CHAPTER – III

CLASSIFICATION OF OFFENCES AND BAIL MECHANISM

3.1 INTRODUCTION

The Criminal Procedure Code has classified offences into two groups, namely bailable and non-bailable depending on the gravity of the offences and the punishment.\(^1\) The main provision relating to bail in bailable cases is contained in Section 436, and relating to non-bailable cases is given in Section 437, the Criminal Procedure Code of 1973.\(^2\) The classification of offences into the two categories of bailable and non-bailable offences may be explained on the basis that bailable offences are generally regarded as less grave and serious than non-bailable offences. On this basis it may not be easy to explain why, for instance offences under Sections 477, 477A, 475 and 506\(^3\) of the Indian Penal Code should be regarded as bailable whereas offences under Section of 379 should be non-bailable. However, it cannot be disputed that Section 486 Criminal Procedure Code recognizes that a person accused of a bailable offence has a right to be released on bail.\(^4\)

The classification has been made for the obvious reason that seriousness and gravity of the charge and the severity of the punishment awardable are very probable factors which are likely to tempt an accused person either to tamper with the prosecution evidence or to abscond in order to escape the punishment. If a person is arrested for an offence which is non bailable, in that case court has discretion to can grant bail. The definition of a non-bailable offence appears in Section 2 (a) of the Code.\(^5\) Which provides that “Bailable offence”

\(^3\) Indian Penal Code, 1860.
\(^5\) Supra note 1.
means an offence which is shown as bailable in the first schedule or which is made by any other law for the time being in force and “non-bailable offence” means any other offence.⁶ Although Non-bail offences not defined directly in the code but in the definition of bailable offence itself and using word any other offence’ make it clear that the offences which not declared bailable are non-bailable.

3.2 MEANING OF BAIL

Bail simply the process of releasing a person which may be on his personal bond or on some security, bail is the post arrest process and before trial. In the criminal procedure code bail is not defined anywhere, but classification of offences into bailable and non-bailale offences made expressly or may be made after examining the gravity of offences. Grave offences to be made non-bailable, where bail not to be granting as a right but to be granted on examining certain factors by exercising the judicial discretion by courts on some just and human grounds.⁷

3.3 CLASSIFICATION OF OFFENCES

3.3.1 Bailable Offence

Bailable offence means an offence, which has been categorized as bailable, and in case of such offence, bail can be claimed, subject to fulfilment of certain conditions, as a matter of right under Section 436 of The Criminal Procedure Code, 1973. In case of bailable offences, the Police is authorised to give bail to the accused at the time of arrest or detention. As defined under Section 2(a) of the code – bailable offence means an offence which is shown as bailable in the

---

⁶ http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13_chapter%207.pdf
First Schedule, or which is made bailable by any other law for the time being in force; and non-bailable offence means any other offence.  

3.3.2 Non-bailable Offence

Non-bailable means an offence in which bail cannot be granted as a matter of right, except on the orders of a competent court. In such cases, the accused can apply for grant of bail under Section 437 and 439 of code. Grant of bail in a non-bailable offence is subject to judicial discretion of the Court, and it has been mandated by the Supreme Court of India that “Bail, not Jail” should be the governing and guiding principle.

3.4 OBJECTS OF BAIL

It is not the object of the criminal law to confine a person accused of crime before his conviction. Bail, in criminal cases is, therefore, intended to combine the administration of justice with the liberty and convenience of the person alleged accused. Administration of justice on the spot or immediately after the commission of a crime in accordance with the fundamental principles of natural justice embedded in a fair and just legal system is not feasible. This appears to be one of the reasons for the evolution of the bail jurisdiction in any legal system. The release on bail is crucial to the accused as the consequences of pre-trial detention are against the principle of presumption of innocence. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. As far as the administration of justice is concerned after the registration of crime, it takes

---

time to complete the investigation and thereafter, it takes even longer to conclude the trial. It is a matter of common experience that the judicial machinery, particularly in India, is ill-equipped to provide a speedy trial to the accused in conformity with well-established principles of criminal jurisprudence. The question, whether an accused should be kept in the prison or set free pending investigation and trial, is a matter of great concern in every criminal case where the accused is under arrest. An accused person cannot be detained in judicial custody for a long time by refusing him bail if the legal system is not in a position to provide a speedy trial. The inability of the judicial system to provide an expeditious trial to the accused should always be kept in mind while dealing with the issue of bail. Keeping a person behind bars without providing him a quick trial is quite incongruous to the concept of personal liberty, which is a basic human right. The under-trial prisoner, therefore, cannot be allowed to suffer in jail for an indefinitely long time.\(^{11}\)

The intention of legislature is to speed up trial without unnecessarily detaining a person as an under trial prisoner. This provision applies only to a case triable by a magistrate and not to a case committed to the sessions for trial. The intention behind the provision is that trial should be concluded within a period of 60 days from the first date fixed for evidence.\(^{12}\)

In bail applications, generally, it has been laid from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owes more than verbal respect to the principle that that punishment


begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.\textsuperscript{13}

Criminal Courts have been eternally faced with the dilemma as to whether or not to grant bail in offences of non-bailable nature. On the one hand, is the question of personal liberty of a citizen, while on the other, is the question of public interest. Interestingly, the concept of freedom in a political State in a wider sense was explained by Justice H.R. Khanna in the case of \textit{ADM Jabalpur v. Shivakant Hukla}\textsuperscript{14}, it was held that freedom under law, is not absolute freedom. It has its own limitations in its own interest, and can properly be described as regulated freedom. In the words of Ernest Barker,

\begin{enumerate}
\item The truth that every man ought to be free has for its other side the complementary and consequential truth that no man can be absolutely free.
\item That the need of liberty for each is necessarily qualified and conditioned by the need of liberty for all.
\item That the liberty in the State, or legal liberty, is never the absolute liberty of all.
\item That the liberty within the State is thus a relative and regulated liberty.
\item That a relative and regulated liberty, actually operative and enjoyed, is a liberty greater in amount than absolute liberty could ever be – if indeed such liberty could ever exist, or even amount to anything more than nothing at all.\textsuperscript{15}
\end{enumerate}


\textsuperscript{14} \textit{ADM Jabalpur v. Shivkant Shukla}, AIR (1976) 2 SCC 521.

3.4.1 Bail not to be Arbitrary

Bail or jail at the pre-trial or post-conviction stage belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, called judicial discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system that the crucial power to neglect, it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. Deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.\textsuperscript{16} Bail is granted to secure the presence of the person charged with crime at his trial or at any other time when his presence may lawfully be required and to force him to submit to the jurisdiction and punishment imposed by the court. Bail is never denied for the purpose of punishing a person accused of crime. The principal aim of bail is removal of restrictive and punitive consequences of pre-trial detention of an accused.\textsuperscript{17} Bail should not be refused only on the ground that the detune is trying to come out on bail and there is enough possibility of his being bailed out. But if there is possibility that the detune if bailed out, is likely to commit activities prejudicial to the maintenance of public administration than bail may be refused.\textsuperscript{18}

