BAIL IS THE RULE, JAIL EXCEPTION

DISSERTATION

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CERTIFICATE

This is to certify that the research work entitled "Jail is the Rule, Bail Exception" is the work done by HEMANT KUMAR SINGH under my guidance and supervision for the partial fulfilment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled "Bail is the Rule, Jail Exception" is the outcome of my own work conducted under the supervision of Dr./ Prof. MAMTA RANA, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

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List of Abbreviations

AIR – All India Reporter

BC – Before Christ

Cr LJ – Criminal Law Journal

Cr PC – The Code of Criminal Procedure, 1973

CRNZ – Criminal Reporter New Zealand

FIR – First Information Report

HCD – High Court Division

HC – High Court

Hon'ble – Honourable

ICCPR – International Covenant on civil and Political rights

NCRB – National Crimes Records Bureau

PIL – Public Interest Litigation

SCC – Supreme Court Cases

SC – Supreme Court

SF - San Francisco

SLP- Special Leave Petition

Vs – Versus

Chapter 1 - Introduction

The administration of the criminal justice system tries to strike a balance between the search for truth and the fairness of the process. Highlighting "Bail, not jail", is the general rule in Indian criminal jurisprudence based on the cardinal principle that a person is presumed to be innocent till his conviction. This decision of bail or pre-trial detention is separated by a very thin line of demarcation which is to be understood.

A person whose personal liberty is curtailed by arrest is entitled to bail. This study will elucidate the "WHY" factor involved in the parody as to Bail or Jail. Because of its complexity, criminal justice system needs to be applied from case to case basis. Moreover the statute stating bail or jail has a different reflection when seen on the ground realities and practical application, creating issues of human rights and criminal administration and tossing a two sided coins with one side aggrieved undertrials awaiting justice and on the other hand influential personalities and criminals, roaming in the name of awaited justice. This study highlights this issue of huge gap of the statute and its application reviewing the bail and pre-trial detention. Finally trying to clarify the concepts of jail and bail and the situation of the current scenario with reference to the statutes and cases respectively.

The word "Bail" basically means the security of an arrestee's appearance in trial. The effect of granting bail is, accordingly not to release the prisoner free from jail or custody, but to release him from the custody of Law and to trust him to the custody of his sureties who are bound to produce him at his trial at a stated time and place. Granting of bail is a rule and refusal is an exception. A person accused of any bailable offence have the right to be released on bail. Bail in case of bailable offences is considered compulsory. In matters of admission to bail the Code of Criminal Procedure, 1973 makes a distinction between bailable & non-bailable offences. The grant of bail to a person accused of non-bailable offence is optional. But any person accused of bailable offence at any moment while under detention without a warrant at any stage of the proceedings possesses the right to be released on bail as per section 436[1]. When the offence is bailable and accused is ready to furnish bail, the police officer has no discretion as to refuse the bail[2]. Even when any person is suspected of committing a bailable offence he is

[1] The Code of Criminal Procedure, 1973

[2] Dharmu Naik v. Rabindranath Acharya 1978 CrLJ 864 : Kanu Bhai v. State of Gujarat 1972 (B) Guj LR 748.

produced before a magistrate and he is prepared to give bail, Magistrate has no choice but to release him on suitable bail[3]. The offence when it is bailable, bail has to be granted. In case the offence is non-bailable further considerations arise[4]. Magistrate cannot refuse the acceptance of surrender and to bail out an accused against whom a petition or complaint of bailable offence has been filed.[5] While adjudicating a bail application a detailed examination of evidence and elaborate records of the merit of the case is anyways to be avoided.

[3] Kanubhai v. State of Gujarat (1972)(B) Guj LJ 864 : Union of India v. S. Bhagwandas 1969 Mad. LW (Cri) 88.
[4] State of Punjab v. Jagjit Singh, AIR 1962 SC 253 : (1962)3 SCR 622
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Chapter 2 - Jurisprudential History

History of Bail

The concept of bail can tracked back to 399 BC[6], when Plato tried to make a bond for the releasing of Socrates. The modern bail system has evolved from a progressions of laws that originating during the middle ages in England. That is how and why the concepts of bail or jail emerged, throwing some light upon the theories of punishment as well as other aspects of criminal justice system. To see how these concepts emerged with a peek into their history and the reason behind their development.

Evolution in England

There existed circuit courts during the medieval period in Britain. Judges used to periodically go on circuit to visit various parts of the country and decide cases there. The terms Sessions and Quarter Sessions are thus resultant from the intervals at which such courts would hold. In the meantime, the undertrials were kept in cells awaited for their trials. These prisoners were kept in an inhumane and unhygienic conditions, which caused the spread of diseases, agitating the undertrials, who were hence then separated from the accused. This brought a situation when they could be released on securing an amount of surety, so that it was warranted that he would appear on the allotted date for hearing. In case he did not appear his surety was held liable and was made to appear for the trial. Steadily the concept of monetary bail came into picture and the said undertrials were asked to secure a monetary bond, which was contingent to be forfeited in case of non-appearance.

In 1215, The Magna Carta [7]being the first step in granting rights to citizens. It said that no man could be taken into custody or imprisoned unless being judged by his nobles or tried by the law of the land.

Then, the Statute of Westminster was enacted in 1275 which separated crimes as bailable and non bailable. It also provided which officials and judges could render decisions on bail.

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[6] Before Christ

[7]A Document first drafted by the Archbishop of Canterbury to make peace between the unpopular King and a group of rebel barons, it promised the protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown.

In 1677, the Habeas Corpus [8]Act was supplemented to the Right Of Petition Act of 1628, which provided the right to the defendant the right to be known of the charges against him, as well as the right to know whether the charges against him are bailable or not., it is provided that, "A Magistrate shall discharge prisoners from their custody taking their Recognizance, with one or more Surety or Sureties, in any amount of sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter offenses for which by law the Prisoner is not bailable."[9]

The English Bill Of Rights of 1689, which outlined safeguards against judges who used to set bail too high. It stated that "excessive bail has been required of persons committed in criminal cases, to escape the benefit of the laws made for the freedom of the undertrails. Disproportionate bail ought not to be required."

Evolution in America

As per the San Francisco News and the SF[10] Chronicles, the first modern Bail and Bonds business in the United States of America, the scheme by which a person pays a percentage to any professional bondsman who further puts up the cash as a guarantee for that person assuring his appearance in the court, was established by Tom and Peter P. McDonough in 1898 in San Francisco. , Actually this was the same year in which the Bill of Rights was presented in England, and the Judiciary Act was passed by Congress. This specified which types of crimes were bailable and fixed bounds on a judge's discretion in setting bail. The Act stated that all non-capital crimes were bailable and that in case of capital cases the decision to detain a suspect in custody, prior to trial, was to be decided by the judge. The Bill Of Rights [11] was incorporated into Constitution of the US, through the 5th, 6th and 8th Amendments to it, assuring citizens the right to due process of law, protection against excessive bail and a fair and speedy trial. The 8th Amendment to the Constitution of the US provides that "extreme bail shall not be required," but it does not provide any unconditional right to bail.

[8] In India, Habeas corpus is covered as writs under The Constitution of India, 1950
[9] The Habeas Corpus Act 1679
[10] San Francisco
[11] The Bill Of Rights in 1791

In assessing the Indian bail system, it is useful to have regard to some international approaches to bail procedures and the grounds for rebutting the presumption in favour of bail. Under the Canadian Charter of Rights and Freedoms the accused has the right "not to be denied reasonable bail without just cause"[12], the onus rests upon the Crown and pre-trial detention is determined at a "show cause hearing".

The Jurisprudence of the Right to Bail under International Law

The concern about the possible abuse of the rights of the individual in the process of the enforcement of the penal laws by the state security tool and law enforcement agents have resulted in legislative interference at both international (in the form of international conventions and covenants) and at national levels aimed at defending the rights of the individual.

International Bills of Rights have wedged on municipal jurisdiction to the extent that most current jurisdictions have unified the International Bill of Rights[13] and treaty norms in their constitutions and national legal systems. The right to bail falls under the general preface of the right of personal liberty of individual and international instruments such as the the African Charter on Human and Peoples‟ Rights, Universal Declaration of Human Rights, and the International Covenant of Civil and Political Rights (hereinafter referred to as ICCPR), have provisions securing the rights of the personal liberty of the individual both during pre and post trial proceedings and these provisions has been internalised in the national of laws of most of the countries. The provisions are as follows:

Legal Position in India

The Criminal Procedure Code, 1973, does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a)[14] as: " Bailable offence means an offence which is provided as bailable in the First Schedule or which is made bailable by any other law(s) for the time being enforce, and a non-bailable offence means any other offence". Further, sections 436 to 450 set out the provisions for the granting of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not

[12] Section 11(e) Bail Reform Act 1971 (Canada)

[13] The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

[14] The Criminal Procedure Code, 1973

been mentioned in the Act[15]. Thus, it is the decision of the court to put a monetary cap on the bond. Unfortunately, it has been seen that courts have not been sensitive to the economic plight of the weaker sections of society. The unreasonable and exorbitant amounts demanded by the courts as bail bonds clearly show their callous attitude towards the poor.

A shift from bail to jail

The concept of risk is a solitary essential assumptions underlying the bail legislation. It is a common adage that past behaviour is a good forecaster of future behaviour. Criminal justice system uses the existence of prior offences as a part of their criteria in measuring potential-risk offenders. The reasoning behind recent philosophical swing from the "disciplinary society" that emerged during the nineteenth century to a movement called "new penology", which is predominantly concerned with the principle of risk management. Similarly it suggests that criminal justice policies have moved from focusing on the individual towards assessing and redistributing risk "according to mathematical formulae based largely on past experience." And such risk evaluation has been the Richter scale for measuring the need for detaining the accused even when his guilt is to be tried upon by the court and the risk of setting him free. Though the fundamental principles guiding the criminal justice system is to use bail as a rule presuming the accused to be innocent and and respecting his rights as an individual primarily.

[15] The Criminal Procedure Code, 1973

Chapter 3 - Statutory Provisions

Provisions of offences classified as bailable or non bailable as well as cognizable or non-cognizable, giving a picture of the judicial minds of what they would have had in their minds while creating such classification, and helping to clearly understand the purpose and logic behind the provisions for jail and bail. Various provisions of statutes like IPC and The Code of Criminal Procedure, 1973 provide such classification of offences on one side and determining rights of individuals involved on accused of such offences. The legislators keeping in view just the aspect as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period. And provisions for such an instatnce have been necessitated under chapter VI of The Code of Criminal Procedure, 1973.

Provisions of Code of The Code of Criminal Procedure, 1973

Chapter 33 of The Code of Criminal Procedure, 1973 Provides Provisions As To Bail And Bonds

The law for issuance of warrants has been laid down in The Code of Criminal Procedure, 1973 under Chapter VI (part b) from sections 70 to 81.

Section 436 [16]– In what cases bail to be taken

When any person other than a person accused of a 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, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

[16] The Code of Criminal Procedure, 1973

Provided further that nothing in this section shall be deemed to affect the provisions of Sub-Section (3) of section 116 [17]or section 446A[18].

Explanation – Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

Notwithstanding anything contained in Sub-Section (1), 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.

Section 436A[19] – 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 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:

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.

[17] The Code of Criminal Procedure, 1973
[18] The Code of Criminal Procedure, 1973
[19] The Code of Criminal Procedure, 1973

Section 437 - When bail may be taken in case of non bailable offence:-

(1) 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, but-

(i) such person 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;

(ii) such person shall not be so released if such offence is a cognizable offence and he has 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 non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (1) of clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

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

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, 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 as hereinafter provided.

(3) 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 IPC[20] or abatement of, or conspiracy or attempt to commit,

[20] Indian Penal Code (45 of 1860)

any such offence, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary,-

a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or
b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or
c) Otherwise in the interests of Justice.

(4) An officer or a Court releasing any person on bail under sub-section (1) or subsection (2), shall record in writing his or its reasons or special reasons, for so doing.

