



RESEARCH PAPER

Powers and Practices of Courts: An Analysis of Granting Bail in Pakistan

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ABSTRACT

The procedure of law in order to decide the bail applications either prearrest or post arrest is well defined during the last decade by many judges of high court and Supreme Court. And one of the settled rules is that the court needs to make tentative assessment of available facts and story of FIR at the bail stage rather than the deeper assessment. In criminal justice system it is the need of time to review the law related to the surety bond because bail does not mean that the court of law will not fulfill the remaining procedure. Bail in the matter of prearrest is the discretion of the court and bail in the matter of post arrest is matter of right rather than discretion. In this context, this paper analyses powers and practices of Courts for granting Bail in Pakistan. It argues that Courts in Pakistan has discretionary powers in some cases for granting Bail. However, such exercise should be done in a prescribed manner and in due course.

KEYWORDS Bail, Courts, Criminal Justice, Discretion, Pakistani Law

Introduction

Liberty of a person is a fundamental human and rightly is a precious right, guaranteed by the Constitution of the Islamic Republic of Pakistan, (1973). It is an established law that no one should be behind the bars until proven guilty. In this regard bail is in a straight line connected to freedom. Actually, bail means the transfer of custody of an accused from the jail authorities to the some whose surety bond is acceptable under the defined law.

Law of surety is of huge significance in bail matter and in early stages of criminal cases. Law enforcement agencies like police etc. use their power to limit the freedom a person because they claim that the custody of accused person is required against the registered case, while they have no authority to announce an accused guilty in any means.

Under the section 497 of the code of criminal procedure (Cr.P.C.) specifically related to the bail matters and most concerning provision is about the matter of further inquiry, provide to the court to look into the matter regarding the further inquiry and if find any fact needs consideration in order to unearth the real facts of the criminal case then the court can allow the bail application as the nature may be. On the other hand, under the section 498 of Cr.P.C. the court of law needs to find out the possibility of involvement of accused into the said occurrence and tentatively assess the story of First investigation report (FIR) and the connection of accused with the said occurrence before decide the matter of bail.

Bail is right of the accused in the latter it is the concession of the court considering all just principles laid down by the superior courts in this behalf. Bail before arrest and even anticipatory bail may be granted if circumstances are such. Bail means procurement of

release from prison, of a person awaiting trial or an appeal, by the deposit of a surety to ensure his or her submission at the required time to the relevant legal authority. The monetary value of the surety, known as bail or the bail bond.

Under the article 21 of the constitution of Pakistan 1973, speak openly about the liberty of a persons which shall not be deprived without due course of law. The thought of safety is for me connected to leader of the base It defend the confidential liberty of a life form as of his care. The idea of safety is closely linked by means of the circumstances "mind "grab and "custody". In each one this kind of state of relationships there is short of liberty of a life shape the question of safety happen what time a life form is in mind or in jail or come again Time there is care.

Classes of Criminal Courts and Magistrates

Following are the Classes of Criminal Courts and Magistrates (Section 6 Cr.pc, 1898).

1. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely:
 - (i) Courts of Session;
 - (ii) Courts of Magistrates.
2. There shall be the following classes of Magistrates
 - (i) Magistrate of First Class
 - (ii) Magistrate of Second Class
 - (iii) Magistrate of Third Class

In wide terms legislature in its wisdom has conferred power of revision to ensure that miscarriage of the justice does not take place by acts advertent or inadvertent. Power of session judge to revise under section 439-A power of session judge are vast. This section gives the same power of revision to session judge as many be exercised by high court under the section 439 Cr.PC. Session court has power to chance the sentence by using its power of revision (1992 MLD 42). Under section 491 (1) concurrent jurisdiction has been conferred on the session judge subject to the directions that were\are issued by the high court. However, it does not to take away to jurisdiction of high court (2003 MLD 1550).

Magistrate can grant bail the mailer falls under following categories.

1. Of the person who is seeking bail has been placed under actual category.
2. He has appeared in answer to process issued by the court.
3. He is brought by the police before the court. The concept of judicial custody does not exist by away of a voluntary surrender before the court. Unless and until the accused is under actual custody by the police, he cannot be construed to be in custody (PLD 2008 Kar 492).

Supreme Court has defined by the high court unless it was shown that same was exercised arbitrarily in contravenes of the settled principle of law. Ho exceptional case have been made out and no compiling circumstances were shown for interference with the said exercise of discretion by the high court and no grounds were made out for the leave and petition was dismissed (2008 SCMR 74)

Discretionary Power

The discretionary power of the court means:

To exercise the power to decide the matter pending for adjudication as per law guided by the principles of law under different circumstances. Courts cannot go beyond the power confirm by the law and always do the needful as per law but nothing else.

