THE UNFULFILLED PROMISE OF DEFAULT BAIL – ON THE JUDICIAL COMMITMENT TO PRE-TRIAL PUNISHMENT IN INDIA

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ABSTRACT

Indian criminal procedure contemplates a system of "default bail", requiring a pre-trial detainee's unconditional release following the completion of a specified duration in prison, provided the state's inability to file a "charge-sheet" – a document containing its investigative work – within this duration. While the legislative provisions regulating default bail are seemingly absolute, a five-decade long doctrinal evolution of the law on default bail has weakened it in many aspects, making the regime largely toothless. This weakening, I propose, has occurred in three dimensions – first, the authorization of re-arrests after an accused's release; second, the prohibition on enquiring into a charge-sheet's substance to assess an investigation's completeness; and third, the concentration of institutional efforts to hinge the accused's release on the time of document-filings in court, which serves to whitewash how the regime has become rigged in the state's favour. The law on default bail has evolved with a minimal conceptualization of its necessary normative underpinnings, which concern the imposition of a duration-definite investigative duty on the state and its pursuit of "systemic effectiveness" as a principle of procedure. The systemic attachment of guilt with pre-trial detainees that entrenches a notion of guilt to its recipient class is one important explanation behind the Court's negative institutional outlook towards default bail, offering insights into why the regime has been substantially weakened.

Keywords: *default bail – criminal procedure – charge-sheet – remand – guilt – pre-trial detention*

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INTRODUCTION

Unconditional rules in criminal procedure – especially those enabling criminal defendants' release based on the state's non-adherence with procedural guarantees – often cause discomfort to courts, causing the introduction of various riders and exceptions.[1] One rule that has arguably caused the greatest discomfort to the criminal justice machinery has been that of "default bail", contained in the Code of Criminal Procedure, 1973 ("CrPC"). Section 167(2) requires that a pre-trial detainee must necessarily be released on the completion of sixty (or ninety) days from the "date of remand",[2] if the police fail to complete their investigation, the completion of which is evidenced through the filing of a "charge-sheet" within the stipulated period.[3] This rule, as has been envisioned in the CrPC, is unconditional in terms of its disconnection with the merits of the case. The nature of the allegations, their gravity, and the accused's antecedents are all irrelevant in determining the accused's eligibility to obtain default bail.[4]

The Supreme Court's ("Court") formal views on default bail have undergone a sea transformation since the regime's formal introduction five decades ago – from referring

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1 Along with the Code of Criminal Procedure 1973, s 167(2), Courts have generally shown discomfort with CrPC requirements positing time limits within which certain acts must be performed. Section 437(6), which states that a person may be released on bail if their trial has not been completed within 60 days of its commencement, has been interpreted to signify only an encouragement of a speedy trial, and not confer a right on the accused. Similarly, the Court has interpreted Section 468, which states that no court can take cognizance of an offence beyond the "period of limitation" to mean only that a complaint must be registered within such period, and not that a court would be disempowered to take cognizance of such an offence. For cases on Section 437(6) that state its generally non-binding character, see *Robert Lendi v Collector of Customs* (1986) SCC OnLine Del 167 [16]; *Anwar Hussain v State of Rajasthan* (2006) SCC OnLine Raj 534 [6]. For the interpretation of "cognizance" as "complaint" u/s 468, see *Sarah Mathew v Institute of Cardio Vascular Diseases* (2014) 2 SCC 62.

2 The "date of remand" under s 167(2) refers to the date on which an accused has been sent to judicial or police custody after their production before a Judicial Magistrate, which must occur within twenty-four hours of arrest, as provided u/s 57. The calculation of the sixty/ninety days must be from the date of remand, not the date of arrest, pursuant to *Chaganti Satyanarayana v State of AP* (1986) 3 SCC 141 [16]. The "remand" hearing concerns the issue of whether the accused should be detained in the first place, or whether they should be released. For case-law on the enquiry during remand, see *Satender Kumar Antil v Central Bureau of Investigation and another* (2022) 10 SCC 51 [47]; *Gautam Navlakha v National Investigation Agency* (2021) SCC OnLine SC 382 [73]; *Prabir Purkayastha v State (NCT of Delhi)* (2024) SCC OnLine SC 934 [16]-[20].

3 Code of Criminal Procedure 1973, s 167(2) states that a failure of the police to complete an investigation within the stipulated period –which is expressed through a "final report" u/s 173, which is called the "charge-sheet" – causes the accrual of a right of "default bail" on the accused.

4 See *State v T Gangi Reddy* (2023) 4 SCC 253 [15], stating that "it cannot be said that the order of release on bail under the proviso to Section 167(2) CrPC is an order on merits".

to Section 167(2) as a "paradise for criminals" in 1975,[5] to recognizing it as a "fundamental right directly flowing from Article 21" in early 2023.[6] This evolution in its stance towards Section 167(2), however, is wrongly reflective of the Court's substantive treatment of the law on default bail, which has evolved with substantial consistency to the accused's disadvantage, with its conceptualization as a "paradise for criminals" serving as the constant overarching interpretive principle behind its judicial treatment.

