

## RIGHT TO BAIL IN CRIMINAL JUSTICE SYSTEM: A JURISPRUDENTIAL APPROACH

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### Abstract

Criminal Justice System is a system by which Law comes into force and punishment is given to the accused for committing a crime. Further, this system protects the innocent and victim rights till the final decision of the case. Criminal Justice system affects everyone in the society as it may be in favor of one person and can be against some another person. The right of bail of an accused can affects the society at large if bail is granted to the accused as he/she can harm the peoples of society, destroy the evidences and can fly from the proceedings of the courts. But there are restrictions imposed by the Judicial System on accused while granting bail, if accused fails to obey restrictions then his/her right to bail can be denied.

In Criminal Justice System Harmony can be provided by involving the offender and victim in the judicial process, and it is the right of the victim that he/she can proceed with all the Judicial Proceedings till the final decision of the case. Victims are entitled to oppose the bail applications of accused for heinous crimes in addition to their right to file appeal against acquittal of accused. The Supreme Court in Ashish Mishra case<sup>[1]</sup> bail granted to the accused was set-aside for not honouring the victim's rights to participate in the hearing i.e. the threat to a victim's safety. The problem in India is that bail hearings tend to focus a lot more on the merits of the case than anything else. So, in the abstract victim participation is a good idea, a lot depends on how courts regulate the system to ensure that no side can hold the process hostage.

**Keywords:-** Criminal Justice System, Bail, Accused & Victim.

### Introduction

We live in a democratic society and the society has lost faith in Criminal Justice System. Victims of crime feel ignored and are crying for attention and justice. There is a need for developing a

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<sup>1</sup> Ashish Mishra @ Monu v. State of U.P., SLP(CrI) No. 7857/2022.

cohesive system, in which, all parts work in coordination to achieve the common goal. This was used to describe the present status of victim justice in India by Justice V S Malimath while deciding the reforms in the criminal justice system.[2]

The victims of a crime are a significant part in the criminal justice systems all around the world and slowly reforms had been adopted to ensure that the victims get the justice they deserve but, India still has a long way to go as the concept of victim rights are often disregarded as the major focus is on the accused rather than the victim.

According to the Declaration of Basic Principle[3] of Justice for Victims of Crime and Abuse of Power, the definition of Victim has been stated as “Victim” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within the States.

Victims play a vital role in any proceeding in the court of law as it is their rights that have been affected due to various reasons such as their fundamental rights being violated or due to any criminal activity that occurred to them etc. Even though this is the case, In India the scenario is different as more rights are given to the accused and not to the victims as they do not have many remedies to seek justice.

Victim justice is a method through which the victims can seek justice from the court of law and ensure that their rights are protected and not be just witnesses to the proceedings when they take place and they usually include the right to get compensation, the right to be included when the proceedings are going on. Right to be included of the victim in criminal proceedings is very necessary so that the victims can get a platform to raise voice on the atrocities that have committed to victim. When the court allows victim to participate in proceedings then the offender feels a sense of responsibility towards the society and especially to the victim. There are special rights that are given to victims that have faced sexual assault, stalking or domestic violence, some of them are as follows:

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<sup>2</sup> Malimath Committee Report Vol.I, March 2003.

<sup>3</sup> Universal Declaration of Human Rights, 1948.

1. **The right to attend proceedings:** The victim's right to attend proceedings includes the right to attend the trial, sentencing, and parole hearing of the offender, but may include other proceedings as well. A victim's right to attend the trial is often limited in cases where the victim is also a witness in the criminal case.
2. **The right to be heard:** The victims have a right to be heard in the court of law and voice out of their concerns and how the crime has impacted them, this is also a way to promote victim justice.
3. **The right to information:** The victim as well as his/her family members have a right to be informed of the court proceedings and any other relevant information that is important to be informed to the victim's.