3.5 BAIL PROVISIONS IN BAILABLE AND NON-BAILABLE OFFENCES

In the matter of admission to bail, the Code of Criminal Procedure makes a distinction between bailable and non-bailable offences. The grant of bail to a person accused of a non-bailable offence is discretionary under Section 437, and the person released on bail may again be arrested and committed to custody by an order of the High Court, the Court of Session and the court

\begin{itemize}
\item \textsuperscript{16} Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, AIR 1978 SC 429 (para1) (1978) 1 SCC 240.
\item \textsuperscript{17} State of Rajasthan v. Balchand, 1977 AIR 2447, 1978 SCR (1) 535.
\item \textsuperscript{18} Shashi Aggarwal v. State of Uttar Pradesh, 1988 1 SCC 436.
\end{itemize}
granting the bail. The High Court and the Court of Session may release any person on bail and by a subsequent order cause any person so admitted to bail to be arrested and committed to custody. Whereas person accused of a bailable offence is treated differently. He may at any time while under detention without a warrant and at any stage of the proceedings before the court before which he is brought he has a right under Section 436 of Code, to be released on bail. The Criminal Procedure Code, 1973 makes no express provision for the cancellation of a bail granted in bailable offences. Nevertheless, if at any subsequent stage of the proceedings, it is found that any person accused of a bailable offence is intimidating, bringing or tampering with the prosecution witnesses or is attempting to abscond, the High Court has the power to cause him to be arrested and to commit him to custody for such period as it thinks fit. This jurisdiction springs from the overriding inherent powers of the High Court and can be invoked in exceptional cases only when the High Court is satisfied that the ends of justice will be defeated unless the accused is committed to custody. This inherent power of the High Court exists and is preserved by Section 482 of the Code. The person committed to custody under the orders of the High Court cannot ask for his release on bail under Section 436 of Code. But the High Court may by a subsequent order admit him to bail again.¹⁹

Whenever an application for bail is made to a Court, the first question that it has to decide is whether the offence for which the accused is being prosecuted is bailable or otherwise. If the offence is bailable, bail will be granted under Section 436 of the code with or without surety but if the offence is not bailable, further considerations arise and the Court have to decide the question of grant of bail in the light of those further considerations such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar

other considerations which arise when a court is asked for bail in a non-bailable offence.\textsuperscript{20}

3.6 BAIL IN BAILABLE OFFENCES-SECTION 436

A reading of Section 436(1)\textsuperscript{21} of the code would clearly indicate, that in the first instance, a person charged of a bailable offence is entitled to bail as a matter of right in all bailable offences when an accused is arrested and detained without warrant by the officer in charge of the police station or appears or brought before the Court and is prepared at any time, while in custody or at any stage of the proceedings before the court to furnish bail, such person shall be released on bail. Right to seek bail in respect of bailable offences is a matter of right. The value of the bond and the nature of the sureties is the only discretion vested in the Court. The proviso to the provision also makes it very clear that the officer-in-charge in his opinion or the Court in its opinion, in their discretion will release the person by only taking a personal bond without insisting the surety for the appearance. The provision also makes it clear that grant of bail need not necessarily be by the Court only. The police officer has also jurisdiction to release the person on bail with or without surety.\textsuperscript{22}

Bail under Section 436(1) is as a matter of right the area of discretion being that the court may release the person merely on executing a bond without surety for his appearance instead of taking bail from such a person when a person is indigent and is unable to furnish surety.\textsuperscript{23}

The provisions of Section 436 apply to any person other than a person accused of a non-bailable offence. It, therefore, follows that this section applies to any person accused of bailable offences. The provisions of the sections are very wide and they cover all persons other than those accused of non-bailable

\textsuperscript{20}http://shodhganga.inflibnet.ac.in/bitstream/10603/7790/9/09_chapter%203.pdf.
\textsuperscript{23}Sushil Suri v. State, 2006 (3) R.C.R. (Cr.) 355 at p. 358 (Del.).
offences. The only exception is given in the second provision to the section, which says that nothing in the Section 436 shall be deemed to affect the provisions of Sub-section (3) of, Section 116 or Section 446A.

Section 436 enjoins a duty on the police officer to release such a person on bail if he is arrested or detained without warrant by an officer-in-charge of a police station, and on the magistrate, if he offers a bail at any stage of the proceeding before the said court. The scheme of Section 436 appears to be that at any stage prior to the proceeding before the court, it would be the power of the officer-in-charge of the police station to release such a person on bail and if such person is not prepared to offer bail at that stage, then at a subsequent stage, he can still offer the bail before the magistrate at any stage of the proceedings. The duty enjoined upon the police also finds support from Section 50(2) of the court. Any other construction of Section 436 (1) would necessarily lead to an absurd situation where two separate authorities will be exercising the same power, could not have been the legislative intent. The situation where two separate authorities can exercise the same power are not foreign to the Code inasmuch as there are provisions which give concurrent jurisdiction to two authorities, but in the case of Section 436(1) there does not appear to be any intention of the legislature to give concurrent powers to the police officer and the magistrate.\textsuperscript{24} According to Article 21 of the Constitution of India, no person shall be deprived of his life or personal liberty except according to procedure established by law.\textsuperscript{25}

3.6.1 Maximum Period for which an under Trial Prisoner can be Detained

Under Section 436A provides for maximum period for which an under trial prisoner can be detained. Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one

\textsuperscript{24} Romeshbhai Amrital Chhatral v. State, 1983 (2) Crimes 186. (Page no. 76 PV).
\textsuperscript{25} Article 21, Constitution of India, 1950.
of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties under Section 436A.\textsuperscript{26}

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties: Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

**Explanation.** In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

There have been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. As remedial measures Section 436A has been inserted to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It has also been provided that in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offender. The provisions of this section cast a statutory duty upon the officer in charge of the police station to release on bail a person who was involved in a bailable offence. The power to release either on bail or on a personal recognizance i.e. bonds without sureties extends to the time the accused is in the custody of such

\textsuperscript{26} Section 436A inserted by Act 25 of 2005, (w.e.f. 23-6-2006).
officer. The right of the accused to be released arises only when the person under arrest or detention is prepared and able to give bail. He cannot be taken into custody unless he is unable or unwilling to offer bail or to execute a personal bond. Recently it was held by the Apex Court that the subordinate Courts should have to follow the guidelines regarding speedy disposal of bail application.

3.7 WHETHER CONDITION CAN BE IMPOSED IN BAILABLE OFFENCES

A release on bail in bailable offence is without condition. The accused cannot be compelled to appear before the police since such condition would be repugnant to Section 436. A police officer should grant bail on furnishing a reasonable amount of surety. An improper refusal of bail is in violation of a duty cast upon him. It has been held in In re District Magistrate, Vizagapatnamr, that in bailable offence the discretion is to be restricted to the demand of security to ensure the presence of the person when required him to do so. The Allahabad High Court has held that there is no discretion in law to impose conditions for grant of bail except with regard to security and sureties.

While releasing a person concerned with commission of a bailable offence whether the Court is entitled to impose certain conditions was one of the main issues recently dealt with and answered by Gujarat High Court in Shantilal Javerchand Jain v. State of Gujarat, the Court held that it can impose relevant conditions while releasing an accused alleged to be guilty of a bailable offence as there is no specific restriction in code on the court’s power to impose relevant conditions. The Court held that the conditions are normally

29 A.I.R. 1949 Mad. 71; see also Tn re Appalaakonda, A.I.R. 1942 Mad. 740.
31 Shantilal Javerchand Jain @ Shantilal Zhaverilal Jain v. State of Gujarat, 2012(1) GLR 902 (paras 11, 12, 13).
imposed in order to strike a balance between the right of accused and the right of the prosecution. The accused is released on bail to avoid unnecessary confinement at the same time the right of the prosecution is preserved or protected to secure the presence of the accused for the purpose of trial. The court is under an obligation to strike a balance between the two conflicting claims. On the one hand, the society to be shielded from hazards of misadventures of a person who is alleged to have committed crime, and on the other hand, the fundamental canon of criminal jurisprudence that a person to be presumed to be innocent till he is found guilty, and the aspect of liberty—which is one of the most important basic human right, which require consideration. In other words, even if such liberty is required or curtailed or regulated, it has to be with utmost care that it balances the individual right and the rights of the society as a whole. Admittedly, there is no statutory provision which suggest that no such condition can be imposed.\textsuperscript{32}

