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ARTICLE

Confused Purposes and Inconsistent Adjudication: An Assessment of Bail Decisions in Delhi's Courts

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Abstract

A persistent issue in the Indian criminal justice system has been the over-incarceration of pre-trial detainees, which is inextricably linked with the practices of trial courts in deciding on the detention and release of accused persons pending trial. The present statutory law and judicial discourse provides little guidance on the process for deciding bail matters. There has also not been much effort to empirically research decision-making in such matters and/or the impact of these decisions on the pre-trial detainee population in prisons. The present study is an attempt to plug this gap, analysing 'regular' bail orders of Sessions Courts of Delhi available from the eCourts system between 2017 and 2019 for the offences of theft and rape. The data reveals a failure to recognise the fundamentally preventive purpose of bail, as well as to develop individualised and specialised processes in compliance with this purpose. Such failure in guidance has resulted in judges importing factors from the trial process that remain unjustified outside of the punitive detention process, such as guilt. In conclusion, we argue that a fundamental reimagination of the approach to bail is required – one that is distinct from the trial process and focuses instead on the individualised assessment of risk.

Introduction

Two persistent issues in the Indian criminal justice system have been the overcrowding of prisons and the over-incarceration of pre-trial detainess, referred to as undertrials in India. Based on 2020 data, the latest Prison Statistics of India Report establishes that undertrials comprise 76% of the prison population.[1] The fact that our prisons are primarily populated with persons not convicted of an offence is cause for deep concern. While the problem of undertrial overrepresentation is widely acknowledged, with a range of influencing factors and possible solutions discussed;[2] in reality, we understand too little of the problem to be able to respond in any meaningful way.

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[1]National Crime Records Bureau, 'Prison Statistics India Report 2020' (Ministry of Home Affairs 2020) <https://ncrb.gov.in/en/prison-statistics-india-2020> accessed 4 Feb 2022.

[2]See Aparna Chandra & Keerthana Medarametla, 'Bail and Incarceration: The State of Undertrial Prisoners in India' in Shruti Vidyasagar et al (eds), *Approaches to Justice in India* (Eastern Book Company 2017); Murali Karnam & Trijeeb Nanda, 'Condition of Undertrials in India: Problems and Solutions' (2016) 53(16) Economic and Political Weekly 14;

The over-incarceration of undertrials is inextricably linked with the bail practices of trial courts that decide on the detention and release of accused persons before and during trial. As discussed in the next section, the present statutory law and judicial discourse provides little guidance on the process and approach for deciding such matters. Despite this reality, there have not been too many efforts to empirically research decision making in such matters and the impact of these decisions on the undertrial population in prisons, as will be seen in the 'Context Setting' section. Existing data cannot tell us if the incarceration of undertrials is largely due to the rejection of bail applications, the imposition of onerous conditions while allowing bail that the accused is unable to comply with, or undertrials just not applying for bail. Any meaningful effort to decongest prisons and reduce the proportion of undertrials in our prisons must answer these questions.

The present article is an attempt to address a small part of this large issue, with its primary focus on bail outcomes in Sessions Courts.[3] Based on an analysis of outcomes in bail applications, this article argues that trial courts conflate the trial and pre-trial process, importing concepts such as guilt into the pre-trial detention process instead of limiting the scope of inquiry to questions of risk. As explained in the 'Methodology and Scope' section, the team analysed 'regular' bail orders of Sessions Courts of Delhi available from the eCourts system between 2017 and 2019 for the offence of theft and rape, the most frequently occurring offences within cases under the *Indian Penal Code* 1860 (IPC), in their respective categories of seriousness. The analysis has limitations in light of its focus on Sessions Courts and in limiting its scope to judicial orders: it does not capture data from oral proceedings in court that are not recorded in the final order, and is not capable of informing us of prior efforts to secure bail in these cases. Despite these limitations, we argue that the study still offers valuable insights into the functioning of the pre-trial detention process that provide a roadmap for further research and reform. While the article does present data on the nature of conditions imposed by such courts, such an analysis remains incomplete without data from prisons on the release or continued detention of individuals whose applications were so allowed.

The findings of the empirical analysis presented in the penultimate section reveal that bail was allowed in 70% of theft cases and 54% of rape cases. A deeper analysis of the reasoning in such orders reveal serious concerns about the approach and processes followed in such matters. Among the dismissal orders, the presumed guilt of the accused and the alleged seriousness of the offence play an outsize role in such determinations. Furthermore, there is a stark absence of individualisation that is necessary for the risk assessment required in such proceedings, with judges and lawyers adopting *pro forma* arguments and reasoning across cases.

Ultimately, the problems in decision-making in such matters stem from a deeper failure to clearly establish the purposes of detention pending trial and to design processes and requirements that are suited for such purposes. Fundamentally, detention pending trial is a preventive action – it is intended to protect against the accused reoffending, absconding, or interfering with the judicial process. This preventive purpose renders it completely different from that of the trial process, necessitating a different framework in which the focus of the evidence should be on risk and not guilt. In addition, the seriousness of offence should not be an independent factor in determination of such matters. Instead, it should form the basis for differential standards of assessment based on risk, such that offences that carry a higher risk in terms of reoffending, absconding, or tampering may require a higher burden of proof before bail can be granted.

Vijay Raghavan, 'Undertrial Prisoners in India: Long Wait for Justice' (2016) 51(4) Economic and Political Weekly 17; Madhurima, 'Undertrial Prisoners and the Criminal Justice System' (2010) 2 Supreme Court Cases Journal J-25; SD Balsara, 'Bail Not Jail - Empty the Prisons' (1980) 22(3) Journal of the Indian Law Institute 341; PN Bhagwati, 'Human Rights in the Criminal Justice System' (1985) 27(1) Journal of the Indian Law Institute 1; Vrinda Bhandari, 'Pretrial Detention in India: an Examination of the Causes and Possible Solutions' (2015) 11(2) Asian Criminology 83.

[3]A Sessions Court is a criminal trial court that has the jurisdiction to try any offence under the Indian Penal Code 1860 and pass any sentence authorised by law, with the death sentence subject to confirmation by the High Court. See ss 26 and 28 of the Code of Criminal Procedure 1973 (CrPC).

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The data reveals a failure to develop and implement individualised and specialised processes for bail matters that comply with this preventive purpose of pre-trial detention. Such failure to design processes and guidance results in judges importing approaches and factors from the trial process that remain unjustified outside of the punitive detention process. In conclusion, we argue that a fundamental reimagination of the approach to bail is required – one that is clear about its purpose and then reimagines standards and processes in compliance with this purpose.

Legal Framework

Bail, while undefined in the *Code of Criminal Procedure* 1973 (CrPC), is generally understood as the security for the release of a person accused of a criminal offence to guarantee their attendance during the investigation or trial process.[4] The CrPC regulates the release of persons pending trial by providing the circumstances under which a person is entitled to release.

At the first level, all offences in the IPC and other penal legislations are divided into bailable and non-bailable offences.[5] In bailable offences, the accused is entitled to bail as a matter of right, while in non-bailable offences the grant of bail is discretionary.[6] In general, bailable offences are less serious offences, usually involving punishment of less than three years of imprisonment, although this rule is by no means absolute.[7]

A range of circumstances and processes govern release on bail, with differing standards under special legislations and different processes for release on account of delays in investigation and trial.[8] However, the present article restricts its scope to release for non-bailable offences in the IPC in the form of regular bail (as opposed to anticipatory or default bail). Each aspect of bail law and practice in India raises complex issues that require independent consideration. Although the scope of the present article is limited, we still believe that our findings and arguments can inform discourse across the spectrum of issues on bail.

While the police can release individuals on bail, discourse generally has focused on judicial grant or denial of bail.[9] Persons in custody must regularly be presented before magistrates, once within twenty-four hours of the arrest and regularly every fifteen days to determine whether further custody is required, in either police or judicial custody, with limits on the period for which police

[4]For a useful summary of the law of bail in India, please refer to Chandrashekhar Pillai, *Kelkar's Lectures on Criminal Procedure* (6th edn, Eastern Book Company 2017).

[5]CrPC, First Schedule.

[6]CrPC, ss 436 and 437.

[7]See Chirag Balyan, 'Bail or Jail: The Antinomies in Liberal Theory and the Way Forward', in Salman Kurshid et al (eds), *Taking Bail Seriously: The State of Bail Jurisprudence in India* (LexisNexis 2020).

[8]The CrPC prescribes that if the report on completion of investigation, known as the 'chargesheet', is not submitted within a prescribed period (sixty or ninety days depending on the nature of offence), then the accused is entitled to bail, also known as 'default bail' (see CrPC, s 167). Further, at particular points in the proceedings, an entitlement to bail emerges, such as when a trial before a magistrate is not concluded within sixty days from the first day fixed for taking evidence and if, after the conclusion of the trial in a non-bailable offence and before the judgement is delivered, the court finds that it is reasonable to believe the accused is not guilty (see CrPC, s 437). Section 436A of the CrPC requires that undertrials who have completed at least half of the maximum sentence (other than those accused of offences with punishment of death penalty or life imprisonment) be released on bail and also bars the detention of undertrials beyond the maximum sentence possible for the offences they are accused of. The circumstances for grant and rejection of bail change under special legislations, such as the *Unlawful Activities (Prevention) Act* 1967 (UAPA) and the *Narcotic Drugs and Psychotropic Substances Act* 1985 (NDPS). These legislations place a higher burden for release on bail, generally requiring that the accused establish that they are not guilty in order to be released on bail. See section 43D (inserted in 2008) of the UAPA; section 37 (amended in 1989) of the NDPS. In addition, the period allowed for submission of chargesheet has been extended under some special legislations, going up to one year for certain cases under the NDPS Act, thus further increasing the period of detention prior to accessing default bail (NDPS, s 36A(4); UAPA, s 43D; *Maharashtra Control of Organised Crime Act* 1999, s 21(2)).

[9]With a few exceptions, such as Anurag Deep, 'Role of Police and the Law of Bail in Common Law Jurisdictions (with Special Reference to India)', in Salman Kurshid et al (eds), *Taking Bail Seriously: The State of Bail Jurisprudence in India* (LexisNexis 2020).

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custody can be granted.[10] A person can apply for bail during such 'remand proceedings' or in separate applications. They can apply multiple times, and if the application is rejected, they can then appeal to the appellate courts: the Sessions Court, the High Court, or even the Supreme Court.[11] In light of limitations in accessing data, as explained in the 'Methodology and Scope' section, the present article only considers applications to the Sessions Courts of Delhi.