### Jurisprudence of Bail

- The jurisprudence of bail in post-independent India, is anchored on the bedrock of Art. 21 of the Constitution of India<sup>[4]</sup> which safeguards not only life but also liberty by commanding that liberty can be deprived only through the procedure established by law, which must be just, fair and reasonable.
- The same procedural law which provides for arrest and incarceration, ensures that bail can be sought by an accused through a broad spectrum of provisions ranging from pre-arrest bail to statutory bail.
- While the former envisaged under Section 438 of the Code of Criminal Procedure enables the accused to approach a Sessions Court or High Court seeking a direction to release him on bail in case he is arrested on non-bailable offence, the later, as conceived under Section 167 of the Criminal Procedure Code,<sup>[5]</sup> 1973, vests with the accused the right to be released on bail if the investigation is not completed within 90 or 60 days, as the case may be, depending on the severity of the alleged offence.
- A conjoint reading of section 436 (bailable offences) and 437 (non-bailable offences) of the Criminal Procedure Code, 1973 makes it clear that the wisdom of the legislature is to secure bail as the rule and the jail as the exception.

<sup>4</sup> The Constitution of India, Article 21.

<sup>5</sup> Code of Criminal Procedure, 1973, Section 167, Acts of Parliament, 1973(India).

- The Cr.PC defines “bailable offence” as an offence which is shown as bailable in the First Schedule of the CrPC, or which is made bailable by any other law for the time being in force; and “non-bailable offence” means any other offence.
- While bail is a matter of right in bailable offences and in non-bailable offences, the grant of bail is at the discretion exercised by the court according to the seriousness of the offence.
- The presumption of innocence is a foundational postulate in India’s criminal jurisprudence. This is the main reason why an accused is usually released on bail pending investigation and trial except for a few offences under the Penal Code as well as offences framed under special statutes like the Unlawful Activities Prevention Act, the Narcotic and Psychotropic Substances Act and the Prevention of Money Laundering Act, all of which impose extremely rigid conditions for the grant of bail.
- While bail refers to the conditional release of a person from confinement or custody during investigation and trial, it can also be sought during the appellate stage to prevent endless internment during the pendency of appeal though the benefit of the presumption of innocence is not available at the later stage.
- The grant of regular bail is usually guided by what is referred to as the triple test — the ascertainment of whether the accused is at flight risk; or the possibility of tampering with the evidence and influencing witnesses.
- In addition to the above, it was held by a three-judge-bench of the Supreme Court (P.Chidambaram Case) (2019)[6 ]that the gravity of the offence may also be an additional consideration which may be ascertained by the sentence prescribed for the offence alleged to have been committed.

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<sup>6</sup> P Chidambaram v. Central Bureau Of Investigation, SLP(Crl.) No.7525 of 2019.

## Bail Granted Cannot Be Cancelled

Bail granted in the instant matter was sought to be cancelled by the Petitioner under sub-section (2) of Section 439 of the Code of Criminal Procedure, 1973.[7] Bail was granted in the offence punishable under Sections 304 and 304-A of the IPC claiming to be the victims of the Sterilization Operation as was conducted. It was contended that bail was obtained by the concerned Respondent by suppression and misrepresentation of facts and further that the bail order passed reflect consideration of irrelevant material.

The question thus before the Court was as to whether there were prima facie grounds available for cancellation of bail under Section 439 (2) of the CrPC.

It was observed that the parameter for grant of bail and cancellation of bail are entirely different. Bail granted under Section 439(1) of the CrPC can be cancelled where the accused:-

- Misuses his liberty by indulging in similar criminal activity;
- Interferes with the course of investigation;
- Attempts to tamper with evidence or witnesses;
- Threatens witnesses or indulges in similar activities which would hamper smooth investigation;
- Is likely of fleeing to another country;
- Attempts to make himself scarce by going underground or becoming unavailable to the investigating agency;
- Attempts to place himself beyond the reach of his surety etc.

It is also a settled principle of law that even if there are two views possible, once the bail has been granted, it should not be cancelled.

