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ANTICIPATORY BAIL IN RAPE CASES: UNDERSTANDING THE LAW BEYOND PUBLIC PERCEPTION

AUTHORED BY - PRASHASTI PATHAK
Maharaja Agarsen Institute of Managment Studies

Abstract

Rape is one of the most serious and heinous offences against the human body, and a person found guilty of committing such an offence must be subject to appropriate punishment in accordance with law. However, while addressing the genuine allegations of rape, it is equally important to recognise that the allegation may in certain cases, be false or motivated, thereby affecting not only the accused but also the integrity of the criminal justice process. This raises an important question: should a person who may ultimately be found innocent be subjected to arrest and its accompanying consequences merely on the basis of accusation?

Against this backdrop, the grant of anticipatory bail in rape cases, often becomes a subject of intense public scrutiny. Anticipatory bail, essentially a form of pre-arrest protection, is granted by courts in appropriate circumstances to safeguard an individual's personal integrity while ensuring that the process of investigation is not compromised. But on what basis does a court exercise this discretion? What parameters guide the court while determining whether an accused should receive protection from arrest, particularly in cases involving allegations as grave as rape ?

This article seeks to examine the jurisprudential reasoning behind the grant of anticipatory bail in rape cases and the factors that courts consider while exercising this discretion. The central questions that this discussion seeks to address is "**When a court grants anticipatory bail in rape cases, is it expressing disbelief in the allegation, or is it merely determining whether custodial arrest is necessary at the stage of investigation".**

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Introduction

Anticipatory bail is governed under **section 482 of Bhartiya Nagarik Suraksha Sanhita,(BNSS)** 2023[1] (formerly section 438 of CrPC). It is a legal order that allows a person to apply for a bail before being arrested in a Non-Bailable offence. It protects a person from wrongful arrest, ensures release if taken into custody and applies through High Courts and Session Courts.

The jurisprudence governing anticipatory bail has witnessed visible evolution as constitutional courts increasingly confront cases in which allegations of rape, or the threat of prosecution for sexual offences, are apparently deployed as instruments of extortion, coercion, retaliation, or strategic abuse of the criminal process rather than as bona fide assertions of victimisation.

While the evidence suggested such instances constituted the limited subset of sexual offence litigation, their normative significance is considerable, as they implicate the constitutional guarantee of personal liberty under **Article 21**, the integrity of the criminal justice system, and the broader legitimacy of legal protections afforded to survivors of sexual violence. The adjudication of anticipatory bail in such cases consequently demands a careful reconciliation of competing constitutional values: the imperative of safeguarding individual liberty against arbitrary deprivation on the one hand, and the State's compelling interest in ensuring a fair, effective, and victim-sensitive investigation into allegations of grave sexual offences on the other.

In response to this the courts have gradually developed an evolving jurisprudential approach whereby applications for anticipatory bail are assessed with heightened scrutiny in cases where the available material prima facie indicates extortionary intent, retaliatory prosecution, or a deliberate abuse of the criminal justice process.

Bail constitutes a procedural mechanism through which the criminal justice system secures an accused person's appearance during investigation and trial while preserving the fundamental right to personal liberty. Indian criminal procedure broadly recognise Regular bail and Anticipatory bail, the latter serving as pre-arrest safeguard against arbitrary deprivation of liberty.

1 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, s. 482.

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The question of judicial discretion in granting anticipatory bail was authoritatively considered by the Supreme Court in the case of "**Gurbaksh Singh Sibbia v. State of Punjab[2]".** The court rejected the proposition that rigid or inflexible rules could not be formulated to govern the exercise of discretion under section 438 of the code of criminal procedure, emphasising that the power must be exercised judicially and with due regard to the facts and circumstances of each individual case. The court's approach reflects the underlying principle that the grant of pre-arrest protection cannot be reduced to a mechanical determination based solely upon the nature of the offence alleged. At the same time, where allegations concern grave offences, the exercise of such discretion necessarily demands greater judicial scrutiny and caution. Thus, anticipatory bail does not operate as an automatic entitlement, nor does the seriousness of an allegation, by itself, render judicial consideration of pre-arrest protection impermissible. The court is required to undertake a careful assessment of the circumstances before determining whether the protection of personal liberty can be reconciled with requirements of a fair and effective investigation.