“Discretion” when applied to a court of justice, means “sound discretion guided by law”. It must be governed by rule, not by absurdity. It must not be arbitrary, unclear and imaginary .it must be legal and regular. In the case of granting bail the discretion of the Judge must be exercised not in opposition to the established principles, but in accordance with established principle of law.

If a prima facie case has been made out by the prosecution and reasonable grounds found for believing that the person accused has been guilty of an offence punishable with death or imprisonment for life. Such person shall not be released on bail pending disposal of the case, unless extraordinary circumstances intervene favoring the accused (*1979 Cr.L.J. 455*).

The jurisdiction to grant bail to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail the Courts have to consider that

- a) The nature of accusations.
- b) The nature of evidence in support hereof.
- c) Severity of the punishment which conviction will entail.
- d) The character and behavior of the accused.

The means and circumstances which are peculiar to the accused reasonable possibility of securing the presence of the accused at the trial and reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and other similar considerations (*2004 Cri LJ 1473 at p. 1474 (J & K)*).

Power to Grant of Bail in Non-Bail able is Discretionary

Bail in bail-able offence is a matter of right in post arrest matters under S. 496 Cr. P.C. But grant of bail for a non-bail-able offence under S. 497 Cr. P.C is a matter of discretion. To grant bail in non-bail-able cases is generally a matter of discretion (*AIR 1958 SC 376*)

If there is no prohibition otherwise and if the guiding principles for enlarging on bail are satisfied, then the court of law in his discretion may release such person on bail. Hence it gives the jurisdiction that contains a discretion which must be used judicially.

However certain conditions can be annexed to the liberty and in certain contingencies to bail already granted can be rushed by cancellation of bail. In addition to these provisions, there is a bar even on such discretionary power of court of law when there appears reasonable ground for believing that the accused is the guilty of an offence punishable with death or imprisonment for life. There are exceptions to this general bar finds place in the proviso relating to young persons or sick or infirm persons or women. Bail is a matter of right if the offence is bail able.

Bail is the matter of judicial discretion

Bail shall not be granted in the case when the offence is punishable with death or imprisonment for life if he is of the view that there appear reasonable grounds for believing that the person accused of or suspected of the commission of the offence has been guilty of the offence. Provided that the court of law in his discretion grant bail to a woman or a minor under the age of sixteen years or a sick or infirm person as provided in law as general exception.

In a case involving a non-bail-able offence, a Court has authority to impose reasonable conditions besides fixing the amount of bail for the attendance of the accused. Discretion has to be exercised in granting bail in cases which are not punishable with imprisonment for life or death except there may be some reasons for not exercising such a discretion in favour of the accused. Such reasons must be mentioned in the order while refusing bail.

In cases of under-trials charged with commission of an offence or offences the court is generally called upon to decide whether to release him on bail or to commit him to jail. The decisions have to be made chiefly in non-bail-able cases. Following things are regarded in this situation and these are nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc (*1990 Cri LJ 1531*).

Exercised Discretion in Judicious Manner and not Causal Manner

In ancient society there was no concept of bail even in Pakistan the very first bail application was allowed in 1949. Grant of bail is through a discretionary order, but it make necessary exercise of such a discretion in a judicious manner and not as a matter of course (*PLJ 1998 SC658*). However, the bail is depending upon the background of facts of the matter being dealt with by the Court and these facts always vary from case to case. The placement of the accused in the society may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought to always be in addition to other circumstances warranting the grant of bail.

The nature of the offence is one of the basic considerations for the grant or refusal of bail if the crime is more heinous the greater is the chance of rejection of the bail however, dependent on the factual matrix of the matter (*PLJ 2002 SC 1475*). Order for bail bereft of any logical reason cannot be continued. Needless to record, the court which is dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course (*PLD 2004 SC 4267*).

The jurisdictions to grant bail have to be exercised on the basis of well settled principles having regard to the circumstances of each case. These jurisdictions must not be used in an arbitrary or causal manner. The Court must keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, the larger interests of the public or State and similar other considerations. In a civilized society bail has become a rule but in primitive society there was no concept of bail (*PLD 1998 SC 1*)

It must also to be kept in mind that for the reason of granting the bail the Legislature has used the words "reasonable grounds for believing. Instead of the word "evidence" which means the Court dealing with the grant of bail can only satisfy itself as if there are genuine cases against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. At this stage it is not predictable to have the evidence establishing the guilt of the accused away from reasonable doubt (*2001 SCMR 1444*).

