

## **Under Trial Prisoners 'Right to Bail and Dynamics of Bail Jurisprudence in India'**

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### **Abstract**

*The idea of bail is noble in criminal jurisprudence. The provisions are incorporated into the criminal justice system to give effect to the personal liberty mentioned in the Indian Constitution. But despite various judicial and legislative measures the extent and duration of under trial incarceration amongst prisoners is on the rise. The Apex Court as a protector and harbinger of human rights, through its solicitous inquiry on various occasions highlighted the plight of the under trials. It quickly fades into the backdrop. A systematic overhauling and reform in the Indian bail jurisprudence is imperative for a true ameliorative impact on the condition of under trial prisoners.*

### **Keywords**

*Under trial, bail, Jail, criminal justice system, Constitution, Presumption of innocence, Personal liberty.*

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## **Introduction**

*“Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and essential requirement of a modern man”*

- John EED. In essays on freedom of power<sup>1</sup>

Jails in India are flooded with under-trial prisoners as more than 2/3rd of the prison inmates constitute under-trial prisoners which means 70% of the Indian prisoners are under trials and they are in jail without their guilt proven. According to the Prison Statistics of India Report, 2019 the present occupancy, capacity of jails in India is 4, 03,739 but the actual occupancy is 4, 78,600 inmates which is 118%<sup>2</sup>. These shocking numbers are testimony of the gross violation of the basic principles of criminal jurisprudence. The provision of bail is an extension of the basic principles of the criminal jurisprudence.

The presumption of innocence is the fundamental postulate of criminal jurisprudence. A person is presumed to be innocent unless proven guilty however there are instances in our criminal law where this cardinal principle of criminal jurisprudence has been violated and more and more persons are being incarcerated for an indefinite period. Bail is the rule and putting the person behind the bars is an exception but these principles appear to have been lost sight of with the result that there is a huge population of under-trials languishing in jails awaiting trial.

In this paper an attempt has been made to explore and analyze the various dimensions of the right to bail available to under trials and the changing jurisprudence of bail within the criminal justice system. Also, an attempt has been made to examine the object and scope of bail in the right of personal liberty of a person accused of an offense and the importance of that personal liberty under our constitutional regime.

## **Meaning and Object of Bail**

The very concept of bail germinates from a presumption of accusatorial system of “presumption of innocence” unless proven guilty. An individual’s Liberty is a fundamental right guaranteed under Article 21 of the Constitution as it operates within the domain of a criminal justice system which cannot be compromised unless he is proven guilty.

The term bail has not been defined in law but it has been expressed as a surety inclusive of a personal bond from the accused. It means the conditional release of an accused from either by the orders of the court or by the police or by the investigating agencies upon the solemn undertaking that he would cooperate both with the investigation and trial.

The word bail has been defined in Black's Law Dictionary "as a security such as cash or bonds especially, security required by a court for the release of a person who must appear in court at a future time".<sup>3</sup>

Although the term bail has not been defined in the law only the term bailable offence and non bailable offence has been defined under section 2(a) of CrPc.<sup>4</sup>

#### **The Different kinds of Bail are**

- **Regular bail:** Under section 436 CrPc bail can be claimed as a matter of right in bailable offenses and under section 437 CrPc bail can be granted to a person accused of a non bailable offense subject to the discretion of the court and not as a matter of right.
- **Anticipatory bail:** The provision of anticipatory bail is found under section 438 CrPc. It is also called pre-arrest or detention bail which is granted before the arrest to someone apprehensive of arrest for a non bailable offense. The law laid down in *Gurbax Singh Sibia versus the State of Punjab, 1980*<sup>5</sup> is based on the concept of anticipatory bail in India.
- **Interim bail:** It is granted for a short span of time before the final hearing for the grant of a regular bail or an anticipatory bail.
- **Default bail :** It is a bail granted to an accused under section 167(2) CrPc who is under judicial custody upon failure of an investigating agency to file a Charge sheet within the stipulated time period of 60 or 90 days as per the gravity of the offense. In *Bikramjit Singh v. State Of Punjab, 2020*<sup>6</sup> the Supreme Court has observed that the right of default Bail under section 167(2) CrPc is not merely a statutory right but a fundamental right that flows from Article 21 of the Constitution of India.

#### **Presumption of Innocence**

The presumption of innocence is a cardinal principle of law and has been acknowledged throughout the world. The innocence of an accused is presumed through a legal fiction.

Article 11(1) of the Universal Declaration of Human Rights (UDHR), Article 6(2) of the European Convention on Human Rights (hereinafter ECHR), Article 48(1) of the Charter of Fundamental Rights of the European Union (hereinafter EU Charter), and Rule 111 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter Nelson Mandela Rules) all support the presumption of innocence.

