

NATIONAL JUDICIAL ACADEMY



NATIONAL SEMINAR ON BAIL & INTERLOCUTORY APPLICATIONS

[P-1312]

5th & 6th November, 2023

Programme Report

ACADEMIC COORDINATORS

Paiker Nasir & Nitika Jain

Faculty, National Judicial Academy

The National Judicial Academy organized a two day national seminar on Bail & Interlocutory Application for the district judiciary on 05th & 06th November, 2022. The seminar deliberated on pragmatic approaches in bail matters and covered themes like- intricacies and nuances of bail, significance of timeliness in bail matters, bail under special Acts like- Prevention of Money Laundering Act, 2002 (PMLA), Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) & Unlawful Activities (Prevention) Act, 1967 (UAPA). Contours of conditional bail and expeditious disposal of interlocutory application was also an integral part of the discussion. The discourse also focused on media trial in bail matters, judicious exercise of discretion and principles for granting of bail. Emphasis was also placed on default bail, anticipatory bail and grounds for cancellation of bail.

Session 1

Bail: Intricacies and Nuances

Speakers: Justice Ashutosh Kumar & Justice R. Basant

The session commenced with a reference to the judgment in *Shaikh Zahid Mukhtar v. State of Maharashtra and Others*, [2016 SCC OnLine Bom 2600] of the Bombay High Court on reverse burden of proof. The trial of Sir Walter Raleigh was pointed out wherein the conduct of the case was so bad and unfair that it sparked a lot of criticism which led to creation of basic principles of fairness. It was highlighted that after this trial most of the principles regarding liberty, fair prosecution, and confessions were developed. It was emphasized that the perpetrator of the offense was also required to be treated with fairness, because of delay in investigation, poor rate of conviction or lesser conviction and that only at the time of bail the entire process was made condign (appropriate to the guilt). With this in background bail not jail principle was evolved and still being evolved and for this purpose bail was granted. It was mentioned that the way bail is handled is still being modulated by various conditions and provisions of the court.

It was stated that some of the considerations while deciding bail matters that judges would weigh include severity of allegations, the possibility of the evidence coming during the course of investigation, the nature of investigation and reports presented while deciding a case. In this regard a reference was made to Sections 437, 439, 440 of the CrPC. It was opined that because the idea to keep a person in jail for a long time lead to overcrowding of jails, undertrial prisoners. Section

498A of IPC was highlighted. A reference was made to judgment in *Arnesh Kumar v. State Of Bihar* (2014) 8 SCC 273 on arrest procedures and the bench decided that the police must note two key points viz. has the accused committed the crime as alleged in the FIR and, whether arrest is necessary and if arrest is necessary whether it will serve any salutary purpose. The case also held that if these key points are not followed the concerned officer would be guilty and answerable to contempt charges and liable for departmental proceedings. Delayed investigation and its effect on grant of bail was also deliberated upon at length. With regard to delayed investigation Sec 436a was highlighted. It was stressed that in terror related cases, in financial matters if there is delayed investigation it has to be in favor of the accused. The importance of liberty as the bedrock of the criminal justice system was elaborated. It was stressed that dealing with the liberty of a person is the most complex matter a judge has to deal with. The concept of default bail was explained during the course of discussion. The case of *Satender Kumar Antil v. Central Bureau of Investigation*, 2022 SCC OnLine SC 825 was reflected upon and the guidelines laid down in the case relating to detention and circumstances when non bailable warrant of arrest can be issued were also highlighted. It was pointed out that in this case the Supreme Court stated that India should have a bail Act similar to that of the Bail Act of 1976 of the United Kingdom.

Further, it was pointed out that so far as liberty is concerned, slightest change in the set of facts will make a difference leading to a change in dispensation of a case and it was suggested that judges must have the facts before them absolutely clear before passing an order. Judges were suggested that while deciding a matter of bail they must also keep in mind the rights of the accused since the accused is also a victim at the hands of state prosecution and the rights of the victims must be balanced too. Societal interest is also very important with a focus on victimology in present times especially in cases where terror activity is there, or where integrity of the nation is involved.

