

ANTICIPATORY BAIL AND THE CRIMINAL DEFENCE OF PERSONAL LIBERTY: JUDICIAL DISCRETION AT THE THRESHOLD OF ARREST

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Abstract

Anticipatory bail occupies a distinctive place in Indian criminal procedure because it intervenes at the point where the coercive power of the State is about to become physical custody. For the criminal defence lawyer, the proceeding is not merely an application for a concession in favour of an accused person; it is often the first judicial examination of whether arrest is necessary, proportionate and justified by the demands of investigation. This paper examines anticipatory bail principally from the perspective of criminal litigation practice, with particular attention to judicial discretion at the threshold of arrest. The paper traces the doctrinal development of pre-arrest protection from section 438 of the Code of Criminal Procedure, 1973 (“CrPC”) to section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”). It argues that the statutory continuity between the two provisions should not obscure the constitutional significance of the remedy. At the same time, anticipatory bail is not an immunity from investigation. The court must reconcile two legitimate concerns: the accused’s entitlement to personal liberty and the investigating agency’s need for effective investigation, including custodial interrogation where genuinely necessary.

From the standpoint of the Criminal Defence Bar, the central problem is not the absence of principles but their uneven application. The paper concludes that anticipatory bail should be understood as a judicial mechanism for preventing unnecessary pre-trial incarceration, not as a privilege for the powerful or an impediment to investigation. Properly exercised, it protects the presumption of innocence, preserves the dignity of the accused and simultaneously permits the State to investigate and prosecute genuine crime.

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Introduction

Arrest is one of the most consequential moments in criminal litigation. Although arrest is legally a step in investigation or criminal process, its practical consequences reach far beyond the mere production of an accused before a Magistrate. Arrest may entail loss of liberty, disruption of employment and family life, reputational damage, coercive interrogation, restrictions on movement and, in appropriate cases, exposure to the institutional pressures of custody. For a criminal defence lawyer, therefore, the period immediately preceding arrest is frequently the most consequential stage at which judicial intervention can prevent an unnecessary deprivation of liberty. Anticipatory bail is designed for precisely this interstitial moment. Section 482 of the BNSS provides for a direction that a person apprehending arrest in a non-bailable offence may be released on bail in the event of such arrest. The provision substantially carries forward the architecture of section 438 of the Code of Criminal Procedure, 1973 ("CrPC"). The BNSS came into force on July 1, 2024, and expressly places anticipatory bail within its chapter on bail and bonds. The statutory continuity is important because the Supreme Court's long-standing jurisprudence under section 438 remains highly relevant to the interpretation of section 482. The constitutional dimension, however, requires careful formulation. Anticipatory bail is a statutory remedy rather than an independent fundamental right. Yet the statutory discretion operates within a constitutional order in which personal liberty is protected by Article 21, and arrest and detention must satisfy standards of legality, fairness and non-arbitrariness. The criminal court consequently performs a constitutional function even while exercising a statutory power.

The leading Constitution Bench decision in *Gurbaksh Singh Sibbia v. State of Punjab* rejected attempts to reduce anticipatory bail to a rigid formula. The Court emphasised that the legislature had deliberately entrusted a wide discretion to the High Court and Court of Session because the circumstances giving rise to a genuine apprehension of arrest cannot be exhaustively catalogued. The decision remains foundational because it treats anticipatory bail as a mechanism to prevent the misuse of arrest while preserving the needs of investigation. The later Constitution Bench decision in *Sushila Aggarwal v. State (NCT of Delhi)* clarified another important dimension: anticipatory bail need not invariably be limited to a fixed

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period and, ordinarily, its protection may continue through the trial unless the court, for reasons specific to the case, considers limitation appropriate. The Court thereby rejected an artificial distinction between pre-trial and trial stages where continued protection is justified. For the practising criminal lawyer, however, the doctrinal propositions become meaningful only when translated into litigation strategy. An anticipatory bail application is often argued on incomplete material: the FIR may contain broad allegations; the case diary is ordinarily not available to the defence; the investigating officer may assert “custodial interrogation” without specifying what can be achieved only through custody; and the complainant may characterise the application as an attempt to evade investigation. The court must decide without conducting a mini-trial and without surrendering its jurisdiction to conclusory allegations. This paper therefore approaches anticipatory bail from the criminal defence bar. Its central proposition is that judicial discretion should be structured but not mechanical. The proper inquiry is not whether the accused has demonstrated innocence, but whether, having regard to the accusation, the role attributed, the risks associated with liberty, the investigative needs and the availability of less restrictive measures, arrest is necessary enough to justify withholding pre-arrest protection.

