
UNDER TRIAL PRISONERS AND THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Under-trial prisoners constitute a significant majority of the prison population (75.8%). All the 4,34,302 out of 5,73,220 persons who are within prisons as under-trials are deemed to be innocent in the eyes of the law. How can a system that calls itself just and fair, justify depriving 4,34,302 “innocent” people of their liberty? “The consequences of pre-trial detention are grave.¹ Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family”. An effective criminal justice system inevitably needs to ensure that accused stands trial for the crimes they are alleged to have committed. Therein lie the historical roots of incarcerating people accused of committing crimes. Depending on the gravity of the offence, the police are empowered to keep a person in their custody for 24 hours, after which any further detention must be authorized by the judiciary. Save a few exceptions, all are entitled to be released on bail².² The Bharatiya Nagrik Suraksha Sanhita (BNSS) 2023(earlier The Code of Criminal Procedure, 1973 (CrPC), does not define the term “bail” although offences are classified as bailable and non-bailable. The former are less serious offences and any person accused of committing these is entitled to be released on bail as soon as s/he is willing to furnish bail.³ When accused of committing non-bailable offences, a person can only be released on bail by the court if it is satisfied that the person shall attend the court to stand trial; will not tamper with evidence or influence witnesses

¹ National Crime Record Bureau Prison (2022), “Prison Statistics of India” report released on 12 April 2024, Ministry of Home Affairs, available at <https://www.drishtias.com> (last visited on 25 May, 2025).

² *State of Rajasthan v. Balchand*, AIR 1977 SC 2477.

³ The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 436.

or obstruct police investigation in any manner; will not commit any other offence or hinder the interest of justice.⁴ Despite sounding fair, the bail provisions and their implementation is highly discriminatory. As far back as 1971, the Legal Aid Committee appointed by the Government of Gujarat noted: The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount. The latest comprehensive report of the Legal Aid Committee of the Punjab Government was for the fiscal year 2021-2022, which detailed extensive outreach and awareness programs, including door to door visits and public legal awareness events that reached 18 million people. Annual report of 2021-2022 highlights large scale efforts by legal aid organisations , noting over 144,668 villages were covered by the outreach teams , 94,365 legal awareness programs were held reaching nearly 19 million individuals . Mobile vans and legal aid clinics played a significant role in spreading legal awareness.⁵ The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is defrauded of his moneys by vendors and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences.⁶ The Supreme Court has held that the unwarranted “cruelty and expensive custody” inherent in the case of “avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible”.⁷ Following on from the Supreme Court, this paper argues that in a huge number of cases, pre-trial detention is avoidable and unnecessary. Indiscriminate arrests by police, ignorance of legal rights, delay in trial, reluctance of the courts to grant bail, inability to provide surety, are some reasons that have led to the unnecessary detention of large number of under-trial people. The Supreme Court has recognised this for years and has been devising ways and formulae to secure the release of under-trial prisoners on bail.⁸ The union government

⁴ *State of Rajasthan v. Balchand*, AIR 1977 SC 2477.

⁵ Report of the Legal Aid Committee appointed by the Government of Punjab 2021-2022 , available at <https://palsa.punjab.gov.in> (last visited on 25 June 2025).

⁶ *Ibid*

⁷ *Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh*, AIR 1978 SC 429.

⁸ *Common Cause, A Registered Society Through Its Director v. Union of India and Others*, (1996) 4 SCC 33

has also realized the gravity of the situation and amended the Cr.P.C. to incorporate liberal provisions of bail. Arguing that the non-implementation of the existing legal provisions is a major reason for the large under trial population lodged in prisons, this paper explores the legal dispensation of bail under the Cr.P.C./BNSS.

Under-trials and their Release

An under-trial prisoner's right against unnecessary detention and the procedure to secure his/her release is given under the Cr.P.C and now under section 479 of Bhartiya Nagrik Suraksha Sanhita (BNSS),2023⁹ addresses the release of undertrial prisoners who have been detained for a significant portion of their potential sentence. Specifically, it mandates that an undertrial prisoner be released on bail if they have been detained for upto one-half of the maximum period of imprisonment for the offence.

