

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

THE LAW COMMISSION

-SUBJECT-

**A COMPLETE REPORT BY THE LAW COMMISSION ON THE
PROBLEMS RELATING TO BAIL**

OFFICE OF THE LAW COMMISSION

OLD HIGH COURT BUILDING
DHAKA-1000

JULY 22, 2002

Preface

Law Commission received a reference from the Ministry of Law, Justice and Parliamentary Affairs by on 21/05/2002 seeking its opinion on the provisions relating to bail.

Prior to this reference the Law Commission had earlier received another reference from the Ministry of Law, Justice and Parliamentary Affairs on 12/01/2002 in which opinion of the Law Commission was sought on various aspects of sections 54 and 164 of the Code of Criminal Procedure, 1898, the provisions relating to bail and misuse of the same causing obstruction to investigation and trial. The Law Commission submitted its report on the reference dated 12/01/2002 on July 14,2002.

The recommendations made in this reference alone are not comprehensive unless read with its report dated 14/07/2002 on a subject akin to this.

**Ikteder Ahmed
Secretary
Law Commission**

Final Report on the Problems Relating to Bail

This is a reference by the Government under section 6 (Ena) of the Law Commission Act, 1996, seeking opinion of the Law Commission as to whether there is any necessity to enact any new law, change the existing law, or adopt any other measures in order to streamline the existing provisions for bail

The reference under memo no. 450 – Ain dated 21.05.2002 of the Ministry of Law, Justice and Parliamentary Affairs, Legislative Drafting Wing, runs as follows: -

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
লেজিসলেটিভ ড্রাফটিং উইং

নং- ৪৫০-আইন

তারিখঃ ২১/০৫/২০০২ইং।

বিষয়ঃ জামিন সংক্রান্ত আইনের বিধানে প্রয়োজনীয় পরিবর্তন/সংশোধন প্রসঙ্গে।

হত্যা মামলাসহ বিভিন্ন ধরনের জঘন্য অপরাধে অভিযুক্ত একাধিক মামলায় সংশ্লিষ্ট আসামীগন মামলাগুলি তদন্তদাখীন/বিচারার্থীন থাকাবস্থায় জামিনে মুক্ত হয়ে ঐ সকল মামলার তদন্ত/বিচার ব্যাহত করার পাশাপাশি নতুন নতুন অপরাধ সংগঠনের মাধ্যমে সমাজ জীবনে ভয়াবহ অবস্থার সৃষ্টি করছে। যার ফলে আইন শৃঙ্খলা পরিস্থিতির অবনতির পাশাপাশি জাতীয় জীবনের সকল ক্ষেত্রে কাঙ্ক্ষিত উন্নয়ন বিঘ্নিত হচ্ছে। এ অবস্থার আশু পরিবর্তন প্রয়োজন।

এমতাবস্থায়, জামিন সংক্রান্ত আইনের বিধান পরীক্ষাক্রমে নিম্নোক্ত বিষয়ে দ্রুত কমিশনের সুপারিশ প্রদানের জন্য আদিষ্ট হয়ে অনুরোধ করা হলো-

(ক) জামিনের আওতা সংকোচন/সীমিতকরণ;

(খ) আইন দ্বারা গঠিত আধা-বিচারিক (Quasi-judicial) কর্তৃপক্ষ কর্তৃক চিহ্নিত অপরাধীদের জামিন প্রদানের বিষয়টি আদালতের এখতিয়ার বহির্ভূত রাখা যায় কিনা;

(গ) অপরাধের মাত্রা বিবেচনায় অপরাধীদের শ্রেণীবিন্যাসক্রমে জামিনের শ্রেণীবিন্যাস করা যায় কিনা;

(ঘ) দফা 'ক' -'গ'- এর উপর প্রণীতব্য সুপারিশ কার্যকর করণার্থে প্রচলিত আইনের সংশোধন যথেষ্ট না হলে প্রয়োজনে নতুন আইন প্রণয়ন।

এছাড়া বিবেচ্য বিষয়ে কমিশনের অধিকতর কোন সুপারিশ থাকলে তাও প্রদানের জন্য অনুরোধ জানানো হলো।

(মোঃ রফিকুল হাসান)
সহকারী সচিব

সচিব

আইন কমিশন

পুরাতন হাইকোর্ট ভবন।

In this reference the Government have expressed concern about the fact that persons accused of heinous criminal offences are often enlarged on bail during

pendency of more than one case against them and then obstruct the course of justice, repeat commission of similar offences thereby creating horrible situation in social life and cause deterioration of law and order as a cumulative result of which desirable developments in all spheres of life are hampered. The Government have also expressed that such situation cannot continue and requires immediate change.