A trajectory of criminal law that causes an expansion of state power is not a development unique to Section 167(2), for the Court's general interpretive lens towards criminal procedure has been characterized as employing a "public order" lens, instead of a "due process" lens.[7]

The Court's treatment of default bail, however, garners much greater contemporary significance than its treatment of trial-related rules of criminal procedure, for the heart of the criminal justice system no longer lies in the adjudication of guilt or innocence through detailed evidence and arguments. It lies, instead, in being free or imprisoned during investigation and trial.[8] The Prison Statistics India Report, released in 2021, states that four-fifths of India's prison population now consists of pre-trial detainees,[9] with other reports stating that the time taken for criminal trials has substantially increased, ranging from 3 to 9 years.[10] Such developments have led to conclusions that

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5 *Natabar Parida Bisnu Charan Parida v State of Orissa* (1975) 2 SCC 220 [8], with the Court observing that while the rule of default bail may offer a "paradise for criminals", the blame thereof lies with the legislature, not with the courts.

6 *Ritu Chhabaria v Union of India* (2023) SCC OnLine SC 502 [15], noting that "It is also pertinent to note that the relief of statutory bail under Section 167(2) of the CrPC, in our opinion, is a fundamental right directly flowing from Article 21…"

7 See Aparna Chandra and Mrinal Satish, 'Criminal Law and the Constitution' in Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook to the Indian Constitution* (OUP 2016) 1055, arguing that "the development of constitutional criminal procedure in India has demonstrated a shift from a liberty perspective to a public order perspective"; See also S N Sharma, 'Towards Crime Control Model' (2007) 49(4) Journal of the Indian Law Institute 543.

8 For the state of the criminal justice system that is disinterested in eventual adjudications of guilt, and functions, instead, on "punishments without condemnation", see Abhinav Sekhri, 'The disintegration of the criminal justice system' *The Hindu* (New Delhi, 7 October 2020) <https://www.thehindu.com/opinion/lead/the-disintegration-of-the-criminal-justice-system/article32785928.ece> accessed 10 September 2023; 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 280, arguing that there are "systemic factors at play which contribute" to "steadily high numbers of undertrial prisoner populations in India".

9 See National Crime Records Bureau, Prison Statistics India 2021 (Ministry of Home Affairs 2022) xi, stating that "[u]ndertrial inmates…were reported as…4,27,165…accounting for…77.1%…at the end of 2021".

10 Arunav Kaul, Ahmed Pathan & Harish Narasappa, 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts' in Shruti Vidyasagar, Harish Narasappa, Ramya Tirumalai (eds), *Approaches to Justice in India* (Eastern Book Company 2018) 91.

the stage of conviction is no longer the pivotal one in a criminal case, with that title having been arrogated by one's arrest or decisions on bail.[11]

This centrality acquired by arrest, bail and remand in contemporary criminal justice, I propose, has substantial implications on the doctrinal development of default bail. The Court, over the past five decades, has weakened the default bail regime substantially, prohibiting an enquiry into a charge-sheet's contents to assess whether it was a product of a genuine investigation, and enabling "re-arrests" after the accrual of default bail if the state develops a belief into the accused's guilt.[12] This development of the law on default bail, which is vulnerable to criticism on grounds of its unprincipled, normatively hollow nature, is capable of being explained through the institutionalized allocation of guilt to pre-trial detainees that remand and bail enquiries facilitate. This is because bail adjudication, and consequently decisions authorizing remand become largely factual, merits-based enquiries into the likelihood with which an accused can be considered to have committed an offence, and the legitimation of one's imprisonment – done through a rejection of bail and authorization of remand – causes the emergence of an institutionalized notion of pre-trial detainees' guilt. Since the individuals availing default bail are those whose remand has been authorized, and whose bail on merits has likely been rejected, an entrenched notion of the guilt of default bail's recipient class acquires prominence, permeates into the adjudication of individual default bail cases, and consequently into the law on default bail. The largely toothless nature of the law on default bail, therefore, can be explained in reference to a systemic perception of the guilt of its recipient class, whose avenues to release are minimized under this overarching framework of pre-trial guilt. This state of affairs must be remedied through adjudicating default bail with a recognition of the normative considerations at stake, which concern the imposition of a duration-definite duty on the state to undertake investigation, and its procedural character to pursue "systemic effectiveness" that requires its law to be exceptionless and absolute.

I make this argument in the following manner – first, I argue that bail adjudication in India has evolved into a largely factual enquiry into an accused's guilt, and the rejection of bail (or authorization of remand) becomes a sufficient indicator of guilt that justifies pre-trial detention (I); second, I propose two principles that must constitute the normative foundation for interpreting Section 167(2) and developing the law on default bail, which concern the imposition of a duration-definite investigative duty on the state,

11 Abhinav Sekhri (n 8) 296.

12 For the prohibition on enquiring into charge-sheets' contents, see *Enforcement Directorate v Kapil Wadhawan* (2023) SCC OnLine SC 972 [23], and for the general approval granted to re-arrests, see *Gangi Reddy* (n 4) [29]. These two cases are discussed in-depth in Section IV.

and default bail's pursuit of "systemic effectiveness" (II); third, I discuss three avenues in which default bail has been substantially undermined by the Court – the authorization of post-release re-arrests; the prohibition on enquiring into charge-sheets' contents to assess investigative completeness;[13] and the "extinguishing regime" (III); and fourth, through a detailed analysis of two cases – Gangi Reddy and Wadhawan – I aim to show the implications that the Court's conceptualization of default bail's recipients as "likely guilty" has towards shaping its doctrine (IV).

