



**RESEARCH PAPER**

**The Concept of Bail in Pakistani Legal System: A Legal Analysis**

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**ABSTRACT**

This paper focuses on the concept of the bail in Pakistani legal system. The concept of Bail is not innovative. The Bail has the essential philosophy behind it. This philosophy says that the person who is accused must be free from the hand of the agency that is law enforcing and such person must give into the hand of the sureties. This is assumed an interim order which can be solitary by the court at any stage in accordance with condition. Liberty of the person is assumed to be important fundamental right, and such right has been in the constitution of Pakistan. This is the established law principle that no person can be assumed guilty until such person is proved guilty. This article argues that the law must be ensured to bail and it should not be favor to refuse the bail expect in some exceptional cases transpire to the contrary. The Bail belongs straight to the freedom. If bail is not offered, it means there is preparation of physical and mental torture to the accused person in duration of his trial. It shall remain uncompensated if he is found innocent and is acquitted at the result of the trail. The code of criminal procedure has provisions that explain the fact of the grant of bail and does not refuse of it and it is the scheme of law. This scheme is overcome in the most extreme and extraneous circumstances for the purpose to avoid infringement of law.

**Keywords**

Bail,ailable Offences, Nature of Offenses, Non-Bailable Offenses, Pakistani Legal System

**Introduction**

The essential idea of bail is discharging a person from the custody of law enforcement authority and convey him into the hand of sureties. The sureties must undertake to provide him at any time when the need is raised (2007 YLR 1582). The definition of bail has not been provided in the code of criminal procedure. Its merely a way of freedom of a person officially or legally under arrest and in custody. In accordance with Wharton's law Lexicon bail is to "release a person who was detained or in imprisoned and take security in order to produce him". While stroud's judicial Dictionary has said "A bail is obtained when a man is detained for wrongdoing or any such case so that he is refrained of his liberty and being by law available offer the surety to those which have authority to bail him"

In common law a person who is accused is supposed to be admitted to bail when such person has been released from the court officer's custody and has entrusted to the custody of persons that are known are sureties. These sureties are

bound to produce him at fixed time and place in order to answer charge against him. And these sureties remain unable to do so are liable to forfeit such sum that is specified at the time when bail is granted. Bail is called a security given for the due appearance for the prisoner in order to obtain his release from the imprisonment. This is also a temporary release upon security of one who provides bail (Websters 7th new judicial Dictionary).

In order to grant liberty to a person who is arrested, or imprisoned security is taken for the aim of his appearance on date at a certain place such security is called bail as the person arrested or bail as the person arrested or in provided into the bands of those who have bounded themselves or have become or have become bail for his due appearance when required needed for the sake to protect him from prison.

According to the Supreme court of Pakistan bail has been defined as 'a technique which is grew for effecting the production of two basic ideas of human value, viz., the right of an accused to enjoy his personal freedom and the public's interest on which a person's release is conditioned on the surety to produce the accused person in the Court to stand the trial' (*AIR 1979 SC 777*).

In the Constitution of Pakistan 1973, the right of liberty has been guaranteed and it has been saved in accordance with law under the article 9 of the constitution. If the accused has been acquitted from the all sort of pain, torture which may be physical and mental in duration of his detention of the police or judicial custody how the such person be compensated this question lies behind it.

The purpose of bail is to guarantee the reappearance of the accused at succeeding proceedings although allowing him liberty and protecting him for avoidable detention. Thus, while allowing bail, the sureties or conditions should be such as sufficient to make certain the accused be present next hearing. Also, it should not be out of place to mention that the same should not be excessive or bulky as may probably turn out to be a punishment, instead.

The purpose of releasing accused on surety bond is to make sure his presence on each and every date of hearing before Trial Court till conclusion of trial for fulfillment thereof. Person who stands surety executes bond in required sum or money and undertakes to produce on each date of hearing. The aim to release an accused on the surety bond is to make believe that he be present on every date of hearing in front of the Trial court until the trial's conclusion for the fulfillment of it. The person who takes surety he is to execute bond in the required amount of money and is to undertake produce him on every date of hearing (*PLD 2013 Sindh 68*).

### **Constitutional Provisions relevant to the Concept of Bail**

The relevant Constitutional provisions are as follows:

Article 4 and Article 10 of the constitution of Pakistan deal with bail.