Statutory Architecture

Section 438 of the CrPC introduced anticipatory bail as a statutory remedy against apprehended arrest. Section 482 of the BNSS now occupies the corresponding position. The legislative transition is significant because it places the remedy within India’s new procedural framework, but the text preserves the essential concept: a person who has reason to believe that he may be arrested for a non-bailable offence may approach the High Court or Court of Session for a direction that, in the event of arrest, he be released on bail. The statutory structure makes clear that anticipatory bail is prospective. The applicant must apprehend arrest; once the applicant is arrested in relation to the same offence, the question ordinarily shifts from pre-arrest protection to regular bail. The Supreme Court has recently reiterated this conceptual boundary while considering the relationship between custody in one case and an application for anticipatory bail in another. The fact that a person is in custody in a different offence does not, by itself, extinguish the court’s jurisdiction to consider anticipatory bail in relation to a separate offence. The BNSS provision also preserves the familiar power to impose conditions. The criminal court may require the applicant to make himself available for interrogation, refrain from inducement or threats to persons acquainted

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with the facts, not leave India without permission, and comply with other conditions considered necessary in the interests of justice. These conditions are not ancillary to the remedy; they are one of the principal mechanisms by which the court reconciles liberty with investigation. For the defence, the practical significance is substantial. A well-prepared application should not merely say that the applicant is innocent. It should identify why custodial arrest is unnecessary and how every legitimate investigative concern can be addressed through conditions. A defence lawyer who offers a credible framework for cooperation—appearance before the investigating officer, production of documents, preservation of electronic evidence, disclosure of travel details where appropriate, and non-contact with witnesses—places the court in a position to protect liberty without appearing to disable investigation.

The statutory power should also be distinguished from a power to conduct a trial at the bail stage. The court must make a prima facie assessment, but it should avoid detailed findings that may prejudice the trial. The defence should therefore resist the temptation to convert the anticipatory bail hearing into an adjudication of every factual dispute. The stronger approach is to identify the narrow issue: whether arrest and custody are justified in light of the material presently available and the risks actually demonstrated.

Constitutional Foundation

Article 21 declares that no person shall be deprived of life or personal liberty except according to procedure established by law. After the constitutional jurisprudence developed in *Maneka Gandhi v. Union of India*, the procedure affecting liberty cannot be understood as a purely formal command. It must meet standards of fairness, reasonableness and non-arbitrariness. Anticipatory bail should be located within this constitutional setting without overstating its status. The remedy is statutory. Yet when a court decides whether a person should be exposed to arrest and custody, it necessarily deals with personal liberty. The question is therefore not whether Article 21 itself creates an absolute right to anticipatory bail; it does not. The constitutional significance lies in the manner in which statutory discretion must be exercised. *Gurbaksh Singh Sibbia* remains instructive because it rejected a narrow conception of arrest as merely a procedural event. The Constitution Bench recognised the humiliation and harassment that may accompany arrest and explained that anticipatory bail was intended, among other things, to meet situations in which arrest could become an

