

PROVISIONS RELATING TO BAIL UNDER THE CODE OF CRIMINAL PROCEDURE IN BANGLADESH

Written by Sayedul Husan

*4th Year LL.B. (Hons.) student, Bangladesh University of Professionals (BUP), Dhaka,
Bangladesh*

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ABSTRACT

The term "bail" was originally taken from the French word "bailer," which means to provide or deliver. So, bail denotes to release of an accused person from police custody or imprisonment for a while in the hand of a surety and the responsibility of presenting the accused person before the Court whenever necessary has been assigned to the surety. Bail also gives a message to the bailed person that though he is not in judicial custody, he is under the Court's observation and has to remain sincere to the court proceeding till the judgement of the case is declared. Considering the facts and circumstances, the trial court or appellate Court decides on granting, cancelling or restoring bail. However, keeping in mind the very fundamental right of life and personal liberty ensured by the constitution of Bangladesh, our other statutory laws have made bail provisions to achieve two purposes. First, to secure the accused's presence before investigation agencies as well as the Court of law and second, to preserve his fundamental right to life and liberty. Thus bail keeps a balance between the two.

Keywords: Offence, Arrest, Investigation, Bond, Surety, Bail, Conviction, Appeal, Criminal Justice.

INTRODUCTION

Bail is a release certificate for the accused person to enjoy public life, although a case for any offence has been registered against him. It works as a security for the due appearance of the arrested or imprisoned person to obtain temporary release from legal custody or imprisonmentⁱ. The idea of bail originates from the conflict between police power and restricting a man's liberty alleged to have committed an offenceⁱⁱ. Generally, bail is a temporary release, it can not be expected for a lifetime, and it is granted against a single case as brought against the accused. According to Black's Law Dictionary, bail refers to the release of an accused person from legal custody on the condition that he must appear at the time and place specified, as well as submit himself to the jurisdiction and judgement of the courtⁱⁱⁱ. So, simply it is a pledge or commitment made by the accused person to court by furnishing surety that he will appear on every date fixed for the hearing of his case. If the accused fails to attend the hearing on the day fixed, the surety furnished by him gets forfeited. And when the police or any other investigation agency arrests the accused, it does not mean they are punishing him for the offence; rather, the purpose of such arrest is to ensure the presence of the accused person in the investigation and trial of his case. Moreover, getting bail does not mean the case against the accused has been closed or dismissed. He can be again sent to jail even after being given bail, provided he is convicted or has breached the conditions imposed by police or court while granting bail.

OBJECT AND PURPOSES OF BAIL

Personal liberty is a very exigent right of every citizen. As Bangladesh is a democratic state, so it protects individuals' liberty. Furthermore, by the presumption of innocence, which means innocent until proven guilty, our standard norm is making bail, not jail. So the primary purpose of bail is to free the accused person from custody. In the case of *Rafiqul Islam v State (2006)*,^{iv} the High Court Division observed that the object of bail is primarily to ensure the appearance of an accused on a certain day and place and, therefore, there may be the only direction for attendance at a particular time and place; granting bail upon the fulfilment of any other conditions is not valid in law. And the accused person must be on the undertaking of another person who is called a surety; the surety is responsible for presenting the accused person before the court to answer the allegations against him^v. At the same time, as every criminal case starts

with a prima facie, which means the accused person is assumed to be guilty, so the requirement of bail that the accused appear in court on the day that has been set accomplishes the goal of prima facie.

Offence means any illegal act which is punishable by the state. The Code of Criminal Procedure (CrPC) contains the definition of the word "offence", which states any act or omission made punishable by any law for the time being in force.^{vi} For an investigation into criminal cases, offences are divided into two classes.

