
JUDICIAL DISCRETION IN GRANT OF BAIL

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The term 'bail' is derived from the old French verb 'baillier,' which means 'to provide or convey. Bail is the release of a detained individual to his sureties in exchange for security for his attendance at a specific location and time, subject to the jurisdiction and judgment of the Court. The Criminal Procedure Code establishes the regulations for granting bail, which governs bail procedures in India. The Court has been given considerable discretion over the amount of security, which means it can impose a monetary limit on the bond (SECTION 436-450). The exceptions specified in Section 437 of the code specify when a person can plead guilty to a non-bailable offence. Obtaining bail in such instances is not a right but a matter of the bench's discretion, which is primarily dependent on whether they believe the applicant is qualified for bail¹. This paper aims to determine the significance of discretionary power of the judiciary in the matter of bail.

TYPES OF BAIL

Depending on the stage of the criminal case, a person in India may ask for one of three types of bail.:

1. **Regular Bail:** Regular bail can be given to someone who has already been arrested and kept in police custody. Sections 437 and 439 of the CrPC allow a person to apply for regular bail.
2. **Interim Bail:** Interim bail is a bail that is granted for a set period. Interim bail is granted to an accused prior to the hearing for ordinary bail or anticipatory bail.
3. **Anticipatory Bail:** If a person believes he or she will be arrested for a non-bailable offence, he or she may petition for anticipatory bail. It is analogous to obtaining advance bail under

¹ Mukhopadhyay, Richaa. (2020). "Bail and judicial discretion," Latest laws.com, available at: <https://www.latestlaws.com/articles/bail-and-judicial-discretion-a-judicial-analysis/>

Section 438 of the CrPC. Section 438 bail is a bail before arrest, and if the Court has granted anticipatory bail, the police cannot detain the individual².

Bail cannot be denied unless the accused has committed a severe or terrible offence. Even if the offence is penalized by a severe sentence. If the Court feels the individual can escape the country, he will deny his bail application. Bail often imposes movement restrictions. It denotes that the individual is unable to leave the city or nation. If required, the lawyer must persuade the Judge that the person will attend the sessions. The Judge must also consider the possibility that the offender would use his or her influence to tamper with or taint evidence, compel witnesses, or impede the inquiry once freed. If there is even a slight chance of these events occurring, the Court will refuse the bail application. In addition, the probability of committing a crime after being released must be considered. The prosecutor must offer strong evidence in Court or submit a stringent objection to prevent bail.

CLASSIFICATION OF OFFENCES

According to the CrPC, there are two types of offences:

- a) Bailable
- b) Non-bailable

The gravity of the offence and the harshness of the punishment form the basis for this categorization. A bailable offence is usually less grave than a non-bailable offence. "Bailable Offence" means an offence that is listed as bailable in the First Schedule or that is made bailable by another legislation for the time being in force, and "non-bailable offence" means any other offence listed in clause (a) of Section 2 of the CrPC.

APPLICABILITY OF JUDICIAL DISCRETION UNDER CODE OF CRIMINAL PROCEDURE, 1973

Judicial discretion refers to the ability of judges to enact and interpret laws. Section 360 of the Code of Criminal Procedure allows courts to sentence offenders to probation, which constitutes the bulk of judicial jurisdiction. Bail is the defendant's protection, and it acts as a surety or assurance that the defendant will appear in Court when summoned. Sections 436 to 450 of the

² Atigre, Ameyprasad. (2020). "Critical analysis on bail and judicial discretion" ITJ, available at: <http://lawtimesjournal.in/critical-analysis-on-the-concept-of-bail-and-judicial-discretion/>.

Criminal Procedure Code, which deal with bail processes in India, include the regulations for the issue of bail.

