
THE FUTURE OF PRE-TRIAL DETENTION IN INDIA: RETHINKING SECTION 187 BNSS

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ABSTRACT

Remand is a vital component of India's criminal procedure framework, designed to balance investigative requirements with the constitutional protection of personal liberty. Section 187 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023¹, continues the structure earlier contained in Section 167 of the Code of Criminal Procedure, 1973², while introducing limited modernizations such as flexible police custody, electronic production of accused persons, and enhanced safeguards for vulnerable groups. Judicial decisions—from *Anupam J. Kulkarni* to *Rakesh Kumar Paul*—have played a crucial role in defining the contours of lawful detention and affirming the accused's right to default bail once statutory timelines expire. A comparative look at the United Kingdom and United States demonstrates that these jurisdictions impose far tighter controls on pre-trial detention, treating bail as the primary rule. In contrast, India's extensive reliance on judicial custody has contributed to a high undertrial population and raises concerns under international standards such as Article 9 of the ICCPR, which emphasizes speedy trials and minimal pre-trial detention. This paper evaluates the continuities and reforms introduced under Section 187 BNSS, analyses the jurisprudence governing remand and default bail, and highlights the need for stronger judicial scrutiny and alternative custodial models to ensure that the right to personal liberty remains meaningfully protected.

¹ Bharatiya Nagarik Suraksha Sanhita, 2023.

² The Code of Criminal Procedure, 1973.

1. INTRODUCTION

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023³ serves as the central procedural statute governing India's criminal justice system. Among its key provisions is Section 187, which outlines the rules relating to the remand of an accused individual. Article 22(2)⁴ of the Constitution mandates that no arrested person may be kept in police custody for more than twenty-four hours without being presented before a Magistrate. Section 187 operationalises this constitutional safeguard by empowering the Magistrate to extend custody beyond the initial twenty-four hours when the investigation requires additional time. The objective behind this provision is twofold: to prevent unlawful or excessive police detention and to ensure that investigating authorities receive the time necessary to gather relevant evidence in a lawful and supervised manner.

1.1 Historical Background and Legislative Intent

Section 187, BNSS finds its roots in the Code of Criminal Procedure, 1898, where Magistrates were authorized to remand accused persons for limited periods. The 41st Law Commission Report, leading to the 1973 Code, recognized the need for clearer safeguards. Consequently, Section 167 CrPC, 1973 introduced strict deadlines (60/90 days) and codified the right to statutory bail, which is currently incorporated as Section 187 of BNSS.

The legislative intent was twofold:

1. Prevent arbitrary deprivation of liberty by police.
2. Encourage speedy investigation and filing of charge sheets.

Thus, Section 167, CrPC was not merely procedural but is intrinsically linked to the constitutional guarantee under Article 21.

1.2 Text of Section 187 BNSS

Section 187 establishes the rule that an accused must be produced before a Magistrate within 24 hours of arrest. If the investigation cannot be completed within that time, the Magistrate

³ Bharatiya Nagarik Suraksha Sanhita, 2023.

⁴ The Constitution of India, 1950.

may authorize detention up to fifteen days in total, either in police or judicial custody. In more serious offences, where the offence is punishable with death, life imprisonment, or imprisonment for not less than ten years, custody may extend up to ninety days. For other offences, it may extend up to sixty days. If the charge-sheet is not filed within these statutory periods, the accused is entitled to 'default bail,' which has been recognized as a fundamental right.

1.3 Objectives of Section 187, BNSS

The central purpose of Section 187 is to safeguard individuals from unlawful detention by ensuring that police custody is always subject to judicial supervision. The provision strives to maintain a balance between protecting the rights of the accused and upholding the broader interests of justice. By permitting additional time for investigators to gather necessary evidence, Section 187 prevents the premature release of persons involved in serious offences while simultaneously requiring Magistrates to examine whether continued custody is justified. In this way, the section performs a dual function—supporting effective investigation and preserving the constitutional right to personal liberty.

