
BALANCING LIBERTY AND JUSTICE: A COMPARATIVE ANALYSIS OF BAIL PROVISIONS UNDER CRPC/BNSS AND THE NDPS ACT

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Abstract

This article presents a comparative legal analysis of bail provisions under the Code of Criminal Procedure, 1973 (now largely replaced by the Bhartiya Nagarik Suraksha Sanhita, 2024), and the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). While the CrPC/BNSS offers a balanced framework for granting bail based on judicial discretion and general criminal law principles, the NDPS Act prescribes far stricter conditions, particularly under Section 37. Through an exploration of statutory provisions, judicial interpretations, and landmark judgments, the article highlights the evolution of judicial thinking, shifting from strict literal compliance toward a more nuanced approach that accounts for the rights of the accused under Article 21 of the Constitution. The paper further analyzes how courts navigate the tension between safeguarding public interest and ensuring personal liberty in NDPS cases. By comparing the legal thresholds, procedural standards, and burden of proof in both frameworks, the article aims to contribute to the ongoing discourse on bail jurisprudence in India. The study concludes that while stringent laws are necessary to curb the menace of drug trafficking, the courts must not lose sight of constitutional guarantees and must adopt a balanced, case-by-case approach to protect justice and liberty.

KEYWORDS: Bail, NDPS, CrPC, BNS, BNSS, IPC, Criminal Law, Crime

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Introduction

Bail plays a vital role in criminal law, based on the principle that an accused person is presumed innocent until proven guilty. It helps maintain a balance between a person's right to liberty and the need to ensure their presence during the trial. While the Code of Criminal Procedure, 1973 (now largely replaced by the Bhartiya Nagarik Suraksha Sanhita, 2024) provides the general rules for granting bail in India, certain special laws lay down stricter conditions. One such law is the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), which has very rigid bail provisions under Section 37.

This article analyses the concept and legal framework of bail under both the CrPC/BNSS and the NDPS Act. It examines how courts approach bail in these cases, discusses important judgments, and provides a comparative analysis of the two systems. The aim is to understand how courts try to balance the strict requirements of the NDPS Act with the fundamental rights guaranteed under Article 21 of the Constitution.

Understanding Bail: Concept and Definition

Bail refers to the temporary release of an accused person from custody, typically on the condition of providing a monetary guarantee to ensure their presence in court whenever required. In simpler terms, when someone is charged with a criminal offence and held in police or judicial custody, they may be released by furnishing a security or amount that binds them to appear before the court during the proceedings.

For this purpose, a person paying the amount acts as a surety. The security may not strictly be in cash it can be in kind as well such as Fixed deposits in bank, RC of a vehicle, Property papers etc.

It must be understood that bail is not a permanent release. The accused is not absolved of the charges but remains legally an accused person until the judicial process reaches its conclusion and a verdict is given.

Bail can be either unconditional or conditional and in the later the non-observance of the bail conditions might lead to the cancellation of the bail.

Provisions Relating to Bail under the Code of Criminal Procedure (CrPC) and the Bhartiya Nagarik Suraksha Sanhita (BNSS)

Section 436 CrPC (478 BNSS)

It talks about bail in bailable offences. Bailable offences are offences that are less serious and are punishable for a term which is less than 3 years of imprisonment or with fine only. In cases of bailable offences, the accused is entitled to bail as a matter of right, and the police are also empowered to grant it.

Section 437 (480 BNSS)

It talks about bail in Non bailable offences. Non bailable offences are offences which are serious in nature and are punishable for a term more than 3 years. In these cases, the bail is not granted as a matter of right but the accused has to file bail application in the court and give reasons as to why bail should be granted. It is the discretion of the court to grant or reject the bail. Under this section, the application can be made to a Judicial Magistrate or Metropolitan Magistrate. However, the court can only entertain bail applications for offenses that are not punishable by death or life imprisonment.

