the case may be further delayed and the appellant will suffer due to prolonged custody-Allegation of overthrowing the Government by the petitioners and his followers—After investigation police submitted charge sheet-No. scope for tampering with evidence—Prolonged custody without trial-58 accused persons named in F. I. R are all on bail except the petitioner—No material to distinguish the case of the petitioner with those of others who have been released on bail—The same privilege to be granted to the petitioners. **Held**—Long delay in holding the trial. Court found reasonable to allow the petitioners to be released on bail till the commencement of trial.

12 BLD 213 (AD)—Sree Manuj Kumar Saha Vs. State—When an application for bail is filed in a pending criminal appeal, whether the court should not ordinarily issue any Rule. **Held :** In a pending Criminal appeal when an appellant files an application for a bail, the court should not ordinarily issue any Rule. The Court may grant or refuse the bail or ask the petr. to come up with a seperate petition any may hear the State if necessary before disposing of an application for bail (Ref : 44 DLR 354 (AD)).

12 BLD 507—Mustafizur Rahman Vs. State—Petitioner present in court—Chairman of the Bangladesh Commerce and Investment and Member of Jatiya Sangsad, man of status in society—Case against him as alleged started by some interested quarter at the behest of his political enemies out of grudge to malign and humiliate—Apprehension of being hacled and humiliated by the police and his enemies if he goes to surrender before the Court of the Chief Metropolitan Magistrate, Dhaka—Hence compelled to prefer application

before the High Court Division for safety and security of his life and prestige.

12 BLD 440—Mojor General (Rtd) M. Shamsul Huq Vs. State—Anticipatory Bail—Sections 409/467/468/109-read with Prevention of corruption Act, 1947 (Act II of 1947)—Section 5 (2)—Accused not named in the F.I.R—In charge Sheet named as an accused. No formal warrant issued by the Upa-zila Magistrate as yet to the knowledge of the petitioner, aged 65, retired Army Officer and former Minister-Police very vigilant to secure his arrest-Petitioner's apprehension of subjection to harassment and humiliation during his movement from Dhaka to Matlab by police and political rivals-petitioner allowed adinterim bail in anticipation of his arrest by the police with direction to surrender before the Court of Upa-zila Magistrate within 10 days.

12 BLD 128—Majid Vs. State—Bail—Section 498/ 339C Cr. P.C— Trial could not be concluded within specified time-Co-accuseds moved the High Court Division-Rule issued and case pending hearing-impugned order of Sessions Judge stayed-most of the Co-accused persons enlarged on bail by the trial court and the High Court Division—Petitioner accused stand on the same footing-enlarged on bail.

7 BCR 143 (AD)—Abdul Hakim Vs. The State—Bail—For considering the prayer for bail the direct and over act alleged against the persons named in the F.I.R are required to be considered. If it were found that some of the accused persons although present and named in the F.I.R did not take any leading and active part in the alleged assault upon the deceased which caused his death and caused no other serious offence, they are entitled to bail—Merely because a person's name is mentioned in the F.I.R and charge-sheet along with others in a case under section 302 P. C does not automatically debar him from getting bail unless it is found that he is connected in some direct manner with the offence of murder.

6 BLD 7 (AD)— Md. Wasefuddin Vs. Habibur Rahman—Discharge of accused—Question of fresh enquiry—Improper prosecution by private persons for offences in connection with

any institution should be guarded—the proper procedure in such cases is to gear the institutional machinery for the purpose of bringing the culprits to book. Principal of a Private College should not be prosecuted without concurrence of the Governing body at the instance of private individual.

9 BLD 2 (AD)—S.M. Shahjahan Ali Tara Vs. The State—Whether refusal of bail on the ground that prima facie there was no illegality in the trial is proper—The appellant was tried in absentia and convicted under section 420 Penal Code and sentenced to R. I. for 7 years and fine of taka 35,000/- He contends, he surrendered to the court and was granted bail; the Court erred in not allowing withdrawal of the case against him—In the peculiar circumstances of the case the appellant is entitled to bail particularly when there is hardly any chance of his abscondence.

35 DLR 167—Khair Fakir Vs. The State—Bail is a very valuable right granted to an accused by the Court and once it is granted, it should not and ought not to be interfered with lightly except upon valid grounds and cogent reasons.

5 BLD 110 (AD)—Golam Sarwar Kamal Vs. The State—Anticipatory bail. From the facts stated in the petition and the circumstances mentioned therein, it appears that the appellant may reasonably apprehend that the police might arrest him to prevent his participation in the election. His arrest would dim or even destroy the chances of his winning the election. Political activities cannot be restrained even by the possibility of resorting to criminal prosecution. Bail granted to the appellant till one week after the postponed election (Ref : 4 BCR 472, 5 DLR 143 FC, 37 DLR 196).

3 BCR 86 (AD)—Treatment entails likelihood of risk of life, Bail may be granted (Ref : 1989 Pak Cr. LJ 1077 Karachi).

3 BCR 50 (SC)—Habibur Rahman Chowdhury Vs. The State—As a general rule bail should not be withheld as punishment unless the facts warrant such course.