1.4 Types of Custody

Section 187 recognises two distinct forms of custody. **Police custody** involves holding the accused under the immediate supervision and control of the investigating authorities, and the total period for which this may be authorised is limited to fifteen days. **Judicial custody**, in contrast, places the accused in a jail under the authority of the court, and this detention can extend to sixty or ninety days depending on the seriousness of the alleged offence. The movement from police custody to judicial custody marks a shift from an investigative purpose to a preventive one, ensuring that continued detention occurs only under the scrutiny and authority of the judiciary.

2. JUDICIAL PRONOUNCEMENTS

Judicial interpretation has played a decisive role in shaping the scope and application of Section 167 of the CrPC. In *State of Rajasthan v. Balchand alias Baliay* (1977)⁵, the Supreme Court reaffirmed the foundational principle that “bail is the rule and jail is the exception,” thereby

⁵ *State of Rajasthan v. Balchand alias Baliay*, (1977) 4 SCC 308.

underscoring the centrality of personal liberty in criminal procedure. The Court further clarified the limits of police custody in *CBI v. Anupam J. Kulkarni* (1992)⁶, holding that an accused cannot be placed in police custody after the first fifteen days from the date of arrest, and any further detention must be in judicial custody. In *Uday Mohanlal Acharya v. State of Maharashtra* (2001)⁷, the Supreme Court held that the right to default bail becomes an “indefeasible right” once the statutory period for filing the charge-sheet expires. Similarly, *Sanjay Dutt v. State* (1994)⁸ laid down that default bail can be claimed only when the accused applies prior to the filing of the charge-sheet. The liberal approach to default bail was reinforced in *Rakesh Kumar Paul v. State of Assam* (2017)⁹, where the Court stressed that ambiguity in bail provisions must operate in favour of the accused.

Other significant decisions further enriched the jurisprudence surrounding Section 167, CrPC:

(i) *R.S. Nayak v. A.R. Antulay*, AIR 1986 SC 2045; (1986) 2 SCC 716¹⁰

The Supreme Court held that the proviso to Section 167(2) grants an accused a statutory and indefeasible right to bail, which cannot be negated by subsequently filing a charge-sheet after the bail application has been made.

(ii) *Sheikh Meheboob v. State of Maharashtra*, AIR 2005 SC 1805; 2005 Cr LJ 2136¹¹

The Court recognized statutory bail as a substantive legal right, affirming that even in cases involving grave offences, the accused must be released once the prescribed time period expires.

(iii) *Sunita Devi v. State of Bihar*, AIR 2005 SC 498; (2005) 1 SCC 608¹²

The Supreme Court stressed that detaining an accused beyond the statutory limit violates Article 21, and any such custody is unconstitutional.

(iv) *Narayanrao v. State of Andhra Pradesh*, AIR 1957 SC 737; 1958 SCR 283¹³

⁶ *CBI v. Anupam J. Kulkarni*, (1992) 3 SCC 141.

⁷ *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453.

⁸ *Sanjay Dutt v. State (II)*, (1994) 5 SCC 410.

⁹ *Rakesh Kumar Paul v. State of Assam*, (2017) 15 SCC 67.

¹⁰ *R.S. Nayak v. A.R. Antulay*, AIR 1986 SC 2045; (1986) 2 SCC 716.

¹¹ *Sheikh Meheboob v. State of Maharashtra*, AIR 2005 SC 1805; 2005 Cr LJ 2136.

¹² *Sunita Devi v. State of Bihar*, AIR 2005 SC 498; (2005) 1 SCC 608.

¹³ *Narayanrao v. State of Andhra Pradesh*, AIR 1957 SC 737; 1958 SCR 283.

This judgment highlighted that detention without lawful authorization is impermissible, reinforcing the necessity of strict judicial supervision in remand proceedings.