Section 438 (482 BNSS)

It talks about anticipatory bail. Under this provision, an individual can seek bail in anticipation of arrest. If the person fears they might be taken into custody, they have the option to apply for bail beforehand. It is the court's discretion to accept or reject the application. In case the application is accepted then if any time an authority comes to arrest him, he is entitled to get bail as if he was accused of a bailable offence.

Section 439 (483 BNSS)

This section gives power to the court of sessions and the high court to grant bail in the cases of non - bailable offences. The authority granted by this section is broader compared to the powers under Section 437 of the CrPC. Under this section, the Sessions Court and the High Court can grant bail even in offences that carry the death penalty or life imprisonment.

Considerations While Granting Bail

- Nature of the offence.
- History of the offender.
- Likelihood of the accused absconding.
- Likelihood of accused tampering with the evidence.

- Likelihood of the accused manipulating or threatening the witness.

In **Gurucharan Singh v. State (Delhi administration) 1978**,² the Court observed some of the points to consider before granting bail under both Sections 437 and 439. These are:

Nature and gravity of the circumstances in which the offence was committed, Position of the accused with reference to the victim and witness, Possibility of the accused to flee from justice, Possibility of repeating the offence, Possibility of jeopardising his own life, Possibility of tampering with prosecution witnesses, other facts and circumstances as well as its investigation.

Understanding Bail under the NDPS Act

Section 37 of the NDPS Act: This section outlines the conditions for granting bail. According to this provision, bail may only be granted if the following requirements are satisfied:

- An opportunity to oppose the bail must be afforded to the Public Prosecutor.
- The court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offense and that the accused is not likely to commit any offense while on bail.

Compared to the CrPC, the NDPS Act imposes stricter conditions for granting bail. The twin conditions under Section 37 of the act make it difficult for the accused to obtain bail from the court, as the judges are often reluctant to grant bail especially due to the second condition requiring the court's satisfaction that reasonable grounds exist to believe the accused is not guilty and unlikely to commit an offence while on bail. One may wonder how the court can be assured that the accused will refrain from committing offences during the bail period.

These bail provisions are sometimes referred to as "*draconian*", as they make it nearly impossible for an accused to secure bail.

Criteria Considered for Granting Bail under the NDPS Act

- **Nature and quantity of drugs:** In cases involving small quantities there are high chances of bail being granted compared to the cases involving high or commercial quantities.
- **Role of the accused:** Court examines whether the accused had a substantial role or not.

² Gurucharan Singh v. State (Delhi Admin.), (1978) 1 SCC 118, 124; 1978 SCC (Cri) 41. Available at: <https://indiankanoon.org/doc/534034/>

- **Criminal history of the accused:** Past record of the criminal is also considered for the purpose of bail.
- **Possibility of tampering with the evidence or influencing witness:** The court also considers the likelihood of the accused tampering with the evidence or influencing the witness if he is granted bail.

Apart from these special conditions the conditions for bail that are applicable under the CRPC are also applicable to the bail in NDPS.

Landmark Judgments on Bail under the NDPS Act

- In **State of Punjab v. Baldev Singh (1999)**³, the Hon'ble Supreme Court held that, by virtue of Section 37 of the NDPS Act, all offences under the Act are cognizable and non-bailable. The Court highlighted that Section 37 sets forth stringent conditions that need to be fulfilled before bail may be granted under the NDPS Act.
- In **Gurdev Singh v. State of Punjab (2021)**⁴, the Supreme Court observed that the amount of narcotic substance confiscated plays a crucial role in determining whether to impose a sentence exceeding the minimum sentence mandated by the Narcotic Drugs and Psychotropic Substances Act, 1985. The Court further held that sentencing authorities have broad discretion to impose imprisonment ranging from 10 to 20 years. While determining the sentence, the Court may also consider factors beyond those listed in Section 32B (a) to (f) of the Act.
- In **State of Kerala v. Rajesh (2020)**⁵, the Supreme Court clarified that bail in NDPS cases is not solely governed by Section 439 of the CrPC, but is also subject to the conditions laid down under Section 37 of the NDPS Act. The Court emphasized that bail under the NDPS Act can be granted only when the prosecution has been given an opportunity to oppose it, and the Court is convinced by reasonable grounds of the accused's innocence.

