

APPROVER AND TENDER OF PARDON.

Who are empowered to Tender Pardon [Sec. 306 (1) of the Criminal Procedure Code, 1973. (for short Said Code)].

The Chief Judicial Magistrate or Metropolitan Magistrate can tender pardon at any stage of Investigation, or Inquiry into, or trial of the offence. And the Magistrate of the First Class can tender pardon at any stage of the "Inquiry" or "Trial" but not at the stage of investigation. .

When two authorities are simultaneously empowered to grant tender of pardon, if the lower authority has not granted, the higher authority may grant. But at the first instance if the higher authority is approached and it has not granted, the lower authority shall not grant except on fresh facts, which were not brought before the superior authority, which declined to grant pardon. Like bail applications any Magistrate Court if declines to grant pardon, the same court can entertain second application but only on fresh facts or additional fresh facts.

What is the procedure involved in declaring an accused as approver:

It is nothing but a bargain between the police and accused. Once the bargain is settled then the procedure is to be followed.

Either the prosecution or the accused who has agreed to be an approver or somebody on behalf of such accused may move application for tender of pardon. Both parties will be heard. Since both parties already came to an understanding, there will be no question of any objection by either of the parties. If there is any objection by either of the parties the court will not grant tender of pardon. Court will examine the facts of the case and after hearing both parties it shall record the reasons before granting tender of pardon. Police in general get the confessional statement of the accused recorded prior to the initiation of these proceedings as guarantee but it is not compulsory. Even the court will not look into such confessional statement as a factor weighing for granting or rejecting tender of pardon.

The Hon'ble Supreme Court explained the law to this regard in Criminal Appeal no. 1925 of 2008 between State of Maharashtra v. Abu Salem Abdul Kayyum Ansari in the following terms;

The salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to

the rest. Section 306 Cr.P.C. empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence . The Magistrate of the first class, under Section 306, is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 vests the court to which the commitment is made, with power to tender a pardon to an accomplice. The expression, 'on the same condition' occurring in section 307, obviously refers to the condition indicated in sub-section (1) of section 306, namely, on the accused making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. An accomplice who has been granted pardon under section 306 or 307 Cr.P.C. gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the

whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under section 308 CrPC to that effect, the protection given to him is lifted.

In this case the Hon'ble Supreme Court considered sections 114, illustration (b), 132, 133, 154, 315 of the Indian Evidence Act, 1872 and Article 20(3) of the Constitution of India .

BAIL AND REMAND

Every citizen of India has a fundamental right of freedom under Article 21 of the Indian Constitution. Since we are governed by the rule of law, freedom of every individual within the territory of India is subject to the rule of law. In other words, if any individual violates the rule of the land, he is bound to face consequences under the law and in such a case, his freedom can be restricted.

Whenever any person, arrested by police approaches the court to release him on bail, it is the solemn and bounded duty of court to decide his bail application at the earliest by a reasoned order.

The Hon'ble Bombay High Court has even circulated **circular no. A.1211/2009**, where it states that the Hon'ble High Court in Cr. Writ Petition no. 18/09 has observed that **judges of subordinate courts do not decide bail application within reasonable period of time**. By virtue of above circular all judicial officers are directed to dispose off bail applications **as expeditiously as possible** and to comply with that direction.

In view of above constitutional provision and the circular referred to above, it is duty of every judicial officer not to be responsible for delay in disposing off bail application.

Above circular is circulated in the year 2009 in the South Goa District, vide letter bearing no. 20-10-2009.

There are two types of offences, bailable and non bailable governed by sections 436 and 437 of the Said Code.

The aspect of bail in bailable offence came under scanner of the Hon'ble Supreme Court in case of **Rasiklal v/s Kishore, s/o Khanchand Wadhvani [(2009) 4 SCC 446]** where the Hon'ble Supreme Court in clear words held that incase of bailable offences, right to claim bail is an **absolute and indefeasible right** and if the accused is prepared, court/ police officer is bound to release him on bail and **only choice available is in demanding security** in surety and if the accused is wiling to abide by reasonable conditions which may be imposed on him.

Order of granting bail is judicial act and not ministerial act and thus reasons must form the basis for any order on bail application.

The Hon'ble Bombay High Court in **Cr. Bail Application no. 152/2011** has issued directions which are circulated to all subordinate judicial officers and has held that if trial of non bailable offence is not concluded within period of 60 days from first day of taking evidence, the accused should not be forgotten or given a go by and that all should bear in mind that this is very important right conferred on accused in jail, so that accused should not be required to remain in custody indefinitely in cases triable by Magistrate. Therefore, such cases should be taken up promptly and disposed off, preferably within period specified in law. In this case section 437(6) of the Said Code was considered which reads that '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 60 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'.