Judges were cautioned that they are most vulnerable to criticism and attacks. With regard to default bail, it was mentioned that the provision relating to default bail i.e. Sec. 167 of CrPC has been put to a lot of misuse. The case of *Sadhwi Pragyna Singh Thakur v. State Of Maharashtra*, (2011) 10 SCC 445 was referred. On default bail the following two judgements were pointed out viz. *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453 and, *M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence*, (2021) 2 SCC 485 wherein the Supreme Court has reiterated the law that the date on which the accused was remanded to judicial custody has to be

excluded from calculation of statutory period of 180 days. Some other judgements dealt with during the course of discussion included *Sushila Aggrawal v. State (NCT of Delhi)*, (2020) 5 SCC 1 wherein it was held that larger interest of the state has to be taken care and balance the rights of the individual with that of the interest of the society; *Gurbaksh Singh Sibbia v. State of Punjab* (1980) 2 SCC 565; *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 [Anticipatory bail must be time bound]; *Rakesh Kumar Paul v. State of Assam*, AIR 2017 SC 3948; *K.L. Verma v. State And Anr*, (1998) 9 SCC 348 (anticipatory bails are not for the entire duration but for a short duration).

On cancellation of bail it was highlighted that if right reasons are not accorded bail can be canceled. Sec. 439 (2) of the CrPC was referred to. Quashing of bail was also discussed.

Thereafter, judges were enlightened on what their status is and the heavy burden of responsibility they have upon them. They were suggested to respect it and cherish that duty bestowed upon them as a judge. It was emphasized that district judges work at the grass root level and they are the visible face of the judiciary for the people of India. It was pointed out that a subordinate judge is sovereign in the areas and functions that they are assigned to act. It was suggested judges must decide everything that comes their way without fear or favor. It was opined that judges must be “sterner stuff” as the word used by Shakespeare and that they must do what is expected of them. It was further stressed that subordinate judges are the most important because it is on their strength that the entire judicial institution relies. It was highlighted that to make justice appear to be done, judges have to make a lot of sacrifices.

The session covered aspects pertaining to what is bail wherein it was highlighted that the accused is given liberty on appropriate conditions, surety, and ornamental custody. Bail is an arrangement made until the investigation is properly complete. It shifts the accused from police custody/judicial custody to any other form of custody which is more liberal. Some non-negotiable fundamentals were listed such as:

- The purpose of the Criminal Justice System (CJS) is to ensure there is freedom from crime and freedom from the fear of crime. Right to life includes the right to live without the fear of crime and or infliction of crime. Freedom from internal disturbances. Part of the sovereign function of the judge is to ensure a crime free state wherein citizens must not be inflicted with fear of crime.

- Sacrosanct under our constitution, freedom and liberty are values every citizen is entitled to and should not be disturbed unless procedure established by law.
- Presumption of innocence while considering bail applications
- The constitutional democracy recognizes the right to reasonable opportunity to defend and indictment under Art. 21 of the Constitution.
- Detention pending trial is not punitive, that detention is not even to satisfy the victim while considering bail applications. [That detention is not even to satisfy the victim. Victimology is not a concept that can interfere with the bail application – considering the consequences of punishment.]

The judgment in the case *P Chidambaram v. Directorate of Enforcement* (2019) 9 SCC 24 on the point bail not jail may be the rule but it is subject to certain conditions was highlighted. Three cardinal principles that must be considered to reject bail applications or while granting/considering bail were dwelt upon:

1. Gravity of the offense – how that crime affects the society is the kind of gravity that must be considered. Linkage with crime free society ...threat to which person is exposed.
2. Flight risk - Concerns may be different – concise and customize as per the need of the case
3. Interference with justice – Fair trial restriction

It was stressed that the Rule of law is punishing the accused with procedure/punishment established by law, not against the law. Justice not according to law should not be done. It was mentioned that the fear of the media including print, social, and television is instilling great worry in the minds of judges and it was opined that judiciary is not a majoritarian institution. It was suggested that there are conditions as vibrant tools to balance conflicting interests of individuals and society's which judges have with them to justify bail consideration. Nexus between the condition and the consideration for bail must be drawn. The judgment in *Aparna Bhat v. the State of Madhya Pradesh* (2021) SCC 230 on conditions while granting bail was discussed. It was pointed out that early disposal of bail applications is non-negotiable and bail applications should not be pending for longer durations. Judges were suggested to dispose off bail applications at the earliest. Justice Krishna Iyer's judgment in *Gudikanti Narasimhulu and Ors v. Public Prosecutor*, 1978 AIR 429 was referred to. Default bail at the stage of trial and Sec. 437(6) of CrPC was discussed.

