Volume 7 Issue 3 2026 2582-5534

Bail is the Rule and Jail ss the Exception: A Critical Analysis of Bail Jurisprudence in India

Author- Nikita Desai,
Jaipur National University

ABSTRACT

The rule that 'bail is the rule and jail is the exception' is one of the most often cited maxims in Indian criminal procedure. However, there exists a considerable gap between constitutional theory and practice of granting bail in India. The issue of pre-trial detention is directly linked to the principle of presumption of innocence, individual liberty, right to legal counsel, and right of the accused to mount a defense. It is necessary to safeguard at the same time important interests of securing presence, preventing witness intimidation, protecting evidentiary material and upholding the course of justice.

This article traces the constitutional origins of bail under Articles 14 and 21 and the evolution of the law through cases such as State of Rajasthan v. Balchand, Gudikanti Narasimhulu v. Public Prosecutor, Hussainara Khatoon, Sanjay Chandra v. CBI, Dataram Singh v. State of Uttar Pradesh, Arnab Manoranjan Goswami v. State of Maharashtra and Satender Kumar Antil v. CBI, to the modern statutory framework via the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), specifically Sections 478 to 483, including Section 479 concerning the release of undertrial prisoners. The analysis reveals that while Indian law is moving towards seeing pre-trial detention as a constitutional issue, statutory limitations, discretionary abuse, socio-economic inequalities in furnishing bonds and sureties and the problem of delays in trials still continue to pose a challenge to that approach.

It is contended that the maxim should be followed in the true spirit and should become an assumption of bail. Pre-trial detention should only have individually justified reasons in the light *of procedural risks and increasing duration of the same should lead to increasing scrutiny. The article ends with recommendations for reasoned bail orders, conditional bail orders with proportionality, proper implementation of Section 479 BNSS, custody reviews and constitutional proportionality analysis in prosecutions by special statutes.*

Keywords: *Bail; Personal Liberty; Article 21; Undertrial Detention; BNSS; Presumption of Innocence; Criminal Procedure; Speedy Trial.*

I. INTRODUCTION

The outcome of a criminal trial is a decision on whether an individual is guilty; a criminal arrest or a remand does not make that decision. That fundamental difference is the reason why pretrial detention should be exceptional in a constitutional democracy. An individual facing a criminal trial is presumed innocent and, except for those restrictions that are necessary for the purposes of the proceedings, is entitled to the constitutional protection of his/her personal liberty. It was in the case of *State of Rajasthan v. Balchand* that the jurisprudence on Indian bail recognized this approach when Justice V.R. Krishna Iyer enunciated the basic principle as "bail, not jail".[1]

It appears almost too simplistic. Bail rulings take place in the overlap of liberty and institutional danger. It is true that courts have to take into consideration the gravity of the charges and the threat of sanctions, but this does not mean that the seriousness of the offense should be used instead of analysis. The legal reasons to detain accused persons before trial are mainly procedural in nature: ensuring the accused is present, avoiding the disruption of the trial process and investigations, and dealing with the danger posed by a possible new crime.

This idea was developed further by the Supreme Court in its ruling Gudikanti Narasimhulu v. Public Prosecutor.[2] It was only in the Hussainara Khatoon case that this aspect was made very clear since it came out that there had been a delay in trials, and that the right to speedy trial was contained within Article 21. In these cases, it was evident that while a remand may be legal, it could be unjust because one remained behind bars.[3] The question this paper poses is how it is that when the law says bail is the norm in India, pretrial detention continues to be a default mode? This is because of the broadness of judicial discretion, because of some statutes, because of delays,

[1]State of Rajasthan v. Balchand, (1977) 4 S.C.C. 308, 308-09 (India).
[2]Gudikanti Narasimhulu v. Pub. Prosecutor, High Ct. of A.P., (1978) 1 S.C.C. 240, 242-45 (India).
[3]Hussainara Khatoon (I) v. Home Secy., State of Bihar, (1980) 1 S.C.C. 81, 85-86 (India).

and because of material differences. The way for a fair bail process involves something more than a good doctrine.