The CrPC does not specify the grounds for the grant or rejection of bail in non-bailable offences, with much of the guidance on exercising this discretion provided by the Supreme Court. While considering applications for bail, the Supreme Court has repeatedly emphasised the importance of providing reasons for granting or rejecting bail, both to demonstrate that the decision involved application of mind and to allow the appellate court to evaluate the reasoning of the lower court's decision.[12]

Although there is no constitutional right to bail, the Supreme Court has highlighted its links with rights under Article 21 of the *Constitution of India*, holding that the prolonged and arbitrary detention of individuals violates the right to speedy trial and access to justice.[13] Refusal of bail is a restriction of personal liberty protected under Article 21 and therefore can only be permitted if it is justified as a necessary infringement.[14] In addition, a fundamental value of the criminal process is the presumption of innocence, which the Supreme Court has recognised ought to restrict the detention of individuals not yet convicted of any offence.[15]

In light of these protections, detention of individuals has been primarily permitted to prevent the 'triple test' of risks: the risk of reoffending, flight risk, and the risk of tampering with evidence and influencing witnesses.[16] However, while the Supreme Court has highlighted these three considerations, it has also consistently listed a range of additional factors to be examined in making such a determination, with particular emphasis on the seriousness of the alleged offence and the available evidence against the accused.[17]

[10]CrPC, s 167 provides that if an investigation cannot be completed in 24 hours, the accused must be forwarded to a magistrate who will determine if further custody is necessary, for a period not exceeding fifteen days at a time, with a maximum of fifteen days for police custody and a maximum of ninety days of judicial custody if it is an offence punishable with death, imprisonment for life, or imprisonment for a term of not less than ten years; and sixty days if it is any other offence.

[11]CrPC, s 439.

[12]*Ram Govind Upadhyay v Sudarshan Singh* (2002) 3 SCC 598; *State of Maharashtra v Sitaram Popat Vetal* (2004) 7 SCC 521; *Chaman Lal v State of UP* (2004) 7 SCC 525; *Kalyan Chandra Sarkar v Rajesh Ranjan* (2004) 7 SCC 528; *Omar Usman Chamadia v Abdul* (2004) 13 SCC 234; *Lokesh Singh v State of Uttar Pradesh* (2008) 16 SCC 753; *Brij Nandan Jaiswal v Munna* (2009) 1 SCC 678; *Prasanta Kumar Sarkar v Ashis Chatterjee* (2010) 14 SCC 496; *Mauji Ram v State of Uttar Pradesh* (2019) 8 SCC 17; *P Chidambaram v Directorate of Enforcement* (2020) 13 SCC 791; *Mahipal v Rajesh Kumar* (2020) 2 SCC 118; *Sunil Kumar v State of Bihar* (2022) 3 SCC 245; *Manoj Kumar Khokhar v State of Rajasthan* (2022) 3 SCC 501.

[13]*Hussainara Khatoon & Ors v Home Secretary, State of Bihar* 1979 AIR 1360; *Ashim v NIA* (2022) 1 SCC 695; *SC Legal Aid Committee v Union of India* (1994) 6 SCC 731; *Shaheen Welfare Association v Union of India* (1996) 2 SCC 616; *RD Upadhyay v State of AP* (1996) 3 SCC 422.

[14]*Sanjay Chandra v CBI* (2012) 1 SCC 40.

[15]ibid.

[16]*P Chidambaram* (n 12).

[17]*Gurcharan Singh v State (Delhi Admin)* (1978) 1 SCC 118; *State of Maharashtra v Captain Buddhikota Subha Rao* 1990 SCC (Cri) 126; *Prahlad Singh Bhati v NCT Delhi* (2001) 4 SCC 280; *Ram Govind Upadhyay* (n 12); *Chaman Lal* (n 12); *Kalyan Chandra Sarkar* (n 12); *Jayendra Saraswathi Swamigal v State of Tamil Nadu* (2005) 2 SCC 13; *State of UP v Amarmani Tripathi* (2005) 8 SCC 21; *Vaman Narain Ghiya v State of Rajasthan* (2009) 2 SCC 281; *Prasanta Kumar Sarkar* (n 12); *Dipak Shubhashchandra Mehta v CBI* (2012) 4 SCC 134; *Kanwar Singh Meena v State of Rajasthan* (2012) 12 SCC 180; *CBI v V Vijay Sai Reddy* (2013) 7 SCC 452; *Neeru Yadav v State of UP* (2014) 16 SCC 508; *Anil Kumar Yadav v State (NCT of Delhi)* (2018) 12 SCC 129; *P Chidambaram* (n 12); *Mahipal* (n 12); *Myakala Dharmarajam and Others v State of Telangana* (2020) 2 SCC 743; *Harjit Singh v Inderpreet Singh @ Inder* (2020) 2 SCC 118; *High Court of Judicature for Rajasthan v State of Rajasthan* Crl App 5618 of 2021; *Shri Mahadev Meena v Raveen Rathore* Crl App 1089 of 2021; *Bhoopendra Singh v State of Rajasthan* Crl App 1279 of 2021; *State of Kerala v Mahesh* Crl App 343 of 2021; *Sudha Singh v State of Uttar Pradesh* (2021) 4 SCC 781; *Sunil Kumar* (n 12); *Manoj Kumar Khokhar* (n 12); *Centrum Financial Services Limited v State of NCT of Delhi* (2022) 13 SCC 286.

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One such articulation of the relevant factors can be found in the Supreme Court's decision in *Prasanta Kumar Sarkar v Ashis Chatterjee*: 'whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; nature and gravity of the accusation; severity of the punishment in the event of conviction; danger of the accused absconding or fleeing, if released on bail; character, behaviour, means, position and standing of the accused; likelihood of the offence being repeated; reasonable apprehension of the witnesses being influenced; and danger of justice being thwarted by grant of bail.'[18] Other factors include the position of the accused with reference to the victim and the witnesses.[19]

Among the factors listed, the Supreme Court has consistently emphasised the importance of considering the seriousness of offence accused of, as one of the 'basic considerations in the grant and rejection of bail'.[20] The reasoning for this is that accused persons facing the likelihood of severe punishments are more likely to abscond or threaten the victims and their family in order to avoid the harsh punishment.[21] In addition, the Supreme Court has expressed the need to keep in mind the interests of the victim's family and community that lose faith in the justice process when such accused are released on bail.[22] Judges have also highlighted the necessity to consider the evidence against the accused, but advised the deciding court not to exhaustively evaluate the merits of the case, but instead limit itself to a *prima facie* evaluation of the case.[23]

While discourse on concerns with administration of bail in the country has emphasised the adequacy of existing guidelines and the need for better implementation, we argue that fundamental inconsistencies and gaps in the guidance from the Supreme Court itself have contributed to problems in trial court decision-making.[24] One such issue is the lack of sufficient clarity from the Supreme Court on the relationship between the purposes of pre-trial detention and the factors, such as the nature of crime that it has deemed appropriate to consider while granting bail. For instance, the risk of reoffending is the purpose that detention is intended to protect against, while the criminal history of the accused might be a relevant factor in determining whether such a risk is present. But the Supreme Court lists risk of reoffending as a factor, without clarifying the manner in which such a risk might be demonstrated. By clarifying the purpose of detention, a clearer and more useful articulation of factors for such determination could be developed. The primary purpose of pre-trial detention ought to be to protect against the triple test of risk, that is, of reoffending, of absconding, or of tampering. While the 268th Law Commission of India Report on bail discusses the concept of risk assessment, it lists similar factors for such assessment as laid down by the Supreme Court without engagement on the relationship between the factors and the triple test.[25]

[18] *Prasanta Kumar Sarkar* (n 12).

[19] *Gurcharan Singh* (n 17).

[20] *Ram Govind Upadhyay* (n 12). See also *Gudikanti Narasimhulu v Public Prosecutor, APHC* (1978) 1 SCC 240; *Babu Singh v State of UP* (1978) 1 SCC 579; *Satish Jaggi v State of Chhattisgarh* (2007) 11 SCC 195; *Ash Mohammad v Shiv Raj Singh* (2012) 9 SCC 446; *Neeru Yadav* (n 17); *P Chidambaram* (n 12); *Jayaben v Tejas Kanubhai Zala* (2022) 3 SCC 230.

[21] *State of Rajasthan v Balchand* (1977) 4 SCC 308 [3]; *Babu Singh* (n 17) [13]; *Panchanan Mishra v Digambar Mishra* (2005) 3 SCC 143 [13]; *Sanjay Chandra* (n 17) [28].

[22] *Shahzad Hasan Khan v Ishtiaq Hasan Khan* (1987) 2 SCC 684.

[23] *Gurcharan Singh* (n 17); *Puran v Rambilas* (2001) 6 SCC 338; *Sitaram Popat Vetal* (n 12); *Chaman Lal* (n 12); *Kalyan Chandra Sarkar* (n 12); *Ajay Kumar Sharma v State of UP* (2005) 7 SCC 507; *Amarmani Tripathi* (n 17); *Lokesh Singh* (n 12); *Vaman Narain Ghiya* (n 17); *Masroor v State of Uttar Pradesh* (2009) 14 SCC 286; *Prasanta Kumar Sarkar* (n 12); *Dipak Shubhashchandra Mehta* (n 17); *Kanwar Singh Meena* (n 17); *Sanghian Pandian Rajkumar v CBI* (2014) 12 SCC 23; *Anil Kumar Yadav* (n 17); *Mahipal* (n 12); *Myakala Dharmarajam and Others* (n 17).

[24] See for example, Umang Poddar, 'India's judiciary wants a new bail law – but wouldn't implementing existing rules do the job anyway?' (Scroll.in, 16 Jul 2022) <https://scroll.in/article/1028189/judiciary-is-asking-for-a-new-bail-law-but-wouldnt-implementing-existing-rules-do-the-job-anyway> accessed 28 Feb 2023.

[25] Law Commission, '268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail' (Law Com No 268, 2017).

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Of particular interest here are questions concerning the gravity of the offence and considerations of guilt. As discussed above, the Supreme Court has declared both of these factors to be relevant considerations while deciding on bail applications. However, declaring these two factors to be relevant in and of themselves without connecting them to the purposes of pre-trial detention has resulted in widespread inconsistency and subjectivity on how these factors are accounted for in bail adjudication. We would argue that there needs to be significant clarity on how the guilt of the accused and seriousness of the offence translates into considerations under the triple test.

Guilt of the accused can only be established through the trial process, on the basis of evidence proved beyond reasonable doubt. It is unclear what purpose it serves in bail adjudication, as there is no evident link between guilt of the accused and the triple test. Even if, on the limited evidence available at the pre-trial stage, an accused appears to be guilty, if it is determined that there is no risk of the accused absconding, reoffending, or tampering, the accused ought to be released and only detained once the guilt has been established through the rigour of the trial process. Guilt and risk must be viewed independently of each other, and the court must abandon its focus on guilt during bail adjudication.