Session 2

Expeditious Disposal of Bail Applications

Speakers: Justice Subramonium Prasad and Justice Atul Sreedharan

The session threw light upon the definition of “Bail, highlighting that there is no specific definition for bail in the CrPC. The definition of bail was stated as “security for the appearance of a prisoner on which the accused is released pending trial or investigation”. It was emphasized that bail jurisprudence lies between the tenets of upholding the personal liberty of an individual and ensuring that society as a whole remains protected. These are its two conflicting demands. Various judgments were referred to including *Tulsi Ram Sahu v. State of Chattisgarh*, Special Leave to Appeal (Crl.) No(s). 2564/2022; *Motamarri Appanna Veerraju v. State of West Bengal*, (2020) 14 SCC 284; *Rajesh Seth v. State of Chhattisgarh*, SLP (CRL.) 1247/2022 wherein Supreme Court observed that “indefinite adjournment in a matter relating to anticipatory bail, that too after admitting it, is detrimental to the valuable right of a person”; and *Gurcharan Singh & Ors vs State (Delhi Administration)*, 1978 AIR 179.

It was pointed out that the Supreme Court has consistently noted and re-approached lower courts for delaying the disposal of bail applications whether regular bail applications or anticipatory bail. It was stressed that Supreme Court through judgments have stated that delay leads to denial of justice to the litigant who is made to face great deal of inconvenience. It infringes the personal liberty of the individual seeking bail and prejudice the investigation or hamper the same.

Some parameters for grant and/or denial of bail were highlighted in light of Supreme Court’s judgments viz. (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) the nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail. Further, the necessity of giving reasoned bail orders was emphasized upon referencing the judgment in *Kranti Associates (P) Ltd. v. Masood Ahmed Khan*, (2010) 9 SCC 496 wherein it was mentioned that reasons reassure that

discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

The session further highlighted the statistics pertaining to the number of bail cases in High Court in October 2022 and the number of Criminal appeals withdrawn from High Court from January to October 2022. The session further focussed on innovative and Scientific Approach to Bail Applications such as FASTER and ICJS. The session dwelt upon the system of *Fast and Secure Transmission of Electronic Records* (FASTER) wherein it was highlighted that a suo-moto case *In Re Delay in Release of Convicts after Grant of Bail*, SMW(C) No. 4/2021 was registered by the Supreme Court after it had been found that convicts lodged in Agra Central Jail had not been released even after 3 days of bail being granted to them which led to the conceptualization of FASTER. A software which was launched for transmission of Court Orders swiftly and securely through the electronic mode. The impetus behind the launch of FASTER was the news that many prisoners were not getting released from jail despite bail having been granted to them. It was found that physical copies of the Orders were not delivered to the jail authorities on time. The significance of FASTER was underlined as a mechanism that will ensure timely release of undertrials and prevent them from having to wait behind bars because certified copies of their bail orders are taking time to reach the prison.

The Inter-Operable Criminal Justice System (ICJS) was also discussed during the session. It was explained that the ICJS is a project conceptualized by the e-Committee, Supreme Court of India and initiated by the Ministry of Home Affairs – it is a national platform for enabling integration of the main IT system used for delivery of Criminal Justice in the country. National Crime Records Bureau (NCRB) will be responsible for the implementation in association with National Informatics Centre (NIC). The ICJS seeks to integrate the five pillars of the system, i.e. Police (through Crime and Criminal Tracking and Network Systems), e-Forensics for Forensic Labs, e-Courts for Courts, e-Prosecution for Public Prosecutors, and e-Prisons for Prisons. This will allow all High Courts and subordinate Courts to access the metadata of FIR and charge sheet.

Judges were suggested that they must only mention statements of facts necessary and the reasons essential for granting bail with brief reasons since brief mention of facts for arriving at those reasons is also necessary. With regard to the test of rigidness judges were suggested to read Unlawful Activities prevention Act (UAPA) vis-a-vis Prevention of Money Laundering Act

(PMLA). The session also focussed on how the interest of victim *versus* accused has to be balanced. The session included deliberation on the principle of burden of proof wherein it was highlighted that the presumption of innocence cannot be given away in a democratic state governed by the Constitution.

Judges were suggested to prepare and have a checklist on how to grant bail and not on how to reject bail. Some aspects of Sec. 438 of CrPC wherein NRI seeks bail under the said provision in Indian Courts were discussed. Practical challenges faced by judges while granting bail and the alternatives to overcome those challenges were deliberated amongst judges. It was suggested that judges must justify bail orders on merits of the case.