I. BASICS OF INDIAN BAIL ADJUDICATION – THE FOUNDATION OF PRE-TRIAL GUILT

The scheme of the CrPC is such that while default bail can be obtained only after the completion of sixty (or ninety) days from one's remand, bail ordinarily can be obtained at all stages of investigation, and all stages of trial.[14] A decision as to whether a person must be released on bail must also be taken on the date of remand, which is the date on which the accused is presented before the Magistrate for the very first time.[15] Due to the centrality of bail to contemporary criminal justice, as well as its ripple effects on default bail, I discuss bail adjudication in India from three perspectives – its vision in the CrPC, which is highly restrictive, carrying a default position of the rejection of bail (A); Supreme Court-sponsored changes to rules on arrest and bail in the past decade (B); and the practical operationalization of arrest and bail, which – data suggests – demonstrates substantial continuity with CrPC-envisioned police and judicial discretion (C).

A. Arrest and Bail in the CrPC – Outdated, Restrictive Conditions

The CrPC contains a layered, classificatory regime to determine the circumstances of arrest and bail – offences are "cognizable" or "non-cognizable", and "bailable" or "non-bailable".[16] A "cognizable offence" is one for which the police can arrest without

13 A "charge-sheet" is the colloquial term for a "police report" under s 173 of the CrPC, which is the police's assessment of the commission of an offence by the accused. The timely presentation of the charge-sheet, as discussed below, is determinative of whether the accused is entitled to be released on default bail. For the nature of a charge-sheet, see *Saurav Das v Union of India* (2023) SCC OnLine SC 58.

14 While offences are classified as "bailable" and "non-bailable" as discussed in sub-section A, bail can be granted for all offences. The only difference is that for non-bailable offences, the accused must offer reasons, and demonstrate conditions warranting their release. See CrPC 1973, ss 437, 439.

15 The accused must be produced before the Judicial Magistrate before the completion of 24 hours of arrest. The Magistrate then decides whether the accused is sent to police custody (which can be for a maximum of 15 days in the manner enunciated in *V Senthil Balaji v State* (2023) SCC OnLine SC 934), or judicial custody. Pursuant to *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273 [8.2], the Magistrate must also decide the issue of bail on the date of remand itself.

16 This classification is provided separately for each individual offence in the Indian Penal Code, 1860 under the First Schedule to the CrPC. See First Schedule, CrPC 1973.

obtaining a Magisterial warrant, meaning that the decision to arrest is solely their own.[17] A "non-cognizable offence" is one for which the police cannot arrest without a Magisterial warrant, and can investigate only after obtaining the Magistrate's directions.[18] A "bailable offence", on the other hand, is one for which bail can be availed as a matter of right, meaning that there is no pre-trial detention; and a non-bailable offence is one for which the grant of bail lies at the Court's discretion, and the burden of showing circumstances warranting release lies on the accused.[19]

The CrPC, as it was originally enacted, contained no guidance as to the circumstances necessitating arrest, requiring only that there be some grounds to believe the accused's connection with the commission of a cognizable offence.[20] This, it was noted by the 177th Report of the Law Commission of India, was an unsatisfactory state of affairs: the deferential standard to arrest u/s 41 meant, in effect, that it became an ordinary tool to be employed with high casualness, without regard to a substantive assessment of its rights-implications.[21] Subsequently, a principle of "necessity to arrest" was installed, meaning that a mere connection with the offence could not be the sole criteria to arrest, and the police must additionally show the necessity of arrest for five specific purposes, which were listed u/s 41.[22] Further, pursuant to the Supreme Court's observations in Joginder Kumar v. State of U.P.,[23] Parliament added s 41A to the CrPC, which concerned the substitution of arrest with a procedure called an "appearance before the police.[24] Using this method, the police would interrogate an accused without arresting them, for the conditions necessitating arrest u/s 41(1) – which concern the possibility of committing an offence during one's release, requirements of pre-trial interrogation etc. – had not arisen.[25]

17 CrPC 1973, s 2(c) states that a "cognizable offence means an offence for which… a police officer may… arrest without warrant".

18 CrPC 1973, s 2(l) states that a "non-cognizable offence means an offence for which…a police officer has no authority to arrest without warrant".

19 CrPC 1973, s 2(a) states that a "bailable offence" means an offence…shown as bailable in the First Schedule… and "non-bailable offence" means any other offence".

20 CrPC 1973, s 41 (unamended) states that a "police officer may…arrest any person…who has been concerned in any cognizable offence…".