3.8 POWER TO REFUSE BAIL

Sub-section (2) of Section 436 empowers the court to refuse bail to an accused person even if the offence is bailable, where the person granted bail fails to comply with the conditions of the bail bond. Such refusal will not affect the powers of the Court to forfeit the bond and recover penalty from the surety as laid down by Section 446. Even in bailable offence the Court has power to refuse to release a person on bail. The person committed to custody under the order of the High Court cannot ask for his release on bail under this section, but the High Court may by subsequent order admit him to bail again.\textsuperscript{33} An order granting or refusing bail is interlocutory. Order refusing bail is not a final order. Bail may be refused at one stage but may be granted at a later stage in the same proceedings. It can be even rescinded or modified or cancelled at any

stage. It does not terminate the proceedings or decides a point for decision in the case and therefore is not a final order.\textsuperscript{34}

3.8.1 Who may be Released on Bail

A person who is accused of a bailable offence will be entitled to a bail under this section. He will be entitled to bail if-

a. He is accused of a bailable offence.

b. He is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court;

c. A complaint or a police report of a bailable offence is made against him, or he is suspected of having committed such an offence\textsuperscript{35}.

But even though the offence is bailable, bail will not be granted if the accused stultifies the process of the Court or breaks his bond of appearance.\textsuperscript{36} When a bail application is moved before the subordinate Courts, the same shall be disposed of the same day.\textsuperscript{37} Power under Section 436 should be exercised sparingly by the High Court.\textsuperscript{38} Instructions were issued by the High Court in regard to disposal of application for bail by the subordinate Courts.\textsuperscript{39} Bail can be taken by the police officer who has arrested or detained the person concerned or by the Court before whom the person appears or is brought. Under Section 440, the High Court or the Court of Session may in any case direct that the bail required by a police officer or magistrate be reduced.\textsuperscript{40}

When a police officer makes an arrest under Section 41 he is bound to give the

\textsuperscript{34} K.P. Vasu v. State, AIR 1975 Ker. 15.
\textsuperscript{40} Talab Haji Husaain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376.
person arrested the option of the bail and bail bond should be not excessive but in accordance with position in life occupied by the person arrested.\textsuperscript{41} In *Superintendent and Remembrances of Legal Affairs, Bengal v. Jairali*\textsuperscript{42}, the decision in the matter of the petition of *Daulat Singh*\textsuperscript{43}, was doubted and it was held that there was no indication in that section that the police are bound, after arrest, to inform the persons arrested that they are entitled to be released on bail. But Section 56 lays down that a police officer making an arrest shall, without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before Magistrate having jurisdiction in the case or before the officer-in-charge of a police station. The police officer effecting an arrest is an officer-in-charge of a police station and if the offence is bailable, such officer shall release the arrested person on bail when the arrested person is prepared to give bail. If, however, the police officer arresting a person is not an officer-in-charge of a police station, then the arrested person has to be produced before the officer-in-charge of a police station, as required under this section. In all cases in which the offence as alleged against the person arrested is non-bailable, such person shall be produced before a magistrate under Section 167. Provision for bail in such a case is made under Section 437.

### 3.9 GRANT OF BAIL BY MAGISTRATE UNDER SECTION 437

The Criminal Procedure Code, 1973 has conferred the power to grant bail on-

2. Magistrate
3. Sessions Court
4. High Court

\textsuperscript{41} In the matter of the petition of Daulat Singh, ILR 14 All. 45 at 47; see also *Wadhawa Singh v. Emperor*, AIR 1928 Lah. 318.
\textsuperscript{42} AIR 1974 SCR 3 348.
\textsuperscript{43} ILR 14 ALL 45.
The Supreme Court of India is not a regular court for bail matters. The Supreme Court however, has got the power to examine the legality of bail orders passed by High Courts in exceptional circumstances in exercise of the power under Article 136 of the Constitution of India.\textsuperscript{44}

An officer-in-charge of police station has been given power to release a person accused of any bailable offence and some of the non-bailable offences (other than the offence punishable with death sentence and life imprisonment) only. The power given to an officer in charge of police station can be exercised only during first 24 hours from the time of arrest. Thereafter, by virtue of the Constitutional mandate, the officer-in-charge of police station has to produce an arrested person before magistrate under Section 57 and hence upon the production of the arrested accused before magistrate, the police will lose its power to release the accused on bail.

The magistrate is given the power to release a person accused of all bailable offences and most of the non-bailable offences once an arrested accused is produced before him or where accused voluntarily appears before him. The powers of magistrate are much wider as compared to the powers of an officer in charge of police station. Though, theoretically, officer in charge of police station is invested with the power to release a person accused of a non-bailable offence, in practice, the issues of granting bail by an officer in charge of police station to an accused alleged to have committed non-bailble offences hardly arise.

Sessions Courts and High Courts have the power to release a person accused of any offence whether punishable with death sentence or life imprisonment, subject to the provisions of any special law circumscribing the powers of the Session’s Court or the High Court. The powers of Session’s Court and High Courts to grant bail are almost unfettered. The only requirement is that Session’s Court and High Courts must exercise their power in a lawful manner.

and the discretion to grant or refuse bail should be exercised upon careful analysis of facts and settled principles of law.\textsuperscript{45}

Section 437, makes provision for bail in case of a non-bailable offence. Sub-Section (1) of Section 437 states that when any person accused of, or suspected of, the commission 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 other than the High Court or Court of Session, he may be released on bail. It uses the phrase, “a Court other than High Court or Sessions Court”. In other words, it speaks of the power of magistrate to grant bail in case of non-bailable offence. Section 437(1) further states that a person accused of a non-bailable offence shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or where such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he 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. The aforesaid restriction on the powers of magistrate is lifted in the proviso. The proviso states that the restriction on the power of magistrate will not apply where the accused is under the age of 16 years or is a women or is sick or infirm. It also provides that magistrate may release such excluded category of accused on bail if it is satisfied that it is just and proper so to do for any other special reason. What could be the reason is not provided in the section and it depends on the facts and circumstances of each case. In practice, release of an excluded category of accused on bail for special reasons under the proviso hardly takes place.\textsuperscript{46}

It is made clear in Section 437(1) that merely because an accused person may be required for being identified by witnesses during investigation shall not be

\textsuperscript{45} Ibid.
sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail gives an undertaking that he shall comply with such directions as may be given by the Court.  

Section 437 mandates that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the court under this sub-section without giving opportunity of hearing to the public prosecutor.

Section 437(2) envisages a contingency where the officer or court during investigation, inquiry or trial forms a reasonable belief that the accused has not committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt. When such belief is formed the accused shall, subject to the provisions of Section 446A and 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.

Section 437(4) makes it mandatory for the officer or the magistrate to record reasons in writing while releasing any person on bail under Sub-section (1) or Sub-section (2) shall record in writing his or its reasons or special reasons for so doing.

Section 437(3) vests power in a magistrate to impose relevant conditions while releasing an accused on bail. When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of Indian Penal Code or abetment of, or conspiracy or attempt to commit any such offences, is released on bail under Sub-section (1), the Court shall impose conditions.

---

48 Ibid.
49 Ibid.
(a) that such person shall attend in accordance with conditions of bond executed under this chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or temper with the evidence, and may also impose, in the interest of justice, such other conditions as it consider necessary.

It impliedly means that where an accused is suspected of the offence other than stipulated hereinabove, it is discretion of magistrate to impose or not to impose the conditions.