The major issue is faced by indiscriminate arrests as the power of the police to arrest people is very wide and they arrest people even when they cooperate with the investigation and are not likely to evade trial. This results in unnecessary detentions. A limitation on the powers of arrest as proposed by the Code of Criminal Procedure (Amendment) Bill 2006 is passed by both the Houses of the Parliament in December 2008. The Code of Criminal Procedure (Amendment) Bill 2006 amends the existing provisions for arrest, i.e. section 41 (and also inserts section 41A into the Cr.P.C). Section 41 limits the indiscriminate powers of arrest of police officers. A person cannot be arrested merely because there is a complaint against her/him. It must a "credible" complaint/information and the police officer must "have reason to believe" that "such person has committed the said offence".¹⁰ In the matter of Pre-mature Release *Rashidul Jafar @ Chotta vs. State of U.P*¹¹ while dealing with the matter of pre-mature release of the prisoners has issued certain directions on 6.9.2022, to the State Govt., Prison Authorities UPSLSA. In case of *Sonadhar vs. State of Chattisgarh*¹² The Hon'able Supreme Court has issued certain directions for expeditious release of Under Trial/convicts from the jails. In cases involving an offence punishable with imprisonment up to a maximum of seven years, the police officer can arrest a person only under certain specified condition laid down in the law. The officer must record her/his reasons for arresting in writing. In cases, where the specified

⁹ The Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023) s . 479.

¹⁰ The Code of Criminal Procedure, 1973(Act 2 of 1974) s. 41.

¹¹ W.P.(CrI).No. 336 of 2019.

¹² SLP (crI.) No. 529/2021.

conditions are not met, the police officer may, instead of arresting a person, issue to her/him a notice of appearance. This requires the accused to appear before the police officer when required and to cooperate with the police officer in the investigation of the offence. This provision, if properly implemented, will lead to a vast reduction in the number of persons accused for offences punishable up to 7 years who would have otherwise ended up being detained in prison during the period of investigation, inquiry or trial of their offence.

Detention in bailable cases owing to poverty

Many poor people are detained in prisons for alleged involvement in bailable offences primarily because they are unable to furnish surety. This is a serious concern because in such cases bail is a matter of right and people end up spending long periods in jail merely because they are poor. Section 436 Cr.P.C., which deals with the right to bail in bailable offences was amended in 2005. It mandates the police or court to release an indigent person on personal bond without asking for any surety. The amendment allows an indigent person to execute a bond that s/he shall appear before the court and stand trial. The section states that the court shall consider any person who is unable to furnish bail within 7 days from the date of her/his arrest as indigent. Therefore, a person accused for a bailable offence can be detained in prison for a maximum period of 7 days. In BNSS Section 478 provides that if an accused is indigent (cannot furnish surety) and is unable to obtain bail within a week of arrest, the court or police officer can release them on a personal bond without sureties. In the landmark judgement of *Satender Kumar Antil vs. Central Bureau of Investigation*¹³ the Supreme Court had laid down the guidelines that Hon'able High Courts and other courts had to keep in mind few things while granting bail. Key rulings include the categorization of offenses for bail consideration, mandatory compliance with CRPC provisions, rejection of automatic arrests upon charge-sheet filing, expedited bail hearings, and the strict enforcement of Section 436-A for undertrial releases.

In the Supreme Court of India, *Justice Sanjay Kishan Kaul, J. Abhay S. Oka*, The Hon'able Supreme Court issues seven directions to avoid delay in release of prisoners after getting bail.¹⁴ After recording the discussion which have been held, it has been stated in para 5 of the

¹³ (2022) 10 SCC 51.

¹⁴ SMWP (CRIMINAL) NO. 4/2021; 31-01-2023.

report that there are 5,000 undertrial prisoners who were in jail despite grant of bail of which 2,357 persons were provided legal assistance and now 1,417 persons have since been released.