21 Law Commission of India, Report No. 177 — Law Relating to Arrest (Ministry of Law and Justice 2001) 68-9.

22 CrPC 1973, s 41 (as amended) states that an arrest may be made for offences punishable with a maximum of seven years "(a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured".

23 *Joginder Kumar v State of UP* (1994) 4 SCC 260.

24 CrPC 1973, s 41A.

25 CrPC 1973, s 41A states that "The police officer shall, in all cases where the arrest of a person is not required… issue a notice".

Lastly, the CrPC contains a default "no-bail" scenario for an accused alleged to have committed a non-bailable offence. While each offence is distinctly characterized as a "bailable" or "non-bailable" offence in the First Schedule, the general rule of thumb is that any offence punishable with a minimum of three years is "non-bailable".[26] It has been estimated that out of roughly 300 offences in the Indian Penal Code, 1860 ("IPC"), 190 are non-bailable, on whom the statutory presumption against bail applies.[27] While this presumption operates against all non-bailable offences, it is further strengthened against offences punishable with death or life imprisonment, for which bail must be availed directly from a Sessions Court.[28] While this does not make bail impossible for non-bailable offences, it cannot be availed as a matter of right – the accused must make a case for bail, arguing primarily two things: first, their factual disconnection with the offence (to the extent permissible, given the prohibition on adducing substantive evidence in assessing their possible commission of the offence);[29] and second, the absence of risks associated with their release. This assessment is also done at the remand hearing, which is the accused's very first presentation before the court to determine whether they must be taken into custody, or be released.[30] This adjudication of bail based on the accused's submissions, I argue below, has evolved into a largely factual enquiry into the accused's role in the offence's commission, with a bail rejection constituting a "semi-adjudication" of guilt.

Given the highly pro-state classificatory regime under the CrPC that discourages bail, the Supreme Court has attempted to intervene on multiple occasions, both in terms of "one-time" release orders when prison overpopulation reaches disastrous levels,[31] and through changing the law on arrest and bail.[32] While doctrinal interventions on arrest have marked a substantial shift from their CrPC-based conceptualization, such interventions on bail – through progressive in comparison to judgments of the 1970s – are still, fundamentally, the same.

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26 CrPC 1973, First Schedule.

27 Abhinav Sekhri, 'The Bailable v Non-Bailable Classification in Indian Criminal Procedure' (2021) 3 GNLU Law and Society Review 56.

28 CrPC 1973, s 437(1)(i) read with s 439. While bail for ordinary offences – including those triable by a Sessions Court – can be availed from a Judicial Magistrate, one must necessarily obtain bail from the Sessions Court for an offence punishable with life imprisonment or death. The Magistrate's assessment of the nature of the allegations to determine their jurisdiction to grant bail has been described in *Prahlad Singh Bhati v NCT, Delhi* (2001) 4 SCC 280 [11].

29 *Amrit Pal Singh v Union Territory of J&K*, Bail App No 223/2020 [High Court of Jammu & Kashmir] [7]-[10]; *Anees v State of Uttar Pradesh,* Crl Misc Bail Application 23624 of 2020 [High Court of Allahabad] [8], [25]-[26] refusing to address the accused's arguments of a dying declaration's inadmissibility and unreliability at the bail stage.

30 For a general description of the remand hearing, see (n 2). See also, *Satender Kumar Antil* (n 1) [47]; *Gautam Navlakha* (n 1) [73]; *Prabir Purkayastha* (n 1) [16]-[20].

32 Aparna Chandra and Keerthana Medarametla, 'Bail and Incarceration: The State of Undertrial Prisoners in India' in Shruti Vidyasagar, Harish Narasappa, Ramya Tirumalai (eds), *Approaches to Justice in India* (Eastern Book Company 2018) 67.

Arnesh Kumar v. State of Bihar is regarded as the most significant case concerning the police's power to arrest in recent times, where the Court stated that the incorporation of the principle of necessity u/s 41(1) and the notice regime u/s 41A meant that things were not business as usual.[33] In that case, the Court laid down a few propositions of law: first, that the requirement of recording reasons when choosing to arrest is mandatory;[34] second, that the Magistrate – at the stage of remand – must review the compatibility of the arrest u/s 41, and refuse to grant custody if the arrest was illegal;[35] third, that if the police effect an arrest without complying with the notice regime u/s 41A, the arrest would be vitiated[36] and fourth, the police's non-compliance with these rules constitutes contempt of court, making delinquent officers liable to imprisonment and fines.[37] There has been substantial case-law building on Arnesh Kumar, with multiple High Courts hauling the police for contempt in light of illegal arrests.[38]

The law on bail, however, has stagnated in terms of substance, for one unfortunate point of commonality subsists: bail adjudication remains a factual enquiry into the likelihood of one's commission of the alleged offence, instead of a risk-based enquiry into the dangers associated with release.[39] This means that a court enquires into the accused's factual connection with the alleged offence in terms of the possibility or likelihood of the accused having committed the offence. On the other hand, the risk-based enquiry considers the risks associated with release, such as one's susceptibility to commit an offence during bail, threaten witnesses, tamper with evidence, or simply flee, in determining whether the detainee must be released.[40] This is not, however, to claim that a risk-based enquiry – the statutory mandate in the United Kingdom (a bail regime Satender Kumar Antil invited Parliament to adopt)[41] – is perfect: the act of authorizing one's detention based solely on "dangerousness" has invited the critique of over-inclusiveness,[42] risk-based factors contain racial undertones of groups deemed risky,

32 ibid.

