



BAIL AS A RULE, JAIL AS AN EXCEPTION: HAS THE PRINCIPLE LOST ITS MEANING?

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ABSTRACT

The maxim that “bail is the rule and jail is the exception” occupies a foundational position in Indian criminal jurisprudence. Rooted in Article 21, it embodies the constitutional commitment that personal liberty cannot be curtailed based on accusation alone. The doctrine reflects the presumption of innocence and the principle that pre-trial detention must not assume a punitive character. The Supreme Court has repeatedly emphasised that incarceration before conviction requires compelling justification, such as flight risk or interference with justice. However, the expansion of stringent special statutes — including the UAPA, NDPS Act and PMLA — has complicated this constitutional promise. Through restrictive bail provisions, reverse burdens and “twin conditions,” these laws have narrowed judicial discretion and contributed to prolonged undertrial detention. This article examines whether the principle of bail as the norm retains substantive force in contemporary adjudication or whether, in practice, it has been weakened by legislative and judicial recalibration.

Keywords: Bail Jurisprudence, Article 21, Pre-trial Detention, Special Statutes, Personal Liberty.

INTRODUCTION

The phrase “bail is the rule and jail is the exception,” articulated in *State of Rajasthan v Balchand*, has profoundly influenced the development of Indian bail jurisprudence. More than a judicial slogan, it reflects the constitutional commitment to personal liberty under Article 21 and the enduring presumption of innocence. When pre-trial detention is imposed mechanically

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or as a reflexive response to the seriousness of allegations, criminal procedure risks assuming a punitive character inconsistent with these constitutional values.

Indian courts have repeatedly clarified that the purpose of bail is to secure the accused's presence at trial, not to impose anticipatory punishment. However, recent developments in criminal legislation—particularly special security and economic statutes—have complicated this principle. Restrictive bail provisions and extended investigative timelines have raised concerns that liberty protections may be gradually eroding. This article examines whether the doctrine continues to operate as a meaningful constitutional safeguard in contemporary criminal adjudication.

CONSTITUTIONAL FOUNDATIONS OF BAIL

The constitutional foundation of bail jurisprudence is anchored in Article 21 of the Constitution, which mandates that no person shall be deprived of personal liberty except according to procedure established by law. In *Maneka Gandhi v Union of India*,¹ the Supreme Court transformed this guarantee by holding that such a procedure must be “just, fair and reasonable.” This interpretative shift infused Article 21 with substantive due process, ensuring that legality without fairness cannot justify deprivation of liberty.

Pre-trial detention directly implicates this constitutional safeguard. Because an accused is presumed innocent until proven guilty, incarceration before conviction must rest on compelling grounds — such as genuine flight risk, likelihood of evidence tampering, or threat to witnesses. Absent such justification, detention risks assuming a punitive character incompatible with constitutional morality.

In *Gudikanti Narasimhulu v Public Prosecutor*,² Justice Krishna Iyer emphasised that while societal interests are relevant, the balance must ordinarily tilt in favour of freedom. Bail adjudication, he cautioned, demands constitutional sensitivity rather than mechanical reliance on statutory language.

The linkage between bail and the right to speedy trial was firmly established in *Hussainara Khatoon v State of Bihar*,³ where the Court recognised speedy trial as a fundamental right under

¹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

² *Gudikanti Narasimhulu v Public Prosecutor, High Court of Andhra Pradesh* (1978) 1 SCC 240.

³ *Hussainara Khatoon (I) v State of Bihar* (1980) 1 SCC 81.

Article 21. The case exposed the troubling reality of undertrial prisoners languishing in custody for periods exceeding the maximum sentence for their alleged offences. In such circumstances, continued detention ceases to be regulatory and becomes indistinguishable from punishment without conviction.

Viewed in this light, bail is not merely a procedural discretion; it is a concrete manifestation of the constitutional promise of life and personal liberty.