II. CONSTITUTIONAL FOUNDATIONS OF THE RIGHT TO BAIL

A. Article 21 and the Requirement of Fair Procedure

Article 21 states that no person should be deprived of his/her life or personal liberty except in accordance with procedure established by law. Post Maneka Gandhi v. Union of India case, this procedure is not simply to be construed as a mere statutory direction, as it must be right, just and fair, and not arbitrary, fanciful or oppressive.[4] Bail hearings are essentially constitutional hearings in miniature. Each denial of bail means the continued confinement by the state of someone who has not yet been found guilty. No doubt, the fact that there is a criminal accusation makes such restrictions possible which otherwise would be impossible, but Article 21 insists that such restrictions must have a rational relationship to the ends of criminal procedure.

B. Presumption of Innocence and Pre-Trial Liberty

The presumption of innocence is not the same as an absolute right to bail. However, if there is a genuine risk of absconding or a threat to witnesses or any ability to hinder the investigation process, then there might be reasons to place an individual in custody. However, the presumption makes the burden of proof lie on the shoulders of those who seek custody, whereas those seeking to secure release are not burdened in such a manner. In Dataram Singh v. State of Uttar Pradesh, the Supreme Court reiterated that a person is presumed innocent until found guilty and that grant of bail is the general rule while refusal is the exception.[5]The orientation also prevents the misuse of bail hearings as trials by stealth. During the bail process, the courts may determine the prima facie strength of the allegation, and they may consider the seriousness of the crime, but determinations of guilt will have an adverse effect on the trial process itself.

III. EVOLUTION OF THE SUPREME COURT'S BAIL JURISPRUDENCE

A. From Balchand to Gudikanti Narasimhulu

[4]Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248, 281-84 (India); INDIA CONST. art. 21.
[5]Dataram Singh v. State of Uttar Pradesh, (2018) 3 S.C.C. 22, 24-25 (India).

The value of Balchand lies not in its elimination of judicial discretion but in its recognition of liberty as the default position. Its exceptions are functional in nature and relate to flight, obstruction, intimidation and similar risks. Gudikanti Narasimhulu provided an additional conceptualization of discretion, underscoring the need for a balancing of individual and social interests involved in release or detention. These cases lend credence to the view that a risk-based approach should govern bail considerations. The critical issue is not whether the alleged crime is deserving of public disapprobation but whether custody is necessary to address the risks involved.

B. Hussainara Khatoon and the Problem of Undertrial Detention

The concept of delay changed its character from an administrative issue to a constitutional issue by Hussainara Khatoon. It was held by the Supreme Court that speedy trial is an important part of fundamental right to life and liberty.[6] This principle is still fundamental to contemporary laws on bail. A detention order that was justifiable when an inquiry started might become unreasonable as time goes by with little or no tangible results. The longer a person is held in custody, the greater need there is to evaluate the continued justification of such detention.

C. Sanjay Chandra and the Rejection of Pre-Trial Punishment

In Sanjay Chandra v. CBI, the Supreme Court pointed out that the object of bail is neither punitive nor preventive, and that the refusal of bail must not be used as a punishment. Bail cannot be denied merely because the offence alleged is a serious one, although the nature of the accusation and the severity of the punishment remain relevant to assessing the risk of absconding.[7] What makes this ruling important is that it differentiates two statements that are usually confused. While gravity may be important, gravity on its own cannot make it clear that the accused will escape, tamper with evidence or intimidate witnesses. The rationale behind the ruling should link the circumstances of the individual case with the necessity for detention.