Section 437(5) makes provision for cancellation of bail by the same court. An officer has no such power to cancel bail granted by him. The provisions states that any court which has released a person on bail under Sub-section (1) or Sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.\(^{50}\)

Section 437(6) makes provision for release of an accused on bail if a trial is delayed beyond 60 days from the first date fixed for taking evidence subject to condition that the accused should be in custody during the whole period of 60 days. Though usually such statutory release on bail is to be ordered, the magistrate may for good reasons refuse to release the accused on bail under this sub-section.\(^{51}\)

\(^{50}\) *Ibid.*

\(^{51}\) *Ibid.*
Section 437(7) states that 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, the Court shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.  

Thus, a well-balanced procedure has been prescribed under Section 437 for bail in respect non-bailable offences. If there is reason to believe that the accused has not committed any non-bailable offence, he is entitled to bail. If the trial is delayed beyond 60 days from the date fixed for taking evidence for no fault of accused, the accused is usually entitled to bail. A women accused, an accused below 16 years of age or an accused who is old, sick, or infirm may be released by the magistrate irrespective of the fact that the offence is punishable with death sentence or life imprisonment. The provision is also made for releasing accused of an offence punishable with death sentence or life imprisonment after recording special reasons in writing by the magistrate.

The scheme of The Criminal Procedure Code, 1973, mainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a court that that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the magistrate placed in this position would be akin to what is envisaged in State of Haryana v. Bhajanlal that is, the alleged complicity of the accused should, on the factual matrix than presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. The Criminal Procedure Code, 1973 severely

---

curtails the powers of the magistrate while leaving that of the Court of Sessions and the High Court untouched and unfettered.\textsuperscript{55}

3.9.1 Detailed Analysis of Section 437

Section 437 deals with the powers of an officer-in-charge of police station and magistrate to grant or refuse bail.

A close reading of Section 437 leads to the following result:

When any person accused of or suspected 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 other than the High Court or Court of Session.

He may be released on bail, but-

(i) Such person 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;

(ii) Such person shall not be so released if such offence is a cognizable offence and

(a) He had been previously convicted of an offence punishable with death, imprisonment of life or imprisonment for seven years or more or

(b) He had been previously convicted on two or more occasions of a non-bailable and cognizable offence.\textsuperscript{56}

However, any person from the above excluded category may be released on bail by the magistrate if such person is under the age of 16 years or is a woman or is sick or infirm.

Provided further that for any other special reasons the Court may release a person referred to in (i), (ii) on bail if it is satisfied that it is just and proper to do so.

Mere fact that an accused may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such direction as may be given by the Court.

Section 437 is concerned only with the court of magistrate and an officer –in-charge of police station. It expressly excludes High Courts and Court of Session.

There is a noticeable trend in above provisions of law that even of such non-bailable offence a person need not be detained in custody for any period more than it is absolutely necessary. If there are no reasonable grounds for believing that he is guilty of such an offence.57

Accused facing allegations of committing non-bailable offence other than offence punishable with death or life imprisonment is usually released on bail unless other overwhelming factors relevant for refusing bail are in existence.58

There are certain overriding considerations that need to be borne in mind. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Courts to come to a conclusion as to nature of the case he is involved in or he is suspected of. If at that stage from the

---

materials available there appears reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody, at that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits. In other non-bailable cases, the Court will exercise its judicial discretion in favour of granting bail subject to Sub-section (3) of Section 437, if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail, subject, however, to the first proviso to Section 437(1) The Criminal Procedure Code, 1973 and in a case where the magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such offence, this will however, be an extra ordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.59

3.9.2 Scope and Application of Bail

Section 437 gives the Court or a police officer power to release an accused on bail in a non-bailable case, unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life. But (1) a person under the age of sixteen years (2) a woman; or (3) a sick or infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life. Where a person is charged with a non-bailable offence, but it appears in the course of

59 Ibid., p. 53.
the trial that he is not guilty of such offence, he can be immediately released on bail pending further inquiry. The same may be done after the conclusion of a trial and before judgment is pronounced, if the person is believed not to be guilty of a non-bailable offence. As a safeguard the section provides for review of the order by the Court which has released the person on bail. The power of the Magistrate under this section cannot be treated at par with the powers of the Sessions Court and the High Court under Section 439. The basic rule may perhaps be tersely put as bail not jail except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating utter troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the Court. Grant of bail is the rule and its refusal is an exception. But while granting it the Court has to be satisfied that the order to be passed is in the interest of justice. The provisions of Code do not contemplate either granting of a bail on the basis of an assurance of a compromise or cancellation of a bail for violation of the terms of such compromise. Having granted the bail under the said provision of law, it is not open to the trial Court or the High Court to cancel the same on a ground alien to the grounds mentioned for cancellation of bail in the said provision of law. Furlough and parole are two distinct terms now being used in the jail Manuals or laws relating to temporary release of prisoners. When a prisoner is on parole his period of release does not count towards the total period of sentence while when he is on furlough he is eligible to have the period of release counted towards the total period of his sentence undergone by him.60

3.10 LEGAL ASPECTS OF THE BAIL MECHANISM

The significance of bail system in the administration of criminal justice is to be understood in relation to the fact that the advantage of being released on bail is statutorily denied altogether in most of the capital offences. In complex cases,

60 Courts need to be Litigant-centric and Citizen Centric rather than Judge-centric and State-centric.
where discretion is to be exercised to grant release on bail, Courts must look to prescribed legislative standards. These standards are to be found in Section 437 and in the First Schedule (col. 5) of the code. To sift offences as ‘bailable’ and ‘non-bailable’ a legislative guideline is provided in Section 2(a) of the Code of Criminal Procedure, 1973 as well as the First Schedule appended thereto. Section 2(a) of the code purports to define ‘bailable offence’. The words merely explain that it is “an offence which is shown bailable in the First Schedule, or which is made bailable by any other law for the time being in force”; and that ‘non-bailable’ offence means any other offence”. Classification of offences under the code is highly unsatisfactory. The First Schedule shows that the classification has been done in two parts. Part I deals with offences under the Indian Penal Code. Part II deals with the offences under other laws. The tabular details in part I of the First Schedule indicate the kinds of offences in column I. Further in the column 5 of the table, itemised offences of the Indian Penal Code have been enumerated and are characterised as bailable or non-bailable. Since part II covers the entire gamut of penal laws, other than the Indian Penal Code, it is not possible to enumerate all statutory offences in column I of the Table (part II), as has been done in case of offences under the Indian Penal Code (in part I). Thus, instead of mentioning offences in part II, column I, the code has adopted a method of providing general description and nature of punishments prescribed by the legislature for numerous offences. It is with the help of the punishment prescribed for offences enacted in other laws, that the bailable or non-bailable nature of the offence has to be determined. Thus, part II (First Schedule) seeks to formulate that the bailable or non-bailable character of an offence under other laws, is to be determined, by the nature of punishment appended to it by the legislature while enacting a particular statute. The prescribed punishment of imprisonment ranging from a period of three years or above, lead to designate an offence as non-bailable. Those which carry prescriptions for punishments below the period of three

62 Ibid.
years are termed as bailable. A scheme natisation is apparently discernible in legislative classification of the offences in the code. Its rationale, however, is totally unclear, except that legislative wisdom has chosen to do so.\(^{63}\)

### 3.10.1 Discretion in Grant or Refuse Bail

The matter for bail is largely a matter of discretion but such discretion has to be exercised not arbitrarily but judiciously on the basis of norms which by now have become fairly established. Grant or refusal of bail, is not dependent on the whim and caprice of the Court and extra judicial consideration do not play a role in such a decision. The Court does not have any right to refuse bail to the accused person in order to make them believers if they are atheist by temperament.\(^{64}\)