JUDICIAL REAFFIRMATION OF THE PRINCIPLE

For several decades, the Supreme Court of India has repeatedly and emphatically reaffirmed that pre-trial detention must not assume a punitive character. The constitutional presumption of innocence and the guarantee of personal liberty under Article 21 have served as the normative anchors of this judicial approach. While legislative developments and prosecutorial practices have periodically strained this principle, the Court has consistently reiterated that deprivation of liberty before conviction demands strict scrutiny.

A significant restatement of this doctrine occurred in *Sanjay Chandra v Central Bureau of Investigation*,⁴ arising from the 2G spectrum allocation case. The prosecution had opposed bail on the grounds of the gravity and magnitude of the alleged economic offence. Rejecting this contention, the Supreme Court clarified that the seriousness of an allegation, though relevant, cannot by itself justify continued detention. The Court emphasised that the object of bail is to secure the presence of the accused at trial, not to impose anticipatory punishment. It observed that pre-trial incarceration should not become a substitute for a potential sentence and that “the deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon.”⁵ The judgment thus reaffirmed that the criminal process must not be weaponised to impose indirect punishment through prolonged detention.

Importantly, *Sanjay Chandra* also marked a critical moment in the Court’s treatment of economic offences. While acknowledging that such offences may have a serious societal impact, the Court resisted the prosecutorial argument that economic crimes warrant a distinct, inherently stricter bail standard. By granting bail despite high-profile allegations involving

⁴ *Sanjay Chandra v Central Bureau of Investigation* (2012) 1 SCC 40.

⁵ *ibid* [21]– [23].

substantial financial implications, the Court reinforced the constitutional centrality of liberty even in politically sensitive and economically significant prosecutions.

The presumption of innocence was further foregrounded in *Dataram Singh v State of Uttar Pradesh*.⁶ In this case, the Supreme Court cautioned against a growing tendency among courts to treat bail as an exception rather than the rule. Justice Madan B. Lokur observed that a fundamental postulate of criminal jurisprudence is that every person is presumed innocent unless proven guilty, and that this presumption must meaningfully inform bail adjudication. The Court underscored that the grant of bail is a rule and the refusal is an exception, particularly when the accused has cooperated with the investigation and poses no demonstrable flight risk or threat to the judicial process. The judgment also warned against adopting a punitive mindset at the pre-trial stage, noting that incarceration before conviction must not become reflexive or mechanical.

More recently, the Supreme Court undertook a structural intervention in *Satender Kumar Antil v. Central Bureau of Investigation*.⁷ Recognising systemic overuse of arrest powers and the resulting overcrowding of prisons with undertrial detainees, the Court issued comprehensive guidelines aimed at rationalising arrest and bail procedures. The judgment categorised offences based on severity and clarified when an arrest is necessary, emphasising compliance with Sections 41 and 41A of the Code of Criminal Procedure 1973. The Court expressly linked bail jurisprudence to constitutional values, reiterating that unnecessary arrests directly infringe Article 21. It further stressed that investigating agencies must justify an arrest as a measure of necessity rather than routine practice.

What distinguishes *Satender Kumar Antil* is its acknowledgement of the structural dimensions of the bail crisis. Rather than confining itself to case-specific reasoning, the Court recognised that liberty erosion often results from institutional culture, prosecutorial overreach, and habitual judicial deference. By directing courts to adopt a liberty-oriented approach consistent with earlier precedents, the judgment sought to restore doctrinal coherence to bail jurisprudence.

Collectively, these decisions demonstrate a jurisprudential continuity within ordinary criminal law that upholds liberty as the normative baseline. The Supreme Court has consistently articulated that detention before conviction is an exception justified only by demonstrable

⁶ *Dataram Singh v State of Uttar Pradesh* (2018) 3 SCC 22 [2]– [6].

⁷ *Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51.

necessity. While the practical application of these principles may vary across subordinate courts, the doctrinal commitment to “bail as the rule” remains firmly embedded in constitutional interpretation.