2 BCR 161 (SC)—Yasin Vs. The State—In view of the allegation that rests on the statement of a single witness

recorded under section 164 Cr.P.C that she had seen Nasiruddin in the company of her husband co-accused Amaluddin and others in the parlour and she also saw these two appellants along with others carrying a person from that house the appellants should have been released on bail.

2 BCR 24 (SC)—Ala Meah Bepari Vs. The State—Circumstances to be considered for grant or refusal of bail. Appellants not mentioned in the FIR but subsequently mentioned at a much later date. A number of persons are also implicated in the crime, appellants are entitled to bail.

17 Pak. Cr. LJ 1499—Md. Rashid Vs. The State—Facts of absconsion of accused puts court on further alert while considering question of bail.

25 DLR 119—Abdus Sukkur Vs. the State—Bail application when made under section 498 must specifically mention this section in the cause title of the petition and the accused must surrender in court before the application is heard.

25 DLR 45 (SC)—Chowdhury Md. Khan Vs. Sanaullah—First Judge of the High Court refused bail. Later on a fresh application for bail was moved before another Judge of the same High Court who grant bail. Extreme impropriety that results from such course.

22 DLR 258 (SC)—Gulzar Hassan Shah Vs. Ghulam Murtaza—Cancellation of bail by High Court behind the back of the accused when moved by the prosecution against the Session Judge's order granting bail. High Court again moved by accused persons against cancellation order. High Court acts legally in granting bail once again (Ref : 8 DLR 118 FC).

22 DLR 216 (WP)—Shabeehul Hassan Vs. The State—Sessions Judge without considering prima facie aspect of bail application issude notice to prosecution. High Court directly entertained the bail application disapproving the practice of issuing notice. Each bail application should be scrutinised by Sessions Judge to consider its merits and if rejected, he should reject it instantly so that the aggrieved person could seek his

remedy in the superior courts without any let or hindrance. (Ref : 1 BSCD 115).

21 DLR 59 (SC)—Allah Diwaya Vs. The State—An appeal of special leave for bail is not an appeal like ordinary appeals. Bail should be allowed only on exceptional ground.

15 DLR 3 (SC)—Thoba and another Vs. The State—Murder charge—Court to be extremely cautious in accepting evidence when motive for crime is lacking.

15 DLR 2 (SC)—Ghulam Haider Vs. Karim Bakhsh—Bail—Supreme Court does not interfere in a case of bail, unless the circumstances are of an exceptional character so that refusal might entail risk of a grave illegality or clear abuse of process, or some gross act of injustice e. g. victimization. Bail offence under section 326 P. C—Bail not a matter of right.

10 DLR 452—Harsha Nath Pal Vs. The State—Bail—Second application for bail before the same court will not be entertained unless a new ground for modification of the earlier order has been made out. **Held :** This is a sufficient circumstance which entitles the petitioner to make the second application for modification of the previous order.

49 DLR (AD) 119—State Vs. Jobida Rashid—The law permits granting of bail even in a case where there are such reasonable ground for refusing bail, in the case of any woman or any sick or infirm person.

However, the respondent has not been granted bail upon these considerations but upon the view that there are no reasonable grounds for believing that she has been guilty of the offence alleged. The learned Attorney-General could not refer to any principle which has been allegedly violated by the High Court Division nor to any fact which has either been ignored or wrongly relied upon. (Ref : 17 BLD (AD) 163, 4 BLT (AD) 131; 2 BLC 75).

48 DLR 18—M. A. Malik Vs. State—An earlier application for bail having been rejected on merits discarding the ground taken therein similar application subsequently filed without any new ground cannot be considered.

Subsequent application must contain the information clearly about the earlier application (s) together with prominent heading such as second application or other application and so on and further that such application must be filed before the Bench which had rejected the earlier prayer(s), if of course that Bench is not in the meantime dissolved. (Ref : 3 BLT (HC) 32).

48 DLR 18—M. A. Malik Vs. State—The accused petitioner is enlarged on anticipatory bail as it appears that the informant's father is an influential man having easy access to the local executive authorities and in the facts of the case the apprehension of harassment cannot be ruled out.

48 DLR 599—Abdul Wadud Vs. State—Anticipatory bail—As the petitioner is not named in the FIR and the police were after him, they are directed not to arrest him, and if arrested, he should be enlarged on bail immediately. He is directed to surrender then to the magistrate and pray for regular bail.

49 DLR 116—Shahed Reza Shamim Vs. State—Bail in pending trial—The Magistrate ordered for further investigation and the investigation is still pending. It is not certain when the police will submit report after further investigation and when the case may be sent for trial. Considering the facts and circumstances the petitioner may be enlarged on bail.

49 DLR 200—Ahad Miah Vs. State—Restrictive order imposed by the District Magistrate upon liberty of movement of the petitioner enlarged by the High Court Division on anticipatory bail is stayed and the Magistrate's conduct is deprecated.

49 DLR 189—Jobaida Rashid, wife of Khondaker Abdur Rashid Vs. State—The petitioner, being a lady in custody for a considerable period of time and there being absence of materials that her husband, holding illegal fire-arms in their residence, has absconded, she is enlarged on bail.