Similarly, by keeping the purposes of pre-trial detention at the heart of the judicial process, gravity of the offence can be made relevant in a manner that has consequences for the 'triple test' discussed above. The seriousness of the offence ought not to be an independent factor, but the requirements and thresholds of the 'triple test' can be shaped by issues of gravity of the offence. For instance, considerations of tampering with evidence/influencing witnesses might be very different in the context of theft on one hand and child rape on the other. The court might be fully justified in requiring a higher standard to be convinced that there is no threat of tampering with the evidence/influencing the witnesses in the context of child rape than theft. In that sense, the nature and gravity of the offence can have a bearing on the burden that the accused has to bear in convincing the court that the concerns of the 'triple test' will not play out if released on bail.[26]

The lack of clarity on the purposes of detention and the factors to be considered for pre-trial detention has additionally led to a failure to establish specific guidance that would assist in making the determination of whether bail should be granted. The court has not provided instructions on the nature of evidence that can be considered, or the standard of proof required to establish that there is sufficient risk that justifies detention of an individual. In fact, the little guidance provided thus far has been contradictory. A few early cases advised a preference in favour of grant of bail, with Justice Krisha Iyer famously stating 'bail not jail'[27] and generally advising discretion in favour of granting bail, unless exceptional circumstances require otherwise.[28] Subsequent cases, however, have repeatedly stated that 'discretion in grant of bail [is] to be exercised in a judicious manner and not as a matter of course', a starkly contradictory approach.[29]

[26]It is worth mentioning the relevance of the first proviso of section 437 of the CrPC (regulating the determination of regular bail in non-bailable matters), which requires that magistrates not release any person 'if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life'. This is the only mention of guilt or seriousness of the offence in the legislative framework of decision-making in bail matters. However, the provision operates as a limitation on the power of the magistrates to consider bail applications for offences that are outside of their trial jurisdiction (with no such corresponding limitation on Sessions Courts under CrPC, s 439) and therefore does not provide instruction on the role of guilt or seriousness in the decision-making process for bail matters. See *Satender Kumar Antil v CBI* (2022) 10 SCC 51. The law complies with the framework this article proposes, as it creates an exception for the most serious offences and limits such an exception to the magistrate level, allowing Sessions Courts to decide on these matters based on broader criteria than guilt and seriousness.

[27]*Balchand* (n 21).

[28]*Gurcharan Singh* (n 17). See also *Jeetendra v State of Madhya Pradesh* (2020) 12 SCC 536; *Naveen Singh v State of Uttar Pradesh* (2021) 6 SCC 191.

[29]*Ram Govind Upadhyay* (n 12); See also *Kalyan Chandra Sarkar* (n 12); *Ajay Kumar Sharma* (n 23); *Masroor* (n 23); *Prasanta Kumar Sarkar* (n 12); *Dipak Shubhashchandra Mehta* (n 17); *Ash Mohammad* (n 17); *Sanghian Pandian Rajkumar* (n 23); *Neeru Yadav* (n 17); *Anil Kumar Yadav* (n 17); *Mahipal* (n 12).

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The absence of specific guidance from the Supreme Court on the approach and process for deciding such applications has influenced the problematic outcomes visible in the decisions analysed in the present article, as discussed subsequently. The lack of guidance on processes specific to bail adjudication has resulted in trial courts importing factors from the trial process in bail adjudication, with an inordinate focus on guilt of the accused and gravity of offence in bail adjudication and the triple test rarely figuring in the orders. The lack of clarity on standards has resulted in an implicit preference for detention at least until the investigation is complete. Fundamentally, the Supreme Court has failed to provide guidance on the process for determination of risk in bail matters, which has resulted in a complete lack of individualised assessment of such risk in cases.

Context Setting

The over-incarceration of undertrials and the problems with the law regulating bail in India have been the subject of multiple studies and reform efforts.[30] Discourse on the issue has identified a range of influencing factors and systemic problems that have contributed to the state of current prisons.[31] While the role of the current law and practice of bail in India has been recognised, empirical research on the issue has been insufficient to identify the precise nature of the problem. The focus has largely been on prisons as a site of research and intervention, with comparatively less attention on the influence of trial court decision-making.[32]

The Prison Statistics of India reports released by the National Crime Records Bureau (NCRB) have consistently shown that undertrials constitute the majority of inmates in prisons.[33] Academic engagement on the issue has generally relied on these NCRB statistics to critique the overrepresentation of undertrials in the prison population, highlighting the fundamental concern of imprisoning individuals not convicted of any offence and the harms of detention on such individuals.[34] While there has been acknowledgement of the influence of the law and practice of arrests and bail in such over-representation, there has been little effort to empirically assess the impact of trial court practices.[35] Empirical research by civil society has generally focused on release of undertrials from prisons such as through the Undertrial Review Committees and Periodic Review Committees.[36] Similarly, a range of Law Commission of India reports have been published that engage with the

[30]See Commonwealth Human Rights Initiative, 'Circle of Justice: A National Report on Undertrial Review Committees' (Commonwealth Human Rights Initiative 2016); Commonwealth Human Rights Initiative, 'Summary of CHRI's First National Watch Report on the Functioning of the Under Trial Review Committees: Compliance To 'Re-inhuman Conditions In 1382 Prisons'' (Commonwealth Human Rights Initiative 2016); Commonwealth Human Rights Initiative, 'Road to Release: Third Watch Report on Rajasthan's Periodic Review Committees' (Commonwealth Human Rights Initiative 2015); Commonwealth Human Rights Initiative, 'Undertrial Review Committees: Setup and Functioning in West Bengal' (Commonwealth Human Rights Initiative 2015); Commonwealth Human Rights Initiative, 'Undertrial Review Mechanisms: West Bengal' (Commonwealth Human Rights Initiative 2014); Commonwealth Human Rights Initiative, 'Undertrials: A Long Wait to Justice. A Report on Rajasthan's Periodic Review Committees' (Commonwealth Human Rights Initiative 2011); Amnesty International, 'Justice Under Trial: A Study of Pre-Trial Detention in India' (Amnesty 2017); Daksh, 'Access to Justice Survey' (Daksh 2015); *Moti Ram & Ors v State Of Madhya Pradesh* 1978 AIR 1594; *Hussainara Khatoon & Ors* (n 13).

[31]See n 2.

[32]See Centre for Law and Policy Research, 'Reimagining Bail Decision Making Report: An Analysis of Bail Practice in Karnataka and Recommendations for Reform' (2020) <https://clpr.org.in/wp-content/uploads/2020/03/BailReport_AW_Web_Final.pdf> accessed 4 Feb 2022.

[33]See, eg, National Crime Records Bureau, 'Prison Statistics of India Report 2020' (n 1).

[34]See n 2.

[35]Centre for Law and Policy Research (n 32).

[36]See Commonwealth Human Rights Initiative, 'Circle of Justice' (n 30); Commonwealth Human Rights Initiative, 'Summary of CHRI's First National Watch Report' (n 30); Commonwealth Human Rights Initiative, 'Road to Release' (n 30); Commonwealth Human Rights Initiative, 'Undertrial Review Committees: Setup and Functioning in West Bengal' (n 30); Commonwealth Human Rights Initiative, 'Undertrial Review Mechanisms: West Bengal' (n 30); Commonwealth Human Rights Initiative, 'Undertrials: A Long Wait to Justice' (n 30); Amnesty International (n 30).

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issues of undertrial detention and bail, but these have generally focused on data from prisons or a doctrinal analysis of the law and have not considered evidence of trial court practices.[37]

The disproportionate focus on prisons has resulted in a failure to identify the key contributors to the large undertrial population: is it due to excessive criminalisation of particular populations, indiscriminate arrests failing to comply with the law, bail applications being rejected, or the imposition of onerous conditions that a majority socio-economically vulnerable population cannot comply with?[38] While there has been extensive discourse on the problems with a monetary bail system in government reports, academic literature, and Supreme Court judgments, the reality is that there is no evidence of the extent of the contribution of this compliance failure to the incarceration of undertrials.[39] Before the 'undertrial problem' can be addressed, it is essential that the precise contribution of various factors be identified, which could then be remedied accordingly. A component of this process has to be evaluating the decisions of trial courts on bail and the corresponding detention or release of undertrials per prison records towards identifying the source of the problem and ultimately developing effective reforms.

An exception to this focus on prisons was the empirical study of trial court decision making undertaken by the Centre for Law and Policy Research (CLPR) in 2020.[40] The study involved a combination of court observations and analyses of court records in three districts of Karnataka to assess the outcomes in first productions before magistrates in terms of release on bail or the nature of custody imposed (ie, police *versus* judicial). The study found that effective legal representation (defined as filing an application for bail) and the nature of the offence strongly influenced the nature of outcomes. In addition, analysis of court records revealed that bail is more likely to be granted later in the case, usually fifteen days after arrest.

This article studies the outcomes of bail applications before the Sessions Courts of Delhi to assess the extent of trial courts' rejection of bail and conducts an in-depth analysis of the processes and

[37]Law Commission, '36th Report on Section 497, 498 and 499 of the Code of Criminal Procedure 1898 - Grant of Bail with Conditions' (Law Com No 36, 1967); Law Commission, '41st Report on The Code of Criminal Procedure 1898' (Law Com No 41, 1969); Law Commission, '78th Report on Congestion of Undertrial Prisoners in Jail' (Law Com No 78, 1979); Law Commission, '154th Report on The Code of Criminal Procedure 1973' (Law Com No 154 1996); Law Commission, '177th Report on Law Relating to Arrest' (Law Com No 177, 2001); Law Commission, '203rd Report on Section 438 of the Code of Criminal Procedure, 1973 as Amended by the Code Of Criminal Procedure (Amendment) Act, 2005 (Anticipatory Bail)' (Law Com No 203, 2007); Law Commission, '268th Report' (n 25).

[38]See Usha Ramanathan, 'Ostensible Poverty, Beggary and the Law' (2008) 43 Economic and Political Weekly 33; Prabha Kotiswaran, 'How Did We Get Here? Or A Short History of the 2018 Trafficking Bill' (EPW Engage, 18 Jul 2018) <https://www.epw.in/engage/article/how-did-we-get-here-or-short-history> accessed 23 May 2020; Ajita Banerjie, 'Decriminalising Begging Will Protect Transgender Persons from Police Harassment' (The Wire, 17 Aug 2018) <https://www.thewire.in/rights/decriminalizing-begging-will-protect-transgender-persons-from-police- harassment> accessed 22 May 2020; 'India: Stop 'Social Cleansing' in Bangalore – Illegal Mass Evictions Against a Transgender Community' (Human Rights Watch, 18 Nov 2008) <https://www.hrw.org/news/2008/11/18/India-stop-social-cleansing-bangalore> accessed 22 May 2020; Mrinal Satish, '"Bad Characters, History Sheeters, Budding Goondas and Rowdies': Police Surveillance Files and Intelligence Databases in India' (2011) 23 National Law School of India Review 133; Ankita Sarkar & Medha Deo, 'Masquerading Violent Discrimination as Preventive Action: An Analysis of Section 110 of the Criminal Procedure Code' (The P39A Criminal Law Blog, 26 Jan 2021) <https://p39ablog.com/2021/01/26/masquerading-violent-discrimination-as-preventive-action-an-analysis-of-section-110-of-the-criminal-procedure-code> accessed 4 Feb 2021; Law Commission, '177th Report' (n 37) 149; Aparna Chandra & Keerthana Medarametla, 'Bail and Incarceration: The State of Undertrial Prisoners in India', in Shruti Vidyasagar, Harish Narasappa & Ramya Sridhar Tirumalal (eds), Approaches to Justice in India (Eastern Book Company 2017).

