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# WHETHER THE COURT OF MAGISTRATE HAS THE JURISDICTION TO GRANT BAIL IN OFFENCES PUNISHABLE WITH DEATH OR IMPRISONMENT FOR LIFE?

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## ABSTRACT

The power of a Magistrate to grant bail in cases of non bailable offences is restricted if the offence is punishable with death or imprisonment for life. As per section 437 of the Code of Criminal Procedure, it is unambiguous that a Magistrate cannot grant bail if the accused is charged with an offence punishable with death or imprisonment for life. Different courts have interpreted the phrase 'death or imprisonment for life' differently causing confusion and uncertainty in the law. Some courts interpret the phrase conjunctively barring the Magistrate only in cases where both death or imprisonment for life is given as punishment. And some courts have interpreted the phrase disjunctively restricting the Magistrate in all cases in which the offence is punishable with either death or imprisonment for life. This difference in interpretation of the section has caused ambiguity in the scope of powers of a Magistrate to grant bail in offences punishable with death or imprisonment for life. In this paper, I intend to discuss case laws on this point, analyse the various judicial interpretations given in this regard and arrive at a correct and clear meaning of the section.

**Note:** The views expressed by me are my personal views and not that of the Government or any other institution.

The powers of a Court of Magistrate to grant bail in cases of non bailable offences are governed by section 437 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as the Code*). The section is worded widely giving ample discretion to the Magistrate to grant or refuse bail in cases involving non bailable offences. It starts inclusively stating that when a person accused of a non bailable offence is arrested without warrant and is produced before a Magistrate, he may be granted bail. But this power of the Magistrate to grant bail is limited in two scenarios, viz. firstly, if there are reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, and secondly, if such offence is a cognizable offence and the person accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years. Even in these two scenarios some discretion has been given to the Magistrate to grant bail if the accused is under the age of sixteen years or is a woman or is sick or infirm.

Despite the unambiguous wording of the section, there has been a lot of discussion and confusion about the powers of a Magistrate to grant bail in cases involving offences punishable with death or life imprisonment. The confusion stems from the phrase '*punishable with death or imprisonment for life*'. Some argue that the bar u/s 437 (1) (i) of the Code applies to only those offences which bear a punishment of death or imprisonment for life, in the alternate. And some argue that the section bars a Magistrate to grant bail in all offences which bear either death or imprisonment for life or both as punishment. In this paper, I intend to discuss case laws on this point, analyse the various judicial interpretations given in this regard and arrive at a correct and clear meaning of the section. The limits to the powers of a Magistrate to grant bail in non bailable offences are circumscribed within the correct interpretation of section 437 of the Code.

Under section 437 of the Code, a court of Magistrate is empowered to consider applications for bail in all non bailable offences, but bail is not to be granted if there are reasonable grounds to believe that the accused has committed an offence punishable with death or life imprisonment. Thus, the jurisdiction of the Magistrate to grant bail is ousted if there are reasonable grounds to believe that an offence punishable with death or imprisonment has been

committed by the accused. Even in this scenario, a limited discretion has been given to grant bail if the accused is under the age of 16, woman or sick or infirm.

The question of ambit of powers of the Court of Magistrate in cases punishable with death or imprisonment for life came before the Supreme Court in **Prahlad Singh Bhati v. NCT, Delhi and another**, (2001) 4 SCC 280<sup>1</sup>. In this case charge sheet u/s 302, 406 and 498A

IPC was filed against the accused before the Magistrate and bail was granted by him. The Supreme Court set aside the order while holding that to exercise power of bail under section 437 CrPC, the Magistrate must negate the existence of reasonable ground for believing that such an accused is guilty of an offence punishable with sentence of death or imprisonment for life. When there is no reasonable ground to believe that the accused had not committed an offence punishable with death or life imprisonment, the Magistrate has no jurisdiction to enlarge the accused on bail. Thus, a Magistrate may consider applications for bail in offences punishable with death or imprisonment for life, but she cannot grant bail if she is satisfied that there are reasonable grounds to believe that the accused has been guilty of such an offence. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of jurisdiction.