The Court has been granted much leeway in evaluating the amount of protection in this case. Exceptions mentioned in section 437 of the code defines when the accused can take bail in a non-bailable offence. In such a case, obtaining bail is not a person's right but a matter of the bench's discretion, dependent on whether the Petitioner is qualified for bail. After a trial begins, it can go for years, if not decades, and if no parole is granted, the accused can suffer the same period in jail. The cause for the delay is a critical issue in this instance, and it has an impact on the exercise of judicial power in granting bail. As a result, judgements rendered in this regard with the discretion of judicial minds cannot be unreasonable or unlawful. Rapid justice necessitates quick judgements based on constitutional and other factors. The penal code is inconspicuous and lacks a complete set of circumstances for its award, leaving it totally to the discretion of judicial minds. Bail is, therefore, merely a question of court discretion, and problems involving one's liberty and the greater societal and public interest must be balanced to ensure a timely trial.

The judicial discretion to grant or deny bail should be based on long-established criteria. In the 2G case, the prosecution did not object to the issuance of release to five defendants, presumably because there was no fear that they might influence witnesses, tamper with evidence, or flee. In fact, the prosecution should not have objected to the grant of bail to those who applied for it: the distinction it sought to draw between five-year terms and seven-year terms, as well as those appearing in the main chargesheet and those appearing in the supplementary chargesheet, is artificial and illogical. The trial court is not obligated to issue bail just because the prosecution does not object, but is required to apply its mind independently, that discretion must be utilised prudently. In this instance, the trial judge made a severe error by denying bail. The trial court's conclusion that bail should be refused in order to provide a secure atmosphere for the witnesses to testify is unjustified. There should be genuine concern that witnesses would be intimidated. It is important to remember that imprisonment takes away a person's liberty, and even if he is eventually exonerated, there is no acceptable recompense for the period of lost liberty.

SITUATION IN INDIA: A DEPARTURE FROM THE ARTICULATED PATH

In the late 1970s, Justice V.R. Krishna Iyer warned, "Bail is the law, and prison is an

exception." However, in many situations, this has not been followed. The case of Rehana Fathima³ demonstrates how judges diverge from the course established. Rehana Fathima, a Body inequality campaigner, asked her two kids, ages 14 and 8, to paint her naked body above the navel. She recorded it and uploaded it to YouTube with the phrase "Body art and politics." She suggested that family members should spread the word and that greater sex education is needed to reduce violence against women. Everyone has the right to free expression and speech.

A criminal report was filed with the police department for potential breaches of the Protection of Children from Sexual Offenses Act, 2012 ('POCSO') and the Information Technology Act, 2000. The Kerala High Court heard her bail application. Despite dismissing the bail petition, the High Court-educated Judge analysed the case's merits and went to extraordinary measures to explain why her behaviour was not ideal. There is, however, no issue of bail jurisprudence. This is a dangerous method that strays far from the catena. The Judge should have inquired if the accused has a risk of jumping bail if it is granted and if custodial questioning is required. Those questions were neither posed nor addressed in the Order. The Judge has no objection to the Petitioner's naked body being painted on the interior of her home's four walls, but uploading the video is not authorized. The decision's final five pages are the most damaging. There is a protracted debate in our culture about the heightened position of a "mother." Women have long been stereotyped as tolerant moms in our patriarchal culture. Following such elucidation of the duty of an ideal mother, the learned Judge references Manu Smriti and the Holy Quran to this bail petitioner. As a result, these judgements result from a misunderstanding of the Court's viewpoint.

The educated Judge in representative democracy has forgotten that the party petitioning the Court is an equal person, just like any other Judge or government servant. She regards the Court as a service provider rather than a moral speaker. Thus, while trying their best and considering the legislation and some norms to follow for its application, the Indian criminal justice system remains dysfunctional in general, although dealing with some discretionary authority. There is also a need to alter the present bail system to consider the socioeconomic position of the majority of our people. The courts should consider the accused's socioeconomic condition, take

³ Padmanabhan, Prashant. (2020). "Rehana Fathima Case: A problematic bail order," available at <https://theleaflet.in/rehana-fathima-case-a-problematic-bail-order/>.

a humanitarian approach, and undertake background checks to prevent him from fleeing the legal system, culminating in restoring people's civil and other rights.

THE DISCRETION IN SANCTIONING BAIL CANNOT BE USED ARBITRARILY.