In bailable offences the right to claim bail granted under Section 436 of the code is an absolute and indefeasible right. There is no question of discretion in granting bail as words of Section 436 are imperative. There is no manner of doubt that bail in bailable offences can be claimed by accused as of right and the officer or the Court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.\(^{65}\)

### 3.10.2 Power to Grant of Bail in Non-Bailable Offences

Unlike a bailable offence where bail is a matter of right under Section 436 grant of bail for a non-bailable offence under Section 437 (or, for that matter, even under Section 439), is a matter of discretion. The grant of bail in non-bailable cases is generally a matter in the discretion of the authorities in question. The grant of bail in respect of a person accused of or suspected of the

---


commission of any non-bailable offence, is a matter of discretion and under Section 437 of the Code, if there is no prohibition otherwise and if the guidelines for enlarging on bail are satisfied, then, the Magistrate in his discretion may release such person on bail. It thus gives the jurisdiction that contains a discretion which must be utilized judicially. It is stipulated that bail may not be denied only on the ground that the accused is required for getting him identified by the witnesses. Certain conditions can be annexed to the liberty and in certain contingencies liberty already granted can be snatched by cancellation of bail. In addition to these provisions, there is a ban even on such discretionary power of the Magistrate when there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life in which case, the Magistrate has no jurisdiction and power to release the accused on bail as it is well emphasized by the use of the words “but he shall not so release”. Exception to this general ban finds place in the proviso relating to young persons or sick or infirm persons or women. Bail is a matter of right if the offence is bailable. In the case of a non-bailable offence, bail is a matter of judicial discretion.

Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for life if he is of the view that there appear reasonable grounds for believing that the person concerned accused of or suspected of the commission of the offence has been guilty of the offence, provided that he may, in his discretion that he may, in his discretion, grant bail to a woman or a minor under the age of sixteen years or a sick or infirm person.

In a case involving a non-bailable offence, a Court may impose reasonable conditions besides fixing of the bail amount for the attendance of the accused. Discretion has to be exercised in granting bail in cases not punishable with imprisonment for life or death unless there may be some reasons for not exercising such discretion in favour of the accused. Such reasons should be mentioned in the order while refusing bail. In cases of under-trials charged with
commission of an offence or offences the Court is generally called upon to decide whether to release him on bail or to commit him to jail.

The decision has to be made mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc.66

3.10.3 Surety’s Liability and Forms of Bond

Section 436 says that any person, other than a person accused of a non-bailable offence is arrested or detained without warrant or appear or is brought before a court, shall be released on bail if he is prepared to give bail. The word ‘bail’ in the context means bail with surety. The section nowhere states that a person released on bail must give a bond himself. The person giving bail enters into a contract with a penalty clause to produce the accused person before the Court when called upon to do so. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform his contract, then the penalty clause may be put into operation against him, although it is not necessary to exact the penalty in full.67

The terms of a bond or bail bond executed under to Section 436 of The Criminal Procedure Code, 1973 should be in accordance with Forms 3 and 28 of Schedule 11 of Code68, as the case may be. The forms indicate what the contents of a bond with sureties should be. Where the bond is not in accordance with the form the person executing the same incurs no legal liability by executing it. The form also indicates what the contents of a bond with sureties should be.69

66 http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13_chapter%207.pdf
Third party’s bond whether can be taken a police officer acting under Section 436 of The Criminal Procedure Code, 1973 has the power to demand a bail from a person arrested or to accept his own bond without sureties. But under no provision of law can the police officer take a third party’s bond for such person’s appearance.  

Agreement to Indemnify Surety, if Enforceable in Law An agreement to indemnify a person standing bail is illegal. There is nothing in Section 445 which would justify an inference different from the English law on the question. The English law on the subject has been laid down in Consolidated Exploration & Finance Co. v. Musgrave, that any indemnity given to bail a person whether by the so person bailed or by another is illegal. The principle of this English ruling has been followed in Prosanna Kumar Chakravarty v. Prakash Chandra Dutt and Bhupati Chandra Nandy v. Golam Ehihar Choudhury.

The English law on the subject has been briefly put in Halsbury’s Laws of England thus: Where the defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third person to indemnify his surety against liability on his recognizance is illegal because it deprives the public of the protection which the law affords for securing the appearance or good behaviour of the defendant.

But a contrary view has been held in Dula Ram v. Akhey Raj on the ground that Section 445 permits the court or officer to allow a person required to

---

71 Laxmanlal Konakkirti Pandit v. Muishankar Pitambardas Vyas, ILR 32 Bom 449: 10 Bom LR 553.
72 (1900) 1 Ch D 37: 16 TLR 13: 69 LJ Ch 11.
73 28 IC 560.
76 AIR 1952 SCC.
execute a bond with or without sureties to deposit a sum of money or government promissory notes in lieu of executing such bond.

Sufficiency of Bail The decision whether the bail is sufficient or not rests with the court and court alone. But the court generally calls for a report from the police. That does not mean that the decision lies with the police. 77

Proviso 1. The first proviso to Section 436 of The Criminal Procedure Code, 1973 makes an exception to the main part of the section with regard to giving bail by a person arrested or detained without warrant or is brought before a court. The exception contained therein enacts that such officer-in-charge of a police-station or court if he or it thinks fit may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided. This discretion of the officer-in-charge or court becomes mandatory if the person arrested is an indigent person. Explanation to this subsection further enables the officer-in-charge or court to presume such indigent status of the person arrested jails to obtain bail within 7 days of his arrest. The bond so executed by him must conform to the provisions of Sections 440 and 441 of The Criminal Procedure Code, 1973.

Proviso 2. Section 436 enacts, that nothing in the section shall be deemed to affect the provisions of Sub-section (3) of Section 116 or Section 446A. The exercise of the powers under Sub-section (2) of Section 116 is subject to two conditions, namely: (a) the magistrate considers that immediate measures are necessary for the prevention of breach of the peace; and (b) the reasons in support of the consideration are recorded in writing. If these two conditions are complied with the order may be passed at any time during the period commencing from the date when the order is passed till the disposal of the inquiry. 78 Bonds with or without sureties are called for from the persons against

77 Queen-Empress v. Gayitri Prosunno Ghosal, ILR 15 Cal 455.
whom proceedings under Chapter VIII are brought after the termination of the proceedings, but Sub-section (3) of Section 116 makes provision for making an interim order for calling for bond with or without sureties during the tendency of the proceedings. Sub-section (3) of Section 116 makes provisions to the effect that until the bonds are executed, or in default of their execution, the person against whom proceedings are being taken may be detained in custody till the inquiry is concluded.79

Sub-section (2) Sub-section (2) of Section 436 enacts an exception to the substantive part of the main part of Sub-section (1) of the section. It says that where a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody, and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under Section 446. A new provision has been introduced thus cancellation of bail, application if necessary no application is required on behalf of any party for cancellation of bail as it is the duty of the court to do so under Sub-section (5) of Section 437 under proper circumstances. Thus, if the complainant brings the matter to the notice of the Court the latter can pass an order cancelling the bail under the said Sub-section.80

Who can file an application under Sub-section (2) of Section 437 in a case started on a private complaint, the complainant may file an application for cancellation of bail bringing to the notice of the Court the grounds for such cancellation. In a police case it is for the State to move for cancellation of bail, but there is nothing in Section 437(5) prohibiting the complainant in a police case from applying for cancellation. Though no private person is entitled to be heard in support of such an application, when such an application is made, it is open to the High Court to hear him in support of his application. In a

cognizable case challenged by the police, it was the function of the State to question the order of bail if it considered that the said order was unjustified, but when the State does not think it fit to come in revision against the order, it may be that in exceptional cases a revision by a private person is entertained. The High Court can act suo-motu under its revisional powers when it comes to its notice that an inferior court has acted beyond its jurisdiction and in the exercise of its revisional powers it can cancel the bail granted by such inferior Court.