33 Arnesh Kumar (n 15).

34 ibid [7.2].

35 ibid [8.2].

36 ibid [11.6].

37 ibid [11.7].

38 See *Rakesh Kumar v Vijayanta Arya* (2021) SCC OnLine Del 5574; *In Re v Chandan Kumar* (2022) SCC OnLine All 705.

39 While the terms "factual enquiry" and "risk-based enquiry" have not been explicitly employed as distinct categories of considerations in bail adjudication, I use the terms to describe different standards used across case-law.

40 For a list of such factors, see, for example, the Bail Act 1976, Schedule I of the United Kingdom.

41 *Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51 [100.1].

42 Richard L Lippke, 'Preventive Pre-Trial Detention Without Punishment' (2014) 20 Res Publica 112, proposing the slippery slope that detention on grounds of "dangerousness" enables; Paul H Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114(5) Harvard Law Review 1437-1441, discussing a set of moral problems that detention based on dangerousness prompts.

whose members' release is made difficult due to racial bias,[43] and the ex-ante assessment of one's "future-crime-indicating characteristics" is, at the very least, morally problematic.[44] These are, however, problems encountered by a bail regime aspiring to achieve its objectives distinctly from those of conviction and sentencing – in other words, these are problems arising from a bail regime's inability to properly fulfil its own objectives of arriving at principled, risk-based determinations of whether an individual must be released.

In India, however, the bail regime's distinct objectives in determining persons to be released are captured by, and rendered subordinate to those of conviction and sentencing, with the bail enquiry according centrality to a merits-based assessment of the likelihood with which an accused can be deemed to have committed an offence. The Court's early jurisprudence makes the factor of the "gravity and nature of the accusation" a significant one in the decision to release, making the factual enquiry prominent in bail adjudication: State v. Captain Jagjit Singh regarded (solely) the allegation of the revelation of official secrets sufficiently serious to deny bail, irrespective of the risks involved in the accused's release;[45] State of U.P. v. Poosu authorized post-acquittal undertrial imprisonment (awaiting the state's appeal) for a person accused of an offence punishable with death, premised solely on the quantum of punishment that the offence carried;[46] and Gurcharan Singh v. State entrenched the standard of "nature and gravity of…the offence…" in bail adjudication.[47]

The constancy of these principles laid down in the Court's early jurisprudence is discernible in case-law across the last two decades: Jayendra Saraswathi Swamigal v. State of T.N. affirmed Jagjit Singh's standards for bail adjudication;[48] Kalyan Chandra Sarkar v. Rajesh Ranjan considered the "nature of accusation and the severity of

43 Anonymous, 'Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing' (2018) 131(4) Harvard Law Review 1126-8, noting the disproportionate effects of the law on bail, alongside its requirements of furnishing bail, on persons from racial minorities.

44 Frederick Schauer, 'The Ubiquity of Prevention' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal Law* (OUP 2013) 11, proposing the impermissibility of detaining "a social group whose aggregate characteristics probabilistically indicate a proclivity to commit crimes" merely on that ground.

45 The *State v Captain Jagjit Singh* (1962) 3 SCR 622 [5)], stating that "[a]mong other considerations,…a court has to take into account…the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail".

46 *State of Uttar Pradesh v Poosu and another* (1976) 3 SCC 1 [14], holding that there is no "merit in the contention that an order directing the rearrest and detention of an accused respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right…".

47 *Gurucharan Singh v State (Delhi Administration)* (1978) 1 SCC 118 [24], [29].

48 *Jayendra Saraswathi Swamigal v State of Tamil Nadu* (2005) 2 SCC 13 (16).

punishment" as the first and primary consideration in the grant of bail;[49] Rajesh Ranjan v. CBI remarked that if bail were to be granted in light of the presumption of innocence, "then logically in every case bail has to be granted";[50] Prahlad Singh Bhati v. NCT of Delhi noted that the Court must consider the "nature of accusations", along with "the nature of evidence in support thereof" in deciding bail;[51] Rohit Bishnoi v. State of Rajasthan noted that a "prima facie conclusion" of the "serious nature of the accusations" is sufficient ground to deny bail;[52] and Dimple Tyagi v. State of U.P. affirmed that the "settled legal position" includes a factual assessment of the nature of allegations.[53] The phenomena of ordinary criminal law's functional replacement by special laws, which contain a modified version of criminal procedure, can be considered an additional cause – at least in recent times – to the phenomena of a merits-based enquiry in bail adjudication. Legislation such as the Unlawful Activities (Prevention) Act, 1967 ("UAPA") and the Prevention of Money Laundering Act, 2002 ("PMLA") contain explicit provisions requiring a factual enquiry into the accused's involvement in bail adjudication, officially abridging the gap between pre-trial detention and punishment.[54] Thus, once a person has been deemed "likely guilty" by a court under these special laws, their lengthy detention is authorized based on the court's assessment of their likely guilt, and little discomfort seen in this state of things.[55]

Some cases, however, may be read as indicating that the factual enquiry may have taken a backseat, increasing the role of the merits-based enquiry: in P. Chidambaram v. Directorate of Enforcement, the Court employed a "triple test" to decide bail, which enquires into the accused's susceptibility to flee, tamper with evidence, and influence

49 *Kalyan Chandra Sarkar v Rajesh Ranjan* (2004) 7 SCC 528 [11], noting that "…at the stage of granting bail…, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence".