(5) 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.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) 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, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgement delivered.

Case Law - Guiding factors for granting or refusing bail[21].

Section 437A [22]– Bail to require accused to appear before next appellate Court

Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of

[21] Hussainara Khatoon v. State of Bihar (1980)SCC(cri)23 / MR 1979 SC 1360
[22] The Code of Criminal Procedure, 1973

any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.

Section 438 [23]- Direction for grant of bail to person apprehending arrest:-

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Sessions makes a direction under sub-section (1), it may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including-

- a condition that the person shall make himself available for interrogation by a police officer as and when required;
- a condition that the 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;
- a condition that the person shall not leave India without the previous permission of the Court;
- such other condition as may be imposed under subsection (3) of section 437, as if the bail were granted under that section. (2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in confirmity with the direction of the Court under sub-section (1).

[23] The Code of Criminal Procedure, 1973

Section 439[24] – Special powers of High Court or Court of Session regarding bail

A High Court or Court of Session may direct-

that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-Section (3) of section 437[25], may impose any condition which it considers necessary for the purposes mentioned in that Sub-Section; that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

Section 440 – Amount of bond and reduction thereof

The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

Complaint Made Under Section 200[26] to the Magistrate and to the Police Under section 154 [27]have to be further seen with the provisions for Bail as Provided under Section 436 to 439.[28]

The Police officers u/s 157[29], are expected to forthwith start with the investigation of the offence. Section 157 is in no uncertain terms contemplates immediate investigation, and, if any

[24] The Code of Criminal Procedure, 1973
[25] *When bail may be taken in case of non bailable offence The Code of Criminal Procedure:* Section 437 1973
[26] *Examination of complainant by Magistrate*: Section 200, The Code of Criminal Procedure, 1973
[27] *Information in cognizable cases*: Section 154, The Code of Criminal Procedure, 1973
[28] The Code of Criminal Procedure, 1973
[29] *Procedure for investigation*: Section 157, The Code of Criminal Procedure, 1973

person is so arrested in pursuance to First Information Report, interrogation must start immediately.

Section 496 [30]- Right of bail in Bail able offence.

A bailable offence is an offence where bail can be claimed as a matter of right. Where the accused person is prepared to give bail bond, the police officer or the court is bound to set him free on bail. Thus neither the court nor the officer can reject bail where the offence is bail able. It is only the HCD [31]which has power to order him to be arrested and remanded to custody in bail able offence. In every bail able offence bail is right. The accused of a bail able offence can not be taken into custody unless he is unable or unwilling to offer bail bond or furnish security .The court or police may ask for securities. The object of demand of security is not punish the accused but to ensure his presence in the court. Section 498 specified that, the amount of security must be fixed with the nature of the offence, but should not be excessive.

Case Law - *Abdus Salam vs State* [32]

Section 497 - Right of bail in Non- bail able offence

Where a person is arrested for a non bail able offence and is brought before the court, the court may release him on bail. Thus the bail in non-bail able offence is a matter within the discretion of the court, and can not be claim as of right. The accused shall not be released, if there are reasonable grounds for believing that he was guilty for such offence punishable with death or imprisonment for life. However Section 497 provides that, any person under the age of 16 years ,any women or sick or infirm person may be released on bail, even though they are accused of offence punished with long term imprisonment or with death.

Case Law - *Shah Alam Chowdhury vs State* [33]

[30] The Code of Criminal Procedure, 1973
[31] High Court Division
[32] 42 DLR (AD) 10.
[33] 989, 18 CLC (HCD)

Note-It is mandatory for the courts to pass order in writing giving reasons for allowing or rejecting the bail prayer U/S 497(3)[34].

Section 498 - Anticipatory Bail (Bail before arrest)

When a person is granted bail in apprehension of arrest this is called anticipatory bail .This is an extra ordinary measure and an exceptional to the general rule of bail. When any person has reason to believe that he may be arrested for committing a non-bail able offence, he may apply to the High Court or the Court of Session for direction under this section that he shall be released on bail. There is no section or provision which authorized the court to grant anticipatory bail. However application is made under section 498 of The Code of Criminal Procedure, 1973 for anticipatory bail. Both the HCD[35] and the Court of Session exercise this power without any limitation.

Condition for an Anticipatory bail

When the court believes that there is a possibility that the accused has been falsely implicated and that his freedom will not hamper the investigation of the crime may bail granted under s. 498 may be cancelled at any time if the investigation is hampered. It is important to note that the attendance of the person apprehending arrest is compulsory at the final hearing.

- The person shall make himself available for interrogation by a police officer when required.
- The person shall not, directly or indirectly- make any inducement, threat.
- The person shall not leave Bangladesh without the previous permission of the court.

Case reference- *Abdur Rahman Mulla vs State* [36]

[34] The Code of Criminal Procedure, 1973
[35] High Court Division
[36] 50 DLR 401.

Constitutional Safeguards:

It has remained said in a catena of judgements that just because a person is in police custody or imprisoned otherwise else under arrest, does not isolate him of his basic fundamental rights plus his violation allows the person to appear before the Supreme Court under the Article 32[37].Detention does not divest individual of his fundamental rights[38]. They don't escape the person as he enters the remand though they may suffer shrinkage needed by captivity.[39] However, the degree of shrinkage can in addition should never reach the phase of torture in custody of such a nature that the person is reduced to a ordinary animal survival.

Article 20[40]:

Article 20 primarily provides a person the rights contrary to conviction of offences. it includes the norm of non-retroactivity of penal laws (*Nullum crimen sine lege*[41]) i.e. ex-post facto laws thus making it a violation of the individuals fundamental rights if attempts are being to convict him then torture him as per some statute. Article 20 also guards against double jeopardy (*Nemo debet pro eadem causa bis vexari*[42]). This Article most vitally protects an individual from self-incrimination. The police subjects a person to ruthless and continuous torture to make him confess to a crime even though he has not committed the same.

[37] The Constitution of India, 1950

[38] Prabhakar Pandurang v. State of Maharashtra, AIR 1966 SC 424; D.B. Mohan Patnaik v. State of A.P, AIR 1971 SC 2092

[39] Sunil Batra (II) v. Delhi Admn., (1980) 2 SCR 557

[40] The Constitution of India, 1950

[41] "*No crime, no punishment without a previous penal law*", Article 22 of the ROME STATUTE of the International Criminal Court

[42] *No one ought to be twice troubled or harassed [if it appear to the court that it is] for one and the same cause*", http://www.wordinfo.info/words/index/info/view_unit/3475 (Accessed on January 23, 2015)

Article 21 [43]

This article has been assumed in the Indian judiciary to guard the right to be free from torture. This is such view because the right to life is further than a simple right to live an animalistic survival[44].The expression "life or personal liberty" in the Article 21 embraces a guarantee against assault and torture even by the State and its functionaries to any person who is brought into in custody and no sovereign immunity can be appealed against the liability of any State arising owing to such criminal use of force above the captive person.[45]

Article 22 [46]

Article 22 make available four basic fundamental rights in relation to conviction. These include of being learned of the grounds of arrest, to, preventive detention laws, be defended by a legal practitioner of his choice and production of the arrested before the nearest Magistrate in 24 hours of arrest of the person. Thus, these provisions are deliberated to ensure that a person is not exposed to any ill-treatment that is lacking of statutory backing or exceeds prescribed excesses.

[43] The Constitution of India, 1950

[44] Sarah Smith, "*The Right to Life in India: Is It Really the 'Law of the Land"*, http://www.hrsolidarity.net/mainfile.php/2005vol15no05/2446/ (Visited on January 23, 2010), Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, AIR 1981 SC 746a; Bandhua Mukti Morcha v. Union of India, (1997)10SCC549; People's Union for Democratic Rights and Ors v. Union of India (UOI) and Ors, AIR 1982 SC 1473

[45] D.K.Basu v. State of W.B, (1997) 1 SCC 416

[46] The Constitution of India, 1950

Chapter 4 – Judicial view

View of judges and jurists is a very important as it provides a realistic view with a very intellectual and logical point of view. This not only brings out the underlying loop holes but also suggests the probable solutions to the same.

Role of Supreme Court as Activist

Of course, the judiciary in contemporary years has occupied a lead and has came forward with a helping hands to provide some relief to the so called victims of criminal justice in a distinct way.

Some of the current developments that have occupied place during the previous years in our judicial system is to seek redressal and accord justice to the poor society are worth bring up. The importance of these progresses to the delivery system of justice can not be overlooked. They have transformed our legal jurisprudence and will go a very long way in providing relief to the common man and the large masses.

In opinion of the importance of the subject matter, it is brought forward to explain in ephemeral some of the significant areas of the criminal justice delivery system that has attracted the consideration of the courts in recent years. These are:

- ✓ Public interest litigation.
- ✓ Bail justice jurisprudence.
- ✓ Prison justice.

Public Interest Litigation

Public interest owes its origin in the United States of America. It was for the period of the 1960s that public interest litigation emerged as an integral part of the legal aid measure primarily aimed to protect the rights of the weaker sections of the public, such as the women, children, mentally and physically handicapped and others.

In India in the last few decades, a new surge of public interest litigation has knocked the courts. It is being argued that some quarters that public interest litigation has opened a penstock of litigation and by such action, the Indian judiciary seemed to be prognostic itself as the promoter of the freedom of people.

The notion of PIL has brought into exertions by activists and other third parties who could help providing help to the underlying undertrials.

Bail Justice System

Bail is a common term used to mean judicial discharge from custodia - legis[47]. The right to bail and the right to be released from custody in any criminal case, after furnishing sufficient amount of security and bond- has been acknowledged in every civil society as a fundamental feature of the human rights. There exists a principle that the object of any criminal proceeding had always been to secure the presence of the accused of a crime while inquiry, trial and investigation before the court, and to safeguard the availability of the accused to serve the sentence, if held to be convicted. It would be unfair and unjust to deprive any person of his freedom and liberty and keep him in imprisonment, on a condition that his presence in the court, is assured whenever required for trial.

Prison Justice

Justice delayed is justice denied. This is much more so in criminal cases when the liberty of an individual is largely at stake and in jeopardy. The satire of fate is that in all the cases, it is the poor and the week person who remain the victims of the criminal justice system, and not the rich who easily get away.

The predicament of undertrials for the first time came to the notice of the apex Court of India in the landmark judgement of *Hussainara Khatoon v. State of Bihar* [48]in 1979[49], While granting appeal of freedom of undertrials who have almost spent their period of sentences, the court held that their detention was visibly illegal and was in violation of their fundamental rights as guaranteed under Article 21[50]. The court supplementarily said that speedy trial is a

[47] Maxim – meaning Legal Custody
[48] (1980)SCC(cri)23
[49] Hussainara Khatoon v. State of Bihar :
Wherein it was found that thousands of undertrials were suffering in various jails in the State of Bihar for periods extensive than the maximum period for which they could have actually been sentenced, if convicted.
[50] The Constitution of India, 1950

constitutional compulsion and the State can't evade its constitutional obligation and its constitutional mandate by pleading administrative or financial inability.

Cases regulating Condition and Grant of Bail

In ***Hussainara Khatoon*** [51]case, the Court proposed eight point alternative formulae to the conventional grounds for the grant of bail, usually such offence related or finance related :

1. The stretch of his residence in the community,
2. His history, employment status and his financial condition,
3. his family bonds and relationships,
4. his reputation, character and financial conditions,
5. his prior criminal record if any including any record of priorly released on recognizance or on bail,
6. An identity of responsible members of the societywho would vouch for his reliability,
7. the nature of the offence charged and the seeming probability of being convicted and the likely punishment in so far as these reasons are relevant on the risk of non appearance; and
8. any other factors indicating the relation of the accused to the community or else bearing on the risk of wilful failure to appear.