SAY OF THE COMPLAINANT OVER BAIL ORDER:

In the case of **Shri. Ganesh Banu Borase v/s state of Maharashtra & Ors. (Cr. Application no. 585/2009)** decided on 9.4.2009 considered decision of the the Hon'ble, Supreme Court in case of **Brij Nanandan Jaiswal v/s Munna alias Munna Jaiswal & Anr [(2009) 1 SC 678]** when it was held that complainant can

always question the order of granting bail if the said order is not validly passed.

LEGALITY OF DIRECTION TO POLICE TO GIVE ADVANCE NOTICE BEFORE REGISTERING OFFENCE IN ANTICIPATORY BAIL APPLICATION

In yet another circulated decision in a bunch of petitions nos. 58/2012, 59/2012, 60/2012 and 61/2012 the Hon'ble Bombay High Court at Panaji was considering an order passed in an anticipatory bail application whereby police were directed to give notice for 48 hours incase crime is registered so as to enable the applicant to move the court. The Hon'ble, Bombay High Court finally set aside the direction and directed the order passed in the said bunch of petitions to be forwarded to the subordinate courts.

The Hon'ble Supreme Court in case of **Guruchand Singh v/s State (Delhi Administration) (AIR 1978 SC 179)** has laid down factors to be taken into consideration while granting bail and they are as follows:

The nature and gravity of circumstances in which the offence is committed, the position and status of accused with reference to the victim and the witnesses, the likelihood of the accused fleeing from justice of repeating the offence of jeopardizing his own life being faced with a grim prospect of possible conviction in the case

of tempering with witnesses, the history of the case as well as of its investigation and other relevant grounds which in view of so many variable factors cannot be exhaustively set out.

REMAND

The following points are required to be noted while granting remand.

- 1) Efforts must be made by the Investigating Officer to complete the investigation within 24 hours as fixed by section 57 of the Said Code.
- 2) If such completion is not possible and there are grounds for believing that the accusation/information is well founded the officer must forthwith forward the accused to the nearest Judicial Magistrate with a copy of the relevant entries.
- 3) The Magistrate, who receives such information, may authorize the detention of the accused for a maximum period of 15 days whether or not he has jurisdiction to try the case.
- 4) Such detention during the initial period of 15 days may be either in judicial custody or in police custody is the

discretion of the Magistrate. Magistrate having no jurisdiction must forward the accused to the .

- 5) Beyond the period of 15 days, there cannot be any remand to police custody.
- 6) Thereafter, if the Magistrate having jurisdiction is satisfied that adequate grounds exist for doing so, the Magistrate may authorize the detention of the accused otherwise than in police custody for a period of 15 days at a time. Such detention cannot exceed the total period of 90 days or 60 days as the case may be.
- 7) If within the said period of 90 days or 60 days the final report is not filed, the accused has an indefeasible right to be released from custody.
- 8) Thereafter he can be remanded to custody by the Magistrate only if he is not in a position to offer bail.
- 9) When the accused is so released under the proviso to Sec. 167(2) of the Said Code , it shall be deemed that such release is under Chapter 33 of the Code.

- 10) Such bail is also liable to be cancelled under Sec. 437(5) or Sec. 439(2) of the Said Code as the case may be.
- 11) If the final report was filed after 60 or 90 days as the case may and the accused has not availed such indefeasible right to be released on bail before the final report is filed, he cannot claim such right to be released on bail.
- 12) It is duty of Magistrate to inform accused his right of bail by default even in serious cases. i.e. when charge sheet is not filed within prescribed period.
- 13) The period of detention if ordered by the Executive Magistrate is to be counted.
- 14) The word custody includes surveillance, restriction and not necessarily in hand .
- 15) The object of remand is to avoid possible abuse by police and to facilitate investigation and not to coerce the accused.
- 16) The Magistrate must ensure that the arrest is justified.

- 17) It has been normal allegations of accused that he is made to visit police station and police make him wait and register his arrest thereafter. Therefore, magistrate must be careful and keep check and balance.
- 18) In normal circumstances Magistrate must assist the production of accused.
- 19) The object of remand is to enable the Magistrate to see if remand is necessary and to enable the accused to make representation and Magistrate has to pass a judicial order.
- 20) If during the course of custody, commission of different crime is brought to light, accused can be detained for different offence.
- 21) Remand means sending the accused back.
- 22) Magistrate should check the time of arrest as required under article 22 (2) of the Constitution of India to ensure that accused is produced within 24 hours.
- 23) If accused makes an allegation of torture inquiry has to be conducted. Here the role of the Hon'ble Sessions Judge come into play.