[39]See *Moti Ram & Ors* (n 30); *Hussainara Khatoon & Ors* (n 13). See also *Sandeep Jain v NCT of Delhi* (2000) 2 SCC 66; *BN Srivastava v CBI* (2018) 14 SCC 209; *MD Dhanapal v State* (2019) 6 SCC 743; Legal Aid Committee, 'Report of the Legal Aid Committee : Appointed by the Government of Gujarat Under Government Resolution Legal Department No. Lac-1070-D dated 22nd June 1970' (Government Central Press 1971); Expert Committee on Legal Aid, 'Processual Justice to the People : Report of the Expert Committee on Legal Aid, May 1973' (Ministry of Law Justice and Company Affairs, Government of India 1974); Law Commission, '268th Report' (n 25); Murali Karnam & Trijeeb Nanda (n 2); Raghavan (n 2); Madhurima (n 2); Sudesh Kumar Sharma (n 2); Bhagwati (n 2).

[40]Centre for Law and Policy Research (n 32).

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reasonings in such matters to identify areas of intervention and reform. This study explores the factors that primarily influence the outcome of the case, and the evidence (or lack thereof) considered in such proceedings. While the study has limitations, it serves as the first in-depth analysis of reasoning by trial court judges in bail decisions towards instituting more effective reform at the site of decision-making on detention of undertrials.

Methodology and Scope

In light of the ease of access, the study relied on the eCourts system to compile bail orders and focused on the state of Delhi due to the advanced level of digitisation of trial court matters in the state.[41] The eCourts system records bail applications to Sessions Courts as a separate case type (unlike applications to magistrates, which were far more difficult to access separately), that is, 'Bail Matters' for the state of Delhi. The study relied on 'data scraping' to collate information from the case status pages and copies of all orders of all Bail Matters cases in the state of Delhi between 2017 and 2019.

The scraping process resulted in the extraction of data of 94,342 cases. From these, 26,142 (27.71% of the total cases) had no orders available online and were thus excluded. As the study was focused on decision-making in regular bail cases, 29,534 cases were excluded on the basis of case types and outcomes, including orders in matters of anticipatory bail or cancellation of bail and any form of disposal of a matter other than being allowed or dismissed, such as applications that were dismissed as withdrawn. The largest proportion of such cases were anticipatory bail cases, totalling 24,963 (26.46% of the total cases). This process of filtering ultimately resulted in a dataset of 38,666 cases.

Due to the high volume of cases, the team adopted a second level of filtering on the basis of the nature of offence. It is worth mentioning that this exercise required separately extracting information on the offence from the final bail order, since the eCourts' 'case status' page largely fails to accurately record the various offences arrested or charged under.[42] The team then adopted a two-pronged classification approach. The first step was to identify whether the case was bailable and non-bailable, wherein the inclusion of any non-bailable section resulted in the case being classified as a non-bailable case. The team restricted its analysis to IPC and non-bailable cases, excluding cases that included an offence under a special legislation or that involved only bailable offences.[43]

The second category was that of seriousness, determined based on the highest punishment possible for the accused across the different sections arrested under or charged with. This means that if the accused was charged under section 376 of the IPC (which carries the maximum punishment of life imprisonment), as well as section 379 of the IPC (which carries the maximum punishment of three years), then the case would be classified as one of life imprisonment since that is the maximum punishment possible for that accused if convicted of all sections arrested for or charged under. The cases were then accordingly classified into the following categories:

- below three years,
- three to six years,
- seven years and above, below life,
- life imprisonment, and
- death penalty.

[41]The authors undertook a preliminary analysis of digitisation in the eCourts system across all states based on a random sample of court data and found that Delhi had one of the highest proportions of orders uploaded online.

[42]Three primary errors emerged: either the sections were not specified at all, the procedural section 437 of the CrPC was recorded, or only one of the sections punishable under was mentioned. This made it difficult to analyse the offences cumulatively, for example to identify the most serious offence accused or charged.

[43]Limiting the dataset to IPC offences means that if in a 376 IPC case a special legislation such as POCSO was also applied, such a case would have been excluded from the final dataset for analysis.

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On an analysis of the data, the team chose specific offences for analysis that had the highest frequency in particular seriousness categories: 379 IPC (theft) as the most frequent in the 'three to six years' category and 376 IPC (rape) as the most frequent in the 'life imprisonment' category.[44] This means that amongst cases in which the maximum punishment possible was six years, the section that appeared most frequently was 379 IPC. We chose this sample of cases to ensure representation of two varied offences in order to contrast the responses by judges to different offences as well as to capture the broad spectrum of responses by judges across all orders within each offence.

The study is limited by its focus on judicial orders, and thus unable to account for the oral arguments and evidence that may be presented in court and not recorded in the final order. In addition, by sourcing data from the eCourts system, the analysis excludes a large number of cases for which orders were unavailable online. The data also did not capture prior efforts to secure bail in these cases. Furthermore, the study is restricted by its focus on two offences, which became necessary due to the infeasible size of the larger dataset under consideration. Finally, it is worth mentioning that while data is available on the nature of conditions imposed when bail is allowed, without access to corresponding information on release from prisons, the study is limited in its capacity to comment on the issue of onerous bail conditions.

However, since the study analysed all available bail orders under both offences across Delhi in the specified time period, it presents a comprehensive overview of the processes and approach to such proceedings across judges and across two distinct and varied offences. While further research may be necessary that overcomes these specific limitations, the extensive analysis of these orders provides valuable insights into the broader approach to such proceedings in a manner that can inform such future research and the imagination of systemic reform.

The following section documents the findings of the quantitative and qualitative analysis of bail orders and its implications for bail reform in India. This article primarily analyses the nature of arguments raised by the defence and prosecution as well as the reasoning adopted by judges on three issues: the focus on guilt of the accused as opposed to risk under the triple test, the lack of individualised evidence and determination in such orders, and the lack of standards and processes governing bail adjudication that allows for inconsistent and problematic decision-making by trial court judges.

Critical Analysis

At the outset, it is important to recognise the unique nature of the decision to detain or release someone pending trial. It must necessarily be seen as distinct from punitive detention, which is imposed as punishment for the commission of an offence only when the person has been found guilty beyond reasonable doubt, based on admissible evidence. An undertrial remains innocent of the offence accused of/charged with and therefore cannot not be detained punitively. This protection is located in the presumption of innocence, which requires the system to presume that a person is innocent until proven guilty and also protects them from the consequences that follow a conviction of an offence, *unless* extraordinary circumstances dictate otherwise.[45] Detention

[44]It is worth mentioning that while the orders do list the sections that the accused faces charges under, these orders usually only specify '376 IPC' and do not list the sub-sections under 376 IPC that apply to the case. This has prevented a more disaggregated analysis of rape cases.

[45]While there have been differing interpretations of the role of presumption of innocence in the Constitutional framework (see Vrinda Bhandari, 'Inconsistent and Unclear: The Supreme Court of India on Bail' (2013) National University of Juridical Sciences Law Review 549; and S Bhardwaj, 'A fundamental right to be presumed innocent' (*Project39A Blog*, 30 June 2022) <https://p39ablog.com/2022/04/05/a-fundamental-right-to-be-presumed-innocent/> accessed 4 Feb 2022), courts have recognised the intersection between bail and the presumption of innocence. In particular, the court in *Sanjay Chandra* (n 17) [21]–[22] has stated, 'The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty … From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases,

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pending trial can only be justified if it is imposed in order to prevent a harm that specifically outweighs the right to liberty and presumption of innocence of an individual: to prevent absconding, reoffending, and tampering of evidence (the 'triple test').[46]

While these purposes are well-recognised, their implications for the processes and restrictions that ought to then be incorporated in making such determinations are less clear. Unlike a trial, which is focused on the establishment of guilt of the crime accused of, pre-trial detention proceedings function as a determination of risk of harm. Making this determination requires a specialised process to identify specific and individualised evidence of the risk of the accused inflicting any one or more of the harms that the detention is intended to protect against. Guilt is not relevant to the determination since this is not about punishment for an offence committed. Instead, it requires specific evidence that there is significant risk that the individual will inflict harm on the trial process that justifies their detention.

The data of bail orders from the Sessions Courts of Delhi reveals a conflation between punitive and pre-trial detention, which is fundamentally preventive, with the courts importing factors from the trial process such as guilt and seriousness of offence into the pre-trial detention process. There is also a complete lack of individualisation of the process, with *pro forma* arguments and reasoning dominating the orders. Finally, there is a lack of standards or processes that govern these proceedings – a result of failure of guidance from the Supreme Court that requires urgent redress.

Overview of the Dataset

The study analysed data from 1,893 theft cases and 1,243 rape cases, documenting the outcome of each case, the arguments of the prosecution and defence, and the reasoning of the judge.[47] Although the orders did not discuss the facts of the cases in much detail, the cases cover a range of different offences, with theft of mobile phones and vehicles constituting the majority of theft cases, at 38.50% and 26.51% respectively. Among rape cases where such information was available, 41.94% cases comprised 'false promise to marry' cases that allegedly involved consensual relations between the accused and the complainant on the promise of marriage, which the accused did not ultimately comply with. Outside of this category, acquaintance rape constituted a high proportion of rape cases at 28.82%, which includes rape by accused previously known to the complainant such as tenants, landlords, neighbours, etc (see Appendix 2). It is worth mentioning that this dataset is not representative of cases being prosecuted generally, but is a limited representation (due to low availability of information in orders) of cases in which bail was sought before the Sessions Court.[48]

The data also revealed that such matters are generally disposed of quickly. A majority of applications were listed the day after being filed and disposed of on the same day of being listed, with 65.40% of theft cases and 55.99% of rape cases disposed of on the same day of being listed. There were a few concerning instances of such matters taking more than thirty days for disposal despite the general urgency of such matters, constituting less than 1% of theft cases and 2.41% of rape cases. 63.38% of applicants from theft cases and 53.3% of applicants from rape cases were in custody for a period between sixteen and sixty days before their matter was decided (see Appendix 1).[49]

'necessity' is the operative test.' See Abhinav Sekhri, 'Separating Crime from Punishment: What India's Prisons Might Tell Us about its Criminal Process' (2021) 33(2) National Law School of India Review 278; Law Commission, '268th Report' (n 25).

[46]See *Sanjay Chandra* (n 17); *P Chidambaram* (n 12).

[47]Each case represents one application of one accused in one case or FIR. This means that if there were multiple accused in a single case who filed applications for bail, each application is recorded as a separate case in the dataset. In addition, if there were multiple FIRs registered against the same accused, each FIR in which an application for bail was made is recorded as a separate case.

[48]The description of facts in the case was available in only 1143 theft cases (60.38% of total cases) and 701 rape cases (56.40% of the total cases).

[49]Information was unavailable in 446 theft cases and 530 rape cases.

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As can be seen from Tables 1 and 2 below, a majority of both theft and rape applications for bail were allowed by Sessions Courts, with the court granting bail to the accused to be released from detention (subject to conditions) in 69.62% of theft cases and 54.38% of rape cases.