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instrument of personal oppression. This insight is particularly important from a defence perspective. A criminal proceeding may arise from a genuine accusation, but the existence of an accusation does not automatically establish the necessity of arrest. The presumption of innocence is not a conclusive rule governing bail, but it is a foundational criminal-law value. Pre-trial custody is not a substitute for punishment. The court must therefore distinguish between the strength of the accusation and the necessity of custodial arrest. A serious accusation may justify stringent conditions, close judicial scrutiny or, in an appropriate case, denial of anticipatory bail; but seriousness alone should not become a formula that eliminates the statutory discretion. Personal liberty also has a procedural dimension. A person facing arrest should not be compelled to choose between surrendering liberty and abandoning a legitimate defence. Anticipatory bail provides a judicial forum in which the State's power to arrest and the individual's interest in remaining free can be balanced before custody occurs. This is why the remedy has particular importance where arrest itself may cause disproportionate harm, even if the eventual trial ends in acquittal. From the criminal lawyer's perspective, Article 21 therefore informs the method of argument. The defence should not present liberty as an abstract moral proposition. It should connect liberty to concrete facts: the applicant's fixed residence, professional commitments, absence of antecedents, cooperation with investigation, availability of documents, lack of witness-contact risk, and the absence of any demonstrated need for custodial interrogation. Constitutional liberty becomes persuasive when translated into a workable order.

Judicial Discretion At The Threshold Of Arrest

Anticipatory bail is fundamentally a discretionary jurisdiction. Discretion, however, does not mean unpredictability. It means that the court must apply principled judgment to facts that cannot be reduced to a single universal test. The Supreme Court has repeatedly identified relevant considerations. They include the nature and gravity of the accusation, the precise role attributed to the applicant, antecedents, likelihood of flight, likelihood of repeating the offence, possibility that the accusation is motivated by an object to humiliate the applicant through arrest, and the impact of granting protection in large-scale offences. These factors are guides rather than a statutory checklist Page 5 that must mechanically determine the result. The phrase "threshold of arrest" is significant. The court is not deciding guilt. Nor is it deciding whether the prosecution will ultimately succeed. It is deciding whether the State should be permitted to place the applicant in custody while investigation proceeds. The

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standard must therefore be calibrated to the limited but important nature of the proceeding. The defence should ask the court to distinguish three questions. First, is there a credible apprehension of arrest? Second, what investigative objective is said to require arrest? Third, can that objective be achieved through interrogation without custody or through conditions attached to anticipatory bail? This framework helps avoid the false binary between “the accused is innocent” and “the accused must be arrested.” At the same time, the court cannot treat custodial interrogation as irrelevant. Recent Supreme Court decisions emphasise that the absence of a need for custodial interrogation, by itself, does not automatically entitle an applicant to anticipatory bail. The court must first consider the prima facie case, the nature of the offence and the punishment, and then evaluate whether custody is genuinely necessary. The defence therefore should not make “no custodial interrogation is required” a standalone slogan. It should demonstrate why. Judicial discretion is most defensible when reasons are recorded in a way that shows the relevant considerations were actually weighed. A brief order may be sufficient in a straightforward case, but where the prosecution alleges serious economic offences, conspiracy, destruction of evidence, influence over witnesses or the need to recover material, the court should identify why those concerns are or are not adequately addressed by conditions. A reasoned exercise of discretion also protects the prosecution. If anticipatory bail is granted on explicit conditions of cooperation and non-interference, any later breach can be addressed through cancellation. Conversely, if protection is denied merely because an accusation is serious, the order risks converting seriousness into an automatic substitute for the statutory inquiry.

Custodial Interrogation: The Central Background In Anticipatory Bail

In practical criminal litigation, the phrase “custodial interrogation” frequently becomes the decisive battleground. The prosecution may submit that interrogation in custody is necessary for confrontation, recovery, identification of accomplices, tracing money, accessing devices, discovering documents or testing the applicant’s version. The defence ordinarily responds that interrogation can occur without arrest and that custody would serve no legitimate investigative purpose. Neither position should be accepted automatically. The Supreme Court has recognised that custodial interrogation can be a legitimate consideration against anticipatory bail. In cases involving complex conspiracies, large-scale financial transactions, concealed assets, organised crime or serious allegations of witness influence, custody may in fact be necessary. Recent decisions have stressed that the court must not treat the non-