- 24) In case Magistrate lacks jurisdiction over the matter, Magistrate has to forward the record to appropriate forum.
- 25) Total period of 60 days or 90 days has to be calculated from the date of remand and not arrest.
- 26) Magistrate must see its powers under special statute before granting remand.
- 27) It is duty of Magistrate to provide legal aid to accused even when accused is produced for first time before the Magistrate as per direction of the Hon'ble supreme court in **Criminal Appeal Nos. 1899-1900 of 2011 in case of Mohammed Ajamal Mohammed Amir Kasab alias Abu Mujahid v/s State of Maharashtra** and also circular dt: 8.11.2012 of the Hon'ble Bombay High Court.

COMPENSATION TO VICTIM OF CRIME- RECENT TRENDS OF JUDICIAL DECISIONS AND APPROACH EXPECTED FROM TRIAL COURTS. (SEC. 357, 358, 359 AND 250 OF CR.P.C.)

The courts can order an offender to pay compensation to the victim of crime under section 357 of the Said Code.

The legislature considering the difficulty or incapacity of offenders to pay the compensation or incases where the offender may not be traced and in such circumstances in order to compensate or rehabilitate the victim/dependents enacted section 353A in the Said Code where the state governments are required to frame a scheme in coordination with central government for providing funds for compensation to victim / dependants who suffered loss or injury as a result of crime and who require rehabilitation.

The plight of victim in criminal cases was highlighted in Malimath committee which carries the following record.' **Very early in the deliberations of the committee it was recognised that victims do not get at present the legal rights and protection they deserve to play their just role in criminal proceedings which tend to result in disinterestedness in the proceedings and consequent distortions in criminal justice administration. In**

every interactions the committee held with police, the judges, the prosecution and defence lawyers, jail officials and general public ,this concern for victims was quite pronounced and view was canvassed that unless justice to victim is put as one of the focal points of criminal proceedings, the system is unlikely to restore the balance as a fair procedure in the pursuit of truth .'

Some statutes in civil law make provisions for immediate relief and final compensation to the victim of accident and industrial disasters and they are: The Workmen's Compensation Act, 1923, The Motor Vehicle Act 1988, The Railway Act 1989, The Public Liability (Insurance) Act 1991 and The National Green Tribunal Act 2010.

Under criminal law , the Said Code also lays down provisions for victim compensation. Section 357 of the Said Code is an effective provision where section (1) (b) and (c) provide for apportioning compensation from fine imposed by the court to the victim. Section 357 (3) of the said Code provides unbound discretion to judges to balance the right of victims for compensation and save them from resorting to the cumbersome process of civil court as it does not put any limitation over the quantum of compensation.

The judicial contribution for the effective use of section 357 of the Said Code is seen in the case of **Sarwan Singh v/s State of Punjab [(1978) 4 SCC 111]**, where 5 persons committed death of another relative in an agricultural field and before the lower court fine was ordered to be paid to the widow of the deceased victim. It was held by the Hon'ble Supreme Court that if it is found by the court that compensation should be paid, then the capacity of the accused to pay the compensation has to be determined and that if accused has the capacity to pay there could be no reasons to court not directing such compensation.

In ruling of **Palaniappa Gounder v/s State of Tamil Nadu [(1977) 2 SCC 634]** where victim's children filed an application under section 482 of Said Code to pay compensation for death of their father. The Hon'ble High Court had ordered to pay fine of ` 20,000/-. It was observed by the Hon'ble Supreme Court that courts should ensure that fine must not be excessive and should have regard to all circumstances of the case, the motivation of offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine.

In the case of **Hari Singh v/s Sukhbir Singh [(1988) 4 SCC 551]**, the Hon'ble Supreme Court urged all courts to exercise their power under section 357 of the Said Code liberally to safe guard the interest of victim and also laid down principles which court

should consider regarding assessment of amount of compensation and mode of its payment.

In the Hon'ble Supreme Court in the case of **Rachhpal Singh v/s State of Punjab [AIR 2002 SC 2710]** stress is given on sec 357(3) of Said Code and held that it is open to the Court to award compensation to the victim or his family.

Similarly in case of **K. Baskaran v/s Sankaran Vaidhyan Balan [AIR 1999 SC 3762]** where the Hon'ble Supreme Court again gave importance to section 357 of the Said Code in the case of dishonour of cheque.

Section 250 of the Said Code deals with compensation for accusation without reasonable cause. Section 358 of said Code refers to compensation to person groundlessly arrested and section 359 of said Code refers to payment of cost in non cognizable cases.

QUESTION

1. If the accused is admitted in hospital, whether magistrate can grant police remand or judicial custody in absence of production of accused before the court ?