49 DLR 229—Jobaida Rashid, wife of Khandakar Abdur Rashid Vs. State—Mere naming the accused in the charge-sheet without any prima facie material and the mere fact that

in the occurrence the Head of the State with his family has been murdered and that this is a sensational case cannot be a ground for refusal of bail. [Ref : 2 BLC 135].

50 DLR 242—Belayet Hossain Sharif Vs. State—Ordinarily when the petition is not pressed by the Advocate for the petitoner the same is rejected without expressing opinion. Since a Division Bench has already expressed opinion on the application and the judges differed in their opinion the difference should be resolved. There is no scope for not pressing the petition after it had been pressed and opinion expressed by the Division Bench.

50 DLR 242—Belayet Hossain Sharif Vs. State—Merely because a person is respectable, influential or highly placed in the society by reason of his being rich or educated or politically connected or otherwise holding important post or office he cannot avoid the due course of the law to appear before the courts below and use High Court Division as a substitute of the subordinate courts.

50 DLR 242—Belayet Hossain Sharif Vs. State—Power of granting anticipatory bail is very sparingly used by this Court to save a citizen from unnecessary harassment and humiliation in the hands of police on flimsy ground or with ulterior motive or out of political design. This power cannot be exercised in each and every case as a substitute to the exercise of such power by the court below. A person cannot be enlarged on anticipatory bail how high soever he may be unless conditions for granting such bail are satisfied.

50 DLR 242—Belayet Hossain Sharif Vs. State—Since the petitioner has meanwhile been enlarged on bail by the trial Court, the merit of the case is not touched while deciding the question of entitlement to anticipatory bail.

50 DLR 288—M. A. Sattar Vs. State—In view of long detention of the accused petitioner for about two years without knowing when the trial of the case can be concluded and in view of the fact that some of the accused persons standing on the same footing have already been granted bail, the acused-petitioner should be granted bail.

50 DLR 401—Abdur Rahman Molla Vs. State—Anticipatory Bail—the offence with which the petitioner has been accused of being punishable with death or imprisonment for life anticipatory bail cannot be granted though he is an elected Chairman.

50 DLR 577—Dr. Mominur Rahman alias Zinna and another Vs. State—The petitioners of the respective Rule could not satisfy with cogent reason and materials the cause for not surrendering before the Court below. Orders of ad interim anticipatory bail granted by this Court are recalled and the petitoners are directed to surrender to their respective bail bond.

51 DLR (AD) 137—Emran Hossain Vs. State—If the trial is not concluded within a reasonable time, the petitioner can pray for bail in the appropriate court.

51 DLR (AD) 162—Alaluddin Vs. State—In an appeal against a short sentence bail should be ordinarily granted in exercise of a proper discretion because usually it takes time to hear the appeal.

51 DLR (AD) 242—State Vs. Abdul Wahab Shah Chowdhury—The basic conception of the word "bail" is release of a person from the custody of police and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so.

51 DLR 51—KM Obaidur Rahman and others Vs. State— It is for the trial Court to piece together all the fragments of the evidence. Reading the statements under sections 164 and 161 Cr.P.C there appears now reasonable grounds that the petitioner may be parties to a criminal conspiracy for killing the 4 leaders in jail. So the prayer for bail is rejected.

51 DLR 506—Mir Shahidul Islam and others Vs. State—Ordinarily when warrant of arrest is issued against a person or a person is wanted in connection with a non-bailable offence of serious nature he is not entitled to get anticipatory bail. In this view, the ad interim anticipatory bail is recalled and the petitioners are directed to surrender to the Court below.

24 BLD 168 (AD)—The State Vs. Md Nurul Islam—The High Court Division and the Court of Session having concurrent power under section 498 of the Cr.P.C, the lower court should be moved first but it is not an inviolable biblical rule. In exceptional circumstances the higher court can also be moved.

18 BLD 172 (HC) —Md. Belayet Hossain Sharif Vs. The State—Anticipatory Bail—Power of granting anticipatory bail is very sparingly used by the High Court Division to save a citizen from unnecessary harassment and humiliation in the hand of the police on flimsy grounds or with ulterior motives or out of political designs. This power cannot be exercised in each and every case as a substitue to the exercise of such power by the Court below. [Per Kazi Ebadul Hoque, J]

18 BLD 172 (HC) —Md. Belayet Hossain Sharif Vs. The State—Anticipatory Bail—In the F.I.R there is no mention of any specific allegations against the petitioner. His name was simply mentioned as a former Director of the company. Therefore prima facie no offence was disclosed against him. If the petitioner was compelled to go to the trial Court there was a chance of his being unnecessarily harassed. In that view of the matter the High Court Division should allow the petitioner's prayer for anticipatory bail. [Per Muhammad Abdul Mannan, J.]

18 BLD 247 (HC)—Abdur Rahman Molla Vs. The State—On going through the application filed by the petitioner and also hearming his engaged Advocate the High Court Division was not satisfied as to the cause of his non-appearance before the Magistrate. Moreover, the offence with which he has been accused of being punishable with death or imprisoment for life anticipatory bail cannot be granted to the petitioner as simply because he happens to be an elected Chairman.