Table 1. Outcome of Bail Applications for Theft Cases

Theft Outcome		
Outcome	Number of Cases	Proportion
Allowed	1,318	69.62%
Dismissed	575	30.38%
Grand Total	**1,893**	

Table 2. Outcome of Bail Applications for Rape Cases

Rape Outcome		
Outcome	Number of Cases	Proportion
Allowed	676	54.38%
Dismissed	567	45.62%
Grand Total	**1,243**	

While a much higher proportion of bail applications for theft cases were allowed, the proportion of bail applications for rape cases that were allowed was surprising given the courts' emphasis on not granting bail in 'serious offences' (as discussed in the 'Legal Framework' section). Even section 437 of the CrPC bars release by magistrates for such crimes, requiring that no person shall be released 'if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life'.[50]

Although the Sessions Courts retain the power to release the accused on bail in such cases, a majority of the rape cases (65.48%) in the dataset that were granted bail appeared to follow the guidance under section 437 of the CrPC by releasing the accused on the basis of evidence of the accused's innocence (see Table 6). However, an analysis of the orders revealed the problematic reasoning on which such decisions are based. The defence and many of the judges that allowed bail to be granted in such cases would rely on problematic grounds such as the character of the complainant or delays in registering the complaint after the incident. These are concerning as they blame the complainant, stating that such an educated woman 'should have known better' rather than recognising the accused's fault in the act, or fail to recognise that there may be many reasons for a delay in registering the complaint, which is not indicative of the complaint being false.[51]

[50]CrPC, s 437.

[51]See Preeti Pratishruti Dash, 'Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi' (2020) 2(4) Indian Law Review 2; Mrinal Satish, *Discretion, Discrimination and Rule of Law: Reforming Rape Law Sentencing in India* (Cambridge University Press 2016) 61–90; Ved Kumari & Ravindra Barn, 'Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India' (2015) 55(3) British Journal of Criminology 435.

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There were 563 theft cases in which the application was dismissed, and the judges provided some reasoning for their decisions. Similarly, there were 561 of such rape cases where the case was dismissed with some reasoning provided. It is important to note that each factor in Tables 3 to 6 was counted independently in each order – this means that an order dismissing the application for bail may rely on both criminal antecedents of the accused and seriousness of the offence, each of which is counted once. The factors discussed below therefore overlap across bail orders, but the proportion of each factor across total orders is presented to provide some perspective of its relevant prevalence.

Table 3. Theft Judicial Reasoning – Factors for Dismissal

THEFT		
Judicial Reasoning – Factors for Dismissal	Number of Cases	Proportion of Dismissed Cases with Reasoning (563)
Criminal antecedents	322	57.19%
Seriousness of offence	293	52.04%
Evidence of guilt	262	46.54%
Necessity of custody	166	29.48%
Likelihood of reoffending	94	16.70%
Likelihood of tampering of evidence	57	10.12%
No change in circumstances since previous application	57	10.12%
Likelihood of absconding	40	7.10%
Conduct and role of the accused	10	1.78%

Table 4. Rape Judicial Reasoning – Factors for Dismissal

RAPE		
Judicial Reasoning – Factors for Dismissal	Number of Cases	Proportion of Dismissed Cases with Reasoning (561)
Seriousness of offence	449	80.04%
Evidence of guilt	324	57.75%
Necessity of custody	289	51.52%
Likelihood of tampering of evidence	148	26.38%
Likelihood of absconding	42	7.49%
No change in circumstances since previous application	42	7.49%
Case law cited inapplicable	34	6.06%
Plea raised relates to proposed defence	22	3.92%
Offence is non-compoundable, and compromise not ground for bail	17	3.03%
Criminal antecedents	14	2.50%

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There were 1,171 theft cases in which the application was allowed, and the judges provided some reasoning for their decisions. Similarly, there were 588 of such rape cases where applications were allowed with some reasoning provided.

Table 5. Theft Judicial Reasoning – Factors for Allowing

THEFT		
Judicial Reasoning – Factors for Allowing	Number of Cases	Proportion of Allowed Cases with Reasoning (1,171)
Custody not required	838	71.56%
Period undergone in custody	813	69.43%
Absence of criminal antecedents	268	22.89%
Personal circumstances	163	13.92%
Evidence of innocence	115	9.82%
Bail granted to co-accused	114	9.74%
Less serious offence	95	8.11%
Length of trial	78	6.66%
Will comply with conditions	45	3.84%
Family/others undertake to monitor	29	2.48%
Granted bail in other cases	20	1.71%
Limitations of prosecution/investigation	18	1.54%
Settlement of matter	12	1.02%
Will not abscond/misuse liberty/tamper with evidence	11	0.94%

Table 6. Rape Judicial Reasoning – Factors for Allowing

RAPE		
Judicial Reasoning – Factors for Allowing	Number of Cases	Proportion of Allowed Cases with Reasoning (588)
Evidence of innocence	385	65.48%
Period undergone in custody	281	47.79%
Custody not required	258	43.88%
Absence of criminal antecedents	62	10.54%
Personal circumstances	52	8.84%
Marriage between complainant and accused	44	7.48%
Complainant not objecting to bail	27	4.59%
Length of trial	26	4.42%
Will not abscond/misuse liberty/tamper with evidence	23	3.91%
Bail granted to co-accused	18	3.06%
Limitations of prosecution/investigation	13	2.21%
Less serious offence	13	2.21%

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A deeper analysis of the prosecution and defence arguments as well as judicial reasoning reveals fundamental problems plaguing the determination of bail matters before the Sessions Courts of Delhi. This will be examined below.

Guilt versus Risk

In essence, the data reveal a conflation between punitive and pre-trial detention, which should be preventive in scope. Trial courts fail to separate the pre-trial detention process from the trial process and therefore end up engaging only with aspects of the trial itself. In opposing bail, prosecutors usually simply recount the evidence against the accused, making such arguments in 52.26% of theft cases and 61.82% of rape cases. Otherwise, they would highlight the seriousness of the offence accused of, as they did in 36.53% of theft cases and 69.70% of rape cases (see Appendix 3). Similarly, the defence will generally argue that the accused is innocent and has been falsely implicated; this was done in 80.75% of theft cases and 93.04% of rape cases (see Appendix 4).

This focus on guilt and the seriousness of the offence also played an outsized role in judicial reasoning in such matters. Among bail applications that were dismissed, evidence of guilt was a ground relied on by judges in 46.54% of theft orders and 57.75% of rape orders, while seriousness of the offence played a role in 52.04% of theft cases and 80.04% of rape cases. Similarly, evidence of innocence of the accused was a ground in 65.48% of rape cases in which the application for bail was granted (see Tables 3 and 4).

The triple test rarely featured in the orders, whether in arguments from counsels or in the reasoning of the judge. The likelihood of absconding, tampering, or reoffending was argued by the prosecution in 11.49%, 10.64%, and 8.38% of theft cases respectively, while the likelihood of tampering and absconding was argued by the prosecution in 22.01% and 7.20% of rape cases respectively (see Appendix 3). The defence argued that the accused would not abscond, misuse liberty, or tamper with evidence in only 6.46% of theft cases and 5.54% of rape cases (see Appendix 4). Among orders where the application for bail was dismissed, the judges highlighted the likelihood of reoffending, tampering, absconding in 16.70%, 10.12% and 7.10% of theft orders respectively and the likelihood of tampering and absconding in 26.38% and 7.49% of rape orders respectively (see Tables 3 and 4). Conversely, the ground that the accused would not abscond, misuse liberty, or tamper with evidence was mentioned in only 0.94% of theft orders and 3.91% of rape orders in which bail was granted (see Tables 5 and 6).

The focus on guilt and seriousness arises from the Supreme Court guidance itself, which problematically lists them as independent factors for consideration in such matters. As discussed in the 'Legal Framework' section above, guilt ought to play no role in adjudication in the pre-trial stage as it is independent of the purpose of pre-trial detention, that is, risk in terms of the triple test. Furthermore, seriousness of offence should not be an independent factor in such determinations but can be relied on in terms of its links with the risks that pre-trial detention is intended to protect against. If a particular offence carries a higher likelihood of risk, the court may place a higher burden to establish the lack of risk before bail is granted. However, reliance on the gravity of offence as an independent factor is a problematic importation of aspects of trial into the pre-trial process.

This shows a failure to recognise the unique nature of proceedings that pre-trial detention represents, and a reliance on familiar processes from trial instead of developing specialised processes required for the determination of risk of harm. Such processes must necessarily be individualised and must also require their own standards of establishing such risk. However, the current practice is far removed from compliance with such individualised processes.

Lack of Individualisation

The decision-making process in bail cases ought to be individualised. It requires a determination that the specific accused is at risk to abscond, reoffend, or tamper. In addition, the imposition of

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conditions when bail is allowed requires individualisation as it presumes that a certain condition, generally financial, will deter the accused from absconding or from otherwise harming the trial process. This requires evidence distinct from the trial process, unrelated to the offence, but specific to the individual in addition to evidence of the likelihood of the risk they pose.

However, with current practice simply importing the trial process to such determinations, there is little to no effort by trial courts to individualise the process. The prosecution routinely opposes bail based on *pro forma* arguments of evidence of guilt against the accused, opposing bail in 96.81% of theft cases and 96.59% of rape cases in which the submissions of the prosecution were recorded (see Appendix 3). Similarly, the defence presents near identical arguments of innocence of the accused, together with a statement of the period the accused spent in custody (see Appendix 4). The matters are disposed of quickly by the judge based on a few common grounds that are repeated across cases, such as on evidence of guilt or innocence, seriousness of the offence, criminal antecedents against the accused, period undergone in custody, and the necessity of custody of the accused (see Tables 5 and 6).

A ground that appeared frequently in arguments and the reasoning of the judge is the necessity of the custody of the accused, which was relied on without any individualisation specific to the accused. In 13.65% of theft cases and 24.32% of rape cases, the prosecution claimed that the custody of the accused is required as the investigation remains incomplete, or recovery has not yet been undertaken (see Appendix 3). Conversely, the defence would argue that custody is not required anymore as the investigation or recovery is complete or the chargesheet has been filed; with these claims forming 57.53% of theft cases and 33.37% of rape cases (see Appendix 4). Among cases where bail was granted, the courts invoked such practical considerations of custody not being required in 71.56% of theft cases and 43.88% of rape cases (see Tables 3 and 4). While dismissing bail applications, the necessity of custody of accused played a role in judicial reasoning in 29.48% of theft cases and 52.52% of rape cases (see Tables 5 and 6). The concern with such reasoning is the implicit presumption that custody is required for all individuals during the investigation process, with no specific engagement of the court on how such custody is essential for that particular accused in that particular offence or why such requirements could not be met without placing the accused in custody. This lack of individualised justification is present across prosecution and defence arguments as well as judicial reasoning. Specifically, amongst orders granting bail, it represents a concerning presumption in favour of detention at least until the investigation is complete.