50 *Rajesh Ranjan v CBI* (2007) 1 SCC 70 [23]. For a critique of this judgement, see Vrinda Bhandari, 'Inconsistent and Unclear: The Supreme Court of India on Bail' (2013) 6(3) NUJS Law Review 549.

51 *Prahlad Singh Bhati v NCT Delhi* (2001) 4 SCC 280 [8], noting that "[w]hile granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused."

52 *Rohit Bishnoi v State of Rajasthan* (2023) SCC OnLine SC 870 [39]. Due to the "seriousness of the allegations" of the commission of offences under ss 25 and 27 of the Arms Act, 1959 and Section 302 of the IPC, the Court proceeded to cancel the accused's bail.

53 *Dimple Tyagi v State of UP* (2023) Crl Appeal No(s) 3610/2023 [4].

54 UAPA 1967, s 43D(5); PMLA 2002, s 45.

55 For an unequivocal approval of a merits-based enquiry requiring prima facie proof of the accused's innocence, see *Vijay Madanlal Choudhary v Union of India* (2022) SCC OnLine SC 929 [400]-[412], approving this regime under the PMLA; *NIA v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1 [23]-[27], noting with approval the scope of the enquiry under s 43D(5) of the UAPA.

witnesses.[56] On facts, the Court found that the accused did not carry such propensities, and was eligible to be released on bail in a case concerning allegations of corruption and fraud, which are otherwise considered serious.[57] The Court, however, nowhere discouraged an additional enquiry into the factual component, explicitly recognizing that the "gravity of offence is a factor…in addition to the triple test" in bail adjudication.[58] The application of the triple test has been similarly unsatisfactory, indicating that things are, indeed, business as usual, with a factual enquiry similarly prominence.[59] Rohit Bishnoi and Dimple Tyagi are both post-Chidambaram cases and have chosen to prize a factual assessment of the commission of the offence, instead of adopting a risk-based enquiry in adjudicating bail. Further, among the cases arising from arrests under special laws containing bail-restrictive provisions, two judgments must be noted. In Manish Sisodia v. CBI, a case arising from the arrest of a sitting Minister of the Government of Delhi, the Court merely captured a set of information suggesting the accused's possible involvement in money laundering and corruption, rejecting bail accordingly.[60] In Satyendar Kumar Jain v. Enforcement Directorate, another case arising from a sitting Minister's arrest on money laundering allegations, the Court more or less convicts the accused in adjudicating bail, noting that there was "no shadow of doubt" that the accused laundered funds.[61]

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56 *P Chidambaram v Directorate of Enforcement* (2020) 13 SCC 791 [18]-[19]. For proposals of how the "triple test" or "tripod test" may depart from previous doctrinal considerations in bail adjudication, see Editorial, 'Bail basics: On Chidambaram case' *The Hindu* (New Delhi, 6 December 2019) <https://www.thehindu.com/opinion/editorial/bail-basics/article30195231.ece> accessed 17 June 2024, noting that a "triple test" must be invoked to "find out if a person is likely to hinder the trial by fleeing from justice, tampering with evidence, or influencing witnesses", and that factual allegations "cannot be used to deny bail based on allegations yet to be tested in a trial". For a contrary view, see Abhinav Sekhri, 'Supreme Court Grants Bail in the P. Chidambaram Cases — Some Thoughts' (*The Proof of Guilt,* 4 December 2019) <https://theproofofguilt.blogspot.com/2019/12/supreme-court-grants-bail-in-p.html> accessed 17 June 2024, proposing that Chidambaram enabled an enquiry into an offence's seriousness alongside the "triple test".

57 Chidambaram (n 56) [30], noting that the accused was "not a "flight risk" and there is no possibility of tampering with the evidence or influencing/intimidating the witnesses".

58 ibid [23].

59 For cases applying the "triple test" in bail adjudication, see *Vivekanand Mishra v State of UP* (2022) SCC OnLine SC 1903 [25] (denying bail in a case of grievous hurt after a factual enquiry into the likelihood of the accused's commission of the offence); *State of Kerala v Mahesh* (2021) 14 SCC 86 [37] (denying bail using the triple test, citing the seriousness of the allegation of murder as a ground); *Amandeep Singh Dhall v CBI* (2024) SCC OnLine Del 4285 [43]-[52], [63], invoking the triple test but assessing the state's factual allegations against the accused. For a contrary take on the strength of the triple test, see *Deepak Goyal v CBI* (2024) SCC OnLine Del 4108 [23]-[25], noting that detention is not supposed to be punitive and that the "seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail".