In any case, the discretion to be used for grant of bail shall always have to be firmly in accordance with law and to horns the same (2002 SCMR 1475). The provisions of the Criminal Procedure Code have conferred discretionary jurisdiction on criminal courts to grant bail to the accused pending trials or in appeals against convictions. Since the jurisdiction is discretionary it is requisite to be exercised with huge care and caution by balancing valuable rights of liberty of an individual and the interest of the society. While granting or refusing the bail, the courts have to show the grounds for grant or refusal of bail. The jurisdiction must not be exercised in a casual and cavalier fashion (2003 SCMR 707).

The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the state of granting bail a detailed examination of evidence and detailed documentation of the merit of the case need not be undertaken. And there it is require showing in such orders reasons for prima facie concluding why bail was being granted predominantly where the accused is charged of having committed a serious offence.

Any order without of such reasons would suffer from non-application of mind (AIR 2004 SC 1866). It is correct that detailed examinations of the merits of the cases are not required by the courts when such courts are considering an application for bail, but the exercise of discretions have to be based on the well-settled principles. These must be used in a judicious manner and not as a matter of course (2005 SCMR 507).

Though detailed examinations of the evidence and elaborate documentations of the merits of the case are to be avoided by the Court while passing orders on bail applications. A court which is dealing with the bail application must be satisfied as to whether there is a prime facie case but extensive examination of the merits of the case is not necessary. There is a need to point out in the order the reasons for prima facie concluding why bail were being granted chiefly where an accused was charged of having committed a serious offence (2007 Cri LJ 4338 at p. 434- (SC).

It was held by the Hyderabad High Court that the discretionary power of the courts to grant bail is not arbitrary. But this is judicial and is governed by established principles. The purpose of detention of the accused is not corrective but to secure his appearance to abide by the sentence of law. The courts must have to consider the seriousness of a charge, the nature of the evidence, the severity of the punishment which is prescribed for the offences. The severity of the sentence must be kept in mind in the cases of offences punishable with death or with transportation for life since the severity of the punishment is itself such as to induce a person to escape the trial.

The Court has to exercise judicial discretion keeping in view the recognized principles and factors while considering the application for bail.

While the Court exercises its discretion, whether it is under S. 437 or 438 or 439, Cr. P.C., it shall exercise the same properly and not in an arbitrary manner. The discretion exercised shall appear a just and reasonable one. It is true that no norms are prescribed to exercise the discretion. Merely because, norms are not prescribed for the Court to exercise discretion under Ss. 437, 438 or 439 Cr. P.C. that does not mean the discretion shall be left to the whims of the Court (PLD1992 SC 1676).

The personal liberty has guaranteed under the Constitution, and it is necessarily to be coordinated with the considerations under the ordinary law. One can understand refusal of bail in matters eating into the very vitals of the society. In such affairs the issues are always determined by reference to what is in the interest of society and what is against.

In the ultimate analysis the decision in matters in bail is always taken on the circumstances and facts of each case. It is for this reason that the discretion is vested in courts in matters of bail and has always been considered a great trust. This discretion has to

be exercised judicially with all the concern to the facts of a particular case and the circumstances (1988 Cri LJ 749)

While it is true that Article 21 of the Constitution of Pakistan 1973 is of great importance because it enshrines the fundamental rights to individual liberty. However, at the same time a balance has to be strike between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the interest of the society (2007 SCC 70 at p. 79).

The Granting of Bail by Courts in Criminal Justice

Bail by Executive Magistrate

Section 44 (1) has authorized any magistrate to arrest or order the arrest of any person who has committed any offence in his presence. Since the Magistrate has power to order one's arrest, he also has the power to release him on bail. It has held that magistrate arresting a person is not a Court, so detaining such person beyond 24 hours would be illegal normally. So, he has to be produced before a competent magistrate under section 167 (1) of CR.P.C. Under section 81 the executive magistrate has the power to grant bail to a person who is charged of a bail-able offence and arrested under warrant and that the offence was committed in any other district.

Judicial Magistrate

Bail before a judicial magistrate can be moved at any stage of investigation, enquiry or trial, at the time of the commitment or after conviction until a proper bail order is obtained from the appellate Court.

Bail by Sessions Judge

Section 439 of the CR.P.C has conferred the powers upon the Sessions Judge to take up bail application of an accused against whom the investigation is pending. The bail of such accused has been refused by the Sessions Judge at the investigation stage. But the Sessions Judge has power to impose suitable conditions on bail. However, it is the powers the Sessions Judge to put to one side or modify any condition imposed by the magistrate while admitting the accused on bail.