In directing the re-arrest of the accused person who had been admitted to bail it can act suo-motu or on an application by the State or a private complainant. The High Court will, of course, be loath to interfere with the exercise of the direction by the sessions judge. But if the order granting bail is erroneous, it will set aside the order.

3.10.4 Person Seeking Bail must be in Custody

No person accused of an offence can move the court for bail under Section 439 unless he is in custody. Such a person can be stated to be in judicial custody when he surrenders before the court and submits to its directions. If the person is not in police custody because he happens to be in the judicial custody in another State, then he cannot be deemed to have been arrested. Hence, his application for bail is liable to be dismissed. The bail of the petitioner was cancelled by the Sessions Judge and without surrendering he applied to the High Court for the cancellation of the order of the Sessions Judge. The High Court refused to consider his application as he was not in custody.

3.10.5 Functional Aspects of Bail

An arrested person can be released on bail only after his matter has been duly processed through a judicial mind. The functional aspect of bail is to facilitate dispensation of criminal justice in a manner that it is not harsh and keeps the judicial system of an even keel. The exercise of judicial discretion may thus call for an examination of social realities as may smoothen the criminal process for attaining just ends. Thus an accused placed in a position of indecency or infirmity or any other kind of disability may favorably be included in the exercise of judicial discretion for grant of bail. On the other hand, the possibility of the accused absconding or his tampering evidence, or his repeating the offence may justifiably negotiate chances of his release.

3.10.6 Legal and Statutory Aspect of Bail Mechanism

Bail is a post arrest remedy aimed at the release of the arrested suspect till the date of his trial. The mechanism of bail can be best understood by studying the components that particularly go into every bail decision namely:

1. The circumstances leading to the arrest and detention of a person.

2. The factors for arriving at the bail decision like police record relating to the offence, its bailable or non bailable nature, the furnishing of the requisite security by the accused, need for surety and so on.

3. And, lastly interpreting the law relating to bail.

A look into the First Schedule shows that the classification has been done in two pars. Part 1 deals with offences under the Indian Penal Code. Part II deals with the offences under other laws. The tabular details in part 1 of the First

---

87 Emperor v. Naga San, HEWA, 28 Cr. L. J. 776 (FB) (Rangoon).
89 https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8&q=law%20relating%20bail
Schedule indicate the kinds of offences in column 1. Further in column 5 of the Table, itemized offences of the Indian Penal Code have been enumerated and are characterized as bailable or non bailable. Section 436 of the Code makes it clear that when a person other than a person accused of a non bailable offence, is arrested and if she is prepared to give bail, he shall be released on bail. This provision is mandatory.  

An analysis of provisions of Section 437 suggests that the grant of bail in bailable cases needs to satisfy the following conditions, namely (a) the person has been accused of a bailable offence; (b) such person has been arrested or detained without a judicial warrant, by an officer in charge of a police station or is brought before a Court; and (c) such person is prepared to give bail at any time when he is in the custody of such officer, or he is prepared to do so at any stage of the proceeding before such Court. A release on bail in bailable offences is without condition. The accused cannot be compelled to appear before the police since such condition would be repugnant to Section 436. A police officer should grant bail on furnishing a reasonable amount of surety.

An improper refusal of bail is in violation of a duty cast upon him. It has been held in re District Magistrate, Vizagapatnam that in bailable offence the discretion is to be restricted to the demand of security to ensure the presence of the person when required him to do so. The Allahabad High Court has held that there is no discretion in law to impose conditions for grant of bail except with regard to security and sureties. There are some conditions put under Section 437 wherein you can ask for bail even if you committed non-bailable offence. In non-bailable cases, bail is not the right but the discretion of the judge if regards the case as fit for the grant of bail, it regards imposition of certain

---

90 https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8&q=law%20relating%20bail
91 Public Prosecutor v. Raghurawiah, (1957) MLJ (Cri) 609.
92 1868 Punjab Ref. (Crl.) No. 2.
93 AIR 1949 Mad 77. See also in re Appalaakonda AIR 1942 Mad. 740.
94 Rex v. Genda Singh, AIR 1950 All 525.
conditions as necessary in the circumstances. Section 437(3) elaborates the conditions set by the law to get bail in non-bailable offences.

The sub-section says that when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1). However, for that the Court has power to impose any condition which it considers necessary.

‘Any Person’ and ‘Any Case’ – Meaning of The words ‘any person’ have been used in Sections 436, 437, 438 and 439 of the Code of Criminal Procedure, 1973. The expression ‘any person’ means a person accused or suspected of the commission of the offence and has been arrested or detained, or who is required to surrender to custody under an order of arrest against him. The expression includes all the accused whether their case is bailable on conviction or not. The words ‘any case’ mean all cases irrespective of the fact whether or not an appeal lies on conviction.

‘At any Stage of the Proceedings’ – Meaning of The expression means before or after the commencement of trial. The expression has been used in a wide sense and not in a restricted sense of a judicial proceeding, which has been defined in Section 2(i) to include any proceeding in the course of which evidence is or may be legally taken on oath. Thus, when an accused appears or is brought before the Court there should be proceedings of some sort even though neither charge-sheet nor complaint is made against him. The judge has the power to grant bail when the applicant is in the lock-up under arrest and it...

---

97 Queen v. Chocha Rai, (1874) 6 NWP HC 366.
is not necessary, in order to invest the judge with such jurisdiction, that the accused person must be brought before the Court.\textsuperscript{100} There can be no manner of doubt that from the very moment of the arrest of the accused person by the police, the magistrate has the power to consider the question of his release on bail and his orders in this respect are subject to revision by superior courts.\textsuperscript{101} The magistrate has the power under Section 436 to release a person on bail even before the police investigation.\textsuperscript{102}

‘Any person other than person accused of a non-bailable offence’ the expression means a person who is not accused of a non-bailable offence. Section 436 of the Code, therefore, operates in a case when a person is accused of a bailable offence, and becomes inoperative when a person is accused of a non-bailable offence.\textsuperscript{103} The legislature has classified offences for the purpose of bail into bailable and non-bailable. The right of bail has been accorded to the accused only in case of non-bailable offences.\textsuperscript{104} ‘Bailable offence’ means the offence which is shown as bailable in Schedule I, or which is made bailable by any other law for the time being in force; and ‘non-bailable offence’ means any other offence.\textsuperscript{105} Again, ‘offence’ means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.\textsuperscript{106} It has already been noticed that Section 436 of the Code is not limited to persons accused of a non-bailable offence and is applicable to Chapter VIII of the Code except the provisions specifically excluded.\textsuperscript{107}

The definition of the word ‘offence’ given in Section 2(n) of the Code does not come to play where a different intention appears from the subject or context.\textsuperscript{108}

\textsuperscript{100} Achhaibar Missir v. Emperor, AIR 1929 All 614: 30 Cr LJ 718.
\textsuperscript{101} Sunder Singh v. Emperor, ILR 12 Lah 16: AIR 1930 Lah 945: 32 Cr LJ 339: 129 IC 481.
\textsuperscript{102} Waryam Singh v. Croum, AIR 1923 Lah 663: 26 Cr LJ 167.
\textsuperscript{103} Supra note 93.
\textsuperscript{105} Section 2(a), the Criminal Procedure Code, 1973.
\textsuperscript{106} Section 2(n), the Criminal Procedure Code, 1973.
\textsuperscript{108} Udit Prasad Singh v. Supra Kisan, 25 Pat 806: AIR 1947 Pat 381.
The words ‘any law’ do not include the offence under the penal Code but they include all offences made punishable under local or special laws. ¹⁰⁹ When an Act makes provisions for imposition of fine for a certain act the latter is an offence because an act or omission is an offence only when it is made punishable by any law for the time being in force.¹¹⁰ It is the act which is made punishable that constitutes the offence and not the transaction in which the act is done.¹¹¹