D. Arnab Goswami and the Constitutional Duty of Courts

In the case of *Arnab Manoranjan Goswami v. State of Maharashtra*, the Supreme Court emphasized the role of the constitutionally established court's institutions in ensuring the security of individual liberty, while adding that the loss of liberty for even a single day is a matter of

[6]Hussainara Khatoon (I), (1980) 1 S.C.C. at 85-86.
[7]Sanjay Chandra v. CBI, (2012) 1 S.C.C. 40, 52-54 (India).

serious significance. The judgment reinforced the idea that courts must remain attentive to liberty rather than treating custody as an administratively convenient default.[8]

E. Satender Kumar Antil and Systemic Bail Reform

Satender Kumar Antil v. CBI went beyond a case involving bail for an individual and focused on addressing broader issues of arrest, remand and bail. The Supreme Court gave certain directives which were aimed at bringing logic into the practices of arrests and bail, stressed adherence to statutory protections, and noted the link between unnecessary arrests and overcrowded prisons.[9] The significance is the recognition that the bail problem begins well before the bail application is decided. The problem with unnecessary arrests is the creation of unnecessary remands, while mechanical remands lead to avoidable detention; delayed hearing processes change what would have been temporary detention into an extended deprivation of liberty.

IV. THE BAIL FRAMEWORK UNDER THE BNSS, 2023

The Code of Criminal Procedure, 1973 has been superseded by the Bharatiya Nagarik Suraksha Sanhita, 2023 with effect from 1 July 2024. The bail laws are stated in Chapter XXXV. Section 478 provides for the situation where the bail needs to be taken; Section 480 refers to the bail in non-bailable offences in all courts except High Court and Court of Sessions; Section 482 relates to anticipatory bail; and Section 483 concerns the special power of bail of High Court and Court of Sessions.[10]

A. Section 479 and the Maximum Period of Undertrial Detention

The section is especially significant for the constitutional guarantee of pre-trial freedom. Provided that the terms of the section are met, a person who has undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence shall be released on bail. The benefit does not extend to an offence for which the punishment of death has been specified as one of the punishments. The right to release on bond is extended to a first-time offender, that is, a person who has never been convicted of any offence in the past, after detention extending up to one-third of the maximum period. This section imposes an obligation upon the

[8]Arnab Manoranjan Goswami v. State of Maharashtra, (2021) 2 S.C.C. 427, 458-60 (India).
[9]Satender Kumar Antil v. CBI, (2022) 10 S.C.C. 51, 71-78 (India).
[10]Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 478-483, INDIA CODE (2023).

jail superintendent to file an application before the court when the relevant threshold is completed.[11] This reform holds significance in the sense that it transfers some of the load from the prisoner who lacks a competent lawyer to assist him or knowledge of his rights under law. However, there is a significant exception present in section 479, which states that where investigation, inquiry or trial in more than one offence or in multiple cases is pending against a person, he shall not be released on bail by the Court. The impact of this provision requires careful analysis.[12]

B. Bail in Non-Bailable Offences

"Non-bailable" does not mean that bail is not permitted under law. Rather, it implies that there is no automatic statutory right to release and judicial discretion takes centre stage. Such judicial discretion must however be guided by constitutional considerations, statutory considerations, and the objectives of pretrial detention. These include the gravity of the offence, chances of absconding, interference with witnesses, destruction of evidence, antecedents, and the stage of investigation amongst others; none of which is to be applied in a mechanistic way.

C. Anticipatory Bail

An anticipatory bail safeguards freedom from arrest when there is reasonable fear of arrest for an offence which is not bailable. In Sushila Aggarwal v. State (NCT of Delhi), a Constitution Bench of the Supreme Court ruled that anticipatory bail need not, as a rule, be limited to a fixed period, and may ordinarily continue until the end of the trial.[13]

V. WHEN DOES JAIL BECOME THE EXCEPTION?

A. Flight Risk

The most important rationale for detention in traditional theory is that of the significant possibility of evasion of the process by the suspect. However, risk needs to be determined separately. The factors of residence, family connections, work, prior observance of process, ownership of travel

[11]Id. § 479(1), (3).
[12]Id. § 479(2).
[13]Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 S.C.C. 1, 85-89 (India).

documents, behavior following the knowledge of the investigation, and ability to escape from the jurisdiction should carry more weight than generalized assumptions based on the charges alone.

B. Witness Intimidation and Evidence Tampering

The possibility of threats against witnesses and tampering with evidence presents a genuine risk to be considered in the decision to deny bail or impose strict bail terms. But courts need to determine if other means, less restrictive than detention, could mitigate the risk. Examples include witness protection orders, passport surrender, travel bans, reporting requirements, or record access limitations.