The importance of judicial discretion in anticipatory bail is further illustrated by "**Balchand jain V State of Madhya Pradesh[3]"**. While examining the interplay between section 438 of the code of criminal procedure, 1973 and the rule 184 of the **Defence and internal security of India rule 1974[4]**the supreme court rejected the view that the latter provision completely displaced the court's power to grant anticipatory bail. Instead, the court adopted a harmonious construction, holding that both provisions could operate within their respective spheres. The court observed that section 438 operates at a stage when an individual merely apprehends arrest, whereas rule 184 operates after the person has been taken into custody. The judgment therefore demonstrate that the existence of stringent statutory provision does not, by itself extinguish the judicial power to consider pre-arrest protection at the same time the court characterised anticipatory bail as an extraordinary remedy and emphasised that its exercise must remain subject to the relevant statutory conditions and judicial scrutiny the decision thus reflects the underlying principle that the power to grant anticipatory bail must be exercised in a manner that harmoniouses the requirement of the criminal process with the protection of individual liberty.

2 Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565.

3 Balchand Jain v. State of Madhya Pradesh, (1976) 4 SCC 572.

4 Defence and Internal Security of India Rules, 1971, r. 184.

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The need for anticipatory bail was recognised by the **Law commission of India in its 41st report**[5] dated 24 September 1969, which recommended the introduction of a provision empowering the High court and the Court of session to grant bail to a person apprehending arrest on an accusation of having committed a non bailable offence. The recommendation was rooted in the recognition that arrest even before the determination of guilt can have serious consequences for an individual's liberty, dignity, and reputation. Anticipatory bail was therefore conceived as a safeguard against the possibility of arrest being used as an instrument of harassment or humiliation, particularly where an accusation may be motivated by personal, political, or other extraneous consideration.

The provision must also be understood within the constitutional framework of article 21, which guarantees that no person shall be deprived of life or personal liberty except according to the procedure established by law. Anticipatory bail thus represents an attempt to reconcile the state's legitimate interest in investigation and the administration of criminal justice with the individual's fundamental interest in personal liberty. Its underlying rationale is not to place an accused beyond the reach of law, but to ensure that the power of arrest is not employed unnecessarily or transformed into a form of punishment before guilt has been judicially established. It is against this constitutional and statutory backdrop that the Supreme Court's jurisprudence on the exercise of discretion under section 438 assumes particular significance.

Application for anticipatory bail in rape cases involving allegation of rape warrant heightened judicial scrutiny owing to the gravity and nature of the offence alleged. The seriousness of such an allegation cannot be overlooked, particularly where the circumstances of the case indicate a possibility of interference with the investigation or the administration of justice. The court must therefore consider whether pre-arrest protection may create a reasonable possibility of the accused influencing witnesses, tampering with the evidence or otherwise obstructing a fair investigation or trial. The safety and psychological security of the complainant may also contribute relevant considerations, particularly where there are circumstances suggesting a likelihood of threats, intimidation or coercion.

However, the gravity of the allegation alone cannot substitute the judicial assessment required under the law. The question before the court is not merely whether the offence alleged is

5 Law Commission of India, Forty-First Report on the Code of Criminal Procedure, 1898 (September 1969).

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serious, but whether, in the particular circumstances of the cases, custodial arrest is necessary and whether the apprehended risk can be adequately addressed through appropriate conditions imposed while granting protection. Thus, courts have treated the possibility of witness intimidation, interference with evidence and other forms of obstruction of justice as relevant factors while exercising their discretion in application for anticipatory bail in cases involving sexual offence.

However, the seriousness of the allegation and the legitimate concerns surrounding the safety of the complainant and the integrity of the investigation cannot, by themselves, justify overlooking the constitutional rights of the accused. An accused., like every other person, is entitled to the protection of life and personal liberty guaranteed under article 21 of the constitution the judicial approach therefore requires a careful balance between protecting the complainant and ensuring an effective investigation on the one hand and preventing unnecessary or unjustified deprivation of liberty on the other.