Delay in Investigation

Many prisoners languish in prisons because the police do not investigate, and file the chargesheet in time. This is a very serious matter because such people remain in prisons without any suspicion of a police case against them. Section 187 BNSS (167CrPC) lays down the maximum period within which the police investigation must be completed and a chargesheet filed before the court. This period is 90 days for offences punishable with death, life imprisonment or imprisonment for a term of not less than ten years, and 60 days for all other offences. Where the investigation has not been completed within the stipulated timeframe, it is mandatory upon the Magistrate to release the accused on bail, provided he is ready to furnish bail. This provision shields the accused from suffering incarceration on account of the inability of the investigating agency to wind up its investigation. In the case of *Foray Universal Consultancy Services Pvt. Ltd. Vs. State of Telangana*¹⁵ the court held that the jurisdictional Magistrate is competent to go into all aspects from the stage of receiving complaint till completion of investigation and filing of final report and an aggrieved person can always avail the remedies provided by the Code of Criminal Procedure, 1973 his grievance against delay in investigation/improper investigation and the concerned jurisdictional magistrate is in a better position to appreciate all aspects and to monitor the investigation, if so warranted.

Delay in trial in certain cases

Many prisoners are charged with a non-bailable offence which is not very serious and is triable by a Magistrate. They remain in prisons for long period because of the delay in trial. In a case triable by a Magistrate under section 437(6) (now Section 480 BNSS) makes it mandatory for a person to be released on bail where the trial has not concluded within 60 days from the first date fixed for taking evidence. The magistrate may refuse such release, but only after recording the reasons in writing. In the case of *Subhelal @ Sushil Sahu vs. The State of Chattisgarh*¹⁶ has provided the comprehensive interpretation of Section 437(6)(CrPC). This judgement is not merely a procedural clarification; it is a reaffirmation of the principles that underpins the criminal justice system, particularly concerning the right to speedy trial and the exercise of

¹⁵ (2023) 15 SCC 783.

¹⁶ SLP (CrL.) No. 1314 of 2025.

judicial discretion in bail matters. The apex court has sought to address the persistent issue of prolonged under-trial detention, while also ensuring that the interests of justice are not compromised.

Prolonged detention

Many under-trial prisoners are detained in prisons for long periods, which in some cases extend beyond the maximum period of imprisonment prescribed for the offence with which they are charged. Section 436A Cr.P.C. (now Section 479 BNSS), lays down the right of an undertrial to apply for bail once s/he has served one half of the maximum term of sentence s/he would have served had s/he been convicted. On a bail application filed under this section, the court shall hear the public prosecutor and may order the -

- 1) Release of such person on a personal bond with or without surety; or
- 2) Release of such person on bail instead of personal bond; or
- 3) Continued detention of such person.

This section further proscribes the detention of an under-trial beyond the maximum period of punishment prescribed for the offence that s/he is alleged to have committed. Therefore, in effect, this section prescribes the maximum period an under-trial can be detained in any case.

Under-trials and their Rights

The possible obstructions in effective implementation of the existing provisions Even though the provisions to avoid unnecessary detention of prisoners have been in existence for years. The National Human Rights Commission (NHRC) has not released a dedicated report on under trials and their release, but has issued advisories such as April 2025 advisory on implementing Section 479 of BNSS to provide relief to under-trial prisoners.¹⁷ They are not implemented, resulting in a large number of under-trial population within prisons. The reasons for non-implementation are known. Most prisoners who are unable to use the provisions under section 167 or 437(6) are not only unaware of their right to seek release but also too poor to furnish

¹⁷ The National Human Rights Commission ,2025, The Report on “Under-trials suo moto cognizance” New Delhi, *available at* <https://nhrc.nic.in> (last visited on 21 June 2025).