C. Gravity of the Offence

Gravity becomes important since the likelihood of fleeing increases due to potential severe punishment and the seriousness of the repercussions if there is re-offense. Gravity should however not take precedence over the risk assessment. In case the classification of the crime alone was enough, then the constitutional assumption in support of bail would have no relevance for some categories of offenses.

VI. SPECIAL STATUTES AND THE CONSTITUTIONAL TENSION

The rule of thumb that "bail is the rule" faces its greatest challenges when there are certain criminal statutes which carry further statutory qualifications for granting bail. The statutes in connection with terrorism, drugs and money laundering, notably Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967, Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 45 of the Prevention of Money-Laundering Act, 2002, involve a higher legislative evaluation of the type of criminal activity involved. The courts have to take into consideration these statutory limitations. It is in this connection that the landmark judgment of Union of India v. K.A. Najeeb becomes relevant. In spite of the prosecution being under the Unlawful Activities (Prevention) Act, 1967, the Court held that the statutory embargo in Section 43D(5) does not oust the power of the constitutional courts to grant bail where long detention coupled with the unlikelihood of an early trial would amount to an unjustified deprivation of liberty.[14] The very same constitutional logic has also continued to be influential in recent cases.

[14]Union of India v. K.A. Najeeb, (2021) 3 S.C.C. 713, 722-24 (India).

In the case of Javed Gulam Nabi Shaikh v. State of Maharashtra, which concerned UAPA proceedings and long detention, the Supreme Court directed that the accused be released on bail.[15]

The principled stance therefore cannot be that restrictions contained in special statutes are irrelevant or that they destroy Article 21. Statutory criteria apply to routine judicial determination, but when there is an extraordinary period of custody, there must be proportionately deeper constitutional scrutiny.

VII. THE SOCIOECONOMIC DIMENSION OF BAIL

An order for a bail does not always lead to freedom. The defendant may be kept in custody due to the inability to provide a surety, high bail amount, absence of identification documents, and difficult bail conditions. This results in an unpleasant situation of a legal right to be free and the inability to actually do so. In *Moti Ram v. State of Madhya Pradesh*, the Supreme Court did not accept an excessively strict interpretation of sureties and said that bail conditions should not discriminate against the poor.[16]

Such a principle is of great importance. Should two equally situated defendants have the same financial conditions applied to them, yet only one being able to meet such conditions, then equality in law will result in inequality of freedom. The bail conditions should thus be set in accordance with the circumstances of the defendant, as well as with the real danger involved in the process.

VIII. DELAY AS A BAIL FACTOR

In any event, delay is more than just one among many considerations; rather, over time it transforms the constitutionality of detention itself. Prior to conviction, the State may not claim that the gravity of the charges justifies indefinite detention, while at the same time failing to ensure a timely trial. It is the accused who must endure detention without the determination that would justify his punishment. It is for this reason, that the speedy trial doctrine established in Hussainara Khatoon cannot be separated from the law of bail. It is also for this reason that modern cases increasingly consider the time that has passed since the start of the detention, the witnesses left to

[15]Javed Gulam Nabi Shaikh v. State of Maharashtra, (2024) 9 S.C.C. 813, 2024 INSC 645, ¶¶ 18-23 (India).
[16]Moti Ram v. State of Madhya Pradesh, (1978) 4 S.C.C. 47, 54-57 (India).

testify, and the complexities of the prosecution's case along with the time needed to complete the trial.

IX. CRITICAL ASSESSMENT: WHY THE MAXIM OFTEN FAILS IN PRACTICE

A. Unstructured Discretion

Discretion must be involved in the process of granting bail because one cannot calculate risk mathematically. However, without recorded reasons, discretionary power leads to inconsistency geographically and individually. Cases that are similar could have dramatically different results based on the way a judge interprets gravity, antecedents, delay, and prosecutor claims. Therefore, the solution lies in making discretion accountable for its own reasoning.