While considering an application for anticipatory bail, courts may examine the surrounding circumstances and the material available at the preliminary stage to determine whether custodial arrest is necessary and whether the accusation requires closer scrutiny. This may include consideration of circumstances suggesting that the criminal proceedings have been initiated with an ulterior motive, such as underlying property dispute, professional rivalry, or personal vendetta. However, such circumstances do not automatically establish that an allegation is false, rather they constitute relevant factors in determining whether pre-arrest protection is justified in the particular facts of the case.

The same fact sensitive approach can be seen in cases arising out of allegations involving a false promise of marriage. Courts may distinguish between a genuine promise to marry which subsequently could not be fulfilled and a promise allegedly made with fraudulent intent from its inception. Such distinction becomes relevant when assessing the nature of the accusation and whether custodial arrest is warranted at the stage of investigation

At the same time the protection afforded by anticipatory bail is not absolute. Where an accused misuses the protection by attempting to tamper with the evidence, influence or intimidate the witness, evade investigation, or otherwise obstruct the administration of justice, the court may exercise its power to cancel the protection in accordance with law. Anticipatory bail therefore

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represents a conditional protection of liberty rather than immunity from the investigation process.

The Supreme Court's decision in "**Sushila Aggarwal v State (NCT ofDelhi)[6] "** further clarified the nature and duration of such protection. The court held that anticipatory bail need not necessarily be limited to a fixed period and may continue even after the filing of the charge sheet or the framing of charges, unless the court imposes a limitation or circumstances arise warranting its cancellation. The decision reinforces the principle that the grant of anticipatory bail is not merely a temporary protection against arrest but judicial safeguards which depend upon the circumstances and conduct of the accused.

The competing consideration of individual liberty, the safety of the complainant, and the integrity of the investigation therefore make the grant of anticipatory bail a fact sensitive judicial exercise. While deciding an application for anticipatory bail, the court is required to undertake a careful assessment of the legal, evidentiary and procedural circumstances of the particular cases, balancing the individual's rights to personal liberty against the legitimate demand of the investigations and administration of criminal justice. The first consideration ordinarily concerns the nature and gravity of the allegation and the prima facie material placed before the court. The court may examine whether the material presently available discloses a reasonable connection between the accused and the alleged offence, without undertaking a detailed appreciation of evidence or conducting a mini-trial at the stage of bail.

The court also considered the possibility of the accused evading the process of law, tampering with the evidence, or influencing, threatening or intimidating the witnesses. These considerations are particularly significant where the nature of the allegation gives rise to the reasonable apprehension that the accused may interfere with the investigation or affect the fairness of the fair trial. The court therefore assesses the conduct of the accused and their willingness to cooperate with investigation, including compliance with directions issued by the investigation agency and the likelihood of their remaining available throughout the proceeding.

Another significant consideration is the necessity of custodial interrogation. The mere fact the offence is serious does not, by itself, establish that custodial interrogation is indispensable.The

6 Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1.

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court may consider whether custody is genuinely required for purposes such as the recovery of material object, verification of evidence, confrontation with relevant material, or investigation involving physical or digital evidence. This inquiry is particularly important because anticipatory bail is concerned not with determining the guilt or innocence of the accused but with deciding whether arrest and custodial detention is necessary in the circumstances of the investigation.

The court may further take into account the criminal antecedents and overall conduct of the accused, involving previous involvement in criminal proceedings, compliance with investigation requirements, and any circumstances indicating a likelihood of absconding or obstructing the administration of justice. At the same time, the absence of criminal antecedents or demonstrated willingness to cooperate may operate as relevant circumstances in favour of granting protection.