Article 4: Right of individuals to be dealt in accordance with law.

Article 10: Safeguards as to arrest and detention.

## **Arrest**

The meaning of the word arrest is the dispossession of one's personal liberty. For the purpose to find out whether one is under arrest or not. All this depends on whether a person is unhappy of his personal liberty to move about where he pleases not on the legality of his imprisonment. When this expression is used in legal sense this process is connected with criminal offence. Arrest is consisted of taking one into custody. The custody must be under the authority of law. The purpose of detain one or holding one so as to answer questions on the criminal charge framed on him or prevent commission of criminal activity.

“Arrest to define a person of his liberty by legal authority taking under real or assumed authority, custody of another for the purpose of holding or detaining him to criminal charge or civil remand” (Black's Law Dictionary).

## **Offence**

'Offence' means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871. The word 'offence' as defined in the Code means any act or omissions made punishable by any law for the time being enforced apart those from under. An offence is constituted as soon as the act which constitute that offence have been committed. It remains an offence whether it is tribal by a Court or not and the fact that the trial of the offence can only be taken up after certain specified conditions are fulfilled does not make it any the less an offence.

There is nothing wrong in law to regard a single act of firing at two persons as one offence. However, an act or omission is an offence only if it is made punishable by any law for the time being enforce.

## **Cognizable Offence**

Cognizable offence is meant an offence in which there is no need of warrant to a police for the sake of arrest in according to the second schedule, he may arrest without warrant under law which are for the time being enforce (Section 4 Cr.PC, 1898).

## **Non-cognizable Offence**

In this kind of offence police officer does not have any authority to arrest any person without warrant. To arrest a person who is accused of this sort of offence a police officer is required a warrant (Section 4 Sub section F,Cr.PC,1898).

## **Types of Offences and Bail**

Under section 4 (b) of Criminal Procedure Code offence has categorized as

- a) Bailable
- b) Non-bailable

## **Bailable Offence**

It has been mentioned in the criminal procedure Code that if there is a case of bailable offence in such circumstances the accused has an indefeasible right to grant of bail. In such sort of offence reasonable surety is being considered necessary. It is

very clear that a person who is accused of bailable offence has a right to be released on bail. Bailable offences are those which had been explained in the first schedule of criminal procedure code. In other words these are those which are made bailable by any other law which are in force at that time.

The provisions of the section are mandatory and the Court or the officer in Charge of the police station is bound to release on bail the person who in custody and who is accused of a bailable offence. If the offence is bailable the seriousness of the offence is immaterial for the purpose of bail. Where the accused is charged with a non-bailable offence, but it is found that the offence made out on the facts was bailable in such circumstances the accused must be bailed out. The Court has no discretion in the matter. Where the High Court ordered that bail may be granted by the Magistrate after recording some evidence and the Magistrate found that the charge against the accused could be only for bailable offence, he was right in admitting the accused to bail without recording any evidence.

### **Non bailable Offence**

Non bailable means offence other than bailable which are shown in the first schedule and explain section 4 (B). Non bailable offences are grave and serious offence for example dacoity, rape and murder. Under non bailable offences grant of bail is matter of discretion.

### **Bail in bailable Offences**

In accordance with section 496 Crpc it has been pointed out that if there is an accused who has been arrested or detained without warrant by police officer in a bailable offence. In such kind of circumstances, he shall be released on bail against surety, and the surety to be determined by the court no authority has been awarded to refuse bail in the offences that have been mentioned in the bailable in second schedule of the code. However, the officer in charge of a police officer station also has power to grant bail in bailable offences. There are a lot number of occasions in which the superior courts have been decided that the bail in case of bailable case is a right of accused. The court and officer of police do not have any discretion to refuse bail. The reason is that in such sort of case accused has indivisible right (*PLD 1995 SC 35*). It is admitted that code has not a provision which allows the cancellation of such kind of bail in such situation, bail is not only a simple freedom in addition to this it is a right of subject whose liberty is regarded as valuable assets to be saved undiminished.

### **Bail in non-bailable Offences**

In non-bailable offences the accused can be granted bail under the provisions of Section 497 Code of Criminal Procedure subject to conditions that the Court from study of material placed before it thinks that no reasonable justification be present to believe that the accused is guilty of a non-bailable offence. Such bail shall be granted at the discretion of the Court. It must be used judicially and not arbitrarily.