(v) *Viswanathan, Re*, (1978) Cr LJ (NOC) 101 (Mad)¹⁴

The Madras High Court emphasized the need for judicial restraint and caution while granting remand, reiterating that deprivation of liberty should be the exception rather than the rule.

(vi) *Bhatt Shailesh Kumar v. Sampat Mal Lodha*, AIR 1969 Raj 276¹⁵

The Rajasthan High Court held that failure to comply with the requirements of Section 167 renders the detention illegal, making the accused eligible for habeas corpus relief.

2.1 Section 187 and Fundamental Rights

Section 187 must be read in light of constitutional guarantees under Article 21 and Article 22. Article 21 guarantees the right to life and personal liberty, which prevents indefinite detention without due process. Article 22 mandates that no person shall be detained by police beyond 24 hours without judicial authorization. Section 187 operationalizes these safeguards by ensuring judicial control over detention and by providing a mechanism for bail if investigation is delayed.

2.2 Doctrinal Themes

1. The Doctrine of “Indefeasible Right”: Once statutory conditions are met, the accused’s right to bail cannot be defeated by prosecutorial delay.
2. Police vs. Judicial Custody: Courts have distinguished between police custody (for investigation) and judicial custody (for safe detention). Excessive reliance on police custody is discouraged.
3. Constitutional Dimensions: Section 187 is read in light of Article 21. Judicial interpretation consistently links procedural safeguards with the broader principle that “bail is the rule, jail is the exception.”

¹⁴ Viswanathan, Re, (1978) Cr LJ (NOC) 101 (Mad).

¹⁵ Bhatt Shailesh Kumar v. Sampat Mal Lodha, AIR 1969 Raj 276.

2.3 Critical Issues and Challenges

1. Investigative Delays: Despite statutory timelines, charge sheets are often delayed.
2. Judicial Inconsistencies: Different High Courts have taken varying approaches to calculating the 60/90 day period.
3. Special Laws: Statutes like UAPA, NDPS Act, and PMLA extend detention up to 180 days, raising constitutional concerns.
4. Misuse of Remand Powers: Magistrates sometimes mechanically authorize remand without adequate scrutiny.

2.4 Criticism

Despite its safeguards, Section 167, CrPC faced criticism. Investigating agencies sometimes misuse the provision by seeking repeated remands without genuine progress. Judicial custody remands also contribute to overcrowding in Indian jails. Many undertrials remain incarcerated even after becoming entitled to default bail, owing to lack of awareness or legal assistance. Furthermore, special statutes such as the Unlawful Activities Prevention Act (UAPA) and the Narcotic Drugs and Psychotropic Substances Act (NDPS) extend the maximum period of custody from ninety to one hundred and eighty days, raising serious concerns about prolonged detention and erosion of personal liberty.

2.5 Reforms under BNSS, 2023

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)¹⁶ has replaced the CrPC. Section 187 of the BNSS corresponds to Section 167 of the CrPC¹⁷ but incorporates some reforms. It allows for electronic production of accused persons through video conferencing, thereby reducing logistical delays. It also makes provision for the presence of a woman police officer when women are arrested. However, the essential framework of sixty and ninety days for default bail remains unchanged. The reforms indicate a gradual modernization but do not address all concerns regarding prolonged detention.

¹⁶ Bharatiya Nagarik Suraksha Sanhita, 2023.

¹⁷ The Code of Criminal Procedure, 1973.

3. COMPARATIVE PERSPECTIVE

In both the United Kingdom and the United States, the legal systems place strict limits on pre-trial detention, treating bail as the default rule. In the UK, the Police and Criminal Evidence Act, 1984 restricts detention without charge to a maximum of ninety-six hours. In the US, the Fourth Amendment mandates that an arrested individual must be presented before a judicial authority “without unnecessary delay.” When compared to these jurisdictions, India’s allowance of sixty or ninety days of judicial custody gives investigators considerably greater leeway, though this is balanced by a comparatively strong statutory right to default bail.