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requirement of custody as an automatic ground for granting protection. But from a defence perspective, the expression “custodial interrogation” must not become an incantation. The prosecution should be able to identify the investigative objective that allegedly requires custody. If the material sought is documentary and already in the possession of the investigating agency, custody may add little. If the applicant has appeared repeatedly and answered questions, continued insistence on arrest should be justified by something more than repetition of the original allegation. A useful defence submission is therefore to divide the investigative case into categories: documents, electronic evidence, recoveries, interrogation, confrontation, identification of other accused, and witness-related concerns. For each category, counsel can state what cooperation is offered and why custody is unnecessary. This converts an abstract dispute into an operational one. Page 6 There is also an important distinction between interrogation and detention. The State has broad investigative authority to question a suspect within the legal framework, but the power to interrogate does not automatically imply a power or necessity to arrest. Anticipatory bail can preserve the investigating officer’s ability to question the applicant while removing the risk that interrogation becomes a route to unnecessary incarceration. For the court, the appropriate question is not whether the investigating officer prefers custody. It is whether custody is necessary and proportionate to the legitimate investigative objective. That does not require the court to micromanage the investigation. It requires the court to ensure that deprivation of liberty is not treated as a default investigative technique. From the defence bar, the most effective application therefore does not obstruct investigation. It anticipates the prosecution’s investigative concerns and offers conditions capable of addressing them. This approach is both constitutionally defensible and practically persuasive.

A Criminal Defence Lawyer’s Approach To The Anticipatory Bail Application

Anticipatory bail is often won or lost before the oral hearing begins. The quality of the defence application depends upon factual preparation, chronology, document selection and the credibility of the proposed safeguards. First, counsel should establish the exact source of apprehension. Is an FIR already registered? Has the applicant received a notice? Has the investigating officer called the applicant? Have co-accused been arrested? Has a warrant or coercive process been issued? A vague assertion of fear is weaker than a documented apprehension. Second, counsel should prepare a concise factual chronology. The chronology should not become a defence brief on the merits of the entire case. Its purpose is to show

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context, identify contradictions or delay where relevant, and explain why arrest is unnecessary. Third, the defence should isolate the specific role attributed to the applicant. In cases involving multiple accused, the prosecution's allegations may be collective. The court must be assisted in understanding whether the applicant is alleged to have committed the act directly, facilitated it, conspired, benefited from it, or is implicated merely because of association. Role differentiation is especially important where the case involves several layers of participants. Fourth, counsel should deal candidly with antecedents. Concealing a previous criminal case can damage credibility more than the antecedent itself. The defence should explain the status and relevance of prior cases and distinguish between conviction, acquittal, pending investigation, complaint proceedings and cases arising from the same dispute. Fifth, the application should confront the prosecution's likely case on custody. If the prosecution is likely to say that money must be recovered, documents traced or devices examined, counsel should explain what material is already available and what cooperation is offered. Where appropriate, an undertaking to appear before the investigating officer on specified dates can be offered, without conceding that arrest is legally necessary. Sixth, the defence should address witness protection. A court is understandably concerned if an applicant is alleged to have influence over witnesses. The response should be concrete: no contact with specified witnesses, no entry into particular premises if appropriate, and compliance with any reasonable condition. Conditions should be proportionate and linked to an identified risk. Seventh, counsel should avoid over-arguing innocence. A detailed trial on affidavits may invite the court to make findings that cannot properly be made at the bail stage. The more effective position is that the applicant is entitled to the benefit of liberty while the prosecution tests its case through lawful investigation. Finally, the prayer should be workable. Courts are more likely to grant protection where the proposed order is precise: cooperation with investigation, appearance before the investigating officer, non-tampering, non-contact with witnesses, restrictions on travel if justified, and attendance before the trial court.

Liberty With Accountability

Conditions are central to the architecture of anticipatory bail. Section 482 BNSS permits the court to impose conditions directed toward the integrity of investigation and the administration of justice. Proper conditions transform anticipatory bail from a perceived barrier to investigation into a controlled form of judicial protection. The classic conditions include availability for interrogation, prohibition on inducement or threats, restrictions on

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travel, and compliance with other conditions necessary in the interests of justice. The Constitution Bench in *Sushila Aggarwal* also recognised that courts retain flexibility to impose conditions tailored to the facts. From the defence perspective, conditions should satisfy three principles: necessity, proportionality and enforceability. A condition should respond to an identified risk. It should not be imposed merely because it is routinely imposed in every case. For example, a passport surrender condition may be justified where there is a real flight risk; it should not automatically follow from the fact that the applicant has travelled abroad in the past. A condition prohibiting contact with witnesses may be justified where the applicant has a relationship with material witnesses; it should not become so broad that it prevents ordinary family or professional life. The court should also distinguish cooperation from self-incrimination.