1. **Cognizable offence:** It refers to a crime for which the police have the power to arrest the accused person without issuing a warrant, and the police officer is allowed to initiate an investigation without obtaining approval from the magistrate^{vii}. And in such cases, the First Information Report (FIR) must be registered by the police.^{viii} However, the police can conduct a preliminary inquiry before registering the FIR if there is any reasonable ground. These offences are generally heinous types of crimes, i.e., rape, murder, kidnapping, death, etc.
2. **Non-Cognizable offence:** It refers to a crime for which the police do not have the jurisdiction to arrest the accused without first obtaining a warrant, and the police officer is not authorized to start the investigation without the magistrate's permission^{ix}. Moreover, in case of a non-cognizable offence, the police officer does not need to register the FIR. Here the victim can file a complaint to the magistrate against the accused person. Generally, non-cognizable offences are considered private wrongs, i.e., assault, cheating, forgery, defamation, etc.

GENERAL PRINCIPALS FOR GRANTING BAIL

1. *Absence of prima facie case:*

In a criminal case, the prosecution carries the burden of proof. It is on to the prosecution to establish beyond a reasonable doubt that the accused is, in fact, guilty of the offence for which

the accused is being tried. Nevertheless, if the prosecution fails to prove the prima facie case, the Court will grant bail.

2. *Plea of Alibi:*

Alibi is a plea of defence; here, if the accused suggests to the Court that he was not present at the place during the commission of the offence; rather, he was somewhere else when the alleged offence was committed and can prove it, then the Court may grant bail.

3. *The benefit of the doubt:*

If the Court thinks there is any reasonable ground to doubt the prosecution story, then its benefit shall go to the accused and considering this ground, the Court can grant the bail of the accused person.

4. *Delay in lodging FIR:*

If the FIR is not filed on time while not having any valid grounds for doing so, the such delay makes the prosecution case weak and doubtful, and considering this issue; the Court may grant bail.

5. *Delay in an investigation:*

If the crime cannot be punished by the death penalty, life imprisonment, or a sentence of more than ten years in jail and the investigation into the alleged crime is not concluded within one hundred twenty days after the date on which the information relevant to the commission of the offence was received. In that case, the accused person may be allowed to get bail and be released from custody.

6. *Delay in Trial:*

If a trial cannot be completed within the allotted period, and if the accused person is accused of a crime for which bail can not be granted, then with the satisfaction of the Court, the Court may release the accused on bail. However, this provision does not apply to a gang of persons associated with habitually committing dacoity.

7. *Delay in post-trial:*

If the accused person is given a period of imprisonment that does not exceed one year by a Court, and he can convince the Court that he intends to present an appeal, the Court may order that he be released on bail pending the results of his appeal.

8. Bail granted to co-accused:

If the bail is granted to the Co-accused with graver allegations, then the Court may grant bail to others.

9. Further inquiry:

If the judge does not find any sufficient basis to suspect the accused of committing a punishable offence for which bail cannot be given but adequate basis to further investigate his guilt, then the accused can be granted bail during the investigation. And this decision can be taken at any stage throughout the investigation, trial, or inquiry.

Bail under the CrPC:

According to Sections 496 and 497 of CrPC, bail may be approved by-

- ✓ A Court;
- ✓ An Officer in Charge (OC)

Bail in Bailable Offence:

Non-cognizable offences are considered bailable offences due to their non-serious nature. In such a case, it is an absolute right for the accused to get bail and not favour. This right is ensured by the constitution of Bangladesh, which says- “no person shall be deprived of life or personal liberty save in accordance with the law.”^x Our statutory law says, when any person, other than a person accused of a non-bailable offence, is arrested or detained without a warrant by an OC of a police station or appears or is brought before a Court, the OC or Court shall release him on bail if the accused person wants to take bail, besides, if the OC or Court thinks fit, then without giving bail, they can discharge him by executing a bond without any surety for his future appearance.^{xi} And the accused of a bailable offence can not be jailed unless the accused is unable or unwilling to post bail or execute personal bonds.^{xii} In such a circumstance, the objective of the law is to make the individual free unless he cannot provide moderate security; only then will he be imprisoned.^{xiii}

Bail in Non Bailable Offence:

As non-bailable offences are severe, so nobody can claim bail as a matter of right; rather, it is a discretionary power of the Court to decide whether or not to release an accused on bail. If the person is released on bail, he may again be arrested and remanded to custody by order of the Court granting the bail.^{xiv} However, the discretion of the Court must be judicial discretion, not arbitrary, which is governed by established principles.^{xv} The Court has to give due care to the circumstances of the case. In the case of *Nurul Huda Vs. State (2003)*,^{xvi} the Appellate Division (AD) observed - when the Court exercises its judicial discretion, it shall not proceed upon any prior assumption. In practice, our Court does not grant bail if the maximum punishment of the offence is the death penalty or life imprisonment. However, by the discretion power of the Court, considering the facts and circumstances, if the Court thinks fit, they can grant bail though the maximum punishment of the case is the death penalty or life imprisonment. The Appellate Division also added that in such cases, if the court grants bail by using its discretion power, in future, it can not be used as practice or custom somewhat; it will be the judicial discretion power of the Court.

However, section 497 (1) of CrPC indicates that the OC or Court has the discretion in granting bail. While granting bail, the OC or Court must consider that- if OC arrests or detains the accused without a warrant in any non-bailable offence, and if he appears or is brought before the Court, then considering the grounds, he may be granted bail. The general practice of the Bangladeshi courts, except for some exceptions, in the non-bailable offence, the Court does not grant bail. But, if there is any legitimate reason to believe the involvement of the accused person in a crime carries the death penalty or a sentence of life imprisonment, then the alleged will not get bail. But there are three exceptions-

- I. If the accused is younger than sixteen, the Court or police officer may grant bail.
- II. If the accused person is a woman, the Court or police officer may grant bail.
- III. If the accused person is sick or infirm, the Court or police officer may grant bail.

However, section 497(2) of the act states- if there is reasonable ground to suspect that the accused did not commit any non-bailable offence, although there are logical grounds for additional investigation, then he might be granted bail, in such case, the Court or police officer may grant his bail by signing a bond without surety. Subsection 4 states another ground that

says- at the end of the trial, but before pronouncing the judgment, if the accused is found to be innocent by the Court, the Court may release the accused person on bail by signing a bond without any surety.

Considering bail in non-bailable cases, the Court needs to apply some tests-

- i. Whether there are any grounds to suspect that the accused committed the crime;
- ii. The nature and circumstances of the offence;
- iii. Whether there is a chance of the accused absconding;
- iv. Whether there is any likelihood of tempering the evidence by threatening the witnesses.^{xvii}

Available Bail for Non-Bailable Offences:

❖ ***Anticipatory Bail:*** In the CrPC, there is no explicit provision regarding anticipatory bail; instead, it is an extraordinary exception to general rules. Under the vast power of section 498 of CrPC, the HCD or Court of Sessions can grant anticipatory bail. The main purpose of anticipatory bail is to save the citizen from any unnecessary harassment. In practice, only HCD deals with anticipatory bail; though the Court of Sessions has jurisdiction to grant anticipatory bail, it does not exercise such power.

In the case of *State Vs Abdul Wahab (1999)*^{xviii}, it states that- in exceptional circumstances under the broad power of section 498 of CrPC, the HCD or Court of Sessions may grant anticipatory bail. Application for anticipatory bail may be filled either in the HCD or in the Court of Sessions; there is no fixed rule. The HCD also added that normally the Court of Sessions could provide such a remedy. Still, as anticipatory bail is an extraordinary remedy, it needs to be free from any threat or pressure, which is difficult to ensure at Sessions Court.

For getting anticipatory bail, the accused being present before the Court is mandatory. In the case of *State Vs Zakaria Pintu (2010)*^{xix}, the Appellate Division states that- if any fugitive criminal surrenders and prays for bail before the HCD, under section 498 of CrPC, the Court may either grant bail or hand over the accused to the police so that legal action can be taken against him. Nevertheless, the police are instructed not to arrest a fugitive, despite their legal obligation to do so. And it is a vague provision of the CrPC. Such an order may impede the investigation process, and ultimately it is a barrier to the administration of criminal justice.

Application for anticipatory bail must be applied before submission of the charge sheet. There is no scope for anticipatory bail after submission of the charge sheet.