Prahlad Singh Bhati V/s. NCT, Delhi[52] *and Gurcharan Singh V/s. State (Delhi Administration*[53]

It is well settled that the matters that has to be considered in an application for bail are :-

1. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
2. nature and gravity of the charge;
3. severity of the punishment in the event of conviction;
4. danger of accused absconding or fleeing if released on bail;
5. character, behaviour, means, position and standing of the accused;

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[51] *Hussainara Khatoon v. State of Bihar* (1980)SCC(cri)23
[52] 2001 4 SCC 280
[53] AIR 1978 SC 179

6. likelihood of the offence being repeated;
7. reasonable apprehension of the witnesses being tampered with; and
8. danger, of course, of justice being thwarted by grant of bail.

While a ambiguous allegation that accused may tamper with the evidence or the witnesses may not be a valid ground to refuse the bail, if the accused seems to be of such character that his mere presence would at large intimidate the witness or if there is sufficient substance to show that he would use his liberty to undermine justice or to tamper the evidence, then bail should be refused.

Kalyan Chandra Sarkar V/s. Rajesh Ranjan[54]

We may also refer to the following principles in relation to granting or refusal of bail as stated in:-

"The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation on the merit of the case need not be commenced, there is a need to indicate in such orders reasons for prima facie finality why bail was being granted predominantly where the accused is charged of having committed any serious offense. Any order lacking of such explanations would suffer from non-application of mind. It is also indispensable for the court granting bail to reflect among other circumstances, the following factors also before granting bail; they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
2. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
3. Prima facie satisfaction of the court in support of the charge."

[54] 2004 7 SCC 528

Sanjay Suri vs Delhi Adminstration[55]

A trainee newspaper journalist initiated a public interest litigation by filing a writ petition in the Apex Court to gather information regarding seven juvenile undertrials locked up from a long time in Tihar Jail in Delhi, whose circumstances were reported to be miserably. The Court, after getting a thorough investigation conducted of the matter, came to know that the prisoners were living in pathetic conditions in prison and there was in jail. The court accordingly issued a number of to undertake corrective measures, so that the prisoner could be under the law and were not put to realize that the detainees were living in disgraceful conditions in jail and there was overcrowding in prison. The court in like manner issued various directions to the jail administration under the provisions of the Indian Prison Act[56] to attempt restorative measures, so that the detainee could be provided with facilities available under the law and were not put to harassment and inhuman torture.

Kuldeep Singh and B.L. Hansaria, JJ said that:

"Unless there is contemplation on the part of all concerned with the criminal justice system, issues relating to jail reforms, development in the prisoner's condition, and better administration of justice will last to remain on paper. It is only possible to reduce the backlog of criminal cases if the Indian judiciary and lawyers together come to resolve to refrain from unnecessary and consequent adjournments."

Prahlad Singh Bhati vs NCT, Delhi[57]

The principles establishments, which the Court must consider while declining or granting bail, have been highlighted out by this Court for the situation of accordingly :

"The jurisdiction to concede bail must be exercised on the premise of decently settled principles having respect to the circumstances of every case and not in an arbitrary manner. While granting the bail, the Court needs to remember the way of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will involve, the

[55] 1988 AIR 414, 1988 SCR (2) 234
[56] Indian Prison Act , 1884
[57] (2001) 4 SCC 280

character, behavior, means and standing of the accused, circumstances which are exceptional to the accused, reasonable plausibility of securing the vicinity of the accused at the trial, reasonable misgiving of the witnesses being messed with, the bigger interests of the public or State and comparable other contemplations. It has likewise to be remembered that for the reasons of granting the bail the governing body has utilized the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the gift of bail can just fulfill it concerning whether there is a genuine argument against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not predictable, at this stage, to have the evidence founding the guilt of the accused afar reasonable doubt."

The grant or refusal to grant bail lies within the discretion of the Court. The grant or refusal is regulated, to a vast degree, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be prevented just because from claiming the sentiments of the community against the accused. The main roles of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in participation thereon whenever his presence is required.

Gurcharan Singh and Ors. vs State[58]

The Court observed that two paramount considerations, while considering request for grant of bail in non-bailable offense, aside from the seriousness of the offense, are the probability of the accused fleeing from justice and his tampering with the prosecution witnesses. The two of them identify with ensure of the reasonable trial of the case. Though, this aspect is managed by the High Court in its impugned order, in our view, the same is not convincing.

[58] AIR 1978 SC 179

State through Central Bureau of Investigation vs Amarmani Tripathi[59]

Para 16: Reliance is next placed on *Dolat Ram and others v/s. State of Haryana* [60] wherein the distinction between the factors relevant for rejecting bail in a non-bailable case and cancellation of bail already granted, was brought out:

"Rejection of bail in a non-bailable case at the preliminary stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are : interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial**."**

Para 17:**[61]** In an application for cancellation, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant u/s. 439[62] read with Sec. 437[63], continue to be relevant.

Panchanan Mishra vs Digambar Mishra[64]

The Court observed:

"The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime....It hardly requires to be stated that once a

[59] AIR 2005 SC 3490
[60] 1995 1 SCC 349
[61] ibid
[62] *Special powers of High Court or Court of Sessions regarding* bail: Section 439, The Code of Criminal Procedure, 1973
[63] *When bail may be taken in case of non bailable offence*: Section 437, The Code of Criminal Procedure, 1973
[64] 2005 3 SCC 143

person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

Amount of Bail / Bond

The object of calling upon accused to furnish security is not to penalize accused but to ensure his presence in court and the amount of security is to be fixed with due regard to the nature of offence and the means of the accused. This has been dealt in Section 440[65].

B Sardarilal vs Supdt. Central Jail, Tihar, [66]

While administering justice it is the duty of the court to see that any order to be passed or condition to be imposed shall always to be in the interest of the accused and the State. The conditions shall not be capricious. On the other hand, it shall be in the aid of giving effect to the very object behind the discretion. Insisting on local surety or cash surety is incorrect and indirectly results in denial of bail. [67]

State Through Central Bureau Of Investigation Vs Amarmani Tripathi [68]

In an application for wiping out, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant u/s. 439 [69]read with Sec. 437[70], continue to be relevant. We, however, concur that while considering and determining appeals against grant of bail, where the accused has been at long for a considerable time, the post bail conduct and supervening conditions will also have to be taken care of.

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[65] *Amount of bond and reduction thereof*: Section 440, The Code of Criminal Procedure, 1973

[66] 1969 Cri LJ 675 (Delhi) (DB).

[67] 1992 CrLJ 1676 at page 1680-81 (Kant)

[68] AIR 2005 SC 3490

[69] *Special powers of High Court or Court of Sessions regarding bail: section* -439, The Code of Criminal Procedure, 1973

[70]. *When bail may be taken in case of non bailable offence,* section 437 The Code of Criminal Procedure, 1973

Snajay Chandra vs CBI (2G Scam case)

Critical observations of Apex Court in the case, where in the Court extensively dealt with the issue of granting or refusing the grant of Bail, that is, circumstances under which only Bail should be refused, and ordinarily, as a general rule, Bail should be given:

In bail applications, generally, it has been set down from the earlier times that the object of bail is to secure the presence of the accused individual at his trial by sensible amount of bail. The object of bail is neither punitive nor preventative. Hardship of liberty must be considered a punishment, unless it can be required to guarantee that an accused individual will stand his trial when called upon.

The Courts owe more than verbal admiration to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

From the earlier times, it was appreciated that detention in custody pending fulfillment of trial could be a reason for extraordinary hardship. Now and again, necessity requests that some un-convicted persons ought to be held in custody pending trial to secure their attendance at the trial yet in such cases, `necessity' is the operative test.

In this country, it would be truly contrary to the idea of personal liberty enshrined in the Constitution that any individual ought to be punished in appreciation of any matter, whereupon, he has not been convicted or that in any circumstances, he ought to be deprived of his liberty upon only the conviction that he will tamper with the witnesses if left at liberty, spare in the most extraordinary circumstances. Aside from the subject of prevention being the object of a refusal of bail, one must not dismiss the way that any imprisonment before conviction has a substantial punitive content and it would be dishonorable for any Court to reject bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson. [71]

The provisions of Code of criminal Procedure 1973 confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it must be practiced with incredible care and caution by balancing profitable right of liberty of an individual and the interest of the society in general.

[71] Ibid, (Paras 21 to 23)

In our perspective, the reasoning embraced by the learned District Judge, which is confirmed by the High Court, as we would see it, a disavowal of the entire premise of our arrangement of law and typical tenet of safeguard framework. It transcends regard for the necessity that a man might be considered guiltless until he is discovered blameworthy. On the off chance that such power is perceived, then it may prompt confused situation and would jeopardize the personal liberty of an individual.[72]

In this nation, it would be very contrary to the concept of personal liberty cherished in the Constitution that any individual should be rebuffed in admiration of any matter, whereupon, he has not been convicted or that in any circumstances, he should be denied of his liberty upon just the conviction that he will mess around with the witnesses if left at liberty, save in the most exceptional circumstances. Beside the subject of prevention being the object of a refusal of safeguard, one must not reject the way that any detainment before conviction has a significant corrective content and it would be disgraceful for any Court to deny safeguard as a right.

Liberty of Individual

Siddharam Satlingappa Mhetre v. State of Maharashtra[73]

For the situation of this Court held that "pretty much as liberty is valuable to an individual, so is the general public's interest in maintenance of peace, law and order. Both are just as important." This Court further observed: Personal liberty is a very valuable principal right and it ought to be curtailed just when it becomes imperative according to the exceptional facts and circumstances of the case."

Gurbaksh Singh v. State of Punjab[74]

Reemphasizing that liberty… – 'A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.'

[72] Ibid, Para 25
[73] (2011) 1 SCC 694
[74] AIR 1977 SC 2447

Babba v. State of Maharashtra[75]

This Court has taken the view that when there is a delay in the trial, bail ought to be allowed to the accused, additionally the court held the same in cases *Vivek Kumar v. State of U.P.*[76], *Mahesh Kumar Bhawsinghka v. State of Delhi*[77].

Gravity of the Crime

Ram Govind Upadhyay Vs Sudarshan Singh [78]*: Commission of a Henious crime*

Para 2: While the liberty of an individual is valuable and there should always be a all round effort from Courts of law to protect the liberty of individuals - but this protection can be made only available to the deserving ones only as the term protection cannot without anyone else be called to be absolute in each and every other situation but stand competent depending upon the requirements of the circumstances. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs a protection from these elements since the latter are having the capability of spreading a reign of terror so as to disrupt the life and the tranquility of the people in the society. The protection thus to be allowed upon proper caution depending upon the fact situation of the matter. It is in this context the observations of this Court in *Shahzad Hasan Khan vs. Ishtiaq Hasan Khan and Anr*[79]. seem to be rather opposite.

This Court observed in *Shahzad Hasan Khan* [80]as below :-

"Had the learned Judge granted time to the complainant for filing counter-affidavit correct facts would have been placed before the Court and it could have been pointed out that apart from the inherent danger of tampering with or intimidating witnesses and aborting the case, there was also the danger to the life of the main witnesses or to the life of the accused being endangered as experience of life has demonstrated to the individuals from the profession and the judiciary, and in that occasion, the learned Judge would have been in a superior position to ascertain facts to act judiciously. Probably liberty of a resident must be zealously safeguarded

[75] (2005) 11 SCC 569
[76] (2000) 9 SCC 443
[77] (2000) 9 SCC 383
[78] AIR 2002 SC 1475
[79] (1987 (2) SCC 684)
[80] (1987 (2) SCC 684)

by Court, nonetheless when a person is accused of a genuine offense like homicide and his successive bail applications are dismisses on legitimacy there being prima facie material, the prosecution is qualified for place correct facts before the Court. Liberty is to be secured through methodology of law, which is administered keeping in mind the interests of the accused, the relatives of the exploited person who lost his life and who feel helpless and believe that there is no equity in the world as also the aggregated interest of the community so parties don't lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case."