60 *Manish Sisodia v CBI* (2023) SCC OnLine SC 1393 [26].

61 *Satyendar Kumar Jain v Enforcement Directorate* (2024) SCC OnLine SC 317 [28].

Such reasoning in bail adjudication – implicit in ordinary cases, and as explicit as it can get in special laws – constitutes a "semi-adjudication" of the accused's guilt, for the Court premises the grant of bail primarily on its factual assessment of the accused's commission of the alleged offence. Such reasoning departs substantially from the burden levied on the state to deprive one's liberty through a conviction, which requires proof "beyond reasonable doubt".[62] There exists, therefore, a large normative hole in this state of affairs: while conviction-related liberty-deprivation occurs only through proof of the commission of an offence "beyond reasonable doubt", pre-trial liberty-deprivation is acceptable so long as a court deems the commission of the alleged offence "likely". This normative hole's practical implications are striking: while 1.1 lakh persons presently suffer a deprivation of liberty due to a conviction, 4.2 lakh pre-trial detainees have been imprisoned for time periods ranging from three months to five years, with such detention being authorized primarily on the likelihood of their involvement in the alleged offence.[63] Detention for periods akin to those of conviction, therefore, is being authorized through courts' assessment of a possibility of guilt – a situation, I propose below, that conflicts with bail adjudication's fundamental aims and purposes, and one that has permeating implications for doctrinal developments of default bail.

There has, however, been one development that marks a shift both from the CrPC's text and from early case-law – in Satender Kumar Antil, the Court has acknowledged the mass deprivation of liberty resulting from CrPC's presumption against bail for offences punishable with a minimum of three years, holding that the presumption shall now apply only to offences punishable with a minimum of seven years.[64] Despite this change, the doctrine on bail adjudication remains remarkably similar, with courts ordinarily enquiring into the factual commission of the alleged offence in all its dimensions – its seriousness, the likelihood of commission, and the accused's overall involvement in the offence. I discuss the implications of such a mode of bail adjudication below, where a sense of guilt becomes institutionally attached to pre-trial detainees.

C. Pre-Trial Detention and the "Semi-Adjudication of Guilt"

Duff conceptualizes pre-trial restrictions on liberty as a social recognition of an accused's unique normative position, for they must behave in accordance with reasonable social fears emerging in light of the allegations levelled against them.[65]

62 Indian Evidence Act 1872, s 4.

63 National Crime Records Bureau (n 9) xvii.

64 *Satender Kumar Antil* (n 2) [2]. The Court also recommended legislative change through the enactment of a "Bail Act", akin to what exists in the United Kingdom, which streamlines the grounds of bail adjudication.

65 RA Duff, 'Pre-Trial Detention and the Presumption of Innocence' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal Law* (OUP 2013) 123.

Simultaneously, however, he proposes that such accommodation of social fears must not cause an upheaval in an accused's life. The disruption to their life must be minimal, for they are, overall, presumed innocent.[66] On this basis, he proposes that even if pre-trial detention is to be justified on the logic of one's obligation to accommodate social fears, the public distinction between pre-trial detention and conviction-related imprisonment must be institutionally ensured, for the pre-trial detainee does not stand in the moral position of guilt.[67] Raifeartaigh proposes that we must actively pursue lesser rights-restrictive alternatives to pre-trial detention.[68] This is because the distinction between a conviction, which results in a procedurally-sound finding of guilt, and detention, which occurs in pursuit of placating social fears till the trial's completion, is highly susceptible to collapsing.[69] Similarly, Ashworth and Zedner argue that even if pre-trial detention is justified in light of the state's pursuit of preventing harm, such detention must be made as "non-punitive and as normal as possible".[70]

Given the hefty normative considerations involved in pre-trial detention but its simultaneous inevitability on grounds of general social interest, the issue of the correct questions to ask during this enquiry has been heavily debated. A basic, original purpose of the presumption of innocence, Baradaran notes, concerned the imposition of a prohibition on judges from predicting an accused's guilt in advance, requiring comprehensive proof at the stage of trial.[71] Since guilt was to be adjudged only at trial, the sole purpose that pre-trial detention, alongside the law on bail, served was to ensure the accused's presence at trial, nothing else.[72] Page and Scott-Hayward note the steady departure that American courts made from this singular justification for pre-trial detention by detaining individuals that were "believed dangerous or likely to flee", to punish individuals they found "disrespectful or troublesome", as well as to "elicit information or confession[s]".[73] This evolution, over time, gave rise to a general consensus that the purpose of bail had broadened, and that bail law aimed to "contain

66 ibid 125-6.

67 ibid 121. Duff proposes that there must be the "drawing a sharper and more public distinction between those who are remanded pending trial and convicted offenders by, for one obvious instance, detaining them in separate facilities."

68 Una Ni Raifeartaigh, 'Reconciling Bail Law with the Presumption of Innocence' (1997) 17 Oxford Journal of Legal Studies 1.