The lack of individualisation is also evident from the absence of socio-economic profiling, with personal circumstances appearing only in a minority of defence arguments and orders in which bail was granted. Personal circumstances including residence, familial circumstances, age, and occupation were presented by the defence in 25.92% of theft cases and 23.89% of rape cases (see Appendix 4). However, among the orders granting bail, personal circumstances were grounds in the judicial reasoning in only 13.92% of theft cases and 8.84% of rape cases (see Tables 3 and 4). Socio-economic circumstances assume particular relevance in bail proceedings, with information on residential status and familial ties, among others, being pertinent to determination of risk.[52] This should also be seen in light of the class and caste character to bail decision-making, with the undertrial population in prisons comprising a majority of socio-economically vulnerable individuals.[53]

[52]See *Hussainara Khatoon* (n 13).

[53]See National Crime Records Bureau, 'Prison Statistics India Report 2019' (Ministry of Home Affairs 2020) <https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf> accessed 4 Feb 2022; Vijay Raghavan & Roshni Nair, 'A Study of the Socio-Economic Profile and Rehabilitation Needs of Muslim Community in Prisons in Maharashtra' (Tata Institute of Social Sciences 2011); Priti Bharadwaj, 'Pre-trial Detention and Access to Justice in Orissa' (Commonwealth Human Rights Initiative 2010); Commonwealth Human Rights Initiative, 'Right to Legal Aid & Access to Justice: The State of Undertrials in Alwar Prison of Rajasthan' (Commonwealth Human Rights Initiative 2016); Pandit Govind Ballabh Pant

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While the triple test appears infrequently, when it does appear there are negligible efforts to establish a specific risk of the accused absconding, reoffending, or tampering with witnesses. Generally, dismissals on the basis of such risk simply relied on bald prosecutorial declarations of risk of the accused violating the triple test or otherwise merely highlighting the seriousness of the offence as evidence of such risk. Similarly, even amongst the orders that granted bail, the judges simply held that there was 'no chance of the accused absconding' or 'no likelihood of tampering with evidence', without any specific individualised evidence of why the accused was unlikely to pose a risk.

An important aspect of the pre-trial detention process is the guarantees or security imposed when bail is granted to ensure that the accused attends the trial and complies with the other conditions of bail. The guarantees for compliance usually take the form of surety from another person who guarantees the attendance of the accused in court and who will forfeit a particular sum if the accused fails to attend trial or comply with the conditions of bail.[54] The full amount is to be returned on completion of trial. The CrPC prescribes that the amount of bond should not be excessive and should be fixed according to the circumstances of the case.[55]

While imposing conditions of bail, both the theft and rape orders imposed a set of standard amounts across cases, choosing between the sums of INR 10,000, 15,000, 20,000, and 25,000. Nearly all orders required a bond and at least one surety, with only three orders from the rape cases requiring a personal bond only without a surety (see Appendix 8). Not a single order in the entire dataset explained the reasons for the choice of particular conditions or the amounts imposed, or how the condition related to the individual circumstances of the accused. With the corresponding lack of information in the orders on the socio-economic profile of the accused, it is a serious question whether the imposition of conditions is individualised, despite the CrPC providing processes to do so.[56] As long as data on compliance is unavailable, there are limits to the capacity to comment on the implications of this practice, but the lack of discussion in the order while imposing conditions should still be cause for grave concern.

Lack of Standards and Processes

The problems observed across such cases arise from a lack of guidance, both from the statute and Supreme Court judgments. At present, case law conflates the purpose of detention, the factors that must be considered in such decision-making, and the evidence required for such a determination. For instance, cases refer to the 'risk of absconding' as a factor in evaluating whether bail should be granted, when in reality it is the purpose of pre-trial detention that is one of the risks detention is aimed to protect against. This conflation of factors and purpose provides little explanation of how such determinations of risk should be done. As an example, 'lack of familial roots' might be an accurate predictor of the risk of absconding and would thus be an example of a factor that should be considered in bail adjudication in assessing whether there is a risk of absconding.

In addition, there is no clarity on the standards of proof in such matters that would explain which party ought to present evidence, the standard of evidence that must be proven, and the consequences for failing to do so. In fact, the Supreme Court has directly contradicted itself on this point both expressing that discretion should be in favour of granting bail and stating that the 'discretion in grant of bail [is] to be exercised in a judicious manner and not as a matter of course'.[57]

Institute of Studies in Rural Development Lucknow, 'Children of Women Prisoners in Jails: A Study in Uttar Pradesh' (Planning Commission Government of India 2004).

[54]See *Moti Ram* (n 30).

[55]CrPC, s 440(1).

[56]CrPC, s 441.

[57]*Balchand* (n 21); *Gurcharan Singh* (n 17); *Jeetendra* (n 28); and *Naveen Singh* (n 28) have all expressed that bail is the rule while jail is the exception. See also *Ram Govind Upadhyay* (n 12); *Kalyan Chandra Sarkar* (n 12); *Ajay Kumar Sharma*

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The lack of such standards results in an implicit presumption in favour of detention during the period of investigation, as evident from the reasoning of judges in matters that were allowed (as discussed in the 'Lack of Individualisation' section).[58]

All of these issues stem from a failure to truly engage with the unique nature of proceedings in determining release pending trial. There is no guidance on the nature of evidence required in such proceedings, resulting in evidence of guilt being the primary point of engagement in orders. Any other factors that appear in the orders rely on vague allegations and statements as proof, as there are no standards for the evidence required for such grounds to be considered. For instance, it is worth noting that the criminal history of the accused in question was a frequent ground of consideration in theft cases. Criminal antecedents were invoked by the prosecution in 44.07% of theft cases and were invoked by judges in orders dismissing bail in 57.19% of theft cases (see Appendix 3 and Table 5). Yet the evidence relied upon to claim such criminal history raises serious concerns with prior convictions against the accused recorded in only fifteen orders in which criminal antecedents were invoked by judges to dismiss bail (4.66% of the orders), and the remaining relying on vague statements of 'previous involvement in several cases', which were considered sufficient for dismissal of the application.

Even the seriousness of the offence, when invoked, relied on vague statements of 'seriousness and gravity of the offence' instead of any evidence that establishes the seriousness of the particular crime accused of. Interestingly, many of the cases in which the Supreme Court laid down factors for deciding bail matters involved serious offences such as murder, and saw the Supreme Court overturning the High Court's decisions to grant bail.[59] It is this reality that likely influenced the emphasis on the seriousness of the offence in guidelines, but this both fails to acknowledge the differing standards under the law for granting bail in offences that potentially carry the death penalty and life imprisonment (see the 'Legal Framework' section) and fails to provide adequate guidance for other offences. For instance, what constitutes seriousness in an offence for theft as compared to murder? There is no clarity from the Supreme Court and seriousness is repeatedly invoked by trial court judges with no deeper engagement on the issue, with seriousness of the offence invoked by judges in this manner in 52.04% of the theft cases that were dismissed (see Table 5).

One pattern that emerged from the data was the stark variation in outcomes amongst judges. At least four judges from the dataset granted bail in over 95% of theft cases they considered, while five judges allowed bail applications in over 80% of the rape cases disposed of by them. Conversely, three judges dismissed over 70% of the bail applications for theft cases decided by them, while another four judges dismissed over 70% of the bail applications for rape cases disposed of by them. On the other hand, two judges allowed 100% of the bail applications for theft and rape matters considered by them respectively (see Appendix 5). The data raises questions about the role of the judge in the variation in outcomes and its links with the lack of standards and processes in bail adjudication. However, without further and deeper investigation, involving examination of case records and observation of court proceedings, such claims cannot be definitely made. But the data does indicate the need for further research on this question.

(n 23); *Masroor* (n 23); *Prasanta Kumar Sarkar* (n 12); *Dipak Shubhashchandra Mehta* (n 17); *Ash Mohammad* (n 17); *Sanghian Pandian Rajkumar* (n 23); *Neeru Yadav* (n 17); *Anil Kumar Yadav* (n 17); and *Mahipal* (n 12), which have expressed the latter standard.

[58]See also TN Singh 'The Hussainara Case: Some Socio-Legal Aspects of Pretrial Detention' (1980) 1 Supreme Court Cases Journal J-1.

[59]See *Ram Govind Upadhyay* (n 12); *Satish Jaggi* (n 17); *Neeru Yadav* (n 17); *Jayaben* (n 17); *Prasanta Kumar Sarkar* (n 12); *Amarmani Tripathi* (n 17); *Kalyan Chandra Sarkar* (n 12); *Chaman Lal* (n 12); *Harjit Singh v Inderpreet Singh @ Inder* Crl App 883 of 2021; *Mahipal* (n 12); *Kanwar Singh Meena* (n 17); *Prahlad Singh Bhati* (n 17); *Manoj Kumar Khokhar* (n 12); *Sunil Kumar* (n 12); *State of Kerala* (n 17); *Bhoopendra Singh* (n 17); *Shri Mahadev Meena* (n 17).

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It is also worth mentioning that while most orders were reasoned, there were a few that did not provide any specific reasons for their ultimate decision, constituting 8.40% of theft cases and 7.56% of rape cases (see Appendix 6). While a handful provided no reasoning at all, in general these orders would recount arguments from both sides and then simply state that 'in view of overall facts and circumstances' bail is granted or rejected. While the proportions are small, it is a matter of concern that such orders are appearing at all, given that the Supreme Court has repeatedly stated the importance of reasons being given in bail orders, both to demonstrate that the decision involved application of mind and to enable any court in appeal to assess the reasoning behind the decision under consideration.[60]

In addition, a small but significant pattern that emerged was the impact of conceding statements on the outcome of the case, which is representative of the lack of processes governing such proceedings. In a small proportion of cases, the order would record concessions or admissions from the prosecution, investigating officer, or complainant. This data reveals that the application would be allowed in a far higher proportion if there was a conceding statement from any such party and would be dismissed at a greater proportion if there was an indicting statement from such party. In all thirty-five theft cases and twenty-six rape cases where the prosecution made a conceding statement or other admission, bail was granted (see Appendix 3).[61] An investigating officer's conceding statement saw bail being granted in 91.63% of theft cases and 88.30% of rape cases, while an indicting statement saw 69.04% of theft cases and 59.03% of rape cases dismissed.[62] Amongst the rape cases, a statement from the complainant supporting the dismissal of the application saw 68.32% of applications being dismissed, while a statement not objecting to bail being granted saw 89.52% of the applications allowed (see Appendix 7). The issue with such outcomes is that it is located in a context of complete lack of guidance on the role of the prosecution, investigating officer, or complainant in such a process, which ultimately allows for such divergent contributions and varied outcomes.[63]

Even when the law provides a process for such decision-making, the courts failed to undertake the necessary detailed exercises. When imposing conditions for bail, the CrPC allows the court or a subordinate magistrate to conduct a separate inquiry to determine what surety should be imposed, in which affidavits can be considered as proof of relevant facts.[64] However, not a single order in either the theft or rape dataset provides any indication of such an inquiry being undertaken, with conditions imposed absent any explanation of the choice of condition or the specific amount chosen.

Truly engaging with a pre-trial detention system requires a fundamental revamp of the approach and processes undertaken by trial courts. At the first level, we need to clarify that the triple test is the purpose of such detention and separate the factors to be considered in making such a determination. While there has been extensive research on (as well as subsequent critique of) the factors that are predictors of risk in other jurisdictions,[65] we have undertaken no such research in India.