18 BLD 357 (HC) —Major (Retd.) M. Khairuzzaman Vs. The State—Where there is a possibility that the accused may abscond and tamper with the evidence in a case which provides for a sentence of death or imprisonment for life, the accused is not entitled to bail.

18 BLD 433 (HC) —Dr. Mominur Rahman alias Zinna and another Vs. The State— Only after disposal of a Rule confirming the adinterim bail by the High Court Division a subordinate Court would be competent to cancel the bail for misusing the privilege of such bail.

18 BLD 649 (HC)—Shaik Mohammad Aslam alias Md. Aslam alias Sweeden Aslam Vs. The State—There are reasonable apprehension that the accused-petitioner is an architect had direct complicity in the commission of offence of the tripple murder and hence the High Court Division held that the accused-petitioner is not entitled to get any bail in the instant case.

16 BLD 364 (HC) —Ghulam Faruk alias Ovi Vs. The State— When the F.I.R. shows that co-accused Momtazul Hoque Rafique shot at deceased Kafiluddin and thereby caused his death and the post mortem report show that the victim had a bullet injury on his body, it prima facie shows that accused Momtazul Hoque is responsible for murder. Mere presence of the petitioner at the place of occurrence is not prima facie enough to prove his involvement in the murder.

17 BLD 1 (AD) —Abdul Halim & ors. Vs. The State & others—Warrant of arrest without cancelling bail—Issuance of warrant of arrest without cancellation of the existing bail is neither proper nor legal. Since the accused prayed for time for moving the High Court Division for transfer of the case, judicial courtesy demanded that the learned Sessions Judge ought to have granted at least a short time for enabling the accused to move the High Court Division for Transfer of the case.

17 BLD 148 (HC)—Abdul Kader Faruque alias Mohd. Faruque Vs. The State—Gravity of the offence 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.

17 BLD 310 (HC)—Shahed Reza Shamim Vs. The State— Delay in holding trial provides ground for bail—The learned Magistrate ordered for further investigation of the case by the

police. It is not certain when such investigation will be completed and the case sent for trial to the competent Court. Trial of the case is likely to be delayed for unlimited period and this provides a special ground for bail.

17 BLD 366 (HC)—Jobaida Rashid Vs. The State—Mere incidentally naming the petitioner in the chargesheet without any prima facie material and the mere fact that in the occurrence the Head of the State with members of his family was murdered cannot be considered as good grounds for refusal of bail.

17 BLD 253 (HC) —Asik Miah and another Vs. The State—It appears from the F.I.R., charge-sheet, age certificate, post-mortem report that several accused persons threw stone including petitioner No. 1. The post-mortem report shows that there were seven injuries on the victim but it does not show any injury on the chest of the victim. From the school certificate it is found that at the time of the occurrence petitioner No. 1 was merely 14 years old. Considering the circumstances this Court held that the ends of justice will be met if the petitioner be enlarged on bail.

19 BLD 189 (AD)—The State Vs. Abdul Wahab Shah Chowdhury—Pre-arrest or anticipatory bail—There is no dispute that the prayer for pre-arrest or anticipatory bail can be made only under section 498 of the Code and under no other section of the Code. The High Court Division and the Court of Sessions have concurrnet power under the section.

19 BLD 4 (HC) —Probir Kumar Chowdhury alias Tinku and ors. Vs. The State—Anticipatory bail lost its force after submission of charge-sheet and taking of cognizance by the Court concerned. (Ref : 51 DLR 42).

19 BLD 173 (HC) —Nurul Islam & others Vs. The State—Anticipatory Bail—Power of granting anticipatory bail is very sparingly used by this Court to save a citizen from unnecessary harassment and humiliation in the hand of police on flimsy ground or with ulterior motive or out of political designs. This power cannot be exercised in each and every case as a substitute in the exercise of such power by the

court below. A person cannot be enlarged on anticipatory bail how high so ever he may be unless conditions for granting such bail are satisfied. [Ref : 4 BLC 274].

4 MLR 146 (AD) —Emran Hossain Vs. The State—Grant of bail to an accused in non-bailable case is direction of the court. The refusal of bail an arms case when trial was going on is not illegal. However if the trial cannot be concluded within reasonable time, accused may move fresh bail petition in appropriate court.

3 MLR 80 (AD) —Jafar Ali Bali Vs. The State—When the accused after obtaining ad-interim bail restored to seeking extension of the period of bail in a number of times, and the High Court Divison refused extension of the ad-interim bail and directed the accused to surrender in the Court of Session Judge in a case involing murder charge, there is nothing wrong in the said order. Further no order can be passed with regard to the bail of the accused when the bail petition is already pending before the High Court Division.

2 MLR 23 (HC) —Insar @ Kalu Vs. The State—The Code of Criminal Procedure 1898—section 498—When accused has been recognised by eye-witness in a murder case, he cannot be granted bail on the mere plea that other coaccused of same footing has been granted bail.

1 MLR 372 (AD) —Ashraful Vs. The State—Section 498-Bail When can be refused—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 petition is justified.