Bail by High Court

The High Court has been given vast power to grant bail as Court of superior jurisdictions, as a Trial Court or as a Court of Revision. The Powers have also been given to the High Court either to reduce the bail granted by the magistrate, or by the Sessions Judge on being satisfied that the amount of bail is excessive and has also the power to cancel the bail granted either by the magistrate or by the Sessions Judge on being satisfied that the bail has been improperly granted ad regard to being had to the facts and circumstances of the case and in the interest of the public order and for fair trail of the case pending against the accused, his bail should not be granted. The High Courts have been given wide discretionary powers in matters of granting or refusal of bail.

Bail by Supreme Court

Mr. Bashirullah Khan, learned Assistant Advocate - General, N.-W.F.P.in a case submitted that bail could not be allowed under section 497(2) of the Cr.P.C. in a non-bailable offence if the final report under section 173 has already been submitted before the trial

Court. In this connection, he relied upon a case wherein the learned Judges observed (*PLD 1971 SC 324*).

The learned Judge remark that 'the evidence on the Police record ex facie shows that the case of the petitioner requires further inquiry' was equally unwarranted. The final report under section 173 of Cr.P.C. having been submitted in the Court of the Inquiry Magistrate and the statements of a number of witnesses recorded by him, section 497(2), Cr.P.C. was not attracted. There is no other provision in law under which a further inquiry could be made by the police.

The above decision was followed in case wherein it was held that the final challan having already been submitted to the trial Court bail under subsection (2) of Section 497, Cr.P.C. could not be allowed (*1979 SCMR 132*). The last-mentioned judgment purely follows the pronouncement in the case of *Ch. Muhammad Khan v. Sanaullah and others* and this is so stated. However, we may point at with the greatest respect that while taking the view the learned Judges appear to have disregarded the words to the effect "if it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be" occurring in subsection (2) of section 497. Hence, it is impossible, speaking with the extreme respect to stick on to the view taken in these judgments because in our humble opinion no such limitations to the exercise of powers of granting bail by the Court exist under subsection (2) of section 497, Cr.P.C.

The principle which was reiterated by the Honorable Supreme Court of Pakistan in a case judgment reported as wherein it was held that bail to an accused person involved in a murder case cannot be refused merely because there is a customary practice not to grant bail to accused of murder cases when the challan of the case has been submitted and the trial has commenced (*PLD1989 Supreme Court 585*). The following two paragraphs of the reported judgment are relevant and are reproduced below:

It is apparent that when the court finds that the two essential conditions contained in section 497(2), Cr.P.C. are satisfied the accused shall become entitled as of right to bail. In the impugned order the learned Judge, it seems, without saying so in so many words, felt that the two conditions existed in this case- (a), that " there are not reasonable grounds for believing that the accused has committed (a) non-bailable offence; (b), that there are sufficient grounds for further inquiry into his guilt." Accordingly, the accused had become entitled to be released on bail.

The question then arises; whether subsection (2) of section 497, Cr.P.C. would have operation notwithstanding the foretasted practice of this Court. Much discussion is not necessary in this behalf. When an accused person becomes entitled as of right to bail under subsection (2) of section 497, Cr.P.C., the same cannot be withheld on the ground of practice; because the latter is relatable to exercise of discretion while the former is relatable to the exercise and grant of right.

Bail by Executive Authority

Under the section 169Cr.PC during the investigation it has been appeared to the officer in-charge of the police station or investigation officer that there are no sufficient or reasonable ground to prove accused guilty and to forward to the Magistrate. In such situation the officer shall release the accused person on bond with or without sureties.

Under this section he may release the accused person if there is deficient evidence and has not reached any conclusion. The Trial Court power to summon a person who had been released by the police officer and whose name had been written the second column of the challan. The trial court power to summon said person could not be curtailed (*2017Pcr.LJ 1088*). Even no application is necessary required in the matter as the trial court has power to call the said accused whose name had been mentioned in the second column of the challan

and can take the cognizance of the offence. The theme of this section is not to admit any such power of the investigation officer to evaluate defense evidence of the accused and to prefer it over persecution evidence to declare him innocent. The order of discharge is being an administrated order and it would not be amendable in appeal and revision. There is no bar for filling of private complain on the same facts (*PLJ 200 Lah113*).

The Special or the Local Law

Whenever the special or the local law does not specially provide for bail in such situation provisions of CrPC code would apply and the ordinary Courts may grant bail. As there is nothing in foreign Exchange Regulation Act to regulate matters of bail, the powers of the High Court under section 498 to admit a person accused of an offence under the Act to bail has not been limited and the High Court has jurisdiction to admit persons accused under the Act, to bail.