In the case of *State Vs Abdul Wahab (1999)*^{xx}, AD states that the HCD should not grant anticipatory bail for an unlimited period; it means anticipatory bail should be granted up to the filing of the charge sheet. After filing the police report, the accused must appear in Court and considering the case's merit; the judge may grant a fresh bail to the accused. And in the case of *A Wadud Vs State (2007)*^{xxi}, the Court states that- if the accused is already in custody, then he can not apply for anticipatory bail; rather, in such case, a fresh bail may be granted.

CONDITIONS FOR OBTAINING THE ANTICIPATORY BAIL

The Court, which grants anticipatory bail, may impose some stipulations for the accused person, including:

- i. When required, the accused person must present himself before the police officer for interrogation.
- ii. The accused person shall not give a threat or incitement to any person related to the case.
- iii. The accused person can not leave the country without the Court's approval.^{xxii}

If the Court grants anticipatory bail, then the accused person is bound to maintain all the stipulations given by the Court. If the stipulations are violated, the Court may cancel the anticipatory bail and send the accused to custody.

❖ *Interim or Ad-Interim Bail:*

CrPC does not recognise interim or ad-interim bail; instead, it is exercised by the Court's inherent power. Interim bail is a temporary bail granted until the application for anticipatory or regular bail is pending before the Court. While the case is pending in the Magistrate Court, an application for interim or ad-interim bail needs to be filled in the Court of Session.^{xxiii} And while the case is pending before the Sessions Court, an application to the HCD must be filed. Once interim bail is granted - the person may not be arrested for a while as specified by the Court. Even if such a person is listed as accused and FIR gets registered until that time is finished - the accused person can not be touched. However, once the time given by the court lapses - the accused has to apply for anticipatory or regular bail, depending on the situation. As

the interim bail is granted for a limited period, if the accused does not apply for the continuation of the interim bail before expiring, the interim bail will be cancelled, then an arrest warrant will be issued, and police can arrest the accused.

❖ ***Bail after Conviction:***

Sections 496 to 502 provide general rules regarding granting bail. On the other hand, sections 426 and 435 deal with bail after the conviction of the accused person. There are two types of bail after conviction:

1. *Bail pending appeal:*

When an appeal is pending by the convicted person before the appellate Court, the Court may record it in writing and can issue an order to the implementation of the sentence or order appealed against being postponed, and if he is imprisoned, he is freed on bail. Though mainly the power is conferred to the appellate Court, the HCD may exercise this power if a convicted person appeals from a subordinate court. And if a court sentences a person to less than one-year imprisonment and the convicted person can convince the Court to appeal, the Court may release him on bail for a certain period, and as long as he remains free on bail, his sentence will be considered suspended. If the HCD is satisfied that a convicted person has been granted special leave to appeal to the Appellate Division against any sentence that has been imposed, it may, if it thinks fit, order that the sentence or order appealed against be suspended pending the appeal, and the accused may be released on bail.^{xxiv}

2. *Bail pending revision:*

To check and examine the correctness and legality of an order or sentence recorded or passed by the lower court, the HCD may call any lower Court, and Session Judge may call any inferior Criminal Court under its jurisdiction. When HCD or Session Judge call for such a record, they can direct to suspend the sentence and release him on bail.^{xxv}

THE PROCEDURE TO BE FOLLOWED FOR GRANTING BAIL

Everyone wants to stay liberal or independent. So, if anyone is alleged of an offence and the accused person is already arrested, or there is logical ground to believe that he might be arrested, he can face it through the legal procedure and apply for bail. At first, the accused person will consult and appoint a lawyer. After analyzing the fact of the case, the appointed

lawyer will prepare a bail petition and raise it before the court for the hearing. Then the appointed lawyer will appear before the honourable court to hear the bail petition on behalf of his client. The court may consider the nature and gravity of the offence, character and previous criminal record, social status and family background, profession and financial conditions, etc., of the alleged person. After considering all these things, the court will grant or reject the bail petition. If the court grants the bail petition, then the lawyer will submit the bail bond. The appointed lawyer and the magistrate must sign the bail bond. After getting the bail order, if the accused person is in jail, the bail order shall be submitted to the jail authority. If the accused person is in police custody, the bail order shall be submitted to the concerned police officer, and then the concerned authority will release the accused.