3 MLR 158 (AD) —Hamidul Haque Advocate Vs. The State—Anticipatory bail—Whenever an accused is wanted in a case pending before a court of Magistrate, the usual course is that the accused must surrender before the Magistrate and seek his release on bail. He cannot seek bail direct from the High Court Division merely on the allegation that there is apprehension of his not getting fair treatment. However when an accused is granted adinterim bail by the High Court Division such adinterim bail cannot be cancelled without directing him to surrender before the court of Magistrate within the date fixed.

4 MLR 291 (AD) —The State Vs. Abdul Wahab Shah Chowdhury—Anticipatory or pre-arrest bail—Both the High Court Divison and Court of Sessions have concurrent jurisdiction under section 498 of the Code of Criminal Procedure which is not ancillary and subsidiary to the provision of sections 496 and 497. The provision of section 498 is an exception to general rule of his Anticipatory or pre-arrest bail can only be grnated in extra-ordinary and exception circumstances having regard to the limitatios so that such exercise of power does not tantamount to judicial extravagance.

4 MLR 111 (HC) —Bachu Sheikh and 3 others Vs. The State—Grant of bail in non-bailable offence is the discretion of the Court. But in exercising discretion court shall have regard to the gravity of the offence.

4 MLR 111 (HC) —Khairuzzaman (M.) (Major retired) Vs. The State—Grant of bail—descretion of Court—In a non-bailable case both the Court of Sessions and the High Court Division can exercise the descretion in granting bail in suitable cases. In so doing the Court of Sessions as well as the High Court Division has to take into consideration the conditions provided under section 497 Cr.P.C. as both the Sections 497 and 498 are complementary to each other. Bail can not be claimed as a matter of right when investigation or trial of a case in non-bailable offence can not be concluded within the statutory period. In a case of gruesome murder where there is of absconsion of the accused and tampering with the evidence, bail can well be refused.

52 DLR 298 (HC) —Kawsar Alam Khan Vs. State—When on the face of it prosecution case appears to be absurd and preposterous it would be unjust to refuse bail however serious and grave the allegation may be, because in a free and civil society liberty of a citizen can neither be circumscribed nor made subservient to of capricious enforcers of law, more so, when incarceration without trial stretches over a year and a half, without any date for hearing in sight.

12 BLT 454 (HC) —Hazi Mohammad Selim Vs. The State—The case being dragged between the two opposite political parties and there being no chance of going away out of jurisdiction of Court by the petitioner and the allegations of threatening to the witnesses/tampering of evidence so brought against the petitioners by way of G.D. entires having not been proved through proper inquiry we are of opinion that the petitioner are entitled to remain on same bail. [Para-7]

12 BLT 158 (AD) —The State Vs. Md. Nurul Islam a Babul—Section 498 of the Code speaking of the High Court Division or Court of Sessions, we do not find any reason to curtail the jurisdiction of the High Court Division and thus to negate the intention of the legislature making the superior Court subservient to the court below. [Para-10].

8 BLT 76 (AD) —Probir Kumar Chowdhury Vs. The State—Anticipatory (pre-arrest) bail—pre-arrest bail should not be granted after submission of charge sheet and/or after cognizance of the offence taken by the trial court unless exceptional circumstances exist calling for exercise of a discretionary power under section 498 Cr.P.C.

3 BLT 253 (HC) —Md. Liton Vs. The State—Anticipatory bail—The High Court Division and the Sessions Court have concurrent jurisdiction under section 498 of the Code of Criminal Procedure in matters of bail---------If the petition for anticipatory bail are first moved in the High Court Division as a matter of routine, the jurisdiction of the Sessions Judge would become redundant. If the petitioner has any genuine apprehension of his arrest in connection with any cognigable offence, he should have moved the Sessions Judge under section 498 of the Code without moving this court first by passing the Sessions Judge, who has concurrent jurisdiction in the matter.

3 BLT 32 (HC) —M. A. Malik Vs. The State—Anticipatory bail when can be granted. Both the parties are men of money and reputation. The informant's father is a very respectable and influential man having easy access to the local executive authorities. The apprehension on the part of the accused

petitioner can not be as such ruled out as baseless and the petitioner can be enlarged on anticipatory bail.

3 BLT 32 (HC) —M. A. Malik Vs. The State—It is a party's previllege to renew the application for bail until such bail is granted. Once a petition for bail is rejected further application can be made and remedy does not only lie in an appeal.

7 BLT 233 (AD) —Afroza Manjur Vs. Md. Almasuddin & Ors. Observations—High Court Division which observing "We find that the grounds taken in this application are good grounds for bail to be agitated before the court below and not good grounds for anticipatory bail"—We are of the view that the observations are not inappropriate.

4 BLT 245(AD) —Abdur Rahim Vs. The State—The accused-Petitioner has-been in custody while the other two accused have-been released on bail who was alleged to have committed the same offence—the accused-petitioner cannot be kept in custody indefinitely in the name of holding trial, howsoever grave be the allegation. If the trial is not going to be held any time soon the petitioner should be released on bail.

5 BLT 131 (AD)—State Vs. Mrs. Jobiada Rashid—Bail for woman—The mere fact that in the occurrence the head of the state with his family has been murdered and the mere fact this is a sensational case cannot be a ground for refusal of bail to the respondent—The Law permits granting of bail even in a case where there are such reasonable grounds for refusing bail in the case of any woman or any sick or infirm person.