Under such circumstance, the Government have requested the Law Commission to examine whether-

- (a) the scope of bail can be limited;
- (b) the jurisdiction of the Courts to grant bail to such accused persons as are listed as identified criminals by a quasi-judicial authority established by law should be ousted;
- (c) the criminals can be classified according to the degree of the offence and the category of bail can be classified accordingly;
- (d) new laws are required to be enacted for achieving the objectives mentioned in paragraphs (a) and (c).

So far as the reference contained in paragraph (a) is concerned offences for the purpose of bail are classified according to the nature and gravity of offence as bailable and non-bailable in the Code of Criminal Procedure, 1898³⁵.

The classification covers all offences under the Penal Code, 1860 and all other law for the time being in force. To get bail in bailable offences is the right of the accused. Bail in non-bailable offences is the discretion of the Courts, not the right of the accused³⁶. The principles as to how the Courts empowered to grant bail to an accused charged with a non-bailable offence should use this discretion have developed in this country through judicial decisions handed down in the Sub-continent including Bangladesh thorough the ages extending to more than a century. These principles are, briefly, as follows:-

³⁵ Clause (b) of sub-section (1) of section 4 read with the First Schedule, Code of Criminal Procedure, 1898.

³⁶ Sections 496 and 497, Code of Criminal Procedure, 1898.

- (a) whether there is a reasonable ground for believing that the applicant has committed the offence with which he is charged;
- (b) whether the offence is of serious and grave nature;
- (c) whether the punishment that may be imposed on conviction is likely to be severe;
- (d) whether the accused is likely to abscond if enlarged on bail;
- (e) whether the character of the applicant is not satisfactory;
- (f) whether the accused is likely to continue or repeat commission of offences if enlarged on bail;
- (g) whether the accused is likely to tamper with witnesses or evidence;
- (h) whether the accused is in custody for long period and trial is not likely to conclude within a reasonable time;
- (i) whether the accused cannot prepare his defence if in custody; etc.

It has been held that if the answers to any of the questions specified in paragraphs (a) to (g) is in the affirmative, bail should not be granted. The affirmative answer to the questions in paragraphs (h) and (i) may be considered as grounds for granting bail. It must, however, be remembered that the principles for refusing or granting bail can by no means be confined in a straitjacket and must be determined by the Court by the application of judicial wisdom in each particular case taking into consideration the prevailing social condition and environment, law and order situation, index of crime, etc. The law relating to bail provided in the Code of Criminal Procedure, 1898, is full of checks and balances and is, to our view, adequate to meet the prevailing situation. The provisions regarding the grant of bail to an accused charged with a non-bailable offence are sufficiently stringent and in addition, the Law Commission has already proposed certain amendments to the relevant sections of the Code of Criminal Procedure, 1898 relating to bail in order to make the law more stringent in cases of applications for bail by previously convicted accused persons and

accused persons charged with grave offences³⁷. Moreover, the provisions relating to bail regarding certain types of serious offences for trial of which special laws have been enacted, are even more stringent and very strict³⁸.

Under the above circumstances, there is no reason for limiting the scope for bail any further.

So far as the ouster of jurisdiction of the Courts from considering applications for bail (in cases of identified criminals) referred to in paragraph (b) of the reference is concerned, it may be mentioned that the question of bail is essentially a question for *judicial determination*, interpretation of law along with application thereof and *judicial discretion*. The Code of Criminal Procedure, 1898, empowers even police officers who are executive officers to grant or refuse bail in certain circumstances but the ultimate arbiter in this matter is and should be, the Court,³⁹ because, as has already been observed above, it requires use of judicial discretion. Moreover, the question whether a person facing trial should be released or kept in custody during trial is a part of the judicial proceeding in which the trial is held and cannot, therefore, be dealt with by any machinery other than the judicial machinery. Clause (3) of Article 35 of the Constitution mandates categorically that a person accused of a criminal offence shall have the right to a “public trial by an independent and impartial court or tribunal.”⁴⁰ Various international human rights instruments also reiterate the same principles⁴¹. Bangladesh is a party to some of these instruments⁴². Bail being a part of a judicial proceeding, the ouster of the jurisdiction of the Court therefrom is, therefore, likely to militate against our Constitution and various international human rights instruments. We cannot probably afford to do it.