Finally, the court may examine the broader factual context in which the accusation has arisen. Factors such as unexplained delay in lodging the FIR, the nature of relationship between the parties, surrounding disputes, documentary or electronic material, circumstances suggesting, personal, professional, property-related or other forms of animosity may be relevant to the court's assessment. None of these factors, considered in isolation, conclusively establishes that an allegation is false or malicious. Rather, they form part of the overall factual matrix through which the court determines whether the pre-arrest is justified or whether the interests of a fair investigation can be adequately safeguard through appropriate conditions.

When the question of granting anticipatory bail arises in cases involving allegations of rape, courts exercise heightened caution given the gravity and nature of the offence. However, the seriousness of the allegation cannot, by itself, eliminate the constitutional protection of personal liberty. The court must therefore examine the circumstances of the accusation alongside the requirements of a fair and effective investigation before determining whether pre-arrest protection is warranted. The exercise of this discretion is consequently guided by a range of factors rather than by the gravity of the offence alone.

Among the relevant considerations may be the circumstances in which the FIR came to be registered, including whether the surrounding material suggest the possibility of an ulterior motive such as personal, professional or property related disputes, and whether there has been

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an unexplained delay in lodging the complaint. In cases arising from an alleged false promise of marriage, the court may examine whether the promise was made with the fraudulent intent from its inception or whether it was a genuine promise that subsequently could not be fulfilled. The need for custodial interrogation is another significant consideration, particularly where the investigation agency is required to secure evidence or undertake investigative steps that genuinely necessitate custody. The nature of the relationship between the parties, the criminal antecedents and conduct of the accused, their willingness to cooperate with the investigation, and the existence of prima facie material connecting the accused with the alleged offence may also inform the court's assessment.

These factors do not operate as an exhaustive checklist, nor does the presence or absence of any single factor automatically determine the outcome. Rather, they form part of the factual matrix within which the court exercises its judicial discretion. The gravity of rape as an offence undoubtedly weighs heavily against the grant of pre-arrest protection and requires the court to proceed with the considerable caution. However, the gravity of offence cannot be transformed into absolute rule that exclude anticipatory bail in every case. The ultimate inquiry remains whether, in the particular circumstances, custodial arrest is necessary to secure the interests of investigation and justice, or whether those interests can be adequately protected while reserving the accused's personal liberty through appropriate conditions.

The principle that the gravity of an offence cannot, by itself, operate as an absolute bar to anticipatory bail must, however, be understood in light of the statutory exception introduced under the **Bharatiya Nagarik Suraksha Sanhita, 2023**.[7] Section 482 of the BNSS now governs anticipatory bail and corresponds to the earlier Section 438 of the Code of Criminal Procedure. While Section 482(1) continues to permit a person apprehending arrest for a non-bailable offence to approach the High Court or the Court of Session for pre-arrest protection, sub-section (4) expressly excludes certain aggravated sexual offences from the operation of the provision. It provides that Section 482 shall not apply where the arrest is sought on an accusation of an offence under Section 65 or Section 70(2) of the **Bharatiya Nyaya Sanhita, 2023**[8]

7 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023.

8 Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, ss. 65 and 70(2).

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This statutory exclusion is significant in the context of the present discussion because it demonstrates the distinction between judicial caution and legislative prohibition. Ordinarily, the seriousness of an offence remains one of the factors to be weighed by the court alongside the circumstances of the case, the requirements of investigation, the possibility of custodial interrogation, and the protection of witnesses and evidence. Section 482(4), however, creates an express legislative exception in specified offences involving aggravated sexual violence against minors. In such cases, the court's discretion under Section 482 to grant anticipatory bail is statutorily unavailable. The provision therefore represents a deliberate legislative determination that, for these narrowly defined offences, the protection of the child victim and the heightened gravity of the alleged conduct warrant exclusion of the pre-arrest remedy altogether.

The existence of this exception does not undermine the broader principle of judicial discretion governing anticipatory bail. Rather, it demonstrates that where Parliament intends to remove that discretion in a particular category of cases, it does so expressly through the statute itself. The distinction is therefore important: while courts may exercise heightened caution in serious offences, caution should not be confused with an absolute prohibition unless such prohibition is specifically created by law.