6 MLR 356-356 (HC) —Mashiur Rahman (Md.) @ Kana Babul Vs. The State—Grant of bail in non-bailable offence—Long delay in completion of investigation- Long delay in completion of investigation may render ground for granting bail to the accused in case of non-bailable offence.

6 MLR 309-310 (HC) —Khairul Alam (Md.) alias Masum Vs. The State—Grant of bail in non-bailable offence—Bail of accused—Upon rejection repeated bail petitions are permisible. So is the case with appeal against rejection of bail petition-When investigation could not be completed within the specified time and when the accused is in custody for long

time, the accused in such case of non-bailable offence may be granted bail as provided under sub-section (4) of section 339C of Code of Criminal Procedure, 1898.

9 BLC 267—State Vs. Md Abdus Sattar and ors—The Appellate Division expressed their dissatisfaction about the High Court Division, who failed to consider the observations made by the Appellate DSivision while disposing of the criminal petitions for leave to appeal filed by the accused respondents for their bail. However, when the accused respondents have remained on their bail at that stage.[Ref: 24 BCR (AD) 104].

9 BLC 587—Abdul Halim Gazi and ors Vs. State— There is neither any law and principle nor any judicial pronouncement of superior Courts of this sub-continent nor any authority had been placed before the High Court Division regarding granting of anticipatory bail for the second time on the legal funeral of first anticiparory bail.

9 BLC 156—State Vs. Md Nurul Islam Bbul—Without exhausting the lower tier of Judiciary an application for bail can be filed before the High Court Division in exceptional circumstances.

6 BLC 65 (AD) —KM Obaidur Rahman and another Vs. State (Criminal)—The prosecution in this case is trying to establish that these two petitioners were parties in the conspiracy to commit the murder of four national leaders inside the jail and when there is such an allegation and when the case is at the trial stage the High Court Division has not committed any illegality in refusing to enlarge the petitioners on bail. The High Court Division also took notice of old age and illness of the petitioners and directed for their proper treatment in appropriate hospitals.

6 BLC 320 (HC) —Jasmine Nahar Vs. State and another (Criminal)—The victim petitioner neither admitted the offence committed by the accused persons nor she brought any allegation against the accused persons, rather she contradicts the charge-sheet and hence the victim petitioner was released from the judicial custody.

6 BLC 352 (HC) —Sadek Biswas and others Vs. State (Criminal)—Adverting to the allegations made in the First Information Report, the gravity of the offence and the specific parts played by the accused-petitioners in committing macabre murder do not warrant any feature granting bail to accused-petitioners.

6 BLC 530 (HC) —Captain (Retd.) Nurul Huda Vs. State (Criminal)—From the Medical Report it is not manifested that the life of the accused petitioner is in imminent danger and he is required to be released on bail. From the FIR, charge-sheet and materials on record it appears that there are resonable grounds leading to inference of guilt of accused-petitioner and his complicity in commission of crime disentitling him to concession of bail and such concession of bail cannot be extended to the petitioner on the ground of delay in commencement of trial when the offence is grave in nature and there existed reasons for such delay and when the date for holding trial has already been fixed on 10.11.2001.

6 BLC 539 (HC) —Mashiur Rahman (Md) alias Kana Babul Vs. State (Criminal)—Considering the alleged part attributed to accused-petitioner in the FIR that he inflicted a knife blow on the jaw of the mouth of the victim and from post-mortem report that such injury was not so much grave to endanger the life of a person and long delay in completion of investigation, the accused petitioner is released on bail.

6 BLC 586 (HC) —Babu alias (Md) Asaduzzaman Babu Vs. State (Criminal)—In the first information report specific part of firing by pistol, revolver, shooter and other fire-arms causing murderous assault upon victim Sachchu, who ultimately succumbed to the fire-arm injuries, had been assigned to a good number of assailants accused persons but the accused-petitioner has not been attributed to any fire-arm injury. The part attributed to accused-petitioner is creating panic by firing through fire-arms causing no injury to any person. In such facts and circumstances of the case the accused petitioner deserves to be enlarged on bail.

6 BLC (HC) 457—Jasimuddin alias Five Star Jashim Vs. State (Criminal)—There should be no discrimination in the

exercise of discretion while granting bail to accused persons standing on equal footing but that principle has also not been adhered to by the Court below by refusing to grant bail to accused Jashimuddin. In the facts and circumstances of this case, no bail ought to have been granted to any of the accused persons.

7 BLC (HC) 432—Patwary Rafiquddin Haider Vs. State and another (Criminal)—Anticipatory bail-Informant Syeda Tania as plaintiff has instituted an Other Class Suit against the petitioner challenging kabinnama and the present criminal proceeding has been launched against the petitioner by informant on the accusation of alleged forgery committed by the petitioner and the subject matter of Other Class Suit and criminal proceeding laid by informant against the petitioner has been same and that the petitioner as plaintiff, also, laid a Family Suit against informant for decree of restitution of congugal right and both the petitioner and informant filed cases against each other and they are at logger-heads, facts and attending circumstances of the whole matter and the authoritative pronouncement of the Apex Courts and gamut of the whole legal perspects that it will be just and proper to exercise judicial discretion in granting anticipatory bail to petitioner till submission of police report on completion of investigation to be performed by police in the event of registration of Non FIR case into first information report case.