What is the standard on which the Magistrate should judge whether reasonable grounds exist or not? The Supreme Court in **Sundeep Kumar Bafna v. The State of Maharashtra**, (2014) 16 SCC 623<sup>2</sup> has given answers to this question. It was held that bail cannot be granted to a person accused of commission of an offence punishable with death or life imprisonment unless it is apparent to such a court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. It was observed, “*The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana v. Bhajan Lal, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence.*”<sup>3</sup> In the case of **State of Haryana v. Bhajan Lal** 1992 Supp (1) SCC 335<sup>4</sup>, the meaning of expression ‘the reason to suspect commission of an offence’ in section 154 Criminal Procedure Code came up before the Supreme Court. It was held that it is to be decided on case-to-case basis, whether

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<sup>1</sup> Prahlad Singh Bhati v. NCT, Delhi and another, (2001) 4 SCC 280.

<sup>2</sup> Sundeep Kumar Bafna V. State of Maharashtra, (2014) 16 SCC 623.

<sup>3</sup> *Ibid* at 636.

<sup>4</sup> State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335.

from the FIR and its annexures and the attending circumstances, a cognizable case was made out or not.

The judgement of the Bombay High Court in **State of Maharashtra v. Kaushar Yasin Qureshi and another**, 1996 SCC OnLine Bom 137<sup>5</sup> also offers guidance in this respect. The High Court elucidated that in the context of section 437 Criminal Procedure Code, the expression reasonable grounds connotes that there should be a rational or logical basis for inferring that a person is guilty of an offence punishable with life imprisonment or death. The jurisdiction of the Magistrate is not ousted merely because the police whimsically or arbitrarily or capriciously register a case for an offence punishable with death or imprisonment for life. It is only where there are reasonable grounds to believe that the accused is guilty of such an offence, that the Magistrate would have limited jurisdiction to grant bail if the case falls within the purview of proviso to section 437 (1) i.e. in the case of underage person, woman or sick or infirm. It was observed, *“In arriving at conclusion whether there are reasonable grounds to believe that a person is guilty of an offence punishable with death or imprisonment for life the Magistrate should examine the question whether a prima facie case is made out or not. He should not enter into a thread-bare analysis of the prosecution case. It is only in those cases where no prima facie case is made out would it be open to the Magistrate to grant bail on the ground that there are no reasonable grounds to believe that a person is guilty of an offence punishable with death or life imprisonment.”*<sup>6</sup>.

The ordinary grammar meaning of the phrase ‘*an offence punishable with death or imprisonment for life*’ in section 437 (1) Code of Criminal Procedure is that it covers either an offence punishable with death or an offence punishable with imprisonment for life. But a study of the judicial pronouncements shows that it has led to different interpretations of section 437 (1) Code of Criminal Procedure by different courts. One line of interpretation taken by some courts is that the phrase should be read conjunctively i.e., section 437 (1) Code of Criminal Procedure is applicable only to offences in which a sentence of both death *and* life imprisonment is prescribed. In other words, offences in which death or life imprisonment is given in the alternate. The other line of interpretation is that the phrase should be read disjunctively, meaning that the jurisdiction of the Magistrate to grant bail is ousted if there is

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<sup>5</sup> State Of Maharashtra v. Kaushar Yasin Qureshi and Another, 1996 SCC OnLine Bom 137. <sup>6</sup> *Ibid* at 490.

reasonable ground to believe that the accused is guilty either of an offence punishable with death or with life imprisonment.

Before going into the judicial pronouncements, let's briefly study the kind of punishments prescribed in the Indian Penal Code. Following are the classes in which sentences involving death or imprisonment for life can be categorized.

- i. **Offences punishable with death or imprisonment for life and fine:-** In the entire Penal Code there are only two sections in which the punishment prescribed is death or imprisonment for life and fine viz. ss. 121 and 302.
- ii. **Offences punishable with Death:-** There is only one section in which the punishment is prescribed is death viz. s. 303. This section has been struck down by the Supreme Court of India in **Mithu v. State of Punjab**, AIR 1983 SC 473.<sup>6</sup>
- iii. **Offences punishable with Imprisonment for Life:-** There are only a few offences for which the punishment is imprisonment for life and fine only. Eg. Ss. 311, 363 A (2), 388(2) and 389 (2).
- iv. **Offences punishable with Death, or Imprisonment for life, or Imprisonment for a lesser term or fine:** Eg. ss. 132, 305, 307 (2) and 396.
- v. **Offences punishable with Imprisonment for life, or Imprisonment for a lesser term and fine:-** There are many offences in this category. Most of them are triable by the Court of Session but some of them are also triable by the Court of First Class Magistrate. Offences though punishable with life imprisonment but triable by the Court of Magistrate are ss. 326, 377, 388 (2), 389 (2), 394, 409, 467, 472, 474 (2), 475 and 477.