There is provided of Section 497 of the Code provide that where a person is accused of a non-bailable offence, he may be released on bail.

The person who is accused of an offence which bailable, in this regard bail is to be granted. However, if there are non-bailable cases the Court has to decide on the question of granting the bail keeping in mind following considerations.

- i. The nature of the offence
- ii. Seriousness of the offence
- iii. A reasonable possibility of the presence of the accused being secured at the trial, there is a reasonable apprehension of the evidence being tampered with and the quantum of punishment.
- iv. Whenever an application for bail is presented before a court, the first question the court to decide is whether the charge on the accused is bailable or not. If bailable then bail will be granted. If the offence is non-bailable, further considerations will arise before the Court. Further following considerations are made
  - Seriousness and nature of offence.
  - Character of evidence.
  - Circumstances which are unique to the accused.
  - A reasonable possibility of accused's presence not being secured at the time of trial, reasonable apprehension of witnesses being tampered.

#### **When bail may be taken in cases of non-bailable offence**

When any person accused of 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, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or [imprisonment for life or imprisonment for ten years].

“Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail”.

The application for the sake to get bail put forward by the accused who was child under section 2(b) of juvenile justice system ordinance 200. And there had been delay in the conclusion of the trial and there had been no default of the accused in this regard. The non bailable offence converted into bailable offence. All these circumstances were in favor of the accused in order to admit him bail (2007 YLR 2079). The superior court had given ordered that a female accused entitled to be released on bail in all other offences, except the financial corruption, murder and the act of terrorism (2008 YLR 2262). Where an accused was suffering from a serious illness and there were no special diet and quick medical advice were not available in the jail for all the time. So this sick person was entitled to bail by the Court (PLJ 2013 Lhr 176 (DB)).

Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released. [Provided further that the Court shall,

“except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, direct that any person shall be released on bail”

The accused had been in custody for the period of more the ten months. The injuries attributed to accused were on the non-vital part of victim's body and his intention with other coaccused on such occasion needed further probe (2006 YLR 1449).

“who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded”

“who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded”

The Trial court's dairies had shown that there had no delay in the commencement of trial on behalf of the accused side. The sate counsel had also granted his consent to allow bail to the accused. The Bail was allowed to the accused (2009 YLR 269).

“Provided further that the provisions of the third proviso to this subsection shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or involved in terrorism”

“it appear that there are sufficient grounds for further inquiry into his guilt pending such inquiry the accused shall release on bail”

### **Matter of further Inquiry**

The Medico Legal report of the victim girl did not show that sodomy had been done with her. The medical examination of the victim was concluded after two days of her alleged occurrence. In accordance with the medical report no penetration was proved and in absence of it no offence under section 337Ppc would constitute. The story that had been narrated on the first information report seemed to be highly doubtful. Guilt of the accused need further inquiry and was admitted bailing (2008 YLR 2720).

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

If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment 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 judgment delivered.

A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

### **Different Categories of Bail**

There are two kinds of bail

- Pre arrest bail
- Post arrest bail

### **Pre Arrest bail**

Pre arrest bail is also known as anticipatory bail. This kind of bail is considered more difficult as compared to post arrest bail. The reason behind is this that this bail is obtained on maximum legal grounds as superficial facts are available and case is in its infancy stage.

Bail prior to arrest is dealt under the section 498 of the code of criminal procedure. Any accused in opposition to whom a case has registered under a non-bailable offence. In the High court or in the session's court the accused has the right to apply for purpose to get pre-arrest bail. In this regard the conditions an amazing relief to provide bail before arrest. It must not be arranged for an accused who has reached to the court without clean hands and intention is not holy.

This category of bail may only be claimed where in first information report it had disclosed no commission of an offence. And there had disclosed of a bailable offence. Similarly, it can be claimed in a case where positive *mala fides are suspected against* the police and where there is a *prima facie* support for it on record (PLD 1989 SC 192).

Bail prior to arrest is granted where the court in case in any case feels that by chance accused had been wrongly caught up in a case. He is likely to suffer immutable injury to his self-respect, honor and reputation by his arrest (PLD 1990 SC 42).