Para 3: [81]Grant of bail however being a discretionary order - but, on the other hand, calls for exercise of such a discretion in a prudent manner and not as a matter obviously. Order for bail dispossessed of any fitting reason cannot be sustained. Unnecessary to record, then again, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, however may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same ought to and should always be coupled with other circumstances warranting the grant of bail. The nature of the offense is one of the basic consideration for the grant of bail - more heinous is a crime, the greater is the chance of rejection of the bail, however, on the other hand, dependent on the factual matrix of the matter.

Para 4[82]: Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture though however, the same are only illustrative and nor exhaustive neither there can be any. The considerations being :

- While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.
- Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail.

[81] ibid
[82] ibid

- While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.
- Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

Factors to be considered by the Magistrate concerned while granting / refusing Bail – Some observations of the Apex Court / Bombay HC judgments:

State of Rajasthan vs Bal Chand[83]

The accused was convicted by the trial court. When he went on appeal the High Court, it acquitted him. The State went on appeal to the Hon'ble Supreme Court under Art. 136 of the Constitution through a special leave petition. The accused was directed to surrender by the court. He then filed for bail. It was then for the first time that *Justice Krishna Iyer* raised his voice against this unfair system of bail administration. He said that though while the system of pecuniary bail has a tradition behind it, a time for rethinking has come. It may well be that in most cases an undertaking would serve the purpose. Justice Krishna Iyer, in one of his shortest judgment, one page judgment had observed – "the basic rule 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 other troubles in the shape of repeating offences or intimidating witnesses and the like by the Petitioner who seeks enlargement on bail from the court".

Joginder Kumar vs State of UP[84]

In this case the SC held that it shall be the duty of the Magistrate before whom the arrested person is produced to satisfy himself that requirements of pre-arrest have been complied with and shall be followed in all cases of arrest till legal provisions are made in this behalf.

The following requirements were prescribed in the judgement:-

[83] AIR 1977 SC 2447
[84] AIR 1994 SC 1349

- An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.
- The Police Officer shall inform the arrested person when he is brought to the police station of this right.
- An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly.

Narendra vs B BGujral[85]

The SC in the case observed that whenever the liberty of the subject is involved, whether under a penal law, or law of preventive detention, it is the bounden duty of the court, to satisfy itself that "*all the safeguards provided by the law have been scrupulously observed*".

Prashant Kumar vs Manohar Lal [86]

the SC held that "it must be said that the Magistrate as also the Sessions Judges while either granting or refusing bail must support their orders by cogent reasons and that is all the more so required as their orders are frequently subjected to scrutiny of the High Court. The SC further held that any order passed by the Court without giving any reason either for grant or refusal of bail could not sustain and had no force of law.

Dhruv K. Jaiswal vs State of Bihar[87]

Being aggrieved by the aforesaid cryptic order of the Patna HC, the Petitioner approached the SC by way of SLP. The order of the SC reads as under: "we are unable to find from the aforesaid order as to any reason why the learned judge did not find any merit in the application for bail. We do not know, whether he urged such grounds before the HC, as the impugned order is silent. In such a situation we feel that a more feasible course is to permit the petitioner to move

[85] AIR 1979 SC 420
[86] 1988 CrLJ 1463
[87] AIR 2000 SC 209

the HC again. If any such application is filed, we request the HC to pass a reasoned order while disposing of the application.

Non bailable warrants[88]

The law for issuance of warrants has been laid down in under Chapter VI (part b) from sections 70 to 81 of the Code[89]

The Jurisprudence surrounding issuing of Non-Bailable Warrants has been scribed in following of the Cases:

Inder Mohan Goswami & Another Vs. State of Uttaranchal & Others [90]

The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual[91]. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. Only when in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, should non-bailable warrants be issued. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period[92].

Geeta Sethi v. State[93],

it was emphasized that courts administering justice on criminal side must always remain alive to the "*presumption of innocence*" which is the hallmark of criminal jurisprudence and, thus, a natural consequence is that every accused is clothed with the presumption of innocence and

[88] http://www.legalserviceindia.com/Criminallaws/criminal_law.htm (Accessed on 21.1.2015)
[89] The Code of Criminal Procedure, 1973
[90] 2007 (12) Scale15. at para 52
[91] Inder Mohan Goswami & Another Vs. State of Uttaranchal & Others 2007 (12) Scale15. at para 52
[92] ibid
[93] 2001 (91) DLT 47

entitled to just, fair and decent trial and the aim of the criminal trial is not humiliating or harassing an accused, but to determine the guilty of the innocence. In the recent case of *Inder Mohan Goswami & Another Vs. State of Uttaranchal & Others*[94], this Hon'ble court had laid down few guidelines for the courts with regards to issuance of non-bailable warrants: "it is reasonable to believe that the person will not voluntarily appear in court; or the police authorities are unable to find the person to serve him with a summon; or it is considered that the person could harm someone if not placed into custody immediately." Further observed that a non-bailable warrant could be issued if: "…an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law…."

Omwati v. State of UP & Another [95]

The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. In the aforementioned case it was opined that first the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. It was also held that Personal liberty is paramount; therefore courts were cautioned at the first and second instance to refrain from issuing non-bailable warrants. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants.

State of U.P. v. Poosu & Another[96]

In this case it was held that "*broadly speaking, the court would take into account the various factors such as the nature and seriousness of the offence, the character of the evidence,*

[94] 2007 (12) Scale15.
[95] 2004 (4) SCC 425
[96] 1976 (3) SCC 1 at para 13.

circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and the State."

However it must be borne in the mind that whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the court. Although, the discretion is exercised judiciously it is not possible to computerize and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised.[97]

Om Prakash Choith Nanikram Harchandani vs UOI[98]

In a significant judgement, the larger bench of the Supreme Court, in this case had held that the offences under the Customs and Central Excise, The laws are Non – cognizable and bailable.[99] Arrests in Central Excise and Customs have always brought butterflies (sting bees) in one's stomach, as getting a bail had always been a long drawn and a very difficult process.

Apex Court in this case has ruled that the Customs Act[100] and Central Excise Act[101], 1944 are meant for recovery of duties and not for punishing the offenders by way of arrest. Instead of focusing on recovery of duty, the two Departments of Revenue launched criminal proceedings against number of appellant parties and accordingly 15 appeals filed by them are allowed.

Article 21 [102]of becomes relevant here which reads as under:

"No person shall be deprived of his life or personal liberty except according to procedure established by law".

[97] State of U.P. v. Poosu & Another (1976) 3 SCC 1 at para 13
[98] 2011-TIOL-95-SC-CX-LB
[99] http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=13485 (Accessed on 5.2.2015)
[100] Customs Act , 1962
[101] Central Excise Act, 1944
[102] The Constitution of India, 1950

Chapter 5 - Presumption of Innocence

The gradual erosion of the presumption in favour of bail has been the subject of much criticism. It has been argued that this legislative trend has created…"a significant potential for anomalies to arise and for any coherent philosophy behind the law of bail to be lost". As far back as 1987, Weatherburn commented "*if public opinion no matter how poorly informed, is to become sufficient cause for removing a presumption in favour of bail, the reform engendered by the original Bail Act will disintegrate under the weight of all the exceptions". Indeed if the current trend continues, the presumption in favour of bail ma y be the exception rather than the rule".*

The decision to grant or refuse bail is an extremely important one. Refusal of bail not only seriously infringes an individual's basic liberty, but also has broader ramifications in the subsequent criminal processing of that individual, such as lack of access to legal and rehabilitation resources.

Furthermore, bail laws, and decisions based on them, clearly highlight the tension between the competing ideas of the presumption of innocence and protection of the community. An examination of recent bail laws and associated parliamentary debates reveals a shift away from upholding the rights of the individual towards appeasing community fear of violent crime.

Each of these factors list further tests that the court must apply when making the determination.

Presumption of innocence versus protection of the community

As there is no legal mandate for pre-trial punishment, a bail application can, at a theoretical level, be reduced to an assessment between the competing interests of the accused (who is presumed innocent until proven guilty and entitled to remain at liberty) on the one hand, and the community (which expects to be protected from "dangerous" offenders) on the other. However, any realistic assessment of bail needs to work on the basis that the presumption of innocence must give way, in certain circumstances, to accommodate the community's interest in having guilt determined (which is facilitated by the accused's attendance at court) and protecting society against further harm from the offender. It is important that judicial officers

and police bear these broader theoretical constructs underpinning the bail system in mind when they are making decisions concerning bail.

Recently commentators have argued that:"...*the present Indian scenario concerning pre trail custody is currently in gross violation of international law, breaching certain sections of the International Covenant on Civil and Political Rights, to which India is a signatory. Basically, it violates the presumption of innocence and breaches the principle that refusal of bail should be the exception. It is argued that categorically denying people bail equates with substantial pre-trial punishment. It is an injustice that affronts human dignity, offends fundamental principles of law and is all too often fatal in its consequences.*"

In support of these claims, figures show that remand prisoner suicides are disproportionately high, accounting for 36% of suicides among the entire prison population. The common law does not sanction preventative detention, that is, punishment that exceeds the penalty commensurate with the seriousness of the offence. Generally, the sentence should relate to the proven offence and not involve speculation about what the offender may do in the future. As bail laws, appear to focus on preventative detention, it is of interest to refer to the judicial outcomes for those who are refused bail

Chapter 6 - Bail as a Rule

General Meaning of Bail:

Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security, known also as the bail, or, more accurately, the bail bond, is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security. [103]The personal liberty of the person is secured by obtaining "Bail" in the form of, either furnishing "surety" or by "depositing of certain cash amount" in lieu of Surety, or by "executing a Personal Release Bond", before the Court / Officer In-Charge of the Police station, thereby securing to the Court / Police that the person seeking the release, would make himself present during the trial of the offence for which he is alleged to have committed.

General Process

The Criminal law machinery is set into motion when a person makes a complaint to the Police station[104] or when he makes a private complaint to the Magistrate[105] or the Magistrate takes cognizance of any offence on its own[106]. Also, the Police officer, on the basis of information he has received, is empowered to take cognizance of commission of an offence, on its own[107]. Also, the Constitutional courts of India, i.e. High Courts and Supreme Court are empowered to direct investigation of any case by CBI, and set the criminal law into motion.

When a cognizable offence is alleged to have been committed and a FIR is thus filed[108] before the Police station, naming a person therein having committed that offence, the designated

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[103] http://www.lawyersclubindia.com/articles/Bail-Judicial-Reforms--4675.asp#.VRv6jfmUeX8 (Accessed on 14.12.2014)

[104] *Information in cognizable cases*.-: Section 154 of The Code of Criminal Procedure, 1973

[105]*Examination of complainant*.: Section 200 of The Code of Criminal Procedure, 1973

[106] *Cognizance of offences by Magistrates*.-: Section 190 of The Code of Criminal Procedure, 1973

[107]*Procedure for investigation*: Section 157 of The Code of Criminal Procedure, 1973

[108] *Information in cognizable cases* : Section 154 of The Code of Criminal Procedure, 1973

Police officer may arrest and detain that person[109], but only in strict compliance and in accordance with the provisions of The Code of Criminal Procedure, 1973 and the law laid down by Apex Court in its various Rulings[110], more particularly the *Joginder Kumar case* [111]& *Arnesh Kumar case.*[112]

The Hon'ble Apex Court have framed very strict guidelines, before any person can be arrested. And, in the light of obligatory guidelines laid down in *Joginder Kumar*[113] and *Arnesh Kumar* case[114] stated hereinbefore, there is hardly any need to obtain anticipatory Bail.

Notwithstanding whether the cognizable offence committed is Bailable or Non Bailable, when the said Police Officer, while strictly complying with said guidelines, in the light of circumstances of the complaint, decides that there is a need to arrest and detain that person, may arrest that person, and then, he is obliged to comply to provisions of The Code of Criminal Procedure, 1973 and the law laid down by Apex Court in its various Rulings.