Appeal Filed under Special Law

Where an accused who is convicted under a special law and he files an appeal to a tribunal under the special law but there is no provision under which the tribunal may add to him on bail pending the disposal of the appeal. In such type of Court, it will be presumed that such appellate tribunal has the power to pass interim orders and such order including an order to release the convicted person on bail pending the decision of the appeal.

Bail under Narcotic Drugs and Psychotropic Substances Act, 1985

The powers of the High Court to grant bail under section 439 of CrPC are subject matter to the limitations contained in section 37 of the Narcotic Drugs and Psychotropic Substances Act and the restrictions placed on the power of the Court under this said section is applicable to the High Court also in the matter of granting bail.

Considerations for Grant of Bail in Non-Bail-able Offences

The considerations which normally weigh up with the court in granting bail in non-bailable offences are:

- The nature and seriousness of the offence
- The character of the evidence
- Circumstances which are peculiar to the accused
- A reasonable possibility of the presence of the accused not being secured at the trial
- Behavior or plea of defence (*PLD 1969 Lah,209*)
- Reasonable apprehension of witnesses being tampered with
- The larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case (*AIR2003 SC 3224*).

It is commonplace that among other considerations which the Court has to take into account in deciding whether bail should be granted in a non-bailable offence is the nature and gravity of the offence (*AIR 1998 SC 586 at p. 587: 1998 Cri LJ 855*). The question whether to grant bail or not depends for its answer upon a variety of circumstance, the increasing effect of which must enter into the judicial decision. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. To grant bail is a rule refusal is an exception. However, bail cannot be claimed as a matter of right (*2002 SCMR 442*).

In American Jurisprudence, it is stated; “where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would affect that end (American Jurisprudence (2nd, Vol. 8, p. 806, para 39).

One of the considerations for granting bail in a non-bailable offence must be the gravity and the nature of the offence. It was held that in the instant case, there were no mitigating circumstances and that the High Court was not justified in granting bail. It was also observed that without considering the material facts on record, and without assigning any reason, the High Court had granted bail to the accused in spite of the fact that there was sufficient material on record against the accused. Moreover, it was a double murder case and there were eyewitnesses to the occurrence. The bail was accordingly cancelled.

The considerations which normally weigh with the court in granting bail in non-bailable offences are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interests of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case (2007 PLD 242). Further inquiry of the case would only be made out when data collected by prosecution is not sufficient to provide reasonable grounds for believing that a prima facie case exist against the accused (2002 P.Cr.LJ,1386,394).

The Court before granting bail in case involving non-bail-able offences, particularly where the trial has not yet commenced, should take into consideration various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which the peculiar to the accused, reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations (AIR 1984 SC 1503 at p. 1505).

The considerations which normally weight with the court in granting bail in non-bailable offences are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonably possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case (2007 SCMR 242).

Test Applied for Grant of Bail in Non-bailable Offence

Normally the courts apply the following tests while considering applications for bail in case of non-bailable offences.

1. Nature and seriousness of the accusation;
2. Nature of the evidence in support of the accusation;
3. Severity of the punishment which the conviction will entail;
4. the character, behavior and standing of the accused;
5. a reasonable possibility of the presence of the accused not being secured at the trial;
6. The danger of the alleged offence being continued or repeated;

7. The danger of the witnesses being tampered with;
8. The larger interest of the public or the State and similar other considerations.

The considerations which normally weigh with the court in granting bail in non-bailable offences are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.

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Conclusions

The concept of bail in prevail since very long time. And with passage of time its scope being changed. Now a days in Pakistan the bail matter is being discussed as matter of right and matter of discretion of court of law. Even in Pakistan the very first bail matter was decided in 1949. And even after the laps of almost 80 years we are not in position to address the bail matters within the true spirit of law and unable to define that why the accused person is the favorite child of law. Why still it is the duty of prosecution to prove the case beyond the shadow of doubt while we all know that the in our criminal justice system prosecution in not empower to collect the relevant evidence of particular case. And why the courts are depends upon the opinion of investigating officers of police while it is settled principle of law that the finds of police officers are not binding upon the court of law. It is the duty of the court to adjudicate the matter under the law and in accordance with the given principle of law. And why not state took action against whom who filed the false case against the innocent person or persons. Even that every concerned person know that when in National Accountability Bureau (NAB) cases, the matter of bail was addressed, if the bail is matter of right that why not the right of accused has been protected in the law regarding to the NAB at the most.

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