SPECIAL STATUTES AND RESTRICTIVE BAIL REGIMES

The resilience of the principle that bail is the norm has been most severely tested in the context of special legislation that imposes heightened thresholds for release. Enacted in response to concerns surrounding terrorism, narcotics trafficking and economic offences, these statutes recalibrate the balance between individual liberty and collective security—often at high constitutional cost.

UAPA and the Watali Standard: Section 43D (5) of the Unlawful Activities (Prevention) Act 1967 (UAPA) restricts the grant of bail where the court finds “reasonable grounds for believing” that the accusation is prima facie true. In *National Investigation Agency v Zahoor Ahmad Shah Watali*,⁸ the Supreme Court adopted a notably restrictive interpretation, holding that at the bail stage, courts must refrain from detailed examination of evidence and may accept the prosecution’s case at face value if supported by material on record.

The Watali standard substantially narrows judicial scrutiny and, in practice, lowers the threshold for continued detention. By limiting the court’s ability to test the credibility of the prosecution’s assertions, the framework risks displacing the presumption of innocence with a presumption of prosecutorial reliability. The result is a bail regime where liberty becomes contingent not on proof, but on the framing of allegations.

Yet the Court’s later decision in *Union of India v K.A. Najeeb*⁹ introduced an important constitutional corrective. Recognising prolonged incarceration and the improbability of an early trial, the Court held that constitutional courts retain the authority to grant bail to safeguard Article 21, notwithstanding statutory restrictions. The judgment reaffirmed that legislative intent, however stringent, cannot eclipse the constitutional mandate against indefinite deprivation of liberty.

⁸ *National Investigation Agency v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1.

⁹ *Union of India v K.A. Najeeb* (2021) 3 SCC 713.

The coexistence of Watali and Najeeb illustrates an ongoing judicial negotiation between deference to national security legislation and fidelity to constitutional guarantees.

NDPS Act and the “Twin Conditions”: Section 37 of the Narcotic Drugs and Psychotropic Substances Act 1985 imposes “twin conditions,” requiring courts to be satisfied that there are reasonable grounds to believe the accused is not guilty and is unlikely to commit an offence while on bail.¹⁰ These requirements invert the ordinary bail inquiry by effectively demanding a preliminary satisfaction of innocence at the pre-trial stage.

Judicial interpretation has generally been strict, resulting in prolonged detention, particularly in cases involving commercial quantities. Given the procedural and forensic complexities characteristic of NDPS prosecutions, trials often extend over several years. In such circumstances, the rigidity of Section 37 risks transforming preventive detention into de facto punishment before adjudication.

PMLA and Constitutional Oscillation: Section 45 of the Prevention of Money Laundering Act 2002 (PMLA) originally imposed similar twin conditions. In *Nikesh Tarachand Shah v Union of India*,¹¹ the Supreme Court struck down these conditions as unconstitutional, holding them to be arbitrary and violative of Articles 14 and 21. The Court found that the provision disproportionately curtailed liberty without adequate justification.

However, legislative amendment followed, and in *Vijay Madanlal Choudhary v Union of India*,¹² the Supreme Court upheld the revised framework, endorsing Parliament’s authority to craft stringent bail regimes in matters involving economic offences. This doctrinal oscillation—judicial invalidation followed by legislative restoration and judicial approval—reveals the precarious position of bail protections within policy-driven criminal law.

Taken together, these statutory regimes demonstrate that while the rhetoric of liberty persists, its operational space is increasingly circumscribed in cases governed by special legislation. The constitutional promise of bail remains intact in theory, but its practical vitality depends on how courts navigate the tension between security imperatives and the foundational commitment to personal freedom.

¹⁰ Narcotic Drugs and Psychotropic Substances Act 1985, s 37.

¹¹ *Nikesh Tarachand Shah v Union of India* (2018) 11 SCC 1.