What are the circumstances under which Bail is taken:

1. When False / malicious FIR is alleged to have been registered / or is anticipated that such false / frivolous FIR may be registered by any person, the person concerned may apply for Anticipatory Bail before the Sessions Court / High Court.
2. When false FIR / Complaint is registered before the Police station, and the Police, in exercise of their powers, have effected the arrest of the person named as accused in the said FIR, then, notwithstanding the offence alleged is Non-Bailable, the officers In-charge of the Police station, are empowered to grant Bail in Non-bailable offence cases, where if it appears to such officer, at any stage of the investigation, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused person may be released on Bail, whilst recording in writing his reasons or special reasons for so doing, on the

[109] sections 41, 41A, 41B, 41C, 41D of The Code of Criminal Procedure, 1973
[110] Chapter V, Section 41 to 60A) of The Code of Criminal Procedure, 1973
[111] AIR 1994 SC 1349
[112] JT 2014 (7) SC 527
[113] Supra 97
[114] Supra 98

execution by him of a bond without sureties for his appearance.[115] In this respect, an Application may be moved before the concerned Police officer, requesting him that the Accused be released on Bail.

3. Any person who is arrested must be produced before the nearest Judicial Magistrates court within 24 hours of his arrest[116]. When the arrested person is produced before the Judicial Magistrates, the arrested person or his relative / friend may present a simple Bail Application, before concerned Magistrates Court and inform the Magistrate, among other things, that the said arrest is patently illegal, for being effected without following the due process of law and in wilful disregard / defiance of guidelines framed by SC in the case of *Joginder Kumar vs State of U.P*, 1994, and may pray for immediate release.
4. When the person is arrested by Police and is presented before the nearest judicial Magistrate within 24 hours of his arrest under section 57 [117], the Bail Application may be moved before the concerned Magistrates Court, on the conclusion of the Police Custody so granted by the Magistrate on the earlier occasion, and therefore opposing the further Remand; or where the maximum Remand period of 14 days is over, and thereby the Accused is compulsorily to be sent to Judicial Custody (Jail).
5. When a Criminal Prosecution is initiated by way of Complaint before Magistrates Court, and the offence alleged is a "Bailable offence, then, at the first hearing of the case, where the Accused "does not plead guilty" before the Magistrates, then he has to move an Application before the Magistrates Court, that he be released on Bail, till the conclusion of trial. Also, sometimes, where the Offences alleged are only "Bailable" in the FIR, and where the arrest is effected; and where the In-charge of the Police Station, instead of granting Bail by himself, forward the Accused to the Magistrates Court; in that situation, the Bail may be obtained from the Magistrates Court.
6. When the Police fails to file the Charge sheet within the stipulated time as prescribed under section 167(2)[118], the accused has a statutory right to be released on Bail.

7. 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

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[115] *Release of accused when evidence deficient*.-Section 169, 437, The Code of Criminal Procedure, 1973

[116] *Procedure for investigation*: Section 57, The Code of Criminal Procedure, 1973

[117] *Person arrested not to be detained more than twenty-four hours:* Section 57,The Code of Criminal Procedure, 1973

[118] *Procedure when investigation cannot be completed in twenty four hours*: Section167 The Code of Criminal Procedure, 1973

specified as one 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, the said person may move a Bail Application, through Jail or through the Advocate, praying that he shall be released by the Court on his personal bond with or without sureties (Section 436A[119]).

8. When the Police file the Chargesheet in the concerned Magistrates Court; or where under Private Complaint u/s 200, the Magistrate takes cognizance of the offence; and in either of cases, the Magistrate issues Summons / Warrant against the Accused persons, the Accused Person, in case he "Pleads not guilty", he is required to secure Bail from the trial Court.

9. If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.[120]

10. Obtaining Bail securing to the Court the appearance before next Appellate Court, in case of conviction: Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months; and if such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.[121]

11. Then the Applicant person is convicted of any offence to which he is charged off, on the date and at the time of order of conviction, the said guilty person, may make a Bail application u/s 389(3)[122], before the said trial court itself, so as to facilitate the said person to prefer an Appeal to the said order of conviction, before the higher court.

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[119] The Code of Criminal Procedure, 1973

[120] *When bail may be taken in case of non bailable offence* : S.437(6), The Code of Criminal Procedure, 1973

[121] *Bail to require accused to appear before next appellate Court*: S.437A The Code of Criminal Procedure, 1973

[122] The Code of Criminal Procedure, 1973

12. Where an appeal is filed by a convicted person and which is pending, the said person, u/s 389(1)[123] of may prefer a Bail Application before the said Appellate court, inter alia, praying that order of trial Court / Appellate Court may be suspended for the time being, and he be released on bail or on his own bond. Subsequent Bail Application after rejection of earlier Bail Application:

13. When the Magistrates Court rejects the Bail Application, fresh Bail Application may be moved before Sessions or High Court. It may be noted that, when, pursuant to rejection of Bail Application by any Court, be it Magistrates / Sessions Court, when Bail Application is preferred to a higher Court, then, the said Application is considered as a fresh Bail Application, and said Application does not operate as a challenge to the Order of rejection of Bail by lower Court. It may further be noted that there is no limit to the number of Bail Application which may be preferred, either before Magistrates Court / Sessions Court / High Court, provided there must be substantial change in the circumstances from the time when the last Bail Application was preferred and was rejected.

    An accused has right to file second, third and so on bail application, but upon change of circumstances that warrants a fresh application. *Kalyan Chandra Sarkar vs Rajesh Ranjan and Pappu Yadav*[124].

Bail for Bailable offences

If the offence alleged is Bailable, then, the Accused is entitled for Bail as a matter of right, may be before Police station itself, or if forwarded to Magistrates Court, before Magistrates court. However, where the offences alleged are both Bailable and Non-Bailable, the offence would be tried as Non Bailable offence, and benefit of securing Bail on the premise of Bailable offence would not be available to the accused. [125]

Under Section 436 [126]there is no discretion left to the court to impose a condition while releasing a person on bail when he is accused of a bailable offence.

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[123] *Suspension of sentence pending the appeal; release of appellant on bail*: Section389, The Code of Criminal Procedure, 1973

[124](2005) 1 SCC 801

[125] State vs Basawanath Rao, 1966 Cr. LJ 267

[126] *In what cases bail to be taken*: Section 436, The Code of Criminal Procedure, 1973

Sections 169 / 437[127]: Bail by Police in Non Bailable Offences

Even the officer in charge of Police station may by recording reasons in writing, release a person accused of or suspected of committing of any non bailable offence. [128]

Under Section 169[129], officer in charge of Police station can release person even without even reference to Magistrate. [130]This Section is applicable while case is still under investigation of Police. It cannot be applied to cases where accused has appeared before the Magistrate[131].

How Bail is taken

- By furnishing Surety, one or two as directed by the Court;
- By Cash in lieu of Surety;
- By executing Personal Release Bond; No money is required to be deposited while executing this Bond.
- What papers are required by Surety to stand as a Surety for the accused person?

Not all the papers mentioned below are required, but either one of the mentioned in the category, that is to say, one document each of Residence proof, Income proof and personal identity proof:

Rent bills of Place of Residence

- Ration Card
- Rent bills of place of Business
- Deed of Partnership / other document

Relating to Business

- Certificate from the Employer
- Certificate of Amount in the Provident Fund

Title deeds of Properties

- Municipal bills of the Properties

[127] *Release of accused when evidence deficient.* Section 169, The Code of Criminal Procedure, 1973
[128] Gurcharan Singh vs State (Delhi Adm), 1978 Cr LJ 129 (135).
[129] The Code of Criminal Procedure, 1973
[130] 1974 Cri LJ 162 (167) Bom
[131] AIR 1933 All 582 (585) (DB).

- Bank Pass Book
- Income Tax Payment Receipt

Other Proof

- Pan Card
- Election Card

Important grounds to seek Bail:

1. Facts and circumstances of each case;
2. Ingredients of the concerned applicable section The Code of Criminal Procedure, 1973 under which the Bail would be given, i.e. sections 436, 437, 438, 439, 167(2), 169, 389(1), 389(3), 436A, 437A, 437(6);
3. depending upon the stage at which the Bail Application is moved, i.e.
    - At the stage of apprehending arrest on the basis of false and frivolous FIR filed or may be filed[132]
    - At the stage when the Accused person is produced for the first time after the registration of FIR and consequent arrest thereby;
    - At the conclusion of Police Remand;
    - At the stage when the Accused is forwarded to Judicial custody;
    - At the stage when the Police fails to file Chargesheet, as contemplated u/s 167(2);
    - After filing of charge sheet / Private Complaint;
    - After conclusion of 60 days as contemplated u/s 437(6)[133];
    - Where the Accused has spend one half of the punishment in custody (436A);
    - At the time when the trial / Appeal is nearly completion stage (437A);
    - At the time and on the date when the accused is convicted by the trial court u/s 389(3);
    - Before Revisional / Appellate Court u/s 389(1).

[132] Section 438, The Code of Criminal Procedure, 1973
[133] The Code of Criminal Procedure, 1973

General Grounds on which Bail is demanded from the Court

- That the complaint which is filed is malicious and mischievous and is devoid of any merit; OR That there is reasonable and grave apprehension that malicious and mischievous complaint may be filed by one _____ against the Applicant; and pursuant to filing of said false complaint, the concerned Police officer, in the exercise of their powers, may apprehend / arrest the present Applicant.
- That the arrest of the Applicant is patently illegal, because the Police has arrested the accused without following the due process of law as contained in section 157(1), 41(1)(b)(i)(ii), 41(2) r/w section 60-A of The Code[134].
- That the arrest of the Applicant is patently illegal, because, the Police has arrested the accused in blatant disregard of binding guidelines issued by the Apex Court in the case of Joginder Kumar case[135] and Arnesh Kumar case[136];
- That the Police did not even informed the Applicant the grounds of his / her arrest as mandated u/s 50 [137], and have merely stated that the complaint is registered against the Applicant for having committed the offence of.
- That the Complaint is made with the object of injuring or humiliating the Applicant by having him arrested, and that the Applicant has no connection with the offence with which he is alleged to have committed;
- That the FIR contains "bare allegation" without attributing "acts or omission" on the part of the accused person, towards the commission of the offences;
- That the "acts" and "omission" attributed towards the accused person in the FIR does not constitute any offence;
- That No incidence of offence as alleged in the FIR has happened;
- That there are unimpeachable evidence to show that the offence could not have been committed by the accused person as alleged (plea of alibi);
- No purpose would be served to remand the Applicant to Police custody, as the nature of offence is such that no custodial interrogation is warranted;
- That the Applicant is ready and willing to abide by any condition imposed by this Hon'ble Court if admitted to Bail, and will cooperate the Police in the Investigation of the offence;

[134] The Code of Criminal Procedure, 1973
[135] AIR 1994 SC 1349
[136] JT 2014 (7) SC 527
[137] The Code of Criminal Procedure, 1973

- That the Applicant hails from a respectable family, having deep roots in the society, having a permanent residence herein; has ailing and aged father and mother;
- That the Applicant is a highly respectable member of the Society; is highly qualified____ and educated person;
- That whereas the co-accused have been granted Bail, and the allegations against the co-accused and Applicant are identical;
- That the Applicant gives the undertaking to this Court that he will not, in any manner, interfere with the investigation of the offence to which he is charged with, nor he will try to temper with the evidence, if there are any;
- That the Applicant has no criminal antecedent whatsoever;
- That the Applicant is the only earning member of his / her family and personal safety of member of his family is jeopardized in his absence;
- That the Applicant will make himself available to the Police for his due interrogation whenever Investigating Officer would so demand, in accordance with law;
- That there are vague allegations against the Applicant;
- That the allegations made against the Applicant does not constitute any offence, least being cognizable offence;
- That the deprivation of liberty seriously prejudices my case, as I am deprived of opportunities to prepare for my case, the opportunities which is otherwise available to Prosecution, notwithstanding the fact that burden of proving the guilt, beyond reasonable doubt, rests upon the Prosecution, nevertheless, this burden keeps on shifting, and sometimes it is expressly throws upon the Accused u/s 106 of the Evidence Act, 1872;
- That the Prosecution has failed to make out a prima facie case against the Accused Applicant;
- That, from the reading of Chargesheet / Complaint, it can safely be said that the Prosecution case is based on speculation / surmises / probabilities / suspicion / interested witnesses / forged documents;
- That, from the reading of the Chargesheet / Complaint, it can safely be said that no offence is made out against the Accused, even if all the allegations are taken as true, for the acts and omissions attributed towards the Accused Applicant does not constitute any offence;
- The Applicant has to make out a case suggesting that case of the Prosecution is frivolous and mischievous; that Applicant would not run away from the trial and would “receive the judgment” of the Court / would make him present at the time of judgment / will make

himself present in the Court whenever he is called upon by the Court; and will make himself present before the Court, to take the judgment of the Court;