B. Mechanical Reliance on Gravity

Sometimes orders use the phrase "nature and gravity" without elaborating on the reasons why the accused's release might threaten the process. Such orders have the danger of turning allegations into punishments. A better way to go about it would be to make the court explain the particular danger arising from the gravity of the case.

C. Bail Hearings Becoming Mini-Trials

The flipside is an overzealous analysis of merits. The bail courts might get too involved with conflicting evidence, resulting in detailed findings of facts even before the witnesses are cross-examined at the trial stage. It is inevitable that there be a prima facie test in certain cases, particularly those involving specific laws, but a conclusive determination should never be made.

D. Inability to Furnish Bail

The continued detention of persons who have been granted bail but cannot furnish it is a structural failure: bail conditions can legally be legitimate but practically impossible to meet. It must be made sure by the courts that bail conditions are reasonable and are reconsidered by the courts when the accused cannot meet the bail conditions.

X. A RIGHTS-BASED FRAMEWORK FOR BAIL DECISIONS

A framework of questions for bail law in India is useful. First, is there statutory basis for detention? Second, what precisely is the risk to be addressed? Third, what facts support this risk in respect of this accused? Fourth, is there a risk which can be addressed through less restrictive measures? Fifth, how much time has passed since the detention and what is the likely duration of the trial? Sixth, are the proposed terms of bail proportionate in cost and practicality? Seventh, is there a special statute which changes the starting point, and if so, has the lengthy detention raised a constitutional issue? This approach turns "bail is the rule" into a process, one that need not include automatic bail. It obliges the state and the courts to explain the detention based on proper rationale, which must relate to some objective purpose, but must be proportionate in its terms of release.

XI. REFORM PROPOSALS

First, bail conditions must clearly specify the risk that concerns the court. References to general seriousness without any mention of the risk associated with flight, interference with proceedings, witness tampering, re-offending, etc., are unacceptable. Second, a "least restrictive condition" approach should be adopted by the courts. In other words, before resorting to detention as a way of dealing with the risk, the court must consider whether reporting conditions, passport deposit, no contact conditions, etc., would suffice to deal with the risk. Third, implementation of s. 479 BNSS requires automation of notifications regarding custody in prison and court information systems. Compliance with the statutory requirement imposed on superintendents of jails should be overseen to make sure that release of an undertrial is not contingent upon his knowledge of the provision. Fourthly, extended periods of detention must call for judicial review regardless of any change in the factual situation. The lapse of time is, in itself, an important change, since it makes the issue of proportionality and the connection between custody and the expected sentence different. Fifthly, bail conditions should be made subject to an assessment of their affordability. Courts should explain why a financial requirement is necessary and proportional in cases where non-compliance with the requirement would result in the continued detention of the accused. Lastly, special statute bail determinations should include a constitutional safety net. While statutory provisions must be properly applied, Article 21 must prevent pre-trial custody from turning into de facto punishment before conviction.

XII. CONCLUSION

Bail is the rule and jail is the exception is still a good constitutional principle, but it depends on how it is implemented. The Indian Supreme Court's jurisprudence has linked bail to principles such as personal liberty, the presumption of innocence, fairness, speedy trial and the permissible purposes for pretrial detention on numerous occasions. Balchand came up with the memorable principle; Gudikanti Narasimhulu made judicial discretion reasonable; Hussainara Khatoon gave constitutional recognition to delay; Sanjay Chandra prohibited punitive pretrial detention; Dataram Singh reaffirmed the presumption of innocence; Arnab Goswami highlighted the importance of judicial protection of liberty; and Satender Kumar Antil provided an answer to the problems of arrest and bail. The BNSS maintains the legal framework while adding a new first-time-offender rule and an institutional duty on jail superintendents under Section 479. However, statutory change alone will not remedy mechanistic remands, prohibitive bail conditions, delayed trials, and undue reliance on the seriousness of the charges. It is important to note, therefore, that the proper interpretation of the maxim is not one where each and every accused must be set free. What it means is that there is always the need to justify the detention of the accused before conviction. A constitutionally sound bail order must therefore identify the nature of the risk apprehended, the strength of the material relied upon, and the length of detention already undergone.