However, India’s criminal justice system continues to depend extensively on judicial custody, contributing to the disproportionately high number of undertrial prisoners in its jails. International human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) require states to ensure prompt trials and restrict the use of pre-trial detention. India’s persistent reliance on extended judicial custody, therefore, raises concerns about compliance with these global standards and highlights the need for reforms aimed at reducing unnecessary detention.

4. HOUSE ARREST AS AN ALTERNATIVE CUSTODY

Section 187 of the Bharatiya Nagarik Suraksha Sanhita, 2023¹⁸, provides for the detention of an accused in police or judicial custody when investigation cannot be completed within twenty-four hours. While the provision itself does not expressly envisage any alternative form of detention, the Supreme Court in several cases, including *Supreme Court Legal Aid Committee v. Union of India* (1994)¹⁹ and more recently *In Re: Policy Strategy for Grant of Bail* (2021)²⁰, has observed that house arrest may, in appropriate circumstances, be treated as a valid form of custody for the purpose of remand. This judicial recognition opens a progressive interpretation of Section 187 BNSS, where courts can balance the needs of investigation with the constitutional guarantee of personal liberty under Article 21.

House arrest, especially in cases involving elderly or infirm accused, women, or individuals posing minimal security risks, offers a less restrictive yet legally permissible alternative to

¹⁸ Bharatiya Nagarik Suraksha Sanhita, 2023

¹⁹ *Supreme Court Legal Aid Committee v. Union of India*, (1994) 6 SCC 731.

²⁰ *In Re: Policy Strategy for Grant of Bail*, (2021) SCC OnLine SC 362.

incarceration. Importantly, periods spent under house arrest have been acknowledged to count towards the statutory maximum of detention under remand. Comparative perspectives also reinforce this approach: several jurisdictions, such as the United States and certain European nations, regularly employ house arrest with electronic monitoring as an alternative to pre-trial detention, thereby reducing overcrowding in prisons while ensuring effective supervision of the accused. In Latin American jurisdictions, such as Brazil and Argentina, house arrest has been particularly recognized for vulnerable groups, including mothers of young children.

Thus, although not the default mode of custody, house arrest under Section 187 can be seen as part of a global shift towards more humane and proportionate forms of detention. Its incorporation through judicial discretion reflects an evolving jurisprudence that enables Indian courts to safeguard liberty without undermining the administration of justice.

4.1 Alternative Perspectives on Section 187, BNSS

a. Digital Custody in the Age of Cybercrime

Section 167, CrPC was drafted in an era when custody primarily meant physical confinement. However, in the context of cybercrime and white-collar offences, the real investigative necessity often lies in securing digital evidence and preventing tampering with electronic records. In such cases, physical incarceration may not serve any additional purpose beyond intimidation. Courts may consider evolving the idea of “digital custody,” which could involve restricting the accused’s access to the internet, confiscating electronic devices, and placing technological restraints instead of physical imprisonment. This approach could reduce unnecessary detention while ensuring investigative integrity, thereby aligning Section 187 with the realities of a digital society.

b. Judicial Scrutiny and the Right to Liberty

Section 187 permits detention up to sixty or ninety days depending on the gravity of the offence. This prolonged remand, often without trial, risks turning pre-trial detention into punishment, contrary to the constitutional guarantee of liberty under Article 21. To safeguard against misuse, there is a pressing need for stricter judicial scrutiny whenever the prosecution seeks extension of custody. Courts could adopt a model of periodic judicial review, where every remand extension is justified not merely on the ground of “incomplete investigation,” but also

by showing that custody remains strictly necessary. Such a standard would strike a balance between investigative needs and the accused's right to a speedy trial.

c. Restorative Alternatives to Remand

In non-violent or first-time offences, Section 187 remand may be reimagined through restorative alternatives rather than traditional incarceration. Instead of physical custody, courts could explore community service, supervised release, or mandatory counselling programs. This not only reduces prison overcrowding but also avoids the stigmatization of undertrial detention. Restorative measures ensure accountability of the accused while maintaining their ties to society, thereby furthering the objectives of reformatory justice. By cautiously extending Section 187 into restorative spaces, Indian criminal law can align itself with global shifts toward more humane approaches to pre-trial justice.