Life and Personal Liberty submissions:

- My liberty is my life, in the absence of which I am left paralyzed, both in my rights and in my duties, right to life and duty to my family and duty towards my country.
- Liberty is the most prized possession of any being and respect for liberty, i.e. freedom is not merely a policy of the State but is an essential requirement of any civilized society.
- I am no danger to the peace of the society nor have I acquired animal spirit to be caged in prison.
- My life reputation may be ruined if I am stamped as prisoner.
- Imprisoned life, even for a moment, makes my character suspicious to the suspecting society.
- Imprisoned life, even for a moment, strikes at my social dignity and self-esteem.
- My family feed on my income and they feel protected in my shadow. It is said that- "you take my life when you take away the means whereby I live". The life of my family is in jeopardy if I am imprisoned. Who will then feed my family ? Who will then protect my family. Does the State Govt take responsibility of feeding and giving protection, to my family in return for my detention. ?
- Detention of men on merely a complaint is an attractive and brilliant idea to harass all men who tries to disturb or expose the undisclosed agenda of men in power.

Release of Accused on execution of Personal Release Bond / Bail Bond

- If the Bail is secured by way of Surety, the Surety has to execute the Bail Bond, and if the Accused is present in the Court, he is also required to execute the Bail Bond;
- And if the Accused is lodged in the Jail at the time of furnishing of Surety, then, afterwards being released from Jail, he is required to execute Bail Bond in the Court; and the Bail Bond shall contain the conditions on which the Accused is released;
- And in case the Magistrate has ordered the Release of Accused on the execution of Personal Release (PR) Bond, the Accused is released on the execution of the said Bond;

- In any case, the Accused has to execute the Bail Bond, whether along with Surety, if there are any, or of himself alone.
- As soon as the Bond has been executed, the person for whose appearance it has been executed, shall be released; and when he is in jail the Court admitting him to bail, shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him[138].
- It is expected from the Magistrate to accept Bail Bonds even after the court hours particularly when he is sitting in his chamber. Liberty of the subject must be given the top priority in a spirit of dedicated devotion. One must always remember that the rights of the subjects flow not from the mercy of the courts but from the guarantees of our system of laws, namely no person should be deprived of his liberty even for a moment except in strict conformity with law and spending a few minutes even after court hours would exhibit a better desire for fostering the administration of justice[139].
- Immediate release on execution of Bail Bond. If the accused is present in the court he should be released at once. If he is in jail, the court should issue order of release to the officer in charge of jail. [140]
- SC in *Bekaru Singh vs State of UP*[141], had observed that section 442(1)[142] provides that as soon as Bail Bond has been executed the person for whose appearance it has been executed, shall be released.
- Releasing the accused on personal Bond: In *Afsar Khan vs State*[143], (Karnataka HC), observed "if the court is satisfied on a consideration of relevant factor that the accused has ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on personal bond. The decision as regards the amount should be an individualized decision depending on the financial circumstances of the accused individual and the probability of his absconding."

Certain criteria to be considered in determining bail, these factors are:

- the probability of the accused person appearing in court
- the interests or needs of the accused person

[138] Section 442 The Code of Criminal Procedure, 1973
[139] 1969 Cri LJ 896: AIR 1969 Delhi 214 (SB)
[140] Balroop Sharma versus State, 1956 Cri LJ 473 (All).
[141] 1963 (1) Cri LJ 335
[142] Code of Criminal Procedure, 1973
[143] 1992 CCR 2019

- the protection of victims or their close relatives
- the protection and welfare of the community.

Disadvantages where bail is refused[144]

The issue of disadvantage to those refused bail was considered in Chau v Director of Public Prosecutions [145] where the defendant challenged the constitutional validity of the Bail Act [146] on a number of bases, including a claim that it breached the constitutional guarantee of fair process in criminal proceedings. In other words, it was submitted that the absence of bail led to an unfair trial.

Not only do those on remand have fewer resources to prepare their defence, they may make a less favourable impression when they appear in court (they will probably be less well dressed and have experienced a loss of morale). They also miss the opportunity to impress the court by showing that they have met their bail conditions and appeared in court. The accused on remand will have limited opportunities for rehabilitation, will endure upset to their family life, and will suffer stigmatisation and possible contamination by contact with criminals. Furthermore, judicial officers may feel obliged to justify pre-trial custody by guiding the outcome of the trial towards a guilty verdict[147].

It has been argued that detaining accused persons before trial is an important means by which the prosecution can procure a guilty plea.[148] Kellough and Wortley have found that those persons not held in pre-trial custody are much more likely to have all their charges withdrawn by the prosecution. Such findings are, in part, supported by studies which have shown that, controlling for factors such as charge and criminal record, those remanded to custody are much more likely to be convicted and sentenced to prison than those who have been released prior to trial.[149] Furthermore, research in Australia has consistently shown a relationship between

[144] http://www.judcom.nsw.gov.au/publications/st/st24 (assessed on 14.1.2015)
[145] (1995) 37 NSWLR 639
[146] Bail Act 1978 New South wales
[147] Pearson (1990) 79 CR (3d) 90, cited in S Zindel, "*A principled approach to bail*" (1993) February New Zealand Law Journal 49 at 51;
[148] G Kellough and S Wortley, "*Remand for plea*" (2002) 42 British Journal of Criminology 186
[149] New Zealand, P Oxley, Remand and Bail Decisions in a Magistrates Court, 1979, Research Series No 7, Research Unit, Planning and Development Division, Department of Justice, Wellington, New Zealand.

refusal of bail and negative court outcome, when controlling for the effects of offence seriousness, legal representation, previous convictions and plea.[150]

The negative impact on those refused bail may be eased through improvements to the amenities in remand (to assist in trial preparation), compensation to those in custody if subsequently acquitted, and speedier trials. Although some inroads have been made toward redressing the documented discriminatory practices and impact of bail decisions upon certain minority groups[151], the practical effect of these protective measures has yet to be seen.

The concept of risk

Despite the increasing number of exceptions to the presumption in favour of bail, much still rests on the court's ability to identify potentially dangerous offenders for the purpose of pre-conviction detention. Inherent in all bail decisions is the capacity of the court to discern the level of risk the offender poses. In Veen v The Queen (No 1)[152] Stephen J said: "*Predictions as to further violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality*."

Risk assessment is a controversial issue: the accuracy of predictions have been called into question on numerous occasions and, as such, the area is fertile ground for debate. Contributing to that debate is a body of research that found:

- only a small number of defendants commit violent or dangerous offences while on bail
- the amount of crime committed by those on bail is a very small proportion of all crime that is committed

[150] J Stubbs, "Review of the operation of the NSW Bail Act 1978" in M Finlay, S Egger and J Sutton, Issues in Criminal Justice Administration, 1983, Allen and Unwin

[151] Such as those amendments in the Bail Amendment (Repeat Offenders) Act 2002 which inserted s 32(1)(b)(v) and (vi) into the Bail Act, requiring the courts to consider the special needs of a person who is mentally ill or intellectually disabled when determining a bail application, and implemented the first recommendation of the AJAC report, to remove reliance on employment and residence in assessing a person's community ties, and to include reference to traditional Aboriginal extended family and kinship ties and traditional ties to place.

[152] (1979) 143 CLR 458 at 464

- the longer the time spent on bail, the more likely a defendant is to commit an offence — the amount of pre-trial crime could be reduced if the delay in going to trial was reduced[153].

The concept of risk is one of the fundamental assumptions underlying the most recent amendments to the bail legislation. It is a common maxim that past behaviour is a good predictor of future behaviour. Criminal justice agencies use the existence of prior offences as part of their criteria in assessing high-risk offenders.

The rationale behind recent philosophical shift from the "disciplinary society" that emerged during the nineteenth century to a movement called "new penology", which is primarily concerned with the principle of risk management. Similarly it suggests that criminal justice policies have moved from focusing on the individual towards assessing and redistributing risk "according to mathematical formulae based largely on past experience."

[153] Caine, op cit n 21 at 31

Chapter 7 - Jail: An Exception

Though Bail is the rule in certain specific conditions or cases which could be treated as an exceptional domain of cases upon themselves the rule should be diluted for instance and the condition s for the rule to apply shall be vested upon the accused to prove the necessity of granting bail.

These cases may follow:-

Presumption against bail for certain drug offences

The threshold criteria for granting bail should been set high it requires "a real or certain chance of acquittal" before bail is granted. An application for bail should ordinarily be refused and a heavy burden rests on the applicant to satisfy the court that bail should be granted[154]. The strength of the case is the prime, but not the exclusive consideration, and countervailing circumstances common to applications for bail are accorded less weight than in the ordinary case. The application must be exceptional if the case is strong.

In R v Kissner,53 Hunt CJ at CL said in regard to s 8A[155]:

"Its effect is not merely to place an onus upon the applicant to establish his entitlement to bail. He must satisfy the court that bail should not be refused... the presumption expresses a clear legislative intention that persons charged with the serious drug offences should normally or ordinarily be refused bail..."

This interpretation and application of section 8A of the Bail Act [156]has been the subject of recent judicial criticism. Sperling J has remarked on numerous occasions his dissatisfaction with the line of authorities on s 8A but acknowledged that a judge at first instance was bound by them. Adams J has also commented that Kissner and the authorities following it have developed a gloss on s 8A in using the strength of the Crown case as a primary factor to be considered and that the focus should remain on all criteria outlined in section 32.

[154] R v Budiman (1997) 97 A Crim R 548
[155] Bail Act, 1978 New South Wales
[156] ibid

Refusal of bail on a prior occasion

When bail has been refused by the Supreme Court on a prior occasion, the accused must also show that special circumstances exist before the court will entertain a further application for bail. In R v Bubev, the court indicated that the fact that the applicant was in protective custody could be a special circumstance on an appeal. The fact that bail has been refused previously is also taken into account by the court in determining the application.

When an appeal against a refusal to grant bail is made to the Court of Appeal, it has been held that the court should exercise restraint in reviewing the refusal as the original judge is in a better position to assess the relevant factors. The Court of Appeal has original jurisdiction to consider the section 32[157] criteria and the jurisdiction does not depend on a demonstrable error by the judge who granted or refused bail. Unlike the Supreme Court, the Court of Appeal does not need to find "special circumstances" before it can entertain an application for the revocation of bail[158].

Appeal pending[159]

If there is a conviction or sentence appeal pending in the Criminal Appeal, It requires special or exceptional circumstances to justify the granting of bail. Special circumstances may include the fact that the whole of the sentence will have been served before the appeal is determined,[160] if the ground of appeal is certain to succeed, or administrative delay in providing court records for the purposes of appeal. Establishing special circumstances is, of itself, not enough to justify bail.

In R v Sinanovic[161] dealt with an application for bail when an application for special leave to the High Court was pending. There, Justice Greg James said that the test was the same as the common law test applied by the High Court in determining bail applications, that is, whether special or exceptional circumstances exist.