¹² *Vijay Madanlal Choudhary v Union of India* (2022) 10 SCC 386.

PROLONGED PRE-TRIAL DETENTION AND PROPORTIONALITY

India's prison data consistently indicate that undertrial prisoners constitute a significant majority of the incarcerated population. Many remain in custody for years, not as a consequence of conviction, but due to protracted investigations, procedural delays, and systemic inefficiencies that continue to burden the criminal justice system. The constitutional implications of this reality are profound.

The Supreme Court has repeatedly acknowledged that excessive delay corrodes the guarantees of Article 21. In *Union of India v K.A. Najeeb*,¹³ the Court recognised that where a trial is unlikely to conclude within a reasonable time, continued detention ceases to be merely regulatory and becomes constitutionally suspect. Liberty, the Court implied, cannot be indefinitely deferred in the name of procedural progression.

Yet a troubling disjunction persists. Trial courts frequently exhibit reluctance in granting bail in cases involving allegations of terrorism, national security, or economic offences—even where incarceration has extended for substantial periods. This produces a structural paradox: while the Supreme Court articulates liberty-protective doctrines, their translation into everyday adjudication remains uneven. The constitutional promise of bail thus appears robust in principle, but fragile in practice.

BAIL, PROPORTIONALITY, AND CONSTITUTIONAL MORALITY

India's prison statistics consistently reveal that undertrial prisoners constitute a substantial majority of the incarcerated population. A significant number remain in custody for years—not pursuant to conviction, but owing to protracted investigations, congested dockets and systemic inefficiencies that continue to impede timely adjudication. The constitutional implications of this phenomenon are not merely administrative; they strike at the heart of Article 21's protection of personal liberty.

The Supreme Court has repeatedly cautioned that excessive delay undermines the substantive content of constitutional guarantees. In *Union of India v K.A. Najeeb*, the Court recognised that where a trial is unlikely to conclude within a reasonable period, continued detention

¹³ *Union of India v K.A. Najeeb* (2021) 3 SCC 713.

becomes constitutionally suspect. Liberty, the judgment suggests, cannot be rendered contingent upon indefinite procedural delay.

Yet a discernible gap persists between doctrine and practice. Trial courts often display marked reluctance in granting bail in cases involving allegations of terrorism, national security or economic offences—even where incarceration has extended for considerable durations. The result is a structural paradox: while liberty-protective principles are articulated at the apex level, their consistent operationalisation remains uneven. The constitutional promise of bail, though doctrinally affirmed, continues to encounter resistance in its practical application.

HAS THE PRINCIPLE LOST ITS MEANING?

The answer is nuanced.

In ordinary criminal cases governed by the Code of Criminal Procedure 1973, courts continue to apply the liberal bail standard. The Supreme Court has repeatedly emphasised minimal incarceration and rational arrest practices.

However, in cases under special statutes, the principle operates under significant strain. Stringent bail provisions, combined with investigative delay and judicial caution, have produced a parallel bail regime where detention is often prolonged and relief is exceptional.

The constitutional safety valve provided in K.A. Najeeb offers hope, but its application depends heavily on judicial willingness at lower levels. The gap between constitutional theory and ground-level implementation remains a pressing concern.

CONCLUSION

The phrase “bail is the rule and jail is the exception” remains doctrinally intact within Indian constitutional jurisprudence. The Supreme Court continues to reaffirm it as a constitutional imperative under Article 21. Yet the expansion of stringent bail provisions under special statutes and the prevalence of prolonged pre-trial detention have significantly diluted its practical force.

The principle has not disappeared — but its vitality depends on robust judicial enforcement. Unless constitutional courts consistently prioritise liberty over procedural rigidity and legislative severity, the doctrine risks becoming symbolic rather than substantive.

Ultimately, the measure of a constitutional democracy lies not in how it treats the convicted, but in how it safeguards the liberty of the accused. Bail jurisprudence is the frontline of that constitutional promise.