[60]*Ram Govind Upadhyay* (n 12); *Sitaram Popat Vetal* (n 12); *Chaman Lal* (n 12); *Kalyan Chandra Sarkar* (n 12); *Omar Usman Chamadia* (n 12); *Lokesh Singh* (n 12); *Brij Nandan Jaiswal* (n 12); *Prasanta Kumar Sarkar* (n 12); *Mauji Ram* (n 12); *P Chidambaram* (n 12); *Mahipal* (n 12); *Sunil Kumar* (n 12); *Manoj Kumar Khokhar* (n 12).

[61]In these cases, the prosecution admitted that there were some limitations in evidence, that there were no antecedents against the accused, or that there would be delays in compiling evidence.

[62]Indicting statements from the investigating officer were generally in support of the prosecution version, recording the facts against the accused and criminal antecedents, if any. Conceding statements noted some lapse in the investigation or complainant's statement, or the lack of criminal antecedents against the accused.

[63]The Supreme Court recently recognised the right of the 'victim' to fair and effective hearing in bail proceedings but failed to clarify the consideration that ought to be given to such submissions by judges, which is representative of the problem highlighted in this section. See *Jagjeet Singh vs Ashish Mishra @ Monu* Crl App 632 of 2022 (SC).

[64]CrPC, s 441.

[65]See for example Marie VanNostrand & Gena Keebler, 'Pretrial Risk Assessment in the Federal Court' (2009) 73(2) Federal Probation 2; CA Mamalian, 'State of the Science of Pretrial Release I' (Pretrial Justice Institute 2011)

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Identifying factors for such determination requires empirical research to identify the factors that could be relevant in our own country. It requires answering a range of questions: for instance, are community ties relevant? How accurate is it in predicting risk? How does one establish community ties? How many in our country can establish such evidence? Once the factors that are relevant for such determinations are identified, specialised processes and standards need to be developed that can demonstrate individualised evidence of risk of harm to the trial process. This approach has also garnered recognition from the Law Commission of India, which has recommended pre-trial risk assessment and checklist models that can guide prosecutorial discretion in assessing the risk posed by the accused on release.[66]

Conclusion

The overrepresentation of undertrials in the prison population is a persistent concern in India's criminal justice system. This article is an attempt to help address the issue through an empirical analysis of the judicial reasoning of trial courts that decide on the detention and release of these individuals. By analysing the outcomes and judicial reasoning in bail matters, this article sought to identify the gaps in such adjudication that could have a bearing on incarceration of undertrials. While the study is limited by its focus on Sessions Courts and on orders available online, it reveals patterns of decision-making by trial courts that can guide a reimagining of the system to make it more rational and effective for its purpose.

The data reveals a near total failure to design and implement the unique processes required for bail adjudication. The primary consideration of the triple test (that is, the risk of absconding, reoffending, or tampering) rarely appears in orders. Instead, judges simply import factors from the trial process, in particular, placing an outsized focus on guilt and seriousness of the offence, while dismissing applications. Judges also fail to individualise the process, with vague allegations and statements considered sufficient as evidence of factors raised. The lack of standards and processes has also resulted in an implicit presumption in favour of detention, at least until the investigation is complete.

The system requires fundamental reimagination to ensure it is in line with the core purposes of bail adjudication. Adjudication of pre-trial detention should be realigned to focus on addressing the triple test of risks. This means abandoning the focus on guilt – which should be left to the trial process – and reimagining the integration of the seriousness of offence in the process. The gravity of offence can be examined in light of its links with the triple test, with a higher burden placed on the accused in offences that carry a greater risk. Ultimately, greater doctrinal coherence is required, particularly from the Supreme Court, in rigorously establishing the requirements of the triple test and guiding bail adjudication accordingly.

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment.pdf> accessed 4 Feb 2022; Marie VanNostrand, Kenneth J Rose and Kimberly Weibrecht, 'State of the Science of Pretrial Release Recommendations and Supervision' (Pretrial Justice Institute 2011); John-Etienne Myburgh, Carolyn Camman & J Stephen Wormith, 'Review of Pretrial Risk Assessment and Factors Predicting Pretrial Release Failure' (Centre for Forensic Behavioural Science and Justice Studies 2015); Brian H Bornstein et al, 'Reducing Courts' Failure-to-Appear Rate by Written Reminders' (2013) 19 (1) Psychology, Public Policy, and Law 70; Sandra G Mayson, 'Dangerous Defendants' (2018) 127 Yale Law Journal 490; Lauryn P Gouldin, 'Defining Flight Risk' (2018) 1(3) Brigham Young University Law Review 838; Lauryn P Gouldin, 'Disentangling Flight Risk from Dangerousness' (2016) 85(3) University of Chicago Law Review 678.

[66]Law Commission, '268th Report' (n 25).

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Appendices

Appendix 1. Durations

The case status page of the eCourts system records information on when the application is filed, when the matter is first listed, and when the matter is finally disposed of. This data is available for all cases in the dataset.

Table 7. Theft Filing to Disposal Duration

Theft Filing to Disposal Duration		
Filing to Disposal Durations	Number of Cases	Proportion
Same Day	3	0.16%
1 Day	943	49.82%
2–7 Days	639	33.76%
8–15 Days	216	11.41%
16–30 Days	71	3.75%
31–60 Days	21	1.11%
Grand Total	**1,893**	

Table 8. Rape Filing to Disposal Duration

Rape Filing to Disposal Duration		
Filing to Disposal Durations	Number of Cases	Proportion
Same Day	2	0.16%
1 Day	523	42.08%
2–7 Days	434	34.92%
8–15 Days	163	13.11%
16–30 Days	85	6.84%
31–60 Days	26	2.09%
61+ Days	10	0.80%
Grand Total	**1,243**	

Table 9. Theft First Listed to Disposal Duration

Theft First Listed to Disposal Duration		
First Listed to Disposal Durations	Number of Cases	Proportion
Same Day	1,238	65.40%
1 Day	77	4.07%
2–7 Days	334	17.64%
8–15 Days	165	8.72%
16–30 Days	61	3.22%
31–60 Days	18	0.95%
Grand Total	**1,893**	

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Table 10. Rape First Listed to Disposal Duration

Rape First Listed to Disposal Duration		
First Listed to Disposal Durations	Number of Cases	Proportion
Same Day	696	55.99%
1 Day	66	5.31%
2–7 Days	233	18.74%
8–15 Days	140	11.26%
16–30 Days	78	6.28%
31–60 Days	21	1.69%
61+ Days	9	0.72%
Grand Total	**1,243**	

The orders generally record the date on which the accused was remanded in custody. This was used to calculate the period in custody on the date of the order. No information was available for 446 of the theft cases and 530 of the rape cases.

Table 11. Theft Period in Custody

Theft Period in Custody		
Period in Custody Durations	Number of Cases	Proportion
1–7 Days	65	4.49%
8–15 Days	235	16.24%
16–30 Days	476	32.90%
31–60 Days	441	30.48%
61–120 Days	174	12.02%
121+	56	3.87%
Grand Total	**1,447**	

Table 12. Rape Period in Custody

Rape Period in Custody		
Period in Custody Durations	Number of Cases	Proportion
1–7 Days	92	12.90%
8–15 Days	138	19.35%
16–30 Days	193	27.07%
31–60 Days	187	26.23%
61–120 Days	83	11.64%
121+ Days	20	2.81%
Grand Total	**713**	

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Appendix 2. Facts

Description of facts were available in only 1,143 of the theft cases (60.38% of the total theft cases) and 701 of the rape cases (56.40% of the total rape cases). The miscellaneous category captures fact categories that appeared less than ten times in the dataset.

Table 13. Theft Facts

Theft Facts		
Fact Category	Number of Cases	Proportion
Theft of mobile	440	38.50%
Theft of vehicle	303	26.51%
Theft of cash	76	6.65%
Theft of jewellery	60	5.25%
Theft of others	41	3.59%
Theft of purse	32	2.80%
Attempt of theft	24	2.10%
Theft of vehicle parts	21	1.84%
Theft of purse with cash and identity/documents	15	1.31%
Theft of mobile and cash	11	0.96%
Theft of multiple items	78	6.82%
Theft with other crimes	42	3.67%
Grand Total	**1,143**	

Table 14. Rape Facts

Rape Facts		
Fact Category	Number of Cases	Proportion
False promise to marry	294	41.94%
Acquaintance rape	202	28.82%
Stranger rape	50	7.13%
Rape by family member	48	6.85%
Blackmail	22	3.14%
Employer rape	14	2.00%
False promise of employment	11	1.57%
Miscellaneous	60	8.56%
Grand Total	**701**	

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Appendix 3. Prosecution

The judge recorded the submissions of the prosecution in 1,097 cases or 57.95% of the dataset of theft cases. In 35 cases, the prosecution either did not oppose bail or otherwise made concessions or admissions in their arguments in the proceedings.

Table 15. Theft Prosecution Grounds in Opposition to Bail

THEFT		
Prosecution Grounds in Opposition to Bail	Number of cases	Proportion of Cases (1,062)
Evidence of guilt	555	52.26%
Criminal antecedents	468	44.07%
Seriousness of offence	388	36.53%
Necessity of custody	145	13.65%
Likelihood of absconding	122	11.49%
Likelihood of tampering	113	10.64%
Likelihood of reoffending	89	8.38%
No change in circumstances since previous application	49	4.61%

The judge recorded the submissions of the prosecution in 762 cases or 61.30% of the dataset of rape cases. In 26 cases, the prosecution either did not oppose bail or otherwise made concessions or admissions in their arguments in the proceedings.

Table 16. Rape Prosecution Grounds in Opposition to Bail

RAPE		
Prosecution Grounds in Opposition to Bail	Number of cases	Proportion of Cases (736)
Seriousness of offence	513	69.70%
Evidence of guilt	455	61.82%
Necessity of custody	179	24.32%
Likelihood of tampering	162	22.01%
Likelihood of absconding	53	7.20%
No change in circumstances since previous application	24	3.26%
Criminal antecedents	20	2.72%

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Appendix 4. Defence

The grounds raised by the defence were recorded in 1,408 cases or 74.38% of the total theft cases and in 992 cases or 79.81% of the total rape dataset.