[157] Bail Act, 1978 New South Wales
[158] R v Budiman (1997) 97 A Crim R 548
[159] http://www.judcom.nsw.gov.au/publications/st/st24 (Accessed on 04.02.2015)
[160] R v Claxton [1999] NSWSC 653
[161] [2001] NSWSC 164

Justice Greg James said: "Those words permit many matters to be considered in an individual case. What is special or exceptional will, of course, by the very nature of the concept involved in those words, vary from case to case.

Grounds for Refusal Of Bail.

1. Where the person arrested and charged with murder or attempt to murder, bail should not be allowed[162].
2. Where it presumed that, the accused person punished with long term imprisonment should not release by bail.
3. Where the person arrested of non-bailable offence should not release by bail[163].
4. If the court consider that there are reasonable grounds for believing that the accused is guilty[164].
5. Circumstances which disentitle an accused to get bail.
6. If the arrested person fails to furnishes the required security.
7. The person seeking bail must surrender and appear before the court when the application for bail is being heard, otherwise bail application may be refused[165].

Cancelation of Bail. [166]

1. Where the person on Bail, during the period on bail commit the very same offence for which he is being tried or has been convicted.
2. If failed to surrender himself into custody in answer to their bail.
3. Interfere with witnesses or otherwise obstruct the course of justice.
4. If he tempers with the evidence.
5. If he hampers the investigation.
6. If he runs away to a foreign country or goes beyond the control of his sureties.
7. If he commit acts of violence in revenge[167].

[162] Naranji Premij 29cr LJ 901
[163] Bashiram 1970 Cr.L.J. 1 173
[164] (1909) ILR 36 Cal
[165] 14 DLR (SC)321
[166] http://lawcare87.blogspot.in/2012/03/introduction.html (Accessed on 12.03.2015)
[167] Bachhu Lal CR LJ 1505

Chapter 8 - Current Scenario: An Analysis

As understood by a layman an, 'undertrails is a person who is currently on trial or who is imprisoned on remand whilst awaiting trial. As defined in the Oxford Dictionary, 'A person who is on a trial in a court of law'. The 78th Report of Law Commission[168] also includes a person who is in judicial custody on remand during investigation in the definition of an *'undertrails'*.

Analyzing the criminal jurisprudence adopted by India is a mere reflection of the Victorian legacy left behind by the Britishers. The passage of time has only seen a few amendments once in a while to satisfy pressure groups and vote banks. Probably no thought has been given whether these legislations, which have existed for almost seven decades, have taken into account the plight and the socio-economic conditions of 70% of the population of this country which lives in utter poverty. India being a poverty stricken developing country needed anything but a blind copy of the legislations prevalent in developed western countries.

According to the 78th report of the Law Commission[169] of a total prison population of 1,84,169, as many as 1,01,083 (roughly 55%) were under-trials. For specific jails, some other reports show: Secunderabad Central Jail- 80 per cent under-trials; Surat-78 per cent under-trials; Assam, Tripura and Meghalaya-66 per cent under-trials.

National Crimes Report Bureau: Report

The National Crime Records Bureau of the Government of India, in Chapter VI of its report dealing with the number of prisoners undertrials in various prisons across the country, has released some shocking details. It reported that thousands of undertrials had been incarcerated for a period of five years or more, and in fact in states including developed states like Punjab and Delhi, a large number of prisoners were under-trials. In Bihar, 30.4 % of the prisoners incarcerated had not been convicted and yet they languished in jails for years, sometimes for periods longer than the period for which they would have to serve, if convicted.

The figures get even more distressing if one studies the number of prisoners incarcerated for more than one but less than five years in different prisons across India. In Uttar Pradesh and Bihar alone, the number of prisoners detained for a period of between two and five years,

[168] lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf (Accessed on 01.02.2015)
[169] lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf (Accessed on 01.02.2015)

without having been convicted of any offence was 7310. The number of such prisoners languishing in other jails in different parts of the country constitutes a figure several times the figure for the two states mentioned above.

Examining the Central Jail (Tihar), some more disquieting figures come to light. In 1993, out of the 7200 prisoners housed in the Central Jail Complex (called the Tihar Jail), only 900 prisoners had actually been convicted of any crime. Seven out of every eight prisoners in Tihar Jail consisted of those who had not been convicted of any offence, which amounts to close to 90% of all inmates. Even more shockingly, out of the 280 women prisoners, only 20 had been convicted[170]. Thus, 260 out of 280 prisoners were languishing in jail when the law presumed them to be innocent. It is difficult to think of a justification for this woeful failing of our criminal justice system, but solutions may be sought, and the first place to which one's attention is directed is the criminal law in the country, specifically the Criminal Procedure code, which is the backbone of the criminal justice system in the country.

In one of the landmark judgements, the Supreme court with great frankness in Shri Rama Murthy v. State of Karnataka[171] went so far to cite that state had 193,240 people incarcerated of which 137,838 undertrials that justice would be served by simply were releasing the latter. In the 2000's the Supreme Court had also continued to emphasize on the need to protect the undertrial prisoners.

In 2010 the chief justice of India vigorously made this point, adding that "all trial judges have done an excellent job in maintaining a high disposal of cases." However a look at the number of undertrial prisoners would show that much is desired to be achieved. The 2010 Indian government data in the regard of undertrial gives a hopeless situation. While, the numbers have drastically increased to 50,000, there are several who languish in the jail even without being produced before the magistrate once.[172]

[170] Law Commission of India, 78th Report, February 1979: "Congestion of Undertrial Prisoners in Jails", p. 15, para 3.9.
[171] 1997 II AD SC 1
[172] Law Commission of India, 78th Report, February 1979: "Congestion of Undertrial Prisoners in Jails", p. 14, para 3.7.

One of the reasons for this is, as already mentioned above, and is the large scale poverty amongst the majority of the population in our country. Fragmentation of land holdings is a common phenomenon in rural India. A family consisting of around 8 - 10 members depend on a small piece of land for their subsistence, which also is a reason for disguised unemployment. When one of the members of such a family gets charged with an offence, the only way they can secure his release and paying the bail is by either selling off the land or giving it on mortgage. This would further push them more into the jaws of poverty. This is the precise reason why most of the undertrials languish in jail instead of being out on bail.

The NCRB [173]data reveals that 2, 45,244 of Indian prisoners are under trials. These under trials languish in jail due to inadequate legal aid, unsympathetic judges, a bail-system linked inextricably to property & financial wellbeing and a general lack of awareness about rights of arrestees. The single largest tragedy is the continued detention of individuals accused of bailable offences, where bail is a matter of right. In country like India having laws and regulations is much easier as compared to their implementation at the ground levels and what could be better than reviewing the cases to look into such implementation. Initially discussing various cases then comparing as to there exist any gap between the legislative and judicial aspects of Bail or jail.

[173] National Crime Records Bureau website, Convict population: http://ncrb.nic.in/, Table 3.4 (Accessed on 21.01.2015)

Chapter 9 - Other Contemporary Issues

Abuses faced in jail by undertrials[174]

The Constitution of India, the Universal Declaration of Human Rights and the Standard Minimum Rules for Treatment of Prisoners clearly specify the standards of treatment with prisoners on trial. But realities in jails transmit an entirely different tune. Given Below are some challenges that every under-trial prisoner goes through in Indian jails.

1) Prison violence [175]

Prisons are often dangerous places for those they hold. Group violence is also endemic and riots are common. In Sao Paulo, Brazil, on 2nd October 1992, at least 111 people were killed and 35 wounded by military police who were called in the House of Detention after scuffle broke out between two gangs of prisoners allegedly over payment for marijuana. In a three day riot and standoff in the Chappra District prison in Bihar towards the end of March 2002 6 prisoners died in the shootout that occurred when commandos of the Bihar Military Police were called in to quell the riots. Meek and first time offenders are tortured and made to do all the menial tasks. Failure to comply sees them sleeping in front of smelly and overflowing toilets in the night. The worst form of Prison violence was witnessed in Khatri v. State of Bihar where the police had blinded 80 suspected criminals by puncturing their eyes by needles and dousing them by acid. In fact in the case Sunil Batra v. Delhi Administration [176]that the court had already issued a writ directing the authorities that the prisoners shall not be subjected to physical mishandling by jail officials and they should be given adequate medical and health facilities

2) Criminalizing effect of a prison [177]

With hardened criminals being around and in the absence of scientific classification methods to separate them from others, contamination of first time, circumstantial and young offenders into full-fledged criminals occurs very frequently. It is an often given quote, 'prisons are

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[174] www.legalservicesindia.com/article/print.php?art_id=1280 (Accessed on 14.01.2015)
[175] All India Committee, *Report on Jail Reforms* (Ministry of Home Affairs,1980-83)
[176] (1978) 4 SCC 409
[177] The Royal Commission on Capital Punishment [1949 – 53], pg 229.

Universities of crime where people go in as under-graduates and come out with PhDs. in crime.'[178]

3) Health problems –

Most of the prisons face problems of overcrowding and shortage of adequate space to lodge prisoners in safe and healthy conditions. Most of the prisoners found in prisons come from socio-economically disadvantaged sections of the society where disease, malnutrition and absence of medical services are prevalent. When such people are cramped in with each other in unhealthy conditions, infectious and communicable diseases spread easily. A sample study conducted by the National Human Rights Commission of India in early 1998 revealed that 76% of deaths in Indian prisons were due to the scourge of Tuberculosis.

4) Mentally ill prisoners –

Though miniscule, mentally ill prisoners constitute another percentage of population, which is largely ignored and forgotten by both the outside world and those inside. But given the nature of the illness and prevailing social attitudes, they form the most hapless victims of human rights violations. Even for a normal person, prolonged incarceration might lead to a mental breakdown, the atmosphere being such. Many, on the verge of such collapse, do attempt suicide. Sir Alexander Patterson while giving evidence before the Select Committee in 1930 stated – "*…I gravely doubt whether an average man can serve more than ten continuous years in prison without deterioration."*

5) Drug abuse –

After Murder, Attempt to murder and other serious anti-personal offences, people booked under anti-drug laws constitute a substantial percentage of the prison population. Being in prison and cut off from the free world, sees and increased desperation to get the banned substances to satisfy their addiction to drugs. This also increases the danger of fresh prisoners

[178] DR.J.N.PANDEY, *Constitutional Law of India* (Central Law Agency, Allahabad, 47th edn., 2010)

being inducted into drug abuse since 'prison is an environment where there is a captive, bored, largely depressed population eager for some release from the grim everyday reality[179].'

6) Effect on the families of prisoners [180]–

Those imprisoned are unable to look after their families. In the absence of the main bread winner, the family is many a time forced into destitution with children going astray. This combined with the social stigmatization that they face, leads to circumstances propelling children towards delinquency and exploitation by others. It is an inexorable circle. The problems become acute when they belong to the socio-economically marginalized and exploited sections of the society. The dominant class does not fail and loose time in taking advantage of this situation to exploit the remaining family members to the fullest possible extent. This can take the form of rape or forced prostitution of the prisoner's wife and or his daughters.

Challenges Faced By Under-Trials

"Justice delayed is Justice denied"

The criminal justice delivery system in India saw more than 0.2 million undertrial prisoners being neglected in jail for many years, in many cases it exceeded the maximum sentence for the crime which they had committed. Lack of coordination between the Centre, Judiciary & State Governments & also because they did not have anyone to stand as guarantors nor assets to furnish as bail bonds, the poor continued to suffer in prisons[181]. There have been cases where the amount of bail is disproportionately high. One such case even went to the Supreme Court.

1. The Right to Speedy Trial - as recognised by the Supreme Court in Hussainara Khatoon[182] is violated due to protracted delays. This delay is due to all kinds of reasons such as –
    - Systemic delays.
    - Grossly inadequate number of judges and prosecutors.