Section 439 of the Code of Criminal Procedure confers special powers on High Court or Court of Session regarding bail. Even if a Magistrate refuses to grant to bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. Under Section 498 (2) of the old Code, a person who has been admitted to bail by the High Court could be

<sup>7</sup> Criminal Procedure Code, 1973, Section 439(2), Acts of Parliament,1973, (India).

committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, in was lifted in the new Code of Criminal Procedure under Section 439(2).

### **Victim's Right to Oppose Bail Application**

In India's criminal justice system, until 2009, victims had no scope of participating in the process and ensuring that justice was done. Everything was depend on the public prosecutor, who has powers to represent the state, and as considered in many cases that public prosecutor did not pay any heed to the victim's interest.

The 2009 amendments to the Code of Criminal Procedure changed that situation significantly, by amendment in Section 372[8] which allowed the victim to challenge an acquittal even if the state was not willing to do so. But this was clearly not enough, since challenging an acquittal comes only at the very end of the trial process. What happens prior to that – especially in the case of opposing the accused bail? In that matter, the victim was completely excluded from the process and was left dependent on the public prosecutor, whether to oppose bail application or not?

The Madhya Pradesh high court, in its July 18 order in the case of Mahesh Pahade[9] by allowing the victim to challenge bail has taken a bold step towards remedying this situation and giving victim's rights a much-needed forward push.

The case before the court was one of sexual assault of a minor, in which the accused – the minor's uncle – had allegedly misrepresented facts before the court and secured a bail order. The minor's father moved court to have the bail cancelled, but the public prosecutor was not keen on this course of action. In fact, he refused to oppose the bail. It was then left to the father to fight alone.

The lawyer for the accused argued that according to Sections 389 and 439 of the Cr.PC, it is only the public prosecutor who can bring in an application for cancellation of bail or order suspending the sentence. And since the public prosecutor had decided not to oppose the bail, the victim's

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<sup>8</sup> Criminal Procedure Code, 1973 Section 372, Acts of Parliament, 2009 (India).

<sup>9</sup> Mahesh Pahade v. The State Of Madhya Pradesh, Crl. Appeal No. 933/2014.

father, because he was not a party to the case, had no locus standi to move an application for cancellation of bail.

### SC's decision in Puran case<sup>[10]</sup>

The high court was faced with a peculiar problem, on one hand, it had to do justice to the victim but on the other hand, it was also bound by the provisions set down in law. The provisions clearly gave primacy to the public prosecutor.

Justice Hemant Gupta, who wrote the judgment, resolved this by relying on a Supreme Court judgment delivered in 2001 (even before the CrPC was amended to bring in Section 372 which gave substantive rights to victims in the criminal trial process). This apex court verdict was delivered in the case of Puran, Ramesh & Ors. vs Rambilas & Ors.

The case was about a dowry death in which the trial court had released the accused and his family members on bail while their trial was pending. The father of the deceased woman urged the public prosecutor to move court for cancelling the bail, but his pleas fell on deaf ears. Even the high court said that it could do nothing if the public prosecutor decides not to challenge the bail order – the victim or her family members, in such a case, had no right to proceed on their own. However, Justice S.N. Variava, who wrote the judgment for the Supreme Court bench, disagreed with the high court's conclusion. He relied on the apex court's decision given a year before in the case of R. Rathinam v. State<sup>[11]</sup> in which a group of practicing lawyers were allowed to oppose the bail granted to some persons even though the state had decided against it.

Relying on this ruling, Justice Variava held that there was nothing in the Cr.PC which prevented the courts from exercising their power under Section 439 of the Cr.PC (which deals with granting and cancellation of bail) to allow a victim's representatives to move applications for cancellation of bail or suspension of sentence in case the state/public prosecutor is not doing so. Once right of appeal has been given to a victim, it shall include all ancillary rights which are

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<sup>10</sup> Puran, Shekhar And Anr v. Rambilas & Anr., State Of Maharashtra, Appeal (crl.) 599 of 2001, Appeal (crl.) 600 of 2001.

<sup>11</sup> P.Rathinam vs Union Of India, 1994 AIR 1844, 1994 SCC (3) 394.



attached with the right to appeal. Such right to appeal will include right to seek cancellation of bail if the victim is aggrieved against such an order.