surety. It is imperative that the legislature amends these sections on the lines of section 436 of CrPC, so that poor people may be released on furnishing personal bonds in such cases where either the police have not been able to make out any case against them or the trial is not concluded within the stipulated time. In the absence of a legislative change, the judiciary must take a proactive role and release such people on personal bonds. In so far as the non-implementation of the liberalized provisions under section 436 or the bail provisions under section 436 A is concerned, the primary reason is the lack of awareness amongst the under-trial prisoners.¹⁸ The law does not mandate the State Legal Services Authority, jail superintendent or the trial court to inform the accused about this law. Almost 3 years have passed since section 436A was introduced, but it is yet to have the impact that it sought to achieve. At the time of enactment, news reports stated that the introduction of this provision would impact as many as 50,000 under-trial prisoners across India. However, there has been no substantial change in the number of under-trial prisoners who languish in prisons bearing the physical and mental costs for an offence they might not have even committed. Although some High Courts have issued directions for the release of under-trial prisoners under these sections, substantive results are yet to be seen. A decision of the Patna High Court is instrumental in this regard wherein the Court suo moto initiated a PIL for the efficient and effective implementation of section 436A Cr.P.C. The Court explained the role of the Jail Superintendent, the Inspector General (Prisons) and the legal services authorities for the implementation of this section. In its directives, the Court entrusted the Jail Superintendent with the primary duty to inform the under-trial prisoners of the benefits of section 436A Cr.P.C. The Inspector General (Prisons) was attributed the role as a 'Monitor' for the whole process. In a disposition regarding section 436 Cr.P.C., the Bombay High Court in October 2008 took up the issue of under-trial prisoners in bailable cases who could not furnish bail. During the proceedings, it was submitted that in one of the prisons within Bombay itself, 1660 out of 2296 inmates were booked in for bailable offences. The Court decided to undertake the task of monitoring the situation for a year and directed all Sessions Judges of the state to call for periodical records from the magistrates and jail superintendents. With regard to the implementation of section 436, the court stated that the state government and jail authorities should not ignore the law and allow such persons to stay inside jails. An effective implementation of the various provisions and amendments of the Cr.P.C. is vital to ensure a

¹⁸ National Human Rights Commission, 2008 The Report on 'Issues and Recommendations made at the workshop on Detention', New Delhi, available at <https://nhrc.nic.in> (last visited on 21 May 2025).

just criminal justice system which assures the presumption of innocence and the right to liberty to an accused, and prevents her/him from suffering the deprivations that incarceration offers.

Role of Prison Authorities

What role can the prison authorities and the prison visitors/monitors play? In India, the subordinate courts are assigned the primary task of ensuring the enforcement of the provisions under the Cr.P.C./BNSS. In addition to the judiciary, prison authorities and prison monitors also have a significant role to play in order to ensure justice to under-trial prisoners. Prison Authorities The custody and security of prisons and prisoners within it are the fundamental duties and responsibilities of every member of the prison staff. The executive personnel in prison i.e. the superintendents, additional superintendents, deputy superintendents, assistant superintendents and the guarding staff are entrusted with the primary responsibility to ascertain that the human rights which the prisoners are entitled to are not impinged upon and restricted beyond the limit inherent in the process of incarceration itself. Under the Prisons Act 1894, the superintendent must maintain a register of all prisoners admitted and a book showing when each prisoner is to be released. The superintendent has easy access to information relating to the period of detention of each under-trial prisoner under his custody, and hence it should be his duty to inform the prisoner when s/he might become eligible to apply for bail under the various provisions of the Cr.P.C. Indeed, the Patna High Court seems to agree with this contention and has directed the superintendent to inform the prisoners of the benefits of section 436A. Arguably, the prison staff are the primary custodians of prisoners, and have the advantage of being in direct contact with prisoners. They should undertake the responsibility of making prisoners aware of the benefits that might accrue to them under these provisions. They should impart legal information in all forms, written or oral among under-trial prisoners to make them aware of their right of release under the relevant provisions of the Cr.P.C. The prison authorities should also encourage and assist the dispatching of applications for free legal aid to the competent authorities in cases where the prisoner cannot afford legal assistance. It is believed that the prison authorities stand at the forefront for the effective implementation of the provisions of the Cr.P.C./BNSS which secure release of undertrial prisoners unnecessarily detained in prisons.¹⁹

¹⁹ 'Prison Reforms of 2023', available at <https://www.mha.gov.in> (last visited on 25 June 2025).