³ State of Punjab v. Baldev Singh, (1999) 6 SCC 172. Available at: <https://indiankanoon.org/doc/1438183/>

⁴ Gurdev Singh v. State of Punjab, (2021) LL 196 (SC). Available at: https://api.sci.gov.in/supremecourt/2020/12408/12408_2020_36_1501_27321_Judgement_06-Apr-2021.pdf

⁵ State of Kerala v. Rajesh, AIR 2020 SC 721. Available at: https://narcoticsindia.nic.in/Judgments/State_Of_Kerala_vs_Rajesh_on_24_January_2020.pdf

Evolving Judicial Approach to Bail under the NDPS Act

There was a time when the conditions of bail under the NDPS act were followed strictly and court adopted literal interpretation. But the courts have now started to adopt a different approach. Courts have now started to balance the stringent requirements of the NDPS act with the fundamental principles of justice and the rights of the accused.

- In **Deva Ram v. State of Rajasthan (2023)**,⁶ a matter involving offences under Section 8 read with Section 18 and 25 of NDPS Act, the supreme Court observed that the trial was not expected to conclude in the near future, and the accused had been in custody for more than six years. Therefore, the Court granted bail, subject to appropriate conditions.
- In **Rabi Prakash v. State of Orissa (2023)**⁷, the Court observed that prolonged incarceration of the accused could justify granting bail, even in light of the strict limitations under Section 37 of the NDPS Act. It held that excessive detention without timely trial infringes the fundamental right to life and personal liberty under Article 21 of the Constitution, and in such cases, conditional liberty must prevail.
- In **Shivraj Gorakh v. State of Maharashtra (2023)**,⁸ the Court granted bail to a 22-year-old accused of possessing commercial quantity narcotics after noting procedural lapses in search and seizure under Section 42 of the NDPS Act. The accused had no prior record and was detained for over two years with trial pending. Emphasizing the fundamental right to personal liberty under Article 21, the Court noted that prolonged detention can justify granting bail despite the strict conditions of Section 37 NDPS.
- In **Vipin Mittal v. National investigation authority (2023)**,⁹ the Delhi High Court granted regular bail to the petitioner accused under multiple sections of the NDPS Act related to heroin smuggling concealed in licorice roots (Mulethi). The Court took note of the petitioner's clean record, respectable standing in the industry, and lack of links to other accused individuals, concluding that bail was justified.

⁶Deva Ram v. State of Rajasthan, 2023 SCC OnLine SC 1267. Available at: <https://indiankanoon.org/doc/148180409/>

⁷ Rabi Prakash v. State of Odisha, SLP (Crl.) No. 4169/2023. Available at: <https://narcoticsindia.nic.in/Judgments/533-rabi-prakash-v-state-of-odisha-13-jul-2023-482014.pdf>

⁸ Shivraj Gorakh Satpute v. State of Maharashtra, 2023 SCC OnLine Bom 1996. Available at: <http://www.scconline.com/DocumentLink/X3Ttreyd>

⁹ Vipin Mittal v. National Investigation Agency, 2023 SCC OnLine Del 3270. Available at: <https://www.scconline.com/>

- In **Mohd Muslim @ Hussain v. State (NCT of Delhi) (2023)**,¹⁰ a Division Bench held that an undue delay in the trial process can justify granting bail to an accused under the NDPS Act, notwithstanding the strict bail conditions under Section 37.