In Govind Prasad ⁴, the Supreme Court ruled that granting bail is a judicial, not a ministerial function. The discretion cannot be arbitrary. According to the Supreme Court in Harnairain Singh ⁵, this discretion must be exercised judicially, within the limitations set out in Section 437 of the CrPC, and considering the severity of the charge, the nature of the accusation, the severity of the punishment if convicted, the possibility of the accused fleeing the country if released on bail, the potential danger of evidence being manipulated with, health, age, and sex. In addition, the Court has the authority to impose whatever limitations it considers appropriate "in the interests of justice."

The Madhya Pradesh High Court granted bail to Vikram Bagri⁶, who had been jailed in the Ujjain jail for two months on allegations of assaulting a lady to insult her modesty under Section 354 of the Indian Penal Code. The Court made an unusual and disputed ruling, ordering the accused to pay a visit to the victim's house on Raksha Bandhan with a bag of sweets, insist on tying a Rakhi, and "commit to defending her to the best of his ability for all times to come." He was also instructed to give Rs 11,000 to the new sister as part of the Raksha Bandhan ritual and Rs 5,000 to her son for clothes and sweets. The fact that the injunction would have minimal effect on the proceedings is immaterial because it is discriminatory and undermines women's autonomy. Women require no defence since they are on a level with males. They should not have to defend themselves against people suspected of attempting to molest them. In India, Article 14 jurisprudence has evolved from the outdated notion that women are weak and require special care or protection.

When granting bail to Swami Chinmayanand , a former Union minister and BJP politician accused of sexual harassment of a female law student at his college, the Allahabad High Court

⁴ Govind Prasad vs The State of West Bengal, 1975 CriLJ 1249

⁵ Rao Harnarain Singh Sheoji Singh vs State, 1958 CriLJ 563

⁶ Bhargava, Ashish kumar. (2021, March 18). Supreme Court Cancels 'Tie Rakhi For Bail' Order In Sex Assault Case . *NDTV*. Retrieved April 29, 2022, from <https://www.ndtv.com/india-news/supreme-court- cancels-madhya-pradesh-high-court-order-directing-sex-assault-accused-to-get-rakhi-tied-by-woman-as-condition-for-bail-2393493>.

made statements against the survivor for not coming out about her painful experience of sexual assault. The habit of blaming victims should have ended long ago⁷.

CONCLUDING REMARKS

Bail is governed by the 'innocent till proven guilty' premise and that guilt must be established beyond a reasonable doubt. It should also be noted that denial of bail breaches the right to a fair trial because the accused has very limited contact with his attorneys, and that too in a highly regulated environment. The gravity of the offence should not persuade the judges; instead, they should evaluate the evidence and apply their thoughts rationally. A consistent checklist should be employed to guide the courts in issuing bail. The standard should require judges to deny bail only where there is a flight risk, a lack of cooperation on the side of the guilty, or a danger of evidence tampering. Bail conditions should consider the person's socioeconomic level and should not be unreasonable. Bail for the vulnerable has been made unavailable due to the requirement of surety in monetary consideration. Alternative forms of conditions may be imposed for the presence of the guilty at the trial. Conditions that are entirely unrelated to the bail topic or require a high level of surety unwittingly affect the socially vulnerable segments of society. The bail laws are entirely disconnected from the social reality of the nation.

Though bail is regarded as a right and formally equitable regulation, the provision of discretion leads to abuse of authority and a departure from the rule of law⁸. In all bail-related instances, the rule of law should direct judicial discretion, applied through reasoned decisions. The link between the terms and the issue of bail must be stated expressly in the ruling. When deciding on a bail appeal, the court must balance the individual's right to liberty and the larger public interest.

⁷ Mustafa, Faizan. (2020). "Discretion in bail can't be used arbitrarily," The Tribune, available at: <https://www.tribuneindia.com/news/comment/discretion-in-granting-bail-cant-be-used-arbitrarily-125345>.

⁸ Kaur, Bhavnish. (2020). "Bail reform: curbing judicial discretion," Samvidhi, available at: <https://www.samvidhi.org/post/bail-reforms-curbing-judicial-discretion>.

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