Prison Visitors

The concept of the Prison Visiting System is found under the Prisons Act 1894. The system was introduced to provide transparency within the prisons and bring some degree of accountability to the prison management. Prison visitors can be classified as either official or non-official. Apart from these, other external visitors to prisons can also be appointed by the courts and the Human Rights Commissions. This system is an effective tool to improve prison conditions as well as ensure observance of prisoners' legal rights. Prison visitors stand at a unique place within the prison system wherein they have a two-fold role to discharge. On the one hand, they act as the eyes and ears of the prisoners to the outside world by providing the prisoners knowledge about their legal rights. On the other hand, they also act as the eyes of the outside world to scrutinize what goes on within the prison walls. Thus a prison visitor not only acts as an accountability mechanism but also as a custodian for prisoners and their rights. Prison visitors act as guardians to ensure that humane conditions prevail within the prison walls. A prison visitor is well placed to ensure that the directions issued by the courts, the government and the Human Rights Commissions are properly implemented within the prison. A prison visitor is able to enquire into the complaints of the prisoners and assist them in taking remedial action. Prison visitors may also undertake certain special responsibilities with regard to under-trial prisoners. They may periodically check the register, enlisting the period of detention for prisoners, which is maintained by the Superintendent under the Prisons Act, or they may ask for such information specifically.²⁰ Where they find that there are prisoners who can be released under the provisions of the Cr.P.C., they can take steps to assist such prisoners in seeking release. The prison visitors can either inform the prisoner of his rights and ways in which he may apply for release or ask the prison authorities to take appropriate action. In future visits, the prison visitors can follow up these cases to ensure that no undertrial has been unnecessarily detained in prison. Prison visitors can also take steps to create awareness of legal rights and procedures among both the prisoners and prison staff. They may also try and inform them of the latest amendments that are introduced in the law and keep them updated regarding court guidelines on concerned issues. Therefore, a prison visitor has a vital role to play in ensuring compliance with the numerous guidelines, judgments and legal provisions that are introduced from time to time.

²⁰ The Prisons Act, 1894,(Act 9 of 1894), s. 12.

Recent Landmark Judgements

In *Ramesh v. Union of India*²¹ the Court held that the long term detention and overcrowding in prisons were directly addressed at the Hon'able Supreme Court, detaining under trials for an extended period is against Article 21, particularly when there are minor infractions or insufficient evidence. The Court stressed that states must set deadlines for processing bail applications and ordered trial courts to implement section 436A/479 proactively.

*Suleman Samad v. State NCT of Delhi*²² the Court held that timely adjudication of bail applications, especially under the framework of Section 479 of Bhartiya Nagarik Suraksha Sanhita, 2023(BNSS). It questioned the procedural delays and mismanagement at the trial court level, raising questions about judicial accountability and adherence to statutory mandates designed to prevent undue detention. It compels lower courts to adhere strictly timelines and assures that due process rights of individuals are not compromised by systematic delays.

The Court in *Anil Gur @ sonu @ Sonu Tomar v. State of U.P.*²³ to prevent undue long detention of under trial, has directed the UPSLSA to prepare a SOP for legal aid prisoners, accused of various crimes, including heinous offences, who have not filed bail applications before the Hon'able High Court within a period of one year after the rejection of the bail by the Trial Court and also to prepare a SOP for the prisoners, who have not been able to move bail applications before the Trial Court, six months after imprisonment.

Conclusion

The importance of bail provisions and their utilization has been reiterated on many occasions. No person should be made to suffer the deprivations of incarceration before s/he has been proven guilty in the eyes of law. By depriving them of their right to liberty through unnecessary detention, the existing system "punishes" the accused in violation of the basic principle of criminal jurisprudence that every person shall be presumed innocent till proven guilty. To ensure justice for under-trial prisoners, it is essential to effectively implement the existing provisions of the Cr.P.C. All the agencies of the criminal justice system including the police, the judiciary, the prosecution, the defence lawyers and the prison department must adopt a

²¹ 7 SCC 743 2018.

²² 2025 Live Law (Del) 112.

²³ 2023 SCC Online AII 2422.

concerted and a well-coordinated approach to ameliorate the plight of the ‘forgotten souls’ i.e. under-trial prisoners, who languish in prisons unnecessarily.