21 BLD (AD) 91—Hussain Md Ershad Vs. The State—Bail Although the High Court Division itself found that the co-accused and the appellant were on the same footing, the appellant was denied bail because of his responsibility in the matter as the President of the country. This was hardly a good logic as he merely approved the purchase of Radar for the Air force as recommended by the Air Chief. The President's decision may have been wrong or motivated, which is to be decided at the trial but for the purpose of bail there was no reason to discriminate between the accused.

21 BLD (HC) 323—Cahptain (Rtd) Nurul Huda Vs. The State—The Court while considering a bail application under section 498 of the Code is to take into account the nature and

gravity of the offence. In a charge of macabre murder where specific part is attributed to an accused, the High Court Division will sparingly exercise its discretion in granting bail. It is only in a very exceptional case where the life of an accused is in imminent danger, established by medical evidence, the discretion may be exercised in a given case.

21 BLD (HC) 323—Captain (Rtd.) Nurul Huda Vs. The State—Delay-Bail' Delay in holding trial in all cases and circumstances is no good ground for granting bail to an accused person, specially when he stands arraigned of a crime punishable with death or imprisonment for life.

4 BLC (AD) 195—State Vs. Abdul Wahab Shah Choudhury—Per ATM Afzal CJ : The main circumstance as would entitle an order for extraordinary remedy of pre- arrest bail is the perception of the Court upon the facts and materials disclosed by the petitioner before it that the Criminal Proceeding which is being or has been launched against him is being or has been taken with an ulterior motive political or otherwise for harassing the accused and not for securing justice in a particular case.

4 BLC (AD) 195—State Vs. Abdul Wahab Shah Choudhury—ATM Afzal CJ: Anticipatory bail -When it can be considered—This prayer, extraordinary as it is, can only be considered when it appears to the Court that the purpose of the alleged proceeding as far as the accused is concerned is not what it purports to be but to achieve a collateral purpose by abusing the process of law, such as harassment, humiliation etc. of the accused which cannot be permitted.

Although charge was framed on 12-8-95 there has been no progress in the trial because of stay order granted by the High Court Division and such indefiniteness of trial is sufficient to allow the appellant to continue of the bail granted to him. *Hussain Md Ershad Vs. State 5 BLC (AD) 80.*

4 BLC 516—Sultan Vs. State—Considering the First Information Report, charge sheet and order sheets it is found that the accused petitioner is not a First Information Report named accused and the police submitted charge sheet against

him only on the basis of purported confession made by him and another accused to the police and hence the accused petitioner is entitled to be released on bail.

5 BLC 177—Adhir Mondal Vs. State—The petitioner having not been named in the FIR but he was named in the charge sheet with the allegation that he might be involved in the killing because of land dispute and he has been in custody since 13-9-98. Considering the facts and circumstances of the case and that the petitioner has remained in custody since 13-9-98 and he was not aware of the occurrence, the petitioner was enlarged on bail.

5 BLC 661—Selim (Md) @ Khokan Vs. State—As the Civil Surgeon opined the specialised treatment required for the patient which was not available in the jail hospital, a direction was given to shift the accused petitioner to the Bangladesh Medical University, Dhaka from Central Jail, Jessore for proper treatment.

5 BLC 108— Zakir Hossain (Md) Vs. State—Considering the submission of both the sides and perusing the said report of corruption inside the district Jail by the Jailor and employees of the said jail and the certificate issued by the Editor of the said weekly to the effect that the petitioner has been working as a staff reporter of the said newspaper, the petitioner was enlarged on bail.

24 BCR 229 (HC)—Patwary Rafiquddin Haider Vs. The State and another—Anticipatory Bail-Petitioner and the informant are, also , at logger-heads and Suits are pending in the Second Court of Assistant Judge, Ctg-Allegation against the petitioner before us is that he forged Affidavit and Kabbinnama and the alleged act of forgery has become subject matter of a suit in the Second Court of Assistant Judge at Ctg.

499. Bond of accused and sureties.—(1) Before any person released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend

at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court Division, Court of Sessions or other Court to answer the charge.

Scope and application—The provisions laid down in this section as to the nature and contents of the bail bond are imperative and must be strictly followed. It is the court granting bail which has to determine the sufficiency of the bond as well as the sureties. Form No. XLII is prescribed in Schedule V—Forms for that purpose. When the bail bond is not in accordance with this form, the person executing it incurs no liability (AIR 1957 (SC) 587). The court cannot require security in the form of a bank guarantee (1980 P. Cr. LJ 323).

33 DLR 146—R.K.M. Raza Vs. The State—Section 499 nowhere speaks of any cash security. The law makers appear to have incorporated in section 513 a concession to the accused to enable him in circumstances when he is unable to produce his surety to offer cash deposit in lieu of the bond required under section 499.

25 DLR 119 (AD)—Abdus Sukkur Vs. The State—Grant of bail upon the fulfilment of conditions embodied in bail bond is not valid in law.