### **Essential Ingredients of pre arrest bail**

If there has been found the ulterior motives for the detain of the petitioner. There must a doubt that the motive of the accused to participate in some sort of illegal acts is not absolute. And there has been found the ulterior motives in such case bail before arrest may be confirmed. If the mala fide has been provided from the side of authorities and there also be proof of the fear of imminent detention of the accused.

Heinousness of offence is of no significance as long as long the pre-arrest is concerned. In real fact pre-arrest bail cannot be refused due to heinousness of offence Pre -arrest bail can be confirmed when investigations have concluded, and it shows that accused has not committed any offence.

Petitioner or accused must surrender himself in front of the court. It means that no bail to the absconder be allowed. Before detention bail can be established when accused is prepared to put forward bond. Case of petitioner should be a fit case so that court can exercise its discretion of confirmation of bail. If case petitioner is fit case for court to exercise its discretion and in such of confirmation of bail condition pre-arrest bail can be granted under criminal procedure code pre-arrest can be confirmed where accused is ready to submit. Surely bond as prescribed in criminal procedure code.

### **Conditions for Pre-arrest Bail**

The following conditions must be satisfied to allow pre-arrest bail under Cr.PC under Sec 498 Cr. PC, 1898.

- 1) That there should be a real apprehension of impending arrest with the effect of virtual limit on the petitioner;
- 2) That the petitioner should physically surrender to the Court;

- 3) That there should be apprehension of harassment on account of ulterior motives particularly on the part of the police;
- 4) That it should be a fit case on merits for exercise of discretion in favor of the petitioner for the purpose of bail. In this behalf the provisions contained in section 497 of CrPC must be kept in mind;
- 5) And that unless there is reasonable explanation, the petitioner should have earlier moved the Sessions Court for the same relief under section 498 of CrPC (*Khair Muhammad vs. The State, PLD 1973 Lah. 256*).

An application for bail before arrest should be presented to the Sessions Judge (*PLJ 1973 Lah. 524*). The pre arrest bail can be granted when the offences are bailable, non-bailable and non-cognizable.

The petitioner did not approach the High Court with-clean hands and applied for bail when their petitions were pending before the lower Court, and made false statements to justify that course, or where the accused made a misstatement before the Sessions Court in proceedings for bail, bail was not granted.

High Court does not directly entertain bail applications unless in the first-place remedy before the Court of Session is exhausted (*PLJ 1981 Cr. C. 456*). The Sessions Judge and the High Court both have concurrent jurisdiction in the matter of bail. The ordinary principle is that where concurrent jurisdiction is involved the Court of inferior jurisdiction should be moved first.

### **Post arrest Bail**

This is the type of bail that is allowed to the person after his arrest. This may be awarded both in case which are to the accused person in bailable and non-bailable offence subsequent to his arrest. Bail after arrest may be generated to the accused under section 497 of Cr.pc. When accused had been in detection by the law enforcing authority.

### **Conditions for Post-Arrest Bail**

There are vital ingredients of post arrest bail under section 497 Criminal Procedure Code, Post arrest-bail cannot be granted when there exist reasonable ground for believe that petitioner has been guilty of that offence, which is liable to be punished by with death or confinement for life or imprisonment for ten years It reveals that pre-arrest bail is that suspected offence ought to not to go down in prohibitory article of section 497 of criminal procedure code.

It reveals that the pre-condition for the purpose to grant the post arrest bail must not be fail within the prohibitory clauses of section 497 of Cr.Pc. Another ingredient for the condition of post arrest bail is that there should be no reasonable ground for believing that accused had committed non-bail offence. If there a matter which relates to further inquiry in such circumstances the post arrest bail can be confirmed.

### **Protective Bail**

This sort of the bail is to allow to the accused for the aim to make him capable to reach the concerned court of the district for the sake of the bail before arrest. It is awarded not to touch the merit of the case (*MLD 1999 2208*).



The High court has the authority to entertain this if the accused have the political background not to approach the court of the sessions. There is no jurisdiction of the court of session to grant this kind of bail to the person who is accused of the offence against which first information has been registered in a district which is out of its jurisdiction. The reason behind this is that the jurisdiction of the court of session is limited to only its district and not out of it (*PLD 2009 Lahore 209*).