Their exist several misconceptions surrounding the concepts of bail and anticipatory bail particularly in cases involving serious offences such as rape. One of the most common misconceptions is that the grant of bail signifies that the accused has been acquitted of the offence, while the rejection of bail necessarily implies that the accused is guilty of the offence. Neither proposition is legally correct. A decision on bail is ordinarily connected with the question of whether the accused should remain in custody during the investigation or trial and whether such custody is necessary in the interest of justice. The determination of guilt or innocence is a matter for the trial, where the evidence is examined and tested in accordance with the law.

The distinction between bailable and non-bailable offences is also important in understanding the nature of bail. In bailable offences, the law generally recognises a statutory right to bail subject to the applicable conditions. Non-bailable offences, particularly those involving grave allegations, do not create an automatic entitlement to release, and the court is required to exercise judicial discretion after considering the circumstances of the case. Anticipatory bail

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is, in turn, a distinct form of pre-arrest protection available where the statutory requirements are satisfied and the court considers such protection justified in the circumstances.

Another misconception is that the grant of anticipatory bail means that the court has accepted the accused's version or rejected the complainant's allegation. Such an interpretation confuses the limited purpose of a bail proceeding with the ultimate adjudication of the criminal charge. The court, while considering anticipatory bail, does not ordinarily conduct a full-fledged trial or conclusively determine the credibility of the parties. In cases involving allegations of rape, the gravity of the accusation undoubtedly requires heightened judicial scrutiny, but the decision remains dependent upon the facts and circumstances of the particular case rather than the outcome of another case or public perception surrounding the offence.

At the same time, the protection of personal liberty does not imply that the accused is placed beyond the reach of law. An accused remains subject to the investigation and trial and must comply with the conditions imposed by the court. The presumption of innocence continues to operate until guilt is established in accordance with law, while the complainant remains entitled to a fair and effective investigation. Anticipatory bail therefore seeks to preserve a balance between these competing interests rather than declaring either party to be legally vindicated at the preliminary stage.

Understanding the distinction is particularly important in rape cases, where the emotional and social gravity of the allegation can often influence public perceptions of a bail decision. The grant or refusal of anticipatory bail should instead be understood within its proper legal framework as a judicial determination concerning the necessity of arrest and custody, and not as a final pronouncement on the truth or falsity of the allegation.

Conclusion

The question of anticipatory bail in cases involving allegations of rape cannot be answered through a simplistic choice between protecting the complainant and protecting the accused. Rape is undoubtedly one of the gravest offences recognised by Indian law, and allegations of such an offence demand heightened judicial sensitivity, particularly towards the safety and dignity of the complainant, the preservation of evidence and the fairness of the investigation. At the same time, the seriousness of the accusation cannot transform the process of arrest into a form of punishment before guilt has been established. The constitutional guarantee of life and

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personal liberty under Article 21 extends to the accused as well, and the criminal justice system must ensure that the protection afforded to one individual does not become a justification for disregarding the fundamental rights of another.

The jurisprudence surrounding anticipatory bail demonstrates that pre-arrest protection is not intended to place an accused beyond the reach of criminal law. Its purpose is to protect personal liberty in circumstances where arrest may not be necessary, while allowing the investigation to proceed in accordance with law. The Supreme Court's decision in **Gurbaksh Singh Sibbia v. State of Punjab**[9] remains significant in this regard, as it rejected rigid and inflexible formulas for the exercise of anticipatory-bail jurisdiction and emphasised that judicial discretion must be exercised on the basis of the facts and circumstances of each case. Similarly, **Balchand Jain v. State of Madhya Pradesh**[10] reflects the importance of harmoniously interpreting the statutory framework governing pre-arrest protection rather than treating the remedy as automatically displaced by the existence of other legal provisions. The later decision in **Sushila Aggarwal v. State (NCT of Delhi)**[11] further clarified that anticipatory bail is not necessarily confined to a short or predetermined period and that its continuance cannot be treated as automatically extinguished merely by the filing of a charge-sheet or the framing of charges.