The onus or the burden to prove the guilt of the accused is on the prosecution in India. The presumption of innocence is an important facet of Article 21. In

Narendra Singh versus state of MP<sup>7</sup> the division bench held that the presumption of innocence is a human right and that the prosecution always carries the burden of proof. In Durham versus state of UP, 2018<sup>8</sup> it has been held that this cardinal principle of criminal justice appears to have been lost sight of with the result that more and more prisoners are incarcerated in jails for a longer duration.

### **Bail is the Rule and Jail is the Exception**

The principle that bail is the rule and jail is the exception is on the touchstone of Article 21 of the Constitution of India and has been well recognized throughout the repetitive pronouncements of the courts of law. The Law Commission of India in its 268th report observed that the principle of granting bail and jail be an exception rests upon the principles enumerated in the European Convention On Human Rights and also in the Universal Declaration of Human Rights.

The Honorable Apex Court of India has laid down this principle in the celebrated judgment of the State of Rajasthan versus Balchand @ Balia. [9] basing it on the fundamental right to life and liberty under Article 21 of the Indian Constitution.

Leaning in favor of the principle of granting Bail Krishna Iyer, J has observed in Gudhikanti Karasimhula versus public prosecutor, High Court of Andhra Pradesh<sup>10</sup> “The issue of bail is one of Liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of “procedure established by law”.

### **The Dynamics of Bail Jurisprudence in India**

The Honorable Apex Court of India in its repetitive judgments has laid down guiding principles for the grant of bail, the grant or refusal of bail is entirely within the discretion of the court and that discretion has to be exercised reasonably and judiciously Also conditions imposed for the grant of bail ought not to be so strict as to make the grant of bail a fanciful and an illusionary concept severed from reality.

“Courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties, it can safely release the accused on his personal bond in appropriate cases” With these words Justice, PN Bhagwati observed in Hussanaira Khatoon and others vs Home Secretary, State Of Bihar<sup>11</sup> that the under trials are in prison for decades, not because they are guilty but because they are too poor to afford a bail. Following Maneka Gandhi’s judgment<sup>12</sup> he read into fair procedure and discharged by Article 21 the right to a speedy trial and sublimated the bail process to the problems of the destitute and ordered the release of under trials whose imprisonment had exceeded the period of imprisonment on their personal

bond without sureties and held that” speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes a denial of justice”.

Justice Bhagwati, further observed that the state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability as “free legal services to the poor and needy is an essential element of just, fair and reasonable procedure”

In *Khatri versus State of Bihar*<sup>13</sup> the Honorable Apex Court expressed unhappiness over the records of dealing with blinded prisoners that neither legal aid was provided to these blinded under trials nor they were produced before the magistrates when the remand orders were passed. The court citing the mandate laid down in the *Hussainara Khatoons* case expressed with regret that the right to legal aid of an accused person declared as a fundamental right by the highest court of the land has been violated as many under trial continue to languish in jail without free legal aid and without any remand orders, “the provision inhibiting detention without remand is very healthy provision which enables the magistrate to keep a check over the police investigation and it is necessary that the magistrates should and force this requirement and where it is found to be disobeyed come down heavily upon the police”

Thus, the court brought into focus the Constitutional mandate of free legal aid together with observance of due process and section 167(2) CrPC. Further In *Mantoo Majumdar versus the state of Bihar* coming down heavily upon the magistrates for failure to comply with section 167 (2)CrPCthe court held that “the magistrates concerned have been mechanically authorizing repeated detentions unconscious of all the provisions which obligated them to monitor the proceeding which warrants such detention.”[14]

With these words the Court again upheld the under-trial right to personal liberty by invoking section 167 (2) CrPC and ordered their immediate release on their personal bond without sureties.

The Supreme Court has periodically issued one time directions for the release of prisoners in *Supreme Court legal Aid Committee versus Union of India*<sup>15</sup> *Shaheen Welfare Association versus Union of India*<sup>16</sup> and recently in 2016, the Social Justice Bench of the Supreme Court in *ReInhuman Conditions In 1382 prisons*<sup>17</sup> has prescribed comprehensive guidelines to take steps for the effective implementation of section 436A of the CrPCand ameliorate the condition of overcrowding in prisons.