With regard to application by a foreign national seeking bail under Sec. 438 CrPC in Indian court various conditions that may be imposed for grant of bail were highlighted viz. to ensure that the foreign national cooperates with investigation, appear before court or before IO on a given date and time and to be available as and when required. Judges were suggested that while granting bail they must consider the nature of offence and the nature of evidence. Lastly, it was stressed that bail orders must include reasons since the foundation of a judicial decision is reasons.

Session 3

Bail under Special Acts

Speakers: *Justice Ashutosh Kumar & Justice Moushumi Bhattacharya*

The session initiated by discussing the criminal justice system models developed by Herbert Packer namely, the crime control model and the due process model. The former model aims to control and prevent the commission of crimes whereas the later model rests on the premise that every individual has a right to a fair trial with due process.

Thereafter three special acts that were highlighted and formed an integral part of the discourse are – PMLA, that deals with economic offences and enables government to confiscate property earned from illegally gained proceeds; NDPS, that deals with drugs offences and follows a graded system of punishment varying with the quantum of substances in possession and lastly, UAPA that deals with terrorism related crimes and provides for more effective prevention of certain unlawful activities. Subsequently, a comparative view of the bail provisions under

Section 45, PMLA, Section 37 NDPS and Section 43D(5) in the light of relevant case laws was discoursed. It was emphasised that the decision in *Satender Kumar Antil v. CBI*, 2022 SCC OnLine SC 825 provided that- provisions of other offences would apply to Special Acts also. If an accused is already under incarceration, the same would continue and the provision of the Special Act would get applied thereafter. It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. A similar provision to Section 167(2) of the Criminal Procedure Code, 1973 (CrPC) available under the Special Act would have the same effect entitling the accused for a default bail. While discussing *Vijay Madanlal Choudhary v. Union of India*, 2022 SCC OnLine SC 929 , it was emphasised that Section 45 of PMLA imposes twin conditions for grant of bail and restricts the right to bail but such restraint is not absolute.

Other recent judgments as discussed are- *Kulwant Singh vs. State of Punjab*: The Supreme Court granted bail in an NDPS case considering the advanced age of the accused, period of custody undergone and unlikelihood of completion of trial in near future. In *Amit Singh Moni vs. State of Himachal Pradesh*, CRL.A.668/2020, the accused in the NDPS case had undergone custody for a long period and the trail had not progressed since the pandemic, the Supreme Court granted bail. In *Tarun Aggarwal vs. Union of India*, 2022 LiveLaw (SC) 885, the Supreme Court observed that if a court restricts anticipatory bail up to framing of charge, the order should discuss the peculiar facts and circumstances which warranted such restriction.

Session 4

Conditional Bail: Scope & Limits

Speakers: Justice G. R. Swaminathan & Justice N. Anand Venkatesh

The session commenced by discussing *Aparna Bhat v. State of MP*, 2021 SCC OnLine 230. Participants were suggested to read the said judgment for grasping the practical understanding of conditional bail. While referring to *Munish Bhasin and others v. State (Govt. of NCT of Delhi)* (2009) 4 SCC 45, it was iterated that in a proceeding under Section 438 of CrPC, the Court would not be justified in awarding maintenance to the wife and child. The condition imposed by the High Court directing the appellant to pay a sum of Rs. 12,500/- per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside. It was accentuated that one principle

that judges ought to internalize is that they cannot impose unreasonable conditions. In *Sumit Mehta v. State (NCT of Delhi)*, (2013) 15 SCC 570, it was held that while exercising utmost restraint, the Court can impose conditions countenancing its object as permissible under the law to ensure an uninterrupted and unhampered investigation. Why conditions should not be imposed was dealt with in *Dharmesh v. State of Gujarat*, (2021) 7 SCC 198, where the Division Bench of the Supreme Court found that direction passed by the High Court requiring the appellant-accused to deposit a sum of Rs 2 lakhs each towards compensation to the victims, as a condition for grant of bail was not sustainable. The court in this case gave a conceptual clarity as to why such conditions should not be imposed. The court said that Section 357 CrPC is regarding compensation and that the liability of the accused is fixed only at the conclusion of the trial. Referring to *Dataram Singh v. State of Uttar Pradesh*, (2018) 3 SCC 22, it was highlighted that even if grant or refusal of bail is completely upon discretion of judge, it must be applied in a judicious manner and in a humane way as such remanding hinders dignity of accused.