In cases involving rape, however, the exercise of this discretion necessarily assumes a more cautious character. Courts must consider not only the gravity of the allegation but also the possibility of witness intimidation, interference with evidence, the safety of the complainant, the conduct of the accused and the requirements of a fair investigation. At the same time, these concerns must be assessed alongside the necessity of custodial interrogation, the prima facie material available against the accused, criminal antecedents, cooperation with the investigation and the surrounding circumstances in which the accusation arose. Factors such as delay in lodging the FIR, the nature of the relationship between the parties, surrounding disputes or allegations of an ulterior motive may be relevant to the court's assessment, but none of these factors, in isolation, can conclusively establish either guilt or falsity. The essence of anticipatory-bail jurisdiction therefore lies in a cumulative and fact-sensitive assessment rather than the mechanical application of any single factor.

9 Gurbaksh Singh Sibbia (n 2).

10 Balchand Jain (n 3).

11 Sushila Aggarwal (n 6).9

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The statutory framework under the **Bharatiya Nagarik Suraksha Sanhita**[12], 2023 also demonstrates that the principle of judicial discretion operates within limits expressly prescribed by law. Section 482 generally provides the statutory mechanism for anticipatory bail, but sub-section (4) specifically excludes its application to accusations under Sections 65 and 70(2) of the Bharatiya Nyaya Sanhita, 2023. This distinction is significant. It demonstrates that while the gravity of an offence should not ordinarily be converted into a judicially created absolute prohibition against anticipatory bail, Parliament may itself determine, through an express statutory provision, that pre-arrest protection shall not be available in specifically identified aggravated offences. The distinction between judicial caution and legislative prohibition is therefore essential to understanding the present legal position.

Perhaps the most important misconception surrounding anticipatory bail in rape cases is the assumption that its grant amounts to a judicial declaration that the complainant is lying or that the allegation is false. Such an interpretation confuses the limited purpose of a bail proceeding with the ultimate adjudication of criminal liability. A court granting anticipatory bail does not, merely by granting such protection, pronounce the accused innocent, just as the rejection of bail does not amount to a declaration of guilt. The question at the stage of anticipatory bail is substantially different from the question ultimately determined at trial. The court is concerned with whether arrest and custodial detention are necessary in the particular circumstances and whether the interests of investigation and justice can be adequately protected without unnecessarily depriving the accused of personal liberty.

Thus, the grant of anticipatory bail in a rape case should neither be viewed as an endorsement of the accused's innocence nor as an expression of disbelief in the complainant's allegation. It is a judicial determination made at a preliminary stage, based upon the material and circumstances then before the court, concerning the necessity and propriety of pre-arrest custody. Equally, such protection does not confer immunity upon the accused. It remains subject to conditions imposed by the court and may be withdrawn in accordance with law where the accused misuses the liberty, interferes with the investigation, intimidates witnesses, tampers with evidence or otherwise obstructs the administration of justice.

Ultimately, the jurisprudence of anticipatory bail in rape cases reflects a difficult but necessary

12 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, s. 482(4).

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constitutional balance. A criminal justice system committed to both accountability and liberty cannot proceed on the assumption that every accusation must result in immediate arrest, nor can it disregard the legitimate concerns of a complainant merely in the name of personal liberty. The appropriate approach lies in judicial scrutiny that is sensitive to the gravity of the alleged offence while remaining faithful to the presumption of innocence, the requirements of investigation and the constitutional protection against unnecessary deprivation of liberty.

Therefore, returning to the central question of this article—"When a court grants anticipatory bail in rape cases, is it expressing disbelief in the allegation or merely determining whether custodial arrest is necessary at the stage of investigation?"—the answer lies in understanding the limited but significant function of bail jurisprudence. The grant of anticipatory bail is not, by itself, a finding that the allegation is false; it is ordinarily a determination that, in the circumstances before the court, pre-arrest custody is not shown to be necessary and that the competing interests of investigation, justice and personal liberty can be adequately reconciled through judicial protection and appropriate conditions. Understanding this distinction allows anticipatory bail to be viewed not through the binary lens of "believing the victim" or "protecting the accused," but through the more nuanced constitutional framework within which criminal justice must operate.

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