‘Arrested or detained without warrant by an officer-in-charge of a police station’ there is a difference between a summons and a warrant. A summons is addressed to the person whose attendance is required, but a warrant is not an order served on any person, it is simply an order to the police to arrest a person. A warrant, which always implies personal arrest and restraint, is not to be issued when a summons to attend would be sufficient the ends of justice.¹¹² A police officer may, in accordance with Schedule I, or under any other law for the time being in force, arrest without warrant in a cognizable case for a cognizable offence. Under Schedule I to the Code, offences under other laws punishable with imprisonment for three years or upwards, but less than seven years are cognizable offences.¹¹³ The phrase ‘or under any other law for the time being in force’ therefore has reference to such offences as are punishable with imprisonment for less than three years, but are specified as offences for which the police may arrest without a warrant, that is offences which but for the special provision would not be cognizable under the Code.¹¹⁴

It has already been notice in Chapter II, supra that Section 41(1) sets out nine different circumstances in which a police officer may, without an order from a magistrate and without a warrant arrest a person. Sections 41(2), 42, 151 and

¹¹² Queen v. Womesh Chunder Ghosh, 5 WR 71.
432(3) of the Code confer similar powers on the police officer. Section 55 of the Code confers powers on an officer-in-charge of a police station or any officer making an investigation under Chapter XII to require any officer subordinate to him to arrest without a warrant any person who may lawfully be arrested without a warrant. Section 43 of the Code also authorises a private person to arrest any person under the circumstances mentioned in the said section. A perusal of those sections enumerated above will show that in each case of arrest without a warrant the person arrested is accused of having committed or reasonably suspected to have committed or being about to commit or likely to commit some offence or misconduct.\(^{115}\)

Arrest consists of actual seizure or touching of a person’s body with a view to his detention. The pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.\(^{116}\)

Section 46 provides how an arrest is to be made. Sub-section (1) of Section 46 enacts that in making an arrest the police officer or other officer making such arrest shall actually touch or confine the body of the person to be arrested, unless there is a submission to the custody by word or action.\(^{117}\)

The law authorises no informal detention or restraint of any description by the police. All informal detention or restraint by a police officer in the course of an investigation is either illegal arrest or wrongful restraint or confinement, and keeping a person in a condition of restraint without previously arresting him is not only illegal, but it is a gross and unwarrantable breach of the powers entrusted to the police officers. Authority given to arrest by Section 41(1) implies authority to detain but it is illegal to keep a man in a condition of

---

restraint without arresting him. Section 57 of the Code provides that no police officer shall detain in custody a person arrested without warrant for a period longer than is reasonable under the circumstances of the case, and such period shall not, in the absence of a special order of a magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate’s Court. It has been observed by the Supreme Court that the language of Article 22(1) and (2) of the Constitution indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a court. In other words, there is indication in the language of Article 22(1) and (2) that it was designed to give protection against the unauthorised act of the executive or other non-judicial authority.

‘Arrested or detained’ spoken of in Section 436 of the Code must be by an officer-in-charge of a police station although a police officer may arrest without a warrant under Sections 41(1) and 151, and a private person may do so under Section 43 of the Code. It has already been noticed in the foregoing chapter that an ‘officer-in-charge of a police station’ includes, when the officer-in-charge of the police station is absent from the station-house or is unable, due to illness or other cause, to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable or, when the State Government so directs, any other police officer so present.

Police station means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified

118 Empress v. Madar, 1885 AWN 59 (FB).
121 Section 2(o), Cr PC; Naginlal Nandlal v. State of Gujarat, (1%) 1 Cr LJ 142: (1961) 2 Guj LR 664; Tiran Mandal v. State, 1969 Cut LT 291; Ram Karan Dushadh v. State of Bihar, 1971 BLJR 493; See also Chapter II.
by the state government in this behalf. A beat house cannot be said to be a police station unless the State Government declares it generally or specially. Similarly, a police outpost is not a police station. Police station is the lowest unit for the exercise of criminal jurisdiction, and as long as its limits fixed by the notification of the State Government are not altered such station will continue to exercise jurisdiction over the areas specified.

‘Appears or is brought before the Court’ the word ‘appears’ can only mean the physical appearance of the accused and cannot be interpreted to mean appearing through a pleader. The principle of the Criminal Procedure Code is that the accused must attend the court in-person except in certain cases specially set out in the Code such as Sections 205, 273 and 317. It is also to be recalled that the attendance of the accused in court can be dispensed with only under the specific orders of court. The phrase ‘appears or is brought before a Court’ involves the idea that the accused is produced before the court or has surrendered himself in obedience to a process of the Court. There is no basis for the supposition that the appearance of a lawyer is tantamount to the appearance of the accused without any warrant for the arrest of the accused being issued.

There is some divergence of opinion on the interpretation of the word ‘appears’ in Section 436. One view is that the word ‘appears’, in the context of the section means appearance in obedience to a summons or bailable warrant or in pursuance of an undertaking to appear contained in a bond executed by a person when he is arrested and released by the police, does not refer to voluntary appearance of the accused to whom no summons or warrant has been issued or who has not undertaken so to appear. The other view is that the word

---

‘appears’ is wide enough to include voluntary appearance of a person accused of an offence even where no summons or warrant has been issued against him.\textsuperscript{128}

The East Punjab High Court also held that in the case of a person not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in court and surrenders himself.\textsuperscript{129} The word ‘appears’ in Sections 436 and 437 means the appearance of a person who is required to surrender to custody under an order of arrest made against him and not the appearance of a free person who is under no restraint and who merely apprehends a possible arrest.\textsuperscript{130}

A perusal of Sections 204, 244 and 251 makes it quite clear that the expression ‘appears’ is used whenever a Court issues a summons and the expression ‘is brought’ is used whenever a Court issues a warrant. Evidently, therefore, these expressions have been used in the same sense in Section 437. The expression ‘appears’ could not have been used in Section 437 to mean appear once by a pleader. The general principle is that an accused person must attend the court in-person. Sections 205, 273 and 317 are exceptions to the general rule. In all other cases the accused must be present in-person.\textsuperscript{131}

The grant of bail to a person presupposes that he is in custody of the police or the court or, if not already in such custody, is required to surrender to such custody.\textsuperscript{132} Physical appearance of the person before the court is necessary before a person is released on bail under this section. Appearing through counsel cannot naturally result in even notional custody of the Court over the person concerned. It may be that the applicant might give his address in the

\begin{footnotesize}
\textsuperscript{131} State of Punjab v. Datta, 1953 Cr LJ 105.
\end{footnotesize}
application but there cannot be any undertaking that he would not move away from the place. The word ‘appear’ in this section and Section 437 does not contemplate the appearance through counsel.\footnote{State of Uttar Pradesh v. Kailash, AIR 1955 All 98: 1955 Cr LJ 275: 1954 All LJ 471.} The power of granting bail given under Sections 436 and 437, vests in the court before whom an accused appears and is brought. The expression ‘Court’ here means Court which has the power to take cognizance of the case. It does not mean a Court that has no power to take cognizance and has only the power of remand.\footnote{Singeshwar Singh v. State of Bihar, 1976 Cr LJ 1511: 1975 BBCJ 874; 1976 Pat LJR 243.}

Bail, refusal of, where bailable warrant of arrest is non-bailable offence issuance of bailable warrants cannot provide any guarantee of bail in a non-bailable case, though it may be a relevant factor to be considered along with others while deciding the question of bail under Section 439. Undoubtedly where the offence was not bailable merely because the magistrate thought it proper to issue bailable warrants the jurisdiction of the sessions judge to refuse bail cannot be curtailed or fettered. Further, where tax evasion is prima facie of very high value the question of bail should be considered seriously and it should not be granted as a matter of course. Tax evasion of a high value certainly jeopardises the entire economy of the country, and is an economic crime of serious magnitude.