Judges were cautioned to be well aware of the public trust and confidence in the judicial system. With reference to trial by media, judges were advised to strike a balance and should not be predisposed by what is said by the media, or what the popular notion says. It was highlighted that public uproar by media intervention has led to some significant cases like- *R.K. Anand Vs. Registrar, Delhi High Court*, (2009) 8 SCC 106 and *Sidhartha vashisht Alias manu sharma vs State (NCT of Delhi)*, (2010) 6 SCC 1; (2010) 2 SCC (cri) 1385. The session further exemplified how media trail can lead to false accusations by citing *S. Nambi Narayanan v. Siby Mathews*, (2018) 10 SCC 804.

Session 5

Interlocutory Applications: Management & Expeditious Disposal

Speakers: Justice N. Anand Venkatesh, Justice Moushumi Bhattacharya

& Mr. M.S. Krishnan

The session commenced by emphasizing that the judiciary in contemporary times is occupied in handling matters at the interlocutory stage rather than at the final hearing stage. Therefore, it is important to use discretion in the most judicious manner so that the case reaches its logical end.

While stressing on the need to exercise judicial discretion in handling interlocutory application *Deoraj v. State of Maharashtra*, (2004) 4 SCC 697, was highlighted. While discussing *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1, it was underlined that discretion, in general, is the acumen of what is right and apposite. It indicates knowledge and judiciousness, that perceptiveness which qualifies an individual to evaluate critically of what is right and appropriate integrated with care; good perspicacity, and decision directed by caution: thoughtful judgment; accuracy of judgment; an understanding to distinguish between falsity and truth, between wrong and right and not to do according to the will and private -affections of persons.

It was underscored that whether interim relief can be granted on consideration of issues other than those involved in the main suit. Meaning thereby, that without getting into the merits of both the parties whether interim relief can be granted is something which judges should keep in mind while handling interlocutory applications. Secondly, whether a partial interim relief will satisfy the end of justice till the final disposal of the suit. Thirdly, balancing the rights and consequence that follows out of an interim relief to ensure that the final relief in the suit is not overwhelmed because the interim relief has been granted. It is also important for judges to understand that interim orders do not sound like interim degrees since it will have a telling effect in the process of final adjudication of the case and particularly when it is confirmed or reversed in appeal. The exercise of discretion must be even more stringent in cases of mandatory injunction. In this regard, *Dorab Cawasji Warden v. Coomi Sorab Warden*, 1990 AIR 867, was highlighted. The discussion further emphasised that when interim orders come by way of appeal the test is whether it is a possible view for the trial court to have exercised discretion. This is so because judges have to keep in mind that the trial court is on *prima facie* consideration of the materials available. Reference was made to *Wander Ltd. v. Anton India*, 1990 Supp (1) SCC 727. Significance of timing in applying for interlocutory application was also highlighted. Subsequently, various kind of injunctions were briefly discussed namely-

- ✓ Temporary injunctions
- ✓ Permanent injunctions
- ✓ Preventive injunctions
- ✓ Mandatory injunctions
- ✓ Take down orders

- ✓ Super Injunctions
- ✓ Freezing order/Mareva injunctions
- ✓ Search order/Anton Piller order
- ✓ Quia Timet injunctions
- ✓ Anti-suit injunctions
- ✓ Self-injunctions
- ✓ Norwich Pharmacal order
- ✓ John Doe order and
- ✓ Bayer injunctions

The later part of the session highlighted when an injunction can be refused. In this regard, Section 41 read with Section 14 of The Specific Relief Act, 1963 which contains instances and circumstances under which an injunction cannot be granted by a Civil Court were referred. It was accentuated that there are statutory bars under several enactments that curtail the power of civil courts to grant injunctions. The Supreme Court in *State of A.P. v. Manjeti Laxmi Kantha Rao*, (2000) 3 SCC 689 laid down guidelines on how to interpret a clause in a particular Act which seeks to exclude the jurisdiction of the civil court. Judges were cautioned to have an in-depth study of the scheme of the Act to see whether there is a total bar under an enactment or the bar is only partial. Reference was made to *Rajeev Saumitra v. Neetu Singh & Ors*, 2016 SCC OnLine Del 512.