d. Addressing Overcrowding in Indian Prisons

A significant proportion of India's prison population consists of undertrial prisoners, many of whom are detained under provisions such as Section 187. The overuse of remand contributes to overcrowding, poor living conditions, and the violation of prisoners' human dignity. Alternative custodial arrangements, such as house arrest, electronic monitoring, or placement in supervised halfway homes, can ease the burden on prisons while still preserving the objectives of investigation and public safety. This perspective highlights how a reimagined Section 187 could become a tool not only for fairer justice but also for systemic prison reform.

e. Technology and Electronic Monitoring

Several jurisdictions, including the United States and European countries, employ electronic monitoring devices such as GPS-enabled ankle bracelets and biometric check-ins to supervise accused persons during the pre-trial stage. Such measures strike a middle path between liberty and security by ensuring that the accused is not detained in overcrowded prisons while still being under effective surveillance. Incorporating similar innovations under Section 187, even on a pilot basis, could modernize India's criminal procedure framework and bring it in line with global practices.

4.2. Comparative Constitutional Insights

Comparative constitutional jurisprudence demonstrates that pre-trial detention is treated as an exceptional measure. In the United States, the Eighth Amendment prohibits excessive bail, while in the United Kingdom, Article 5 of the European Convention on Human Rights emphasizes liberty and mandates that detention before trial must be a measure of last resort. In the Indian context, Article 21 has been expansively interpreted to uphold personal liberty, suggesting that Section 187 should also be read through the lens of “least restrictive means.” This comparative perspective strengthens the argument that alternatives like house arrest, digital custody, or electronic monitoring are not just policy innovations but constitutional imperatives.

5. CONCLUSION

Section 187 BNSS stands as a critical safeguard against arbitrary detention, embodying constitutional values of liberty and due process. Judicial pronouncements have evolved the concept of default bail as a fundamental right, reinforcing Article 21 of the Constitution. Through judicial interpretation, particularly in *Antulay*, *Sheikh Meheboob*, and *Sunita Devi*, the Supreme Court has fortified the provision as a guardian of liberty.

Yet, the tension between investigative efficiency and individual liberty persists. misuse of remand powers, delays in investigation, and extended detention under special laws remain pressing challenges. The BNSS 2023 introduces some reforms but falls short of comprehensive change. Greater emphasis must be placed on stricter monitoring of remand orders, better access to legal aid for undertrials, and ensuring timely investigation. A reform-oriented approach must ensure stricter judicial oversight, training for Magistrates, and rationalization of detention timelines under special laws.

While the Section 187, BNSS retains the traditional framework of remand custody, its interpretation in contemporary times cannot remain static. Judicial recognition of house arrest as a form of custody demonstrates the flexibility of Indian criminal procedure to accommodate alternatives that are more humane and proportionate. Building on this foundation, there is scope for broadening the understanding of custody to include digital restrictions, electronic monitoring, and restorative alternatives. Such innovations not only safeguard the rights of the

accused under Article 21 but also address systemic concerns such as prison overcrowding and the risk of punishment before conviction.

Comparative constitutional insights further reinforce this position, as jurisdictions worldwide increasingly treat pre-trial detention as a measure of last resort. For India, aligning Section 187 with these global and constitutional principles would mark a significant step toward a more progressive and rights-based criminal justice system. Ultimately, the future of Section 187 lies in its capacity to evolve—from a rigid custodial model to a flexible framework that upholds justice, ensures fair investigation, and affirms the dignity of every individual caught within the machinery of criminal law.

In the words of Justice Krishna Iyer, “Bail is the rule, jail the exception.” Section 187 BNSS should be reformed to represent the strongest statutory affirmation of this principle embodying the delicate balance between state power and individual freedom.

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