Leaving apart ‘anticipatory bail’, which should normally be out of question, even if the Court would have considered the original application for bail alter arrest, the rejection, other things remaining the same, would have had an edge over acceptance as ‘jail and not bail’ should be the rule in such serious cases.\footnote{Income-tax Officer, Central Circle-I v. Gopal Dhamani, 1988 Cr LJ 1079 (1082) (Raj): (1987) 1 Raj LR 859: 1987 Cr LR (Raj) 588: (1988) 35 Taxman 115: 1988 Raj LW 84.} Since there was an allegation against the accused that he is dealing illegally in foreign exchange requiring heavy investigation and also that the accused is dealing with terrorist activities, bail was refused.\footnote{Mool Chand v. State, through the Director, C.B.I., 1992 Cr LJ 2330 (SC): AIR 1992 SC 1618: 1992 AIR SCW 1731.}
3.10.7 Procedure of Moving Application

Application to be made when any person is arrested or detained by a police officer without a warrant, and the person so arrested is prepared at any time while in the custody of such officer to give bail, he may apply to such officer for releasing him on bail. If the person is brought before a court or where he himself appears before the court, he may file an application before the Court for grant of bail. The ground on which bail is sought must be clearly mentioned in the application of bailor affidavit. The application must not contain defamatory matter or grounds attacking the trying magistrate.

3.10.8 Application may be made In-Person or through Advocate

The person arrested may himself make an application for the grant of bail, and he may also be permitted by the court to argue his bail application in person. In Emperor v. H.L. Hutchinson, it was observed that an accused person has no right under the law to be allowed to present an application for bail in-person but it appeared desirable in the special circumstances of the present case that such permission be given, and the applicant had, therefore, an opportunity of presenting his case in-person. It, however, may not, always be possible for the arrested person to present and argue his own bail application.

It is, therefore, necessary and desirable in the interest of justice that the arrested person is allowed to take legal advice while he is in custody and present the bail application through his lawyer.

Right of the accused to consult and to be defended by a lawyer of his choice the right of an accused person to be defended by a pleader is given not only under the Constitution of India but also under the Article 22(1) of the Constitution.

---

137 Sri Chand v. Emperor, AIR 1934 All 815: 36 Cr LJ 184.
138 Cliree Curant (in re:), ILR 15 Born 485.
139 AIR 1931 All 356: 1931 All LJ 515: 134 IC 842.
provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Section 303 also provides that any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code, may of right, be defended by a pleader of his choice. The provisions of Section 303 apply to cases not only of persons accused of an offence but also to persons against whom proceedings were instituted under the Code in any court. That section contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings were actually going on but also implies that he should have a reasonable opportunity of communicating with his legal adviser for the purpose of preparing his defence unless there are exceptional circumstances. Access to legal advisers of the accused should be allowed before and irrespective of the charge-sheet. It has been observed by the Supreme Court that the right conferred by Section 303 does not extend to providing a lawyer by the State or the police or the magistrate. This is a privilege given to him and it is his duty to ask for a lawyer and to engage one himself or get his relations to engage one.

The only duty cast on the magistrate is to afford him the necessary opportunity. The Court has no power to ask the accused to change his lawyer nor can it forbid a duly qualified lawyer to appear on his behalf.

Accused in police custody during investigation, his right to have access to legal advice provisions of Sections 57, 167 and 303 and Section 40 of the Prisons Act make it clear that the right of the accused to be at liberty should not be curtailed unless it is absolutely necessary to do so, and that is why a person arrested by a police officer is not allowed to be left in his custody for more than

twenty-four hours and the very object of sending the person for remand along 
with a copy of the case diary is to enable the magistrate to decide whether the 
evidence collected by the police officer is sufficient to detain the accused in 
custody any longer. The accused also will have the opportunity to engage his 
lawyer to oppose the remand and to file a bail application before the Court.

3.10.9 Supreme Court’s Observations for Improvements in Bail Law

In Moti Ram v. State of M.P.143 the Supreme Court made the following 
important observations for improvements in the laws relating to grant of bail: 
“We leave it to Parliament to consider whether in our socialist republic with 
social justice as its hallmark, monetary superstition, not other relevant 
considerations like family ties, roots in the community, membership of stable 
organizations, should prevail for bail bonds to ensure that the ‘bailee’ does not 
flee justice. The best guarantee of presence in court is the reach of the law, not 
the money tag. A parting thought. If the indigents are not to be betrayed the law 
including bail law, re-writing of many processual laws is an urgent 
desideratum; and the judiciary will do well to remember that the geo-legal 
frontier of the Central Codes cannot be disfigured by cartographic dissection in 
the name of language or province.”

In matters of bail the test to be applied is the test of reasonable belief as 
opposed to decision and conclusion which marks the ends of the trial. The 
available materials for the Court in considering the question of granting bail are 
the charges made, the attendant facts including the police report, facts stated in 
the petition for bail and the grounds of opposition to the granting of that 
petition. The release on bail does not change the reality and from that fact 
alone, it cannot be said that he is not a person arrested for an offence. A person 
released on bail is still considered to be detained in the constructive custody of

SCC (Cri) 485.
the Court through his surety. He has to appear before the Court whenever required or directed. Therefore, to that extent, his liberty is subjected to restraint. He is notionally in the custody of the Court and hence continues to be a person arrested. Even in spite of the fact that the accused had been released on bail, he continues to be a person arrested on a charge of commission of an offence.

The classification of offences into bailable and non-bailable offences and recognizing the right of bail in bailable as a matter of right is definitely to make the law regarding the bail reasonable. Only in respect of non bailable offences bail is a matter of discretion of the concerned court. However of the offence is punishable with death of imprisonment for life the magistrate before whom the accused is produced or surrender cannot release him of bail except in certain specified circumstances and for that purpose that the concerned magistrate has to assign reasons for granting bail. However even in respect of offences punishable with death or imprisonment for life the sessions judge and the High Court have been given wider discretion in matter of bail all these provisions have been made to make the bail law fair and reasonable. In Section 304 the court has the duty to engage lawyer to every accused who seeks legal assistance having no financial capability to engage a lawyer.144

Thus, the jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support hereof, severity of the punishment which conviction will entail, the character, behavior, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial,

144 shodhganga.inflibnet.ac.in/
reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and other similar considerations.

Thus, the power to grant bail in case of non-bailable offences is at discretion of the Courts. The courts exercise this discretion in a cautious manner. A number of factors and material circumstances are to be taken into consideration before grant of bail. If cautious approach is not adopted the bail mechanism may be misused and the accused on bail may pose a threat to society or may repeat the offence also. The Supreme Court has laid down various principles in this regard. These principles must be followed in true spirit by the lower judiciary so that the dignity of the Courts may be properly held. While cancelling the bail, all the surrounding factors must be considered by the courts. The facts and circumstances should be of such a nature, which justify the cancellation of bail.

Thus, after fully analysing classification of offences and the mechanism of bail researcher reach in the conclusion that policy consideration for grant of bail or its refusal yet remains to be spelt out clearly and cogently both by the legislature and by the Courts. In sum, a lack of thought and direction in the composition of a useful bail mechanism has been basic reason for an erratic functioning of the entire administration of criminal justice. In order to streamline the same, there is an imperative need to systemize and streamline the law relating to bail.