Now, let us discuss the meaning of the phrase '*an offence punishable with death or imprisonment for life*' as understood by different courts in India.

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<sup>6</sup> Mithu v. State of Punjab AIR 1983 SC 473.

## THE CONJUNCTIVE LINE OF INTERPRETATION TAKEN BY THE HIGH COURTS OF KERALA, PUNJAB AND HARYANA AND BOMBAY

### I. THE HIGH COURT OF KERALA

In the case of **Satyan v. State of Kerala**, 1981 SCC OnLine Ker 147<sup>7</sup>, FIR u/s 326 IPC was registered, and the Magistrate had refused to grant bail to the accused on the ground that he had no power to grant bail u/s 437 (1) Code of Criminal Procedure, because s. 326 IPC is punishable with imprisonment for life. The High Court of Kerala, set aside the order of the Magistrate and held that the Magistrate was wrong in holding that he had no power to grant bail solely on the ground that s. 326 IPC is punishable with life imprisonment. The Court, while relying on the cases of **Mohammed Eussoof v. King Emperor**, 1925 SCC OnLine Rang 73<sup>8</sup> and **Tularam v. King Emperor**, AIR 1927 Nag 53<sup>9</sup> held that as long as an offence is triable by a Magistrate of First Class, it should not be viewed differently from any other offence triable by a Magistrate for which a lesser term of imprisonment is prescribed. It was decided that the Magistrate had power to grant bail u/s 326 IPC, as the offence was triable by the Magistrate. This decision of the Kerala High Court was followed by its own court in **Chellappan v. State of Kerala**, 1987 SCC OnLine Ker 210<sup>10</sup> also.

In **Mohammed Eussoof**<sup>11</sup> section 497 Code of Criminal Procedure, 1898 (*in pari materia* with s. 437, Code of Criminal Procedure, 1973) was under consideration. In section 497 of the old code the phrase ‘punishable with death or transportation for life’ has been used instead of ‘punishable with death or imprisonment for life’ as used in section 437 of the new Code. It was observed that offence punishable with transportation for life should not be treated differently from offences punishable with long terms of imprisonment. Slight difference in degree of possible punishment does not render one person less likely to put in an appearance than the other. On the other hand there is immeasurable difference in sentence of death and a sentence of life. With these observations, it was held that the phrase ‘death or transportation for life’ in Section 497 of the Cr PC, must not be taken as extending to offences punishable with

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<sup>7</sup> Satyan v. State of Kerala, 1981 SCC OnLine Ker 147.

<sup>8</sup> Mohammed Eussoof v. King Emperor, 1925 SCC OnLine Rang 73.

<sup>9</sup> Tularam v. King Emperor, AIR 1927 Nag 53.

<sup>10</sup> Chellappan v. State of Kerala, 1987 SCC OnLine Ker 210.

<sup>11</sup> *Supra* note 9.

transportation for life only. In **Tularam**<sup>12</sup> order of the Magistrate refusing bail on the ground that he had no discretion in cases in which sentence of transportation for life can be passed was challenged. The High Court while following the decision of Justice Doyle in **Muhammed Eusoof**<sup>14</sup> held that the phrase “death or transportation for life” in s. 497 does not extend to offences punishable with transportation for life only; and means only those offences for which death and transportation for life are alternative sentences; and that the Magistrate improperly refused to exercise the discretion vested in him by law of granting bail in the present case.

## II. THE HIGH COURT OF PUNJAB AND HARYANA

The question whether the Court of Judicial Magistrate First Class is entitled to grant bail in cases punishable with imprisonment for life, though it is the trial court came before the High Court of Punjab and Haryana in **Ramji v. State of Punjab**, 2000 SCC OnLine P&H 1276<sup>13</sup>. The High Court while relying upon **Muhammed Eusoof**<sup>14</sup>, **Tularam**<sup>15</sup> and **Satyan**<sup>16</sup> reached the conclusion that the bar contained in section 437 (1) (i) of the Criminal Procedure Code is restricted to only those cases where the offence with which the accused is charged with is punishable alternatively with ‘death’ or ‘life imprisonment’ and not in cases in which the offence is punishable with life imprisonment.