Table 17. Theft Defence Grounds in Support of Bail

THEFT		
Defence Grounds in Support of Bail	Number of cases	Proportion of Cases (1,408)
Evidence of innocence	1,137	80.75%
Period undergone in custody	979	69.53%
Custody not required	810	57.53%
Absence of criminal antecedents	395	28.05%
Personal circumstances	365	25.92%
Bail granted to co-accused	159	11.29%
Will comply with conditions	129	9.16%
Will not abscond/misuse liberty/tamper with evidence	91	6.46%
Granted bail in other cases	63	4.47%
Cooperation with the investigation	35	2.49%
Length of trial	17	1.21%
Settlement of matter	14	0.99%
Limitations of prosecution/investigation	14	0.99%
Less serious offence	10	0.71%
Family/others undertake to monitor	10	0.71%

Table 18. Rape Defence Grounds in Support of Bail

RAPE		
Defence Grounds in Support of Bail	Number of cases	Proportion of Cases (992)
Evidence of innocence	923	93.04%
Period undergone in custody	525	52.92%
Custody not required	331	33.37%
Personal circumstances	237	23.89%
Absence of criminal antecedents	161	16.23%
Will comply with conditions	84	8.47%
Marriage between complainant and accused	63	6.35%
Will not abscond/misuse liberty/tamper with evidence	55	5.54%
Bail granted to co-accused	39	3.93%
Cooperation with the investigation	36	3.63%
Settlement of matter	23	2.32%
Complainant not objecting to bail	14	1.41%
Limitations of prosecution/investigation	12	1.21%

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Appendix 5. Judge Variation in Outcomes

The data below compares outcomes of (anonymised) judges who have decided at least twenty cases in the dataset, comparing the proportion of allowed and dismissed applications for each judge.

Table 19. Theft Judge Variation in Outcomes

Theft Judge Variation in Outcomes					
	Number of Cases		Proportion of Total Cases		Total Number of Cases Decided by Judge
Judge Code	Allowed	Dismissed	Allowed	Dismissed	Total
Judge-01	24		100.00%		24
Judge-02	46	2	95.83%	4.17%	48
Judge-03	44	2	95.65%	4.35%	46
Judge-04	40	2	95.24%	4.76%	42
Judge-05	30	5	85.71%	14.29%	35
Judge-06	36	6	85.71%	14.29%	42
Judge-07	34	6	85.00%	15.00%	40
Judge-08	39	7	84.78%	15.22%	46
Judge-09	19	4	82.61%	17.39%	23
Judge-10	34	9	79.07%	20.93%	43
Judge-11	18	5	78.26%	21.74%	23
Judge-12	22	7	75.86%	24.14%	29
Judge-13	25	8	75.76%	24.24%	33
Judge-14	15	5	75.00%	25.00%	20
Judge-15	21	8	72.41%	27.59%	29
Judge-16	34	13	72.34%	27.66%	47
Judge-17	24	10	70.59%	29.41%	34
Judge-18	22	10	68.75%	31.25%	32
Judge-19	28	14	66.67%	33.33%	42
Judge-20	23	12	65.71%	34.29%	35
Judge-21	13	7	65.00%	35.00%	20
Judge-22	26	16	61.90%	38.10%	42
Judge-23	27	18	60.00%	40.00%	45
Judge-24	14	10	58.33%	41.67%	24
Judge-25	24	21	53.33%	46.67%	45
Judge-26	12	14	46.15%	53.85%	26
Judge-27	18	21	46.15%	53.85%	39
Judge-28	9	12	42.86%	57.14%	21
Judge-29	20	32	38.46%	61.54%	52
Judge-30	12	20	37.50%	62.50%	32
Judge-31	7	16	30.43%	69.57%	23

(*Continued*)

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Table 19. (*Continued.*)

Theft Judge Variation in Outcomes					
	Number of Cases		Proportion of Total Cases		Total Number of Cases Decided by Judge
Judge Code	Allowed	Dismissed	Allowed	Dismissed	Total
Judge-32	7	21	25.00%	75.00%	28
Judge-33	6	19	24.00%	76.00%	25
Judge-34	8	32	20.00%	80.00%	40
Grand Total	**781**	**394**			**1,175**

Table 20. Rape Judge Variation in Outcomes

Rape Judge Variation in Outcomes					
	Number of Cases		Proportion of Total Cases		Total Number of Cases Decided by Judge
Judge Code	Allowed	Dismissed	Allowed	Dismissed	Total
Judge-15	24		100.00%		24
Judge-35	30	1	96.77%	3.23%	31
Judge-36	24	2	92.31%	7.69%	26
Judge-13	29	6	82.86%	17.14%	35
Judge-25	24	5	82.76%	17.24%	29
Judge-20	17	7	70.83%	29.17%	24
Judge-02	15	9	62.50%	37.50%	24
Judge-18	29	18	61.70%	38.30%	47
Judge-37	13	10	56.52%	43.48%	23
Judge-19	17	16	51.52%	48.48%	33
Judge-12	12	14	46.15%	53.85%	26
Judge-38	14	17	45.16%	54.84%	31
Judge-06	23	28	45.10%	54.90%	51
Judge-39	9	11	45.00%	55.00%	20
Judge-03	9	15	37.50%	62.50%	24
Judge-26	13	23	36.11%	63.89%	36
Judge-22	9	21	30.00%	70.00%	30
Judge-40	5	16	23.81%	76.19%	21
Judge-30	7	26	21.21%	78.79%	33
Judge-41	2	19	9.52%	90.48%	21
Grand Total	**325**	**264**	**55.18%**	**44.82%**	**589**

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Appendix 6. Judicial Reasoning

Table 21. Theft Judicial Reasoning Not Provided

Theft Judicial Reasoning Not Provided		
Outcome	Number of Cases	Proportion
Allowed	147	11.15%
Dismissed	12	2.09%
Total	159	8.40%

Table 22. Rape Judicial Reasoning Not Provided

Rape Judicial Reasoning Not Provided		
Outcome	Number of Cases	Proportion
Allowed	88	13.02%
Dismissed	6	1.06%
Total	94	7.56%

Appendix 7. Conceding and Indicting Statements

The statement of the investigating officer was recorded in 478 theft cases and 315 rape cases.

Table 23. Theft Investigating Officer Statement

Theft Investigating Officer Statement					
Nature of IO Statement	Allowed [Number of Cases]	Dismissed [Number of Cases]	Allowed [Proportion]	Dismissed [Proportion]	Total
Conceding	219	20	91.63%	8.37%	239
Indicting	74	165	30.96%	69.04%	239

Table 24. Rape Investigating Officer Statement

Rape Investigating Officer Statement					
Nature of IO Statement	Allowed [Number of Cases]	Dismissed [Number of Cases]	Allowed [Proportion]	Dismissed [Proportion]	Total
Conceding	151	20	88.30%	11.70%	171
Indicting	59	85	40.97%	59.03%	144

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Complainant's statements were only recorded in the dataset of rape cases, in 326 cases in total.

Table 25. Rape Complainant's Statement

Rape Complainant's Statement					
Nature of Complainant's Statement	Allowed [Number of Cases]	Dismissed [Number of Cases]	Allowed [Proportion]	Dismissed [Proportion]	Total
Supporting dismissal	64	138	31.68%	68.32%	202
No objection to bail	111	13	89.52%	10.48%	124

Appendix 8. Conditions

Table 26. Theft Bail Condition Nature of Bond

Theft Bail Condition Nature of Bond		
Nature of Bond	Number of Cases	Proportion
Personal bond	1,172	88.92%
Bail bond	144	10.93%
Personal bond and FDR in the name of complainant	1	0.08%
Bond	1	0.08%
Grand Total	**1,318**	

Table 27. Theft Bail Condition Nature of Surety

Theft Bail Condition Nature of Surety		
Nature of Surety	Number of Cases	Proportion
One surety of the like amount	1,077	81.71%
One local surety of the like amount	117	8.88%
Surety bond in the like amount	93	7.06%
Two sureties of the like amount	23	1.75%
Two local sureties of the like amount	7	0.53%
Two sureties of half personal bond amount each	1	0.08%
Grand Total	**1,318**	

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Table 28. Rape Bail Condition Nature of Bond

Rape Bail Condition Nature of Bond		
Nature of Bond	Number of Cases	Proportion
Personal bond	560	82.84%
Bail bond	109	16.12%
Personal bond only	3	0.44%
Information not available	3	0.44%
Personal bail bond	1	0.15%
Grand Total	**676**	

Table 29. Rape Bail Condition Nature of Surety

Rape Bail Condition Nature of Surety		
Nature of Surety	Number of Cases	Proportion
One surety of the like amount	570	84.32%
Surety bond of the like amount	40	5.92%
One local surety of the like amount	35	5.18%
Two sureties of the like amount	21	3.11%
Two local sureties of the like amount	4	0.59%
No surety required (only personal bond)	3	0.44%
Information not available	3	0.44%
Grand Total	**676**	

Table 30. Theft Personal Bond Amount

Theft Personal Bond Amount		
Personal Bond Amount	Number of Cases	Proportion
10,000	282	21.40%
15,000	252	19.12%
20,000	339	25.72%
25,000	258	19.58%
30,000	107	8.12%
Other Amounts	80	6.07%
Grand Total	**1,318**	

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Table 31. Theft Surety Bond Amount

Theft Surety Bond Amount		
Surety Bond Amount	Number of Cases	Proportion
10,000	282	21.40%
15,000	252	19.12%
20,000	339	25.72%
25,000	259	19.65%
30,000	107	8.12%
Other Amounts	79	5.99%
Grand Total	**1,318**	

Table 32. Rape Personal Bond Amount

Rape Personal Bond Amount		
Personal Bond Amount	Number of Cases	Proportion
10,000	46	6.84%
15,000	52	7.73%
20,000	149	22.14%
25,000	178	26.45%
30,000	98	14.56%
35,000	18	2.67%
40,000	19	2.82%
50,000	97	14.41%
Other amounts	16	2.38%
Grand Total	**673**	

Table 33. Rape Surety Bond Amount

Rape Surety Bond Amount		
Surety Bond Amount	Number of Cases	Proportion
10,000	45	6.69%
15,000	52	7.73%
20,000	149	22.14%
25,000	178	26.45%
30,000	98	14.56%
35,000	18	2.67%
40,000	19	2.82%
50,000	96	14.26%
Other amounts	15	2.23%
No surety bond	3	0.45%
Grand Total	**673**	

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The data below presents the other conditions imposed by the Sessions Courts while allowing bail, in addition to the bond and surety conditions. The categories are not mutually exclusive, and therefore, a single case could include multiple other conditions.

Table 34. Theft Other Conditions

Theft Other Conditions		
Other Conditions	Number of Cases	Proportion
Not tamper	521	39.53%
Not act prejudicially	167	12.67%
Join investigation	137	10.39%
Not leave area/country	122	9.26%
Furnish address	104	7.89%
Not commit offence	91	6.90%
Mark attendance with PS	71	5.39%
Appear at hearings	64	4.86%
Furnish number and be available	56	4.25%
Not abscond	53	4.02%
Comply with bond/affidavit	33	2.50%
Deposit FDR	15	1.14%
Not delay trial	10	0.76%
Deposit passport	3	0.23%
Miscellaneous (less than 10)	10	0.76%

Table 35. Rape Other Conditions

Rape Other Conditions		
Other Conditions	Number of Cases	Proportion
Not tamper	321	47.49%
Not leave area/country	129	19.08%
Join investigation	117	17.31%
Furnish address	94	13.91%
Not act prejudicially	69	10.21%
Furnish number and be available	52	7.69%
Not abscond	40	5.92%
Not commit offence	25	3.70%
Deposit passport	16	2.37%
Appear at hearings	56	8.28%
Miscellaneous (less than 10)	23	3.40%

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