Judicial view of Bail under the NDPS Act and CrPC/BNSS

- In **Narcotic Control Bureau v. Kishan Lal (1991)**,¹¹ the Court held that in case of any conflict between Section 37 of the NDPS Act and Section 437 of the Criminal Procedure Code, the provisions of the NDPS Act shall prevail.
- In **Union of India v. Thamisharasi & Ors (1995)**,¹² the Supreme Court explained how the bail provisions under the NDPS Act differ considerably from those under the CrPC. It held that Section 437 of the CrPC imposes a limitation requiring the prosecution to establish reasonable grounds to believe that the accused is guilty. In contrast, Section 37 of the NDPS Act sets a more stringent standard by placing the burden on the accused to demonstrate sufficient grounds for the court to believe in their innocence before bail can be granted. Consequently, the burden of proof shifts substantially to the accused under the NDPS Act.
- In **Union of India v. Niyazuddin & Anr. (2018)**,¹³ the Supreme Court held that courts must first ensure compliance with the dual conditions outlined in Section 37 of the NDPS Act before considering the broader principles under the CrPC or any other relevant legislation. It was further held that if Section 37 of the NDPS Act conflicts with Section 437 of the CrPC, the special provision under the NDPS Act would have an overriding effect.

Therefore, while the general bail law under the CrPC typically applies, when a special statute prescribes a different procedure, the special provision takes precedence over the CrPC. Such special bail provisions exist in several laws, including the NDPS Act and the Prevention of Money Laundering Act (PMLA).

¹⁰ Mohd. Muslim @ Hussain v. State (NCT of Delhi), 2023 SCC OnLine SC 352. Available at: <https://indiankanoon.org/doc/135015744/>

¹¹ Narcotic Control Bureau v. Kishan Lal, (1991) 1 SCC 705. Available at: <https://www.scconline.com>

¹² Union of India v. Thamisharasi & Ors., (1995) 4 SCC 190. Available at: <https://indiankanoon.org/doc/79810/>

¹³ Union of India v. Niyazuddin & Anr., (2018) 13 SCC 738. Available at: <https://www.scconline.com/>

Comparison of Bail under the CrPC/BNSS and the NDPS Act

- **Legal framework:** CrPC covers a wide range of offenses, including bailable and non-bailable offenses whereas the NDPS act covers specifically the drug related offences.
- **Stricter conditions:** The NDPS act imposes stricter punishment compared to the CrPC. Bail may be granted only after fulfilling the dual requirements specified under Section 37.
- **Burden of Proof:** Generally, in criminal offences, the burden of proof is on the prosecution, and the accused is presumed to be innocent. However, in offences under the NDPS Act, given the grave nature of the offences, the burden lies on the accused to establish their innocence.
- **Discretion:** Unlike CrPC the courts have limited discretion to grant bail under the NDPS act. The courts are required to apply strict standard due to the seriousness of the offence.

Bail under CrPC is generally more accessible and less restrictive. It provides a framework for granting bail based on the nature of the offense and other general considerations.

Bail under the NDPS act is much stricter due to the high severity of drug-related offenses. Requires the accused to meet a higher burden of proof, and the nature and quantity of the drugs play a significant role in the bail decision.

Personal Opinion

The offences under the NDPS Act are grave in nature, as they affect public health and have significant social and economic consequences. In essence, these offences impact society as a whole. While the Act is justified in dealing with such offences more strictly, it is equally important that courts do not overlook the effect that denial of bail has on the accused and their family. The judiciary must strive to maintain a balance between the seriousness of the offence and the consequences faced by the accused.

Article 21 of the Constitution guarantees the right to life and personal liberty. The courts have repeatedly held that this right does not imply mere animal existence, but includes the right to live with dignity. Therefore, the decision to grant or deny bail should be guided by relevant and just considerations, avoiding reliance on irrelevant or prejudicial factors.

While courts must adopt a strict approach in cases under the NDPS Act due to the seriousness of the offences, they must also remain mindful of the fundamental principle that *'bail is the rule and jail is the exception.'*¹⁴

Thus, although the NDPS Act rightly imposes stringent safeguards against serious drug-related offences, the judiciary must ensure that these safeguards do not override the fundamental rights protected under Article 21. A nuanced, case-by-case approach remains essential to uphold both justice and liberty.



¹⁴Bail is rule, jail is exception - <https://blog.ipleaders.in/bail-is-rule-jail-is-exception/>