## III. THE HIGH COURT OF BOMBAY

The same question has come up before the High Court of Bombay in many cases, but its approach has not been consistent. In the case of **Kaushar Yasin Qureshi**<sup>17</sup> an FIR was registered u/s 323/326/114 IPC. Later on, the victim died, and the case was converted to one u/s 302 read with s. 114 IPC. Order of the Court of Magistrate granting bail was challenged before the High Court. It was held by the High Court that offence u/s 326 IPC is punishable with imprisonment for life and the Magistrate had no jurisdiction to grant bail in respect of it.

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<sup>12</sup> *Supra* note 10.

<sup>14</sup> *Supra* note 9.

<sup>13</sup> *Ramji v. State of Punjab*, 2000 SCC OnLine P&H 1276.

<sup>14</sup> *Supra* note 9.

<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 8.

<sup>17</sup> *Supra* note 5.

In **Hanuman Vishwanath Nehare v State of Maharashtra**, 2001 SCC OnLine Bom 200<sup>18</sup>, FIR was registered u/s 307 IPC and bail was granted by the Magistrate. Later on, the victim died and s. 302 IPC was attracted. The High Court of Bombay held that in respect of offences for which the maximum sentence prescribed is life imprisonment, but alternatively lesser sentence is provided, for instance ten years, the bar of section 437 would operate and such persons cannot be released on bail by the Magistrate as the Magistrate has no jurisdiction to grant bail to such persons under section 437(1), Criminal Procedure Code. In attempt to murder, if hurt is caused, the offence is punishable with imprisonment for life or imprisonment which may extend up to 10 years. Therefore, the Magistrate had no jurisdiction to grant bail and the bail order was set aside.

However, in cases of **Ambarish Rangshahi Patnigere v. State of Maharashtra**, 2010 SCC OnLine Bom 1968<sup>19</sup> and **Ishan Vasant Deshmukh v. State of Maharashtra**, 2010 SCC OnLine Bom 1593<sup>20</sup>, the High Court of Bombay has taken completely different approach. In **Ambarish Rangshahi Patnigere**<sup>21</sup>, offences u/s 467 and 409 IPC were involved. Both the offences are punishable with imprisonment for life, or imprisonment for 10 years and fine. It was observed that though the maximus sentence which may be awarded is life imprisonment, but both these offences are triable by a Magistrate of First Class. If the Magistrate is empowered to try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature. It was held that the restriction under section 437 (1), is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment or any other lesser sentence and is triable by Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application.

In the case of **Ishan Vasant Deshmukh**<sup>24</sup> an FIR u/ss. 417,420,465,468, 471 r/w 34 IPC was registered. The question whether the Magistrate was entitled to consider bail application when an offence is punishable with imprisonment for life was raised before the High Court of Bombay. It was held that the Magistrate is entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life. The decision of the

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<sup>18</sup> Hanuman Vishwanath Nehare v State of Maharashtra, 2001 SCC OnLine Bom 200.

<sup>19</sup> Ambarish Rangshahi Patnigere v. State of Maharashtra, 2010 SCC OnLine Bom 1968.

<sup>20</sup> Ishan Vasant Deshmukh v. State of Maharashtra, 2010 SCC OnLine Bom 1593.

<sup>21</sup> *Supra* note 21.

<sup>24</sup> *Supra* note 22.



Supreme Court in the case of **Prahlad Singh Bhati**<sup>22</sup> was discussed at length and it was concluded that the observations of the Supreme Court mean that if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Session, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the proviso attached to s. 437 Cr.PC. Thus merely, because an offence is punishable with imprisonment for life, it does not follow a Magistrate would not have jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions.

The discrepancy in the approach taken by the various single Judge Benches of the High Court was highlighted in the case of **Jyoti Kaur Kohli v. State of Maharashtra & Anr.**, Criminal Application No. 1289 of 2012, decided on 28.10.2013<sup>23</sup>. In this case, an FIR was registered u/ss. 498 A, 323, 377, 354, 506 (II) IPC. The order of the Magistrate granting bail was challenged before the High Court. It was contended that since the offence u/s 377 IPC is punishable with imprisonment for life or imprisonment for 10 years and fine, the Magistrate was not entitled to grant bail to the accused. It is to be noted that an offence under section 377 IPC is triable by a Magistrate but is punishable upto imprisonment for life. It was pondered upon whether notwithstanding the bar under section 437 (1) CrPC, a Magistrate can consider application for bail only because he has jurisdiction to try the case. It was observed that the view taken by the learned single judges in **Ambarish Rangshahi Patnigere**<sup>24</sup> and **Ishan Vasant Deshmukh**<sup>25</sup> needs to be reconsidered and a reference was made to a larger bench. So far, the reference is still pending before the High Court of Bombay.