### **Procedure for the pre-arrest bail**

Pre arrest bail is also known as anticipatory bail. This kind of bail is considered more difficult as compared to post arrest bail is obtained on maximum ground as superficial facts are available and case is in its infancy stage.

If a person who has an apprehend that there is a chance, or he is likely to be arrested on wrong or trump up charge or due to enmity with someone. In such situation he has the right to go the court of session or high court or another court of competent jurisdiction under the code of criminal procedure for the award of bail in event of his arrest. If the court thinks fit, the court has the authority to allow bail.

### **Bail after Conviction**

This type of bail is granted after the conviction of the accused when the appeal has been accepted for hearing and the court observes that there are grounds for the release of the accused. Therefore, it accepts the bail petition and allows bail also under section 426.

### **Bail in complaint case**

If a question has been highlighted regarding bail in a complaint case, there section 496 code of the code of criminal procedure to deal with such question. If there is a person against whom complaint has been made but such person in literal sense is not accused. In such condition the magistrate has authority to summon the witness in order to check the validity of the complaint and he may direct the police inquiry of the complaint. All these circumstances empowered the magistrate to grant order to furnish bail. Pending inquiry and empowered him to demand bail under the section of 496 Crpc.

However, in a grievance case there is an accused person who has summoned under the part 204 of code of criminal the session court will have authority to proceed under section 91 Crpc of the code. For the purpose to appear in the court, the court may direct the accused to execute bond or with or without surety. The section 91 Crpc has also empowered the court to convict accused if he has failed to provide safety for his appearance (*PLD 1963 SC 478*).

### **Kinds of bail by Nature**

#### **Interim Bail**

It is such type of bail which is decided by the court with no trial the action for a specific period of occasion. Whenever a person had applied for the grant of the bail before the higher courts. The courts had power to demand documents from the lower courts. The documents may be included charge sheet, case diary and investigations agency to make decisions. However, the process to avail these documents may take time. In such circumstances the accused or the convicted has to stay in jail. For the sake, to get avoid jail in the duration in which the higher courts get the document the

accused or convict may furnish for the bail. This bail is called interim bail. This is the temporary bail in order to grant permanent bail or extent the limit of interim bail or even to cancel the application of the bail. Whenever a person who has been committed cognizable offence and an offence which is not bailable. The police had taken him under custody after the expiry of the time duration if any. And the accused has sent to jail under **code of criminal procedure**. Such accused person has a right to be released on from the custody. Regular bail is meant the release of accused person from the custody in order to ensure his presence in the trial.

### **To Grant of Bail**

The court shall necessarily consider the following points while deciding the application for the grant of bail.

- a) There is reasonable ground for believe that the accused had committed the offence
- b) Nature as well as gravity off the charge
- c) In case of convict severity of punishment
- d) Apprehension of absconder when released on bail
- e) The character, the means and the standing of the accused (2013 PCr LJ 32)
- f) danger of witness being tempered with
- g) Opportunity must be given to petitioner to his/her defense
- h) Time for which petitioner is behind the bar
- i) Whether petitioner is the first information report (2007 YLR 3076)
- j) Whether the accused is the record holder (2008 YLR 2105)
- k) Whether reasonable possibility of false implication of accused/petitioner cannot be ruled out (PLD 1997 Karachi 165)
- l) Each and every accused must be presumed not be guilty
- m) Defeated should not be allowed in the process of trial
- n) Possibility of commission is the further offence to be safeguard

In offences which are punishable with death or imprisonment for life and imprisonment for period up to ten years, the court must consider the following points at bail stage.

- a. Benefit of reasonable doubt
- b. Identify or identification of the accused
- c. The roll of accused in the occurrence
- d. Presence of the accused at crime scene
- e. Allegations added in FIR

- f. Statements made in FIR
- g. Supplementary statement during police navigation and police dairy
- h. Plea raised by the accused (*PLJ Shariat Court AJK 23*)

### **Conclusions**

From the above discussion, it is concluded that the theme of the entire criminal justice is to consider the accused innocent until proved guilty. For this reason and keeping in view, the probable acquittal of the accused when and if he is not proved to have committed offence, law of bail is made flexible. It is left to the discretion of the Trial Court to decide for grant of bail, for the most of part. Supreme Court normally does not interfere in the judicial exercise of discretion in the bail matter unless the same is either shown to be perverse, arbitrary or capricious.

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