An anticipatory bail condition requiring the applicant to make himself available for interrogation is not a licence for coercive treatment. The investigation must continue within constitutional and statutory safeguards. The defence should welcome reasonable conditions because they reinforce the argument that liberty and investigation are not mutually exclusive. Where the applicant can remain available, preserve evidence, avoid witness interference and comply with the court, the justification for custodial arrest may diminish.

Some Suggestions On How Could We Move Towards A Structured Judicial Test ?

The jurisprudence would benefit from a structured, non-mechanical sequence of questions. The following framework is proposed from the perspective of criminal defence practice:

1. Genuine apprehension: Is there a concrete and legally cognisable apprehension of arrest in connection with a non-bailable offence?
2. Specific role: What precise role is attributed to the applicant, and is that role distinguishable from general or omnibus allegations?
3. Prima facie material: Without conducting a mini-trial, what material presently connects the applicant to the alleged offence?
4. Necessity of custody: What investigative objective allegedly requires physical custody, and why cannot it reasonably be achieved through interrogation while protected by conditions?
5. Risk assessment: Is there a demonstrated risk of absconding, witness intimidation, evidence destruction or repetition?

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6. Antecedents and conduct: What is the applicant's criminal history, and what does the applicant's conduct before and during investigation indicate about future compliance?
7. Proportional conditions: Can identified risks be neutralised by conditions that are specific, enforceable and proportionate?
8. Public interest and gravity: Does the nature, scale or social impact of the alleged offence materially alter the balance?
9. Continuation: If protection is granted, what circumstances would justify continuation, modification or cancellation?

This is not proposed as a statutory checklist. Its purpose is to make judicial reasoning transparent. It also provides the Criminal Defence Lawyers with a coherent advocacy structure. The prosecutor can answer each factor, and the court can record reasons on each material issue without deciding the merits of the trial.

Conclusion

Anticipatory bail is ultimately a question about the legitimate limits of State power before conviction. The criminal defence lawyer encounters that question not in the abstract but in the urgency of an impending arrest: a client calls after learning that an FIR has been registered; a police officer has asked him to appear; a co-accused has been arrested; or the complainant is pressing for immediate custody. At that moment, the court's discretion can determine whether the investigation proceeds with a free person subject to judicial conditions or with a person placed in custody. The correct approach is neither to romanticise liberty nor to romanticise investigation. Criminal justice requires effective investigation, but investigation is not synonymous with incarceration. Arrest is a coercive measure whose necessity must be assessed in the circumstances of the particular case. The jurisprudence beginning with Gurbaksh Singh Sibbia and substantially clarified in Sushila Aggarwal establishes that anticipatory bail is a flexible judicial remedy. The BNSS preserves that flexibility through section 482. The recent judicial emphasis on prima facie material, seriousness of allegations, custodial interrogation and investigative needs demonstrates that the remedy remains carefully balanced rather than automatic. From the criminal defence perspective, the most persuasive philosophy is simple: an accused should not be arrested merely because arrest is available; arrest should be justified by the legitimate requirements of the case. Where the applicant can be interrogated, documents can be secured, witnesses can be protected and investigation can proceed through enforceable conditions, personal liberty should ordinarily

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receive meaningful judicial protection. Where custody is genuinely necessary, the court must be equally prepared to refuse protection. Judicial discretion at the threshold of arrest therefore carries a constitutional responsibility. Its purpose is not to obstruct the criminal process but to ensure that the coercive power of that process remains proportionate, reasoned and lawful. Anticipatory bail, properly understood, is not a privilege against investigation. It is a judicial safeguard against unnecessary incarceration while investigation continues. That is its enduring value to the Criminal Defence Bar and to the rule of law itself.

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