The Hon’ble Supreme Court in the matter of *State of Maharashtra vs. SitaramPopat Vital*<sup>18</sup> has stated following factors to be taken into consideration, before granting bail to an accused person:

(i) The nature of accusation and the severity of punishment and the nature of evidence. (ii) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant. (iii) Prima facie material available on record for the satisfaction of the Court in support of the charge. The Hon'ble Supreme Court in the matter of Ram Govind Upadhyay vs. Sudarshan Singh and Ors<sup>19</sup> held that it is not necessary to grant bail but certain circumstances need to be considered while granting bail like where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterized as unreasonable.

The Hon'ble Supreme Court in the matter of Prahlad Singh Bhati vs. N.C.T. Delhi and Ors<sup>20</sup> has mentioned that the possibility for repetition of crime, the time lag between the date of occurrence and the conclusion of the trial, illegal detention, and undue and unreasonable delay in conducting trial are some relevant grounds which play an important factor in deciding the bail application. In the case of Satish Jaggi v. State of Chattisgarh & Ors.<sup>21</sup> It was held by the Supreme Court that at the stage of granting of bail, the Court cannot go into the question of credibility and reliability of prosecution witnesses which can only be tested during the trial. But it can only go into the question of the prima facie case established for granting bail. The Hon'ble Bombay High Court held in Stefan Mueller v. State of Maharashtra.<sup>22</sup> That it is well settled position of law that, the accused is entitled to be released on bail in bailable offenses. It is the responsibility of the concerned police officer, if he has arrested or detained the accused for a bailable offense and when the accused is produced before a Magistrate, it is the responsibility of such Magistrate too to inform him of his constitutional right to legal aid and to be released on bail.

In Sumit v. State of U.P.<sup>23</sup> it was held that even if other criminal cases are pending, the accused should be granted bail. Similarly, in Maulana Mohammad Amir Rishadi vs. State of U.P. and another<sup>24</sup> held that only the evidences collected during the investigation will be considered while hearing bail application and merely based on criminal antecedents, bail cannot be denied.

The Hon'ble Apex Court in UOI vs. KA Najeeb<sup>25</sup> has upheld that the access to justice and speedy trial are covered under the ambit of liberty guaranteed as a fundamental right under the Indian Constitution. In Paras Ram Vishnoi vs. CBI<sup>26</sup> has held that an undertrial cannot be kept in custody for an indefinite period awaiting trial. In Anokhi Lal Second Bail vs. State of UP<sup>27</sup> Allahabad High Court while deciding the second bail application of an undertrial, placed reliance upon the law laid down by the Apex Court and granted bail as there was no likelihood to conclude the trial expeditiously. In Re: Delay in release of convicts after grant of Bail<sup>28</sup> the Top Court took suo motu cognizance of not releasing 13 prisoners by prison authorities even

after granted bail by Courts and waited for orders to be received by Post. The Court exclaimed that “we are still looking at the sky for the pigeons to communicate the orders”. To protect the personal liberty guaranteed under the Indian Constitution. It further directed to submit a proposal within two weeks to implement (FASTAR) Fast And Secured Transmission Of Electronic Records System for immediate transmission of Courts orders for their execution.

The Supreme Court and the various High Courts on numerous occasions has directed the lower courts for expeditious disposal and in dealing the bail matters but in the recent years, it has been seen that the trial court’s unnecessary rejection of bail in a mechanical way has torn the very fabric of the bail system in India.. This dereliction of duty by the lower courts creates unnecessary work load on these higher courts. In dealing with the case of Satinder Kumar Antil v. Central Bureau of Investigation & Anr<sup>29</sup> The Supreme Court bench of Sanjay Kishan Kaul J. and M.M. Sundresh J. observed that “The problem is with the mindset. We may lay down a law but the mindset has to change... we endeavored to reduce the numbers of bail applications coming to this court. But the way our order is being interpreted, we will end up having more applications coming to this court.” The bench reprimanded the lower courts and urged them to change their mindset to restore the bail jurisprudence.

### **Conclusion**

Thus we find that the Supreme Court has a long cherished history of protecting the liberty of an accused in criminal cases. Specifically, on the subject of bail which is an integral part of most criminal proceedings and has held that granting bail should be the rule and not the exception. The Supreme Court observed that it had time and again stated that bail is the rule and committal to jail an exception. Refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution and therefore such refusal must be rare. Where delays in the disposal of criminal proceedings take place, the accused ought not to be kept in custody for an inordinately long time and must be released on bail except when under extremely rare circumstances it is not possible to do so. The system of bail is very crucial in our criminal law but the arbitrariness and corrupt practices that cause the harassment of the accused shake the very faith that has been bestowed on the judicial system. Thus, there must be adequate attention and action should be taken to put a halt to what is hostile to the principles of personal liberties that are quintessential for the existence of a democratic society .

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