From an analysis of the case laws discussed above, it is seen that in some cases, the High Courts have taken the view that a Magistrate can consider bail even in offences punishable upto imprisonment for life, only when the offence is also triable by her. The reason for disregarding the bar under section 437 (1) (i) Cr. P.C. is that the trial court should have power to grant bail in cases which are triable by it. In some cases, it has been held that the bar u/s 437 (1) (i) Cr. P.C. applies only to offences when the punishment of death sentence or imprisonment for life has been given in the alternate. According to the categories enumerated above there are only two sections in the Indian Penal Code in which the punishment prescribed is death or

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<sup>22</sup> *Supra* note 1.

<sup>23</sup> *Jyoti Kaur Kohli v. State of Maharashtra & Anr*, Criminal Application No. 1289 of 2012, decided on 28.10.2013.

<sup>24</sup> *Supra* note 21.

<sup>25</sup> *Supra* note 22.

imprisonment for life and fine viz. ss. 121 and 302. This interpretation makes the application of the bar under section 437 (1) (i) almost redundant. It cannot be the intention of the legislature to exclude majority of the serious offences from the bar of section 437 (1) (i) Cr. P.C.

It is submitted that the conjunctive line of interpretation is not the correct way of applying the section for it makes the purpose of the section impotent and it cannot be the intention of the legislature. In the upcoming paragraphs an endeavour has been made to explain why the conjunctive line of interpretation is wrong and the disjunctive line of interpretation is correct.

### THE DISJUNCTIVE LINE OF INTERPRETATION

The deliberation on the powers of a Magistrate to grant bail under section 437 (1) of the Code of Criminal Procedure is pivoted around the meaning of the phrase '*guilty of an offence punishable with death or imprisonment for life*'. The word '*punishable*' has been defined by the Supreme Court in the case of **Sube Singh v. State of Haryana**, (1989) 1 SCC 235<sup>26</sup> as liable to be punished or may be punished and not must be punished. In this case the appellants had been convicted under section 302 IPC and were sentenced to imprisonment for life. The appellants were seeking benefit of section 5 of the Punjab Borstal Act. The Act applies to an offence punishable with transportation or rigorous imprisonment under the Indian Penal Code, 1860 other than an offence punishable with death. An offence under section 302 IPC is punishable with death or imprisonment for life and fine. It was held that since section 302 IPC is punishable with death, the benefit of the Punjab Borstal Act cannot be given to the appellants. Even though, the appellants had been sentenced to life imprisonment but because under section 302 IPC, punishment of death penalty may also be pronounced, the benefit of the Act was not given to them.

Let us apply the above proposition to our discussion. The bar under section 437 (1) Code of Criminal Procedure is applicable to offences punishable with death or imprisonment for life. For many offences in the IPC, the punishment is imprisonment extending upto 10 years or imprisonment for life. In such offences the maximum sentence that a convict can be punished with is imprisonment for life. Thus, even if a convict is sentenced to 3 years of punishment, the

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<sup>26</sup> Sube Singh v. State of Haryana, (1989) 1 SCC 235 at page 239. <sup>30</sup> Code of Criminal Procedure, 1973, § 29.

offence that he is convicted of is punishable with imprisonment for life. Therefore, the bar under section 437 (1) (i) is applicable to such offences.