Moreover, it is difficult to appreciate the purport of this paragraph of the reference, because, we are not aware of any quasi-judicial authority made under any

³⁷ Report of the Law Commission on the Law of Arrest, Detention in the Custody of the Police and Bail dated 15.07.2002

³⁸ Section 32, Special Powers Act, 1974 and section 19, নারী ও শিশু নির্যাতন দমন আইন, ২০০০.

³⁹ Section 496, 497 and 498, Code of Criminal Procedure 1898.

⁴⁰ Article 35 (3), Constitution of the People’s Republic of Bangladesh.

⁴¹ Article 14, International Covenant on Civil and Political Rights.

⁴² Bangladesh signed the International Covenant on Civil and Political Rights, which contains identical principles.

law which is vested with the authority of identifying any accused as a criminal. The determination of accusation is done in a trial and before that the determination or identification of an accused during investigation and/or inquiry is only tentative in nature. Therefore, it will be against the norms of fair justice to exclude the Court's power to consider a prayer for bail merely because there is a tentative determination of accusation against any person. But the more important reason is, as we have already said, that there is no quasi-judicial authority to identify an accused before trial and, at any rate, the reference does not speak of any such authority.

We are, therefore, of the opinion that the Courts' jurisdiction to deal with matters of bail cannot and should not be, ousted.

The reference in paragraph (c) is somewhat confusing in as much as the language used is vague. “অপরাধের মাত্রা বিবেচনায় অপরাধীদের শ্রেণী বিন্যাসক্রমে জামিনের শ্রেণী বিন্যাস” i.e. classification of offenders on the basis of the degree of an offence and corresponding classification of bail will not possibly be a fruitful exercise.

In the Code of Criminal Procedure, 1898 offences are already classified as cognizable and non-cognizable for the purpose of arresting an offender without a warrant or under a warrant. Similarly, for the purpose of considering the question of bail offences have been classified, according to the gravity thereof, as bailable and non-bailable and the principles to be followed in considering the question of bail have been laid down therein and in series of decisions of the superior Courts and have also been left to the judicial discretion of the Courts⁴³. Moreover, in order to deal with the question of bail in cases of certain serious and grave offences bail has been classified as “not to be granted” unless certain conditions are fulfilled.⁴⁴ Under this circumstance, there should not be the problems (referred to in the first paragraph of the reference) which cannot be solved under the existing provisions for bail if all relevant and necessary materials are produced before the Court by the Prosecution and by proper exercise of judicial discretion on the basis of such materials, the over-all social conditions and the prevailing law.

⁴³ Section 496, 497 and 498, Code of Criminal Procedure, 1898.

⁴⁴ Section 32, Special Powers Act, 1974, and section 19, নারী ও শিশু নির্যাতনের দমন আইন, ২০০০.

We, therefore, feel no necessity of recommending any change in, or enactment of, the law of bail other than what have been recommended in our report dated 14.07.2002⁴⁵.

We, accordingly, recommend as follows:-

Recommendations

1. The scope and privilege of bail as available under the existing law may not be curtailed or limited by law.
2. The existing jurisdiction of the Courts to consider the questions of bail may not be ousted.
3. The existing classification of bail may continue and need not be disturbed.
4. The law of bail may be amended according to the recommendations of the Law Commission in its Report on the Law of Arrest, Detention in the Custody of the Police and Bail dated 14 July, 2002. *

Justice A.K.M. Sadeque
Member

Justice Naimuddin Ahmed
Member

Justice A.T.M. Afzal
Chairman

⁴⁵ Report on the Law of Arrest, Detention in the Custody of the Police and Bail dated 14.07.2002.
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*For a fuller and more detailed treatment of the law of bail, see the report of the Law Commission dated 14 July, 2002 entitled, Report on the Law of Arrest, Detention in the Custody of the Police and Bail.