PRACTICES RELATING TO BAIL

Despite the laws and rules, bail has often been given to the most notorious criminals in recent years, whereas bail has been refused to women and children in some minor cases.^{xxvi} As a matter of right, no one can claim bail for a non-bailable offence; rather, it is totally a discretionary power of the Court. If the Court is convinced, it may grant bail; otherwise, it may decline the bail application. But in practice, it is common scenery that, in many cases, the Court rejects the bail application without considering the facts properly. Different scenery is also available; the Court grants bail by using its discretion power without following the adequate measures of granting bail in the non-bailable offence.

CONCLUSION

From the above discussion, it is clear that The CrPC gives only an outline of the bail provisions, yet the Courts handle most of the work. Personal liberty is of utmost importance under Article 32 of the Bangladesh Constitution. Bail is generally a matter of judiciary discretion. The ultimate goal of every accused is to get bail, so it plays a significant role in a criminal case, and the accused who is arrested and living in jail can claim bail at any time. Once bail has been granted, the accused is allowed to remain free until the trial. The decision to grant or deny bail is very important to society because every crime is against the state. Considering the accused's socio-economic circumstances is also important in deciding whether or not to grant bail. The

bail order must establish a perfect balance between the dignity of personal liberty and the interests of society. In order to determine whether the accused holds ties to the community, a comprehensive investigation might be carried out. The restriction of an individual's liberty must be justified by the most valid reasons directly related to the goals of the society's welfare outlined in the Constitution. So, before granting or rejecting the bail, the gravity of the offence, the accused's right to liberty and society's wider interest need to be considered.

ENDNOTES

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- ⁱ AC Sen (ed) 1979, *Mitra's Legal and Commercial Dictionary* (Eastern Law House, Kolkata), p 98
- ⁱⁱ Analysis of the Bail Provision of Bangladesh; <https://www.lawyersjurists.com/article/analysis-bail-provision-bangladesh/>
- ⁱⁱⁱ *Black's Law Dictionary* 177 (4th ed.)
- ^{iv} 26 BLD (HCD) 96, 98.
- ^v *Aiyer's Code of Criminal Procedure* (3rd ed), p CLCIV
- ^{vi} Section 4(1)(o), the Code of Criminal Procedure, 1898
- ^{vii} Section 156, *ibid*
- ^{viii} Section 154, *ibid*
- ^{ix} Section 155(2), *ibid*
- ^x Article 32, the Constitution of the People's Republic of Bangladesh
- ^{xi} Section 496, the Code of Criminal Procedure, 1898
- ^{xii} Zahirul Huq, 2010, *Law and Practice of CrPC*, (12th ed) p 865
- ^{xiii} Zahirul Huq, *ibid*
- ^{xiv} Zahirul Huq, *ibid*
- ^{xv} Dr. Sarkar Ali Akkas, 2019, *Law of Criminal Procedure*. (5th ed) p 76
- ^{xvi} 55 DLR (AD) p 33,35
- ^{xvii} Zahirul Huq, 2010, *Law and Practice of CrPC*, (12th ed) p 868, 869
- ^{xviii} 19 BLD (AD) 189, para 6
- ^{xix} 62 DLR (AD), p 420
- ^{xx} 19 BLD (AD) 189, para 42
- ^{xxi} 59 DLR, p 587
- ^{xxii} Sri M.Sreenu, 2020. *Bail, Anticipatory Bail, Mandatory Bail & Bail After Conviction*, p 8,9
- ^{xxiii} Section 497, the Code of Criminal Procedure, 1898
- ^{xxiv} Section 426, *ibid*
- ^{xxv} Section 435, *ibid*
- ^{xxvi} Islam, S., & Moula, G.(2014). *The Right of Getting Bail of an Arrested Person in Bangladesh—A Legal Study of Theories and Practice*. *Beijing Law Review*, p 44