Now, there are certain offences in IPC triable by a Magistrate but punishable with imprisonment for life viz. ss. 326, 377, 388 (2), 389 (2), 394, 409, 467, 472, 474 (2), 475 and 477. A Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees, or of both<sup>30</sup>. Thus, even if an offence is punishable with imprisonment for life, a Magistrate can sentence a person to a maximum imprisonment of 3 years only. One may argue that since the maximum sentence that a Magistrate can inflict is only three years, the bar u/s 437 (1) (i) Cr.P.C. should not apply to such offences. This limitation in the powers of a Magistrate has led many courts to conclude that in offences triable by Magistrate, even if the maximum sentence is life imprisonment, the Magistrate can grant bail to the accused. This conclusion is against the meaning of the word 'punishable' as defined by the Supreme Court of India. 'Punishable' does not mean the actual punishment sentenced, but the punishment that may be passed. Under the Code of Criminal Procedure, any offence triable by a Magistrate may also be tried by the High Court or the Court of Sessions or the Chief Judicial Magistrate.<sup>27</sup> Further in cases when Magistrate is of the opinion that she cannot pass sentence sufficiently severe she may forward the accused to the Chief Judicial Magistrate.<sup>28</sup> Thus, even in offences triable by the Magistrate, the accused may be sentenced to a sentence of imprisonment higher than 3 years. Just because a serious offence having punishment of life imprisonment is triable by a Magistrate, it does not mean that the Magistrate has power to grant bail, ignoring the bar laid down in section 437 (1) Code of Criminal Procedure.

Though there is no direct case law from the Supreme Court on the subject, there are other legislations in which the phrase appears. The phrase 'punishable with death or imprisonment for life' appears in the section 4 of the Probation of Offenders Act also. The Supreme Court in the case of **Som Nath Puri v. State of Rajasthan**, (1972) 1 SCC 630<sup>29</sup> took the disjunctive line of interpretation in the application of the section. The appellant was convicted u/s 409 IPC, s 5 (2), r/w s. 5(1) (c) and (d) of the Prevention of Corruption Act. It was held that the benefit of section 4 of the Probation of Offenders Act can be given to a person

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<sup>27</sup> Code of Criminal Procedure, 1973, § 26.

<sup>28</sup> Code of Criminal Procedure, 1973, § 325.

<sup>29</sup> **Som Nath Puri v. State of Rajasthan**, (1972) 1 SCC 630.

found guilty of having committed an offence not punishable with death or imprisonment for life. Since, s. 409 IPC is punishable with imprisonment for life, section 4 of the Probation of Offenders Act was not applicable to him. The phrase ‘punishable with death or imprisonment for life’ has similar import in section 437 (1) Code of Criminal Procedure also and cannot be given a different meaning.

The approach taken by the High Courts of Kerala, Punjab and Haryana and Bombay is incorrect for they have heavily placed reliance on the cases of **Mohammed Eussoof**<sup>30</sup> and **Tularam**<sup>31</sup>. The judgment in the case of **Mohammed Eussoof** was later on overruled by a full bench of the Rangoon High Court in the case of **King Emperor v. Nga San Htwa**, AIR 1927 Rang 205<sup>32</sup>. In this case it was held that the decision in the case of **Mohammed Eussoof**’s case was erroneous and that the phrase must be read disjunctively as if it ran “punishable with death or punishable with transportation for life”.

The decision in the case of **Tularam v. King Emperor**<sup>37</sup> has also been reviewed by the Nagpur Bench in the case of **Emperor v. Mt. Janki and another**, AIR 1932 Nag 130<sup>33</sup>. In this case the interpretation of the phrase ‘not punishable with death or imprisonment for life’ as it appeared in section 562 of the Code of Criminal Procedure, 1898 (*in pari materia* with s. 360 Cr.P.C., 1973) was in question. It was observed that the conjunctive interpretation reading death or transportation of life as an inseparable phrase is wrong grammatically. The phrase death or imprisonment for life cannot be read as an inseparable phrase as such an interpretation would make the provision redundant. Example of section 303 IPC was taken, which is punishable with death only. If the conjunctive line of interpretation is adopted, section 303 is left out from the ambit of section 497 CrPC, which cannot be the intention of the legislature.

The High Court of Madhya Pradesh in the case of **Chetti v. State of MP**, AIR 1959 MP 291<sup>34</sup> and the Allahabad High Court in the case of **State v. Sheo Shankar**, AIR 1956 ALL 326<sup>35</sup> have also taken the disjunctive line of interpretation. In the case of **Chetti**<sup>36</sup> it was observed

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<sup>30</sup> *Supra* note 9.

<sup>31</sup> *Supra* note 10.

<sup>32</sup> *King Emperor v. Nga San Htwa*, AIR 1927 Rang 205. <sup>37</sup>

*Supra* note 10.