[179] Rudul Shah v. State of Bihar AIR 1983 SC 1086

[180] K.I.VIBHUTE, Criminal Law(LexisNexis, Nagpur, 10th edn.,2008)

[181] MAJ.GEN.NILENDRA KUMAR, *Law, Poverty & Development* (1st edn., 2011)

[182] Hussainara Khatoon v. State of Bihar (1980)SCC(cri)23

- Absence or belated service of summons on witnesses.
- Presiding judges proceeding on leave.
- Remands being extended mechanically due to lack of time and patience with the presiding judge.
- Inadequacy of police personnel and vehicles which prevents the production of all prisoners on their due dates.
- Many a times, the escorting police personnel merely produces the remand papers in the courts instead of actually producing the prisoner in front of the magistrate. This practice is widely reported, notwithstanding the strict requirement of the law in section 167(2)(b)[183]

2. Right to bail is denied even in genuine cases. Even in cases where the prisoner was charged with bailable offence, they are found to rot in prisons due to exorbitantly high bail amount. The spirit of the Supreme Court in Moti Ram & others vs. State of Madhya Pradesh [184]is violated consta ntly. The Law Commission analysed this in detail in its 78th report on congestion on undertrials. It is also important to point out that the system of giving bail which is mentioned in sections 436 [185]to 450 [186] is also unjust. This is because according to the provisions of the code a person released on bail is required to execute a personal bond and bond of security for a certain amount of money. As a result the poor who cannot afford to avail surety have to suffer in jail till the case is over.
3. Some of the judges even at the High Court level are not following the guidelines laid down by the Supreme Court on bail and grant of the same is dependent upon the attitude of each judge. Standards cannot become prisoners of the whims and fancies individuals. Authority is to be exercised with responsibility.
4. Large number of persons including women and children are detained under Section 109[187] provides for failure to furnish requisite security for keeping good behaviour. The police usually pick them up "because the number of cases had to be brought up to the specified figure". In the absence of a system, that takes a proactive role in providing legal services to prisoners their right to effective Legal Aid is also violated due to politicisation of legal

[183] *No Magistrate shall authorize detention in any custody under this section unless the accused is produced before him.'* Section 167 (2) Criminal Procedure Code, 1973
[184] (1978) 4 SCC 47
[185] Criminal Procedure Code, 1973
[186] Criminal Procedure Code, 1973
[187] Criminal Procedure Code, 1973

aid schemes as many lawyers are hired on political consideration who get a fix salary without the pressure of disposing off cases at the earliest.

Issue of Custodial Torture

Custodial torture ranging from assault of various types to death by the police for extortion of confessions and imputation of evidence are not uncommon. Such a method of investigation and detection of a crime, in the backdrop of expanding idea of 'humane' administration of criminal justice, not only disregards human rights of an individual and thereby undermines his dignity but also exposes him to unwarranted violence and torture by those who are expected to 'protect' him.[188]

In India where rule of law is inherent in each and every action and right to life and liberty is prized fundamental right adorning highest place amongst all important fundamental rights, instances of torture and using third degree methods upon suspects during illegal detention and police remand casts a slur on the very system of administration[189]. Human rights take a back seat in this depressing scenario. Torture in custody is at present treated as an inevitable part of investigation. Investigators retain the wrong notion that if enough pressure is applied then the accused will confess[190].The former Supreme Court judge, V.R. Krishna Iyer, has said that "*custodial torture is worse than terrorism because the authority of the State is behind it."*

[188] K.I. VIBHUTE, *Criminal Justice-A Human Right Perspective of Criminal Justice Process in India*, (Eastern Book Company, Lucknow, 1st Edition, 2004) p. 219

[189] *The Sikh Coalition, Custodial Deaths in Punjab*; 1997-2001, http://www.sikhcoalition. org/HumanRights4.asp (Visited on January 18, 2010)

[190] Asian Human Rights Commission, INDIA: Government of Kerala must criminalise torture to prevent custodial deaths, http://www.ahrchk.net/statements/mainfile.php/2006state ments/688/(Visited on January 23, 2014)

Case study - Mentally ill/ medically unfit under trails[191]

"One of my family member was convicted under ACB case in high court and sentenced to 1 year in jail. We appealed in Supreme Court and applied for bail on medical grounds.

He was in prison for about a month and died of sudden cardiac arrest. He is 66 yrs old and was a very healthy person without any medical issues before he was sent to prison. He does Yoga and walks at least 5 kms each day. He continued doing this even he was inside the prison. Our family member collapsed without any symptoms and there was no first aid provided for him. He was sent to the hospital and it took about 1.5 hours to get to the hospital and was declared dead. He would have been saved if immediate medical attention was given to him like CPR and use of Defibrillator.

My family is devastated with the loss and is under lot of pain. I cannot describe in words what my family is going through and feeling very guilty there was nothing we could do.

We are surprised to learn there is no medical care provided with in the prison such as regular doctor visits, BP check up etc. There were also large no of deaths of happening within the prison (as per PIL) and there were no additional measures taken by the prison authorities. He was also a Sr. Citizen and we learned that he was not put in a Sr. Citizen block."

Some of the facts that we learned after this incident was found in investigation:

- There were only 4 doctors for about 2000 or so inmates.
- There is no medical equipment to treat prisoners with in the prison.
- For any emergency with in the prison, the authorities send the inmates to the government hospital which is about 1 hour drive.
- There was a PIL filed in high court by someone concerning large no of deaths few weeks back before this incident. The high court asked the prison to appointment more doctors. Initially there was only one doctor and after PIL there are 4 of them.

Suggestions Made:

For sudden cardiac arrest there should be immediate medical treatment like CPR and use of Defibrillator. If the first aid is done correctly there is 90% chance the patient can be saved.

[191] www.Legallyservicesindia.com (Accessed on 14.01.2015)

Chapter 10 - Conclusion

Our current criminal justice system- both substantive and procedural- a replica of the British colonial jurisprudence of Past, and is being seriously brought into question. Perhaps the criminal judicial system is established on the laws that are arbitrary and function in a way detrimental to the poor. They have always come athwart as law for the poor reasonably than law of the poor. It operates on the feebler sections of the community, nevertheless constitutional guarantees to the contrary.

Even when peeping into legislations of different criminal justice system it could be concluded the not only India but other countries are also facing problems of undertrails but some countries with better management and case disposal system have overcome this problem to a major extent, probably due to low population in the respective countries and less contribution of poverty in the development of the country has led to a comparatively better condition for them.

In present as compared to statutory provisions with the application we could see various loopholes in form of cases like that of the 2G Spectrum case and Sanjay Chandra Case of Fraud which justify the hypothesis to a great extent But the efforts of the supreme Court in establishing the principle of "Bail is the rule and jail as exception" could also be not overlooked, and judgemts like that of Hussainara Khatton [192]and Bal Chand [193], clearly reflect the efforts of the Apex Court.

Though in a way hypothesis has been proved correct to a greater extent that, there are almost not any people to advocate for the new laws to help the poor, there are practically none to compel the government and the legislature to improve the laws to protect the weak and the poor. Even after six decades of independence, no serious efforts have been done to redraft penal norms, humanize prison houses, radicalize punitive processes, and make anti-social and anti-national criminals etc. incapable of evading the legal coils.

The criminal justice system is bulky, expensive and cumulatively disastrous. The poor can never reach the temple of justice because of heavy costs involved in gaining access and the inscrutability of legal ethos. The hierarchy of courts, with appeals after appeals, puts legal justice beyond the reach of the poor. Making the legal process costlier is an indirect refutation

[192] Hussainara Khatoon v. State of Bihar (1980)SCC(cri)23
[193] AIR 1977 SC 2447

of justice to the people and this hits very hard on the lowest of the low in society. In fact, the legal system has lost its credibility for the weaker section of the community.

Concluding the research checking the validity of the hypothesis as to really if there exist the rule of Bail rule and Jail exception and to what extent such rule is applicable.

Chapter 11 - Suggestions/ Recommendations

It is thought thαt from the vαrious schemes the government operαtes for rurαl employment, loαns to fαrmers etc, α portion of the funds which it trαnsfers to the pαnchαyαt for developmentαl work of the sαme should be set αside αnd kept to meet the bail αmount for undertrials belonging to the particular pαnchayat / block. The utilization of this fund would be in the hαnds of the elected leαders of the society with the representative of district collector district magistrate being a part of the system. This would, go a long way in securing freedom for scores of undertrials who would then be able to contribute to society thereby playing an important role and forming part of the national mainstream. Such a scenario will have the effect of reducing the burden of over-crowding in jail.

The setting up of separate jails, or at any rate isolating undertrials from convicts, would prevent hardened criminals from exercising their deleterious influence over undertrials. Such segregation would also change the attitude of jail authorities and society at large towards under trials.

The under trials who have been charged with petty crimes can further be put in reformative homes instead and asked to do community service till the time they are released on bail. Elementary education facilities must be granted to those under trials who are uneducated and illiterate. Thus, I feel that the benefit of bail should not only be in the hands of a few, but, should be available to the masses including those who do not have the financial capacity to afford it.

- Undertrial prisoners should be boarded in separate cells away from convicted prisoners. There must be proper and scientific classification even among undertrial prisoners to ensure that contamination of first time and petty offenders into full-fledged and hard-core criminals.
- Under no circumstance should they be put under the custody of convicted prisoners.

- Institutions meant for lodging undertrial prisoners should be in proximity to the courts as possible.[194]
- Provisions of Section 167[195] with regard to the time limit for police investigation in case of accused undertrial prisoners, should be strictly followed both the police and courts.
- Automatic extension of remands has to stop which are also given merely for the sake of the convenience of the authorities. Mere convenience of the authorities cannot supersede the Constitutional guarantees under Article 21[196].
- All undertrial prisoners should be effectively produced before the presiding magistrates on the dates of hearing.
- The possibility of producing prisoners at various stages of investigation and trial, in shifts should be explored.
- Video conferencing between jails and courts should be encouraged and tried in all states beginning with the big Central jails and then expanding to District and Sub jails.
- The District Magistrate should constitute a committee consisting of representatives from the local police, judiciary, prosecution, district administration and the prison department at a fairly high level, to visit the Sub jails under their jurisdiction at least once every month and review delay in cases of prisoners if any and adopt suitable measures.
- Police functions should be separated into investigation and law and order duties and sufficient strength be provided to complete investigations on time and avoid delays.
- The criminal courts should exercise their available powers under Sections 309, 311 and 258 of the Code of Criminal Procedure, 1973 to effectuate the right to speedy trial. In appropriate cases jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure, 1973, 1973 and Articles 226 and 227 of The Constitution of India can be invoked seeking appropriate relief or suitable directions to deal with and prevent delay in cases.
- With undertrails prisoners, adjournments should not be granted unless absolutely necessary.

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[194] Ritwik Sneha & Rishab Garg, "*The Problems of Undertrials*" September 17, 2012 Source : http://www.legalserviceindia.com Accessed on (2.3.2015)

[195] *Procedure when investigation cannot be completed in twenty four hour.:* Section 157, The Code of Criminal Procedure, 1973

[196] The Constitution of India, 1950

- Holding Special Courts Jails for prisoners involved in petty offences and willing to confess, should be actively taken up by the High Courts and implemented in all districts.[197]
- There should be a progressive and massive Decriminalization of offences so that many of the wrongs, which are now given the status of crimes, are dealt with as compoundable tortuous wrongs remediable with a claim for compensation.
- The class of Compoundable offences under the IPC and other laws should be widened.
- Alternatives to imprisonment should be tried out and incorporated in the IPC.
- Remand orders should be self-limiting and indicate the date on which the undertrial prisoners would be automatically entitled to apply for bail.
- Computerise the handling of criminal cases and with the help of the National Informatics Centre, develop programmes that would help in managing pendency and delay of different types of cases. The High Courts should take an active interest in helping subordinate courts to speed up cases.
- There should be an immediate increase in the number of judges and magistrates in some reasonable proportion to the general population. It should be at least 107 judges per million of the Indian population.
- In case of violation of any fundamental right of the prisoner then the state should give adequate compensation to the victim.

[197] Dr. A.S. Anand – former Chief Justice of India

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