## Suggestions

### 1. Pendency of cases

There are many pending cases in the court which result in delayed justice i.e. “justice delayed is justice denied”. When bail is granted to offender it doesn't mean that case has been finally decided rather it is just the stage of investigation and further actions are required to be taken by the judges that takes lot of time because of which pendency of cases increasing day by day. Thus, there is a need to reform the laws and the criminal justice system must be made more concerned with speedy trial and justice.

### 2. Under Trial prisoners

Prisons of the country are crowded with under trial prisoners, leading to the problem of overcrowded jails. It should be the duty of judges to ensure that when no suitable evidences are found against the offender and there are no chances to destroy the evidences of the offender, he/she should be released on bail till the final decision of the case after considering the severity of the offence. This is also an infringement of their fundamental right to life under Art. 21 of the Constitution.

### 3. Lack of judges

The courts in India suffer from a shortage of judges, which puts pressure on the judiciary as there is an increase in the number of cases pending in the courts. According to the statistics and reports, there are 19 judges for approximately 10 lakh people in the country, revealing a huge shortage. So, the government should fill the vacant position of judges from to time as per the requirement.

### 4. Ineffectiveness of the justice system

Due to corruption and political influence on the judiciary, the criminal justice system has become ineffective. This leads to a situation where an accused easily escapes from their liability and an innocent person has to spend their life in prison. So, there should be impartiality for delivering the justice.



## 5. Issues within the police force

It is the duty of the police to investigate the matter and find evidence to extract the truth and it should be the duty of court when police fails to investigate the matter within time that accused should be granted bail. Thus, there is a need to reform the criminal justice system in the country.

## 6. Recommendations of the Malimath Committee

The committee made various recommendations on criminal law and the criminal justice system. Some of its recommendations are as follows:

- It suggested changing the adversarial form of the criminal justice system to an inquisitorial system for speedy trials and to deal with the issue of pending cases.
- It recommended the right to silence for the accused against self-harming statements under Art. 20(3) of the Constitution.
- It felt the presumption of innocence of an accused puts an extraordinary and unreasonable burden on the prosecution to prove the charges, which leads to a delay in justice.
- The committee made recommendations for compensation to the victim.
- It also made suggestions to reform the police system in the country and make it accountable and transparent.
- It stressed the appointment of public prosecutors through competitive exams.
- It suggested that every higher court must have judges specializing in criminal law.
- A Presidential Commission must be established in order to inspect the criminal justice system at regular interval.

## Conclusion

The criminal justice system is a system that controls the functioning of institutions like the police, prisons, courts, etc., that work towards granting justice to the victim. It is the duty of the state to maintain peace and harmony in society and this can only be achieved with the proper implementation of laws and the effective criminal justice system of a country. It is settled law that while granting bail, courts only ought to take a preliminary view as to involvement of the accused in the offence, its nature and gravity, and the severity of the punishment if there is a

conviction; besides the possible effect of giving bail to the accused, such as the scope for tampering with evidence, intimidating witnesses, influencing the outcome or the possibility of the accused fleeing justice.

The more significant aspect of the order is the emphasis it places on the right of victims to be heard at every stage of criminal proceedings. The Court has recorded its disappointment with the High Court for not acknowledging this right. The victims' right is not limited to filing an appeal in the event of the acquittal of the accused, but extends to being heard even in the bail stage. By describing the rights of a victim of a crime as "substantive, enforceable and another facet of human rights," the Court has advanced the cause of victimology as a part of criminal law. As a result of both changes in the law and emerging jurisprudence, victims are now in a position to get compensation as well as the status of a participant in the prosecution of offenders. The verdict should lead to greater participation by victims in the criminal process and thus help the cause of justice.

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## Abbreviations

AIR	All India Report
Anr.	Another
Art.	Article
CrI.	Criminal
CrPC	Criminal Procedure Code
IPC	Indian Penal Code
Ors.	Others
SC	Supreme Court
SCC	Supreme Court Cases
SLP	Special Leave Petition
Vol.	Volume