<sup>33</sup> *Emperor v. Mt. Janki and another*, AIR 1932 Nag 130, 1932 SCC OnLine MP 113.

<sup>34</sup> *Chetti v. State of MP*, AIR 1959 MP 291.

<sup>35</sup> *State v. Sheo Shankar*, AIR 1956 ALL 326.

<sup>36</sup> *Supra* note 39 at 292.

that if the phrase is given conjunctive interpretation, then the only offences excluded from the benefit of probation would be ss. 121, 302, 305, 307 (II) and 396, while in all other grave and heinous offences punishable with imprisonment for life, the section could be availed by the accused. It was opined that this could not have been the intention of the legislature. Both the decisions in the cases of **Chetti** and **Sheo Shankar** have been followed by the Orrisa High Court in the case of **Jogi Nahak v. The State**, 1964 SCC OnLine Ori 31<sup>37</sup>.

The High Court of Delhi has also dealt with this question time and again. In the case of **Priyanka v. State & Anr.**, 2015 SCC OnLine Del 9587<sup>38</sup> an FIR was registered u/ss. 354, 376 and 506 IPC. Bail was granted by the Magistrate to the accused persons. The question before the court was whether the Magistrate was competent to grant bail in a case u/s 376 IPC which entails minimum sentence of 7 years which may extend to imprisonment for life. (Prior to the amendment) The High Court held that the Magistrate failed to comply the provisions of section 437 CrPC in not negating whether reasonable grounds exist for believing whether the accused has committed an offence punishable with death or imprisonment for life. Reliance was placed on the case of **Prahlad Singh Bhatti**<sup>44</sup> and it was observed that in Sessions triable cases, the Magistrate should direct the accused to approach the Court of Sessions for bail. Further, if the Magistrate decides to exercise powers under section 437, the provisions of the section must be strictly complied.

A reference was made to the High Court of Delhi in **Court on its own motion v. State**, 2017 SCC Online Del 11099<sup>39</sup> with the question, “*Whether the Magistrate has power to grant bail in a case punishable with life imprisonment but triable by a Magistrate?*”. The Division Bench of the High Court answered the question in affirmative with the caveat that neither bar under sub clause (i) or (ii) of section 437 (1) CrPC, subject to the provisos there to, should stand attracted. In 2018, again a reference, “Whether this court (the court of Magistrate) can release the accused on bail charge sheeted without arrest under section 376 IPC or any other offence punishable with imprisonment of life or death in view of bar under section 437(1) Cr. P.C” was decided by the Delhi High Court in **Court on its own motion v. State**, 2018 SCC Online Del 12306<sup>40</sup>. The Division Bench of the High Court held that if there are reasonable grounds to

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<sup>37</sup> Jogi Nahak v. The State, 1964 SCC OnLine Ori 31.

<sup>38</sup> Priyanka v. State & Anr, 2015 SCC OnLine Del 9587. <sup>44</sup>

*Supra* note 1.

<sup>39</sup> Court on its own motion v. State, 2017 SCC Online Del 11099.

<sup>40</sup> Court on its own motion v. State, 2018 SCC Online Del 12306.

believe that an offence punishable with death or imprisonment for life is made out, the Court shall not consider releasing the accused on bail, unless the case falls under the two provisos to section 437 (1) Cr.P.C.

## **CONCLUSION**

In view of the discussion above, the following conclusions are arrived at.

- i. The bar under section 437 (1) (i) of the Code ousts the jurisdiction of the Magistrate to grant bail in cases where reasonable grounds exist for believing that the accused has committed an offence punishable with death or imprisonment for life.
- ii. The phrase ‘punishable with death or imprisonment for life’ must be given its ordinary grammatical meaning i.e. either death or imprisonment for life. Thus, even if a serious offence bearing punishment of imprisonment for life is triable by a Magistrate, the Magistrate has no jurisdiction to grant bail if she is satisfied that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life.
- iii. The Magistrate may exercise discretion to grant bail only in such cases where she has satisfied herself that there are no reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life. The Magistrate should consider all the materials placed before her and then arrive at the conclusion that the accused is innocent.
- iv. Lastly, the Magistrate may exercise jurisdiction in cases where there are reasonable grounds to believe that the accused is guilty of an offence punishable with death or imprisonment for life, if the accused is under the age of 16 years, is a woman or is sick or infirm.