22 DLR 175 (WP)—Haji Abdul Gani Vs. The State—If obligation to appear in the transferee court is not specified in the bond, the surety cannot be penalised for failure of the accused to appear in that court. No court other than the one before which the accused was bound by the bond to appear can forfeit the bond.

22 DLR 145 (WP)—Md. Salim Vs. The State—Magistrate granting bail should verify solvency of surety himself and not act upon the advice of others.

15 DLR 429 (SC)—Mia Mahmud Ali Qasuri Vs. The State—Condition that the accused admitted to bail shall desist from

repetation of offence with which he is charged cannot be incorporated in bail bond. The imposition of such a condition and its incorporation in the bond can not be considered to be ancillary to powers to grant bail.

4 DLR 352—Lakshmi Narayan Vs. The Crown—On the language of section 499, Sessions Judge and Magistrates have no power whatever to impose any condition at all when they grant bail.

500. Discharge from custody.—(1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and when he is in jail, the Court admitting him to bail shall issue an order of release to the officer-in-charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

Decisions

15 BLD 231—Nurul Hoque Vs. Bazal Ahmed—The term 'discharge' has not been defined in the Code of Criminal Procedure but nevertheless the word "discharge" connotes different meanings in different contexts. When an accused is discharged pursuant to a final report by the police, it means that the accused has been discharged from custody under section 500 of the Code and not discharged from the case. In such a case a second prosecution is permissible in law as the order of discharge was not passsed on merit. If cognizance is taken on the basis of a fresh complaint, or a naraji petition, which also amounts to a fresh complaint, there can be no objection to the proceedings at all.

48 DLR 327—Nurul Hoque Vs. Bazal Ahmed and 3 others—When an accused is discharged pursuant to a final report that means that the accused has been discharged from custody under section 500 of the Code and not discharged from the case.

501. Power to order sufficient bail when that first taken is insufficient.— If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do may commit him to jail.

502. Discharge of sureties.—(1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

CHAPTER—XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

503. When attendance of witness may be dispensed with. Issue of commission and Procedure thereunder.—(1) Whenever in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Metropolitan Magistrate, a District Magistrate, a Court of Sessions or the High Court Division that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

(2), (2A) Omitted.

(2B) **Issue of commission and procedure thereunder.** When the witness resides in the United Kingdom or any other country of the Commonwealth other than Bangladesh or in the Union of Burma, or any other country in which reciprocal arrangement in this behalf exists, the commission may be issued to such Court or Judge having authority in this behalf in that country as may be specified by the Government by notification in the official Gazette.

(3) The Magistrate or officer to whom the commission is issued, or if he is the District Magistrate, he, or such Magistrate, of the first class as he appoints in this behalf shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

504. Commission in case of witness being within a Metropolitan Area.—(1) If the witness is within the local limits of the jurisdiction of any Metropolitan Magistrate, the

Magistrate or Court issuing the commission may direct the same to such Metropolitan Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

(2) When a commission is issued under this section to the Chief Metropolitan Magistrate, he may delegate his powers and duties under the commission to any Metropolitan Magistrate subordinate to him.

505. Parties may examine witnesses.—(1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue and when the commission is directed to a Magistrate or officer mentioned in section 503, such Magistrate or the officer to whom the duty of executing such commission has been delegated shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by advocate, or if not in custody, in person and may examine, cross-examine and re-examine (as the case may be) the said witness.

506. Power of Subordinate Magistrate to apply for issue of commission.—Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Metroplitan Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which under circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

Decisions

28 DLR 20—Begum Nurunnessa Reza Vs. Akhlakur Rahman—The Judicial authorities have stressed the

desirability of examining important witnesses in court to enable it to note their demeanour and assess their credibility. Discretion to issue a commission however should be "sparingly exercised, and only in case of real hardship and incovenience" Although the word "pardah" does not occur in section 506, nevertheless it has been held in several cases that the word "inconvenience" may include inconvenience to a witness which includes pardah in cases of ladies who observed the same. As such, any one claiming to be a pardanashin lady must satisfy the court that she observed pardah.

1954 PLD 9 Pesh—Statement purporting to be doctor's evidence taken on commission simply "Yes" to two interrogatories without any detailed reference to injuries. Held : Doctor not properly examined.

507. Return of commission.—(1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Evidence Act. 1872, may also be received in evidence at any subsequent stage of the case before another Court.

508. Adjournment of inquiry or trial.—In every case in which a commission is issued under section 503 or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonable sufficient for the execution and return of the commission.

508A. Application of this Chapter to commissions issued in Burma.—The provisions of sub-section (3) of section

503, section 504 and so much of section 505 and 507 as relates to the execution of a commission and its return by the Magistrate or officer to whom the commission is directed shall apply in respect of commissions issued by any Court or Judge having authority in this behalf in the United Kingdom or in any other country of the Commonwealth other than Bangladesh or in the Union of Burma or any other country in which reciprocal arrangement in this behalf exists under the law in force in that country relating to commissions for the examination of witnesses, as they apply to commissions issued under section 503 or section 506.

Revision—Revision lies before the Sessions Judge under section 435 and 439A Cr.P.C against the order of the Magistrate and before the High Court Division against the order of Session Judge as a trial Court.

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