

## State Of Uttar Pradesh vs Kailash on 28 April, 1954

**Equivalent citations:** AIR1955ALL98, 1955CRILJ275, AIR 1955 ALLAHABAD 98

**Author:** Raghubar Dayal

**Bench:** Raghubar Dayal

ORDER

Raghubar Dayal, J.

1. This is an application by the State of Uttar Pradesh for the cancellation of the bail granted to Kailash by the Sessions Judge on 3-12-1953 when a case under Sections 366 and 368, Penal Code, was under investigation with the police of Farrukhabad.

By 3-12-1953 the police had not been able to arrest Kailash. Kailash himself did not appear before the Magistrate having jurisdiction over the case, or before the Sessions Judge of Farrukhabad. An application was filed on his behalf before the Sessions Judge praying for bail and stating the reason why he could not appear in Court and why he should be given bail.

The learned Additional Sessions Judge was of opinion that the circumstances were such that the accused could not surrender. He allowed him: bail to the satisfaction of any first class Magistrate having jurisdiction.

It is contended for the State that the learned Sessions Judge had no jurisdiction to pass this order granting bail and that, therefore, this order should be cancelled.

The question to decide then is whether the learned Sessions Judge could grant bail to Kailash, who had neither been arrested nor detainee by the police nor had appeared in Court. Apparently bail could not be granted in such circumstances. Sections 496 and 497, Criminal P. C., lay down when a person can be released on bail. The conception of bail is that a person praying for bail is in custody and desires freedom, which he can obtain only under an order of the Court having jurisdiction over him.

The case reported in -- 'Amarchand v. The Crown', AIR 1950 EP 53 (PB) (A), fully deals with the various provisions of the Criminal Procedure Code and the conception and meaning of the word 'bail'. With respect, I fully agree with the view expressed there, and need not dilate on the matter.

2. Opposite view is expressed in--'Hidayat Ullah Khan v. The Crown', AIR 1949 Lah 77 (B); -- 'State v. Mangilal Shankarlal', AIR 1952 Madh B 161 (C) and -- 'Muzaffaruddin Mohammad v. State of Hyderabad', AIR 1953 Hyd 219 (FB) (D).

The basis of the decision of the Hyderabad High Court is that a person who is liable to be arrested can be said to be restrained and, therefore, the Courts could grant him bail, as bail can be granted to a person who is in some form of custody or restraint.

The basis of decision in AIR 1952 Madh B 161(C) is that bail can be given to a person who appears before the Court, and that the person may appear before the Court through counsel and, therefore, the Court can give him bail irrespective of the fact whether the person concerned was under any sort of restraint or not.

With respect I do not agree with these views. The liability of a person to arrest is no restraint. Notionally every person is liable to arrest for anything which the persons having authority to arrest consider him to have committed. When a person appears in Court, his very physical presence results in his placing himself in the custody of the Court. Whether the Court actually orders his being taken in custody or allows him bail at once, notionally it must be held that the person was in the custody of the Court and got his release on bail. Ordinarily when an accused appears before a Magistrate--in whose Court the accused appear who do not desire to be arrested by the police--the immediate order that such Court passes is that the applicant be taken in custody.

Usually, I imagine, even the application that such a person presents contains some such expression that he was surrendering himself.

Appearing" through counsel cannot naturally result in even notional custody of the Court over the person concerned. It may be that the applicant might give his address in the application, but there cannot be any undertaking that he would not move away from that place. I do not, therefore, consider that the word 'appear' in Sections 496 and 497 contemplates appearance through counsel.

3. It has also been submitted for the opposite party Kailash that Section 498 gives unfettered powers to this Court to admit any person to bail, and in that connection reliance is placed on a Full Bench case reported in -- 'K. N. Joglekar v. Emperor', AIR 1931 All 504 (E). The unfettered powers of the Court under Section 498 relate to the granting of bail in cases relating to offences punishable with death or transportation for life. Section 497, Sub-section (1) does not give any discretion to any Court other than the Court concerned to grant bail to a person against whom there appear reasonable grounds for believing that he had been guilty of an offence punishable with death or transportation for life. This unfettered power of the Court to grant bail does not contemplate, to my mind, the power to grant bail to a person who is not in custody. In fact a person not in custody stands in no need of any order of bail. If he is not in custody he is free to go wherever he likes. In the case of such a person an order of bail can be rightly considered to be an unjustified restraint on his movements instead of any gain to him.

4. I am, therefore, of opinion that the order of the learned Additional Sessions Judge dated 3-12-1953 was passed without jurisdiction and should be set aside.

5. The learned Deputy Government Advocate was not in a position to lay before the Court the considerations bearing on the question whether Kailash should be allowed bail or not. In the circumstances this question is left open for the decision of the Sessions Judge, Farrukhabad, to whose Court the case against the opposite party has been committed.

In order to avoid any possible harassment to the accused, opposite party, and to have him in custody without any appreciable lapse of time, I consider it desirable to order that the opposite party should appear in person before the Sessions Judge, Farrukhabad on Monday the 3rd May, 1954, surrender himself to the Court, and apply for bail, if so advised. The learned Sessions Judge will deal with the application for bail, if presented, on merits. I must make it clear that these directions have not even remote connection with the question whether he deserves bail or not in this case.

6. I, therefore, cancel the bail granted to Kailash, and direct him as noted above. The bail bonds are cancelled.