69 ibid.

70 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 71.

71 Shima Baradaran, 'Restoring the Presumption of Innocence' (2011) 72 Ohio State Law Journal 723, noting that a prohibition on "deciding defendants' guilt pretrial ensure[s] that defendants would remain at liberty before trial."

72 ibid 726.

73 Joshua Page and Christine S Scott-Hayward, 'Bail and Pretrial Justice in the United States: A Field of Possibility' (2022) 5 Annual Review of Criminology 93.

and control people…accused of crimes".[74] The allegation's seriousness, they note, became a primary consideration in bail adjudication because courts – premised on a risk-averse understanding of human behaviour – considered their control over criminal defendants to become the weakest when individuals were accused of the most serious offences.[75] The legitimate purposes for pre-trial detention, however, remained the same: securing the accused's presence for trial, and subserving public interest by temporarily incapacitating persons appearing dangerous, i.e., those that risked harming the trial process.[76] Lastly, Baradaran notes that a merits-based enquiry deleteriously impacted the bail's availability in the United States, for courts could now "weigh evidence" against the accused to deny bail.[77]

Lippke, based on the work of Ashworth and Redmayne, proposes the creation of strict, conjunctive conditions to be satisfied by the state to obtain pre-trial custody of accused persons, which should involve risk-based factors, a burden on the state to show "substantial evidence" of the accused's guilt, as well as its demonstration of the unavailability of lesser-restrictive alternatives to pre-trial detention that fulfil its objectives.[78] Baradaran, however, in discussing factors relevant to assessing the grant of bail, strictly advises against a merits-based enquiry into guilt, for predictive guilt – apart from being possibly inaccurate – diverges from bail's foundational purpose of securing the individual's presence at trial, and incapacitating them even when they pose no risks to the trial process.[79] While a merits-based, factual enquiry may have the advantage of enabling the release of persons appearing disconnected from the offence's commission, it diverges from pre-trial detention's purpose of securing a proper trial and may have the effect of validating a perfunctory and deferential standard for authorizing detention.

Such an enquiry – in the manner seen in Indian cases above – does not resemble Lippke's standard of the presence of "substantial evidence" against the accused and authorizes detention based on a highly preliminary assessment of facts that suggest a possible involvement of the accused in the offence's commission.[80] Instead of operating

74 ibid 94.

75 ibid.

76 ibid 96.

77 Baradaran (n 71) 741.

78 Lippke (n 42) 117-9.

79 Baradaran (n 71) 762-3.

80 See, for instance, the judgment in *Rohit Bishnoi* (n 52), finding allegations of murder sufficient to reject bail on grounds of seriousness; *Nitu Kumar v Gulveer* (2022) 9 SCC 222, holding an offence's seriousness to be a relevant factor in the grant of bail, cancelling bail; *Guria Swayam Sevi Sansthan v Satyabhama* (2018) 13 SCC 387, finding allegations under the Immoral Traffic (Prevention) Act 1956 sufficiently serious, justifying a refusal of grant of bail; *Naveen Singh v State of UP* (2021) 6 SCC 191, finding allegations of fabricating court records serious and factually possible, rejecting bail. There exist a plethora of cases that undertake a highly preliminary analysis of the factual case against the accused, rejecting bail on the offence's seriousness and their possible involvement.

with the intent to accord overwhelming priority to the presumption of innocence and consequently demand immense evidence from the state for authorizing detention, the Indian variant of the enquiry asks the state to produce mere allegations – irrespective of the quality of evidence backing them – in authorizing detention. Lastly,[81] in case the enquiry does become modelled on a factual assessment of "predicting guilt", it would be expected that the accused be able to offer material showing their innocence at the bail hearing too. Unless this is done, the mere production of allegations, without regard to the accused's defence, becomes ripe for courts' utilization to impose conviction-like sentences at the bail stage itself. Indian case-law, especially across High Courts, has taken this route: while enabling detention based on the state's production of allegations, the accused is simultaneously disabled from producing contrary evidence showing their innocence, with observations being made on the permissibility of producing such evidence only at trial.[82]

Thus, even if a factual enquiry must be taken into an accused's guilt, it must be done with the cognizance of the enquiry's possible divergence from pre-trial detention's foundational purposes and must be done with the purpose of increasing the burden on the state to obtain an accused's custody. In case it does become the norm, a minimal expectation would be to secure parity in producing material for undertaking this factual enquiry between the state and the accused – an expectation courts have not fulfilled.[83] Overall, therefore, imprisonment can be authorized based on a factual enquiry into the accused's guilt, the state's production of barebone allegations is highly consequential in this enquiry, and the accused is simultaneously disabled from producing contrary evidence to show their innocence.

A normative unease with pre-trial detention, owing to its character as a distinct and independent punishment, therefore, is highly lacking in Indian bail adjudication, and the above scope of adjudication appears to diverge immensely from pre-trial detention's purposes and principles. Sekhri notes one cause: while the police, overall, have only 15% of investigations pending, courts have pendency rates of nearly 90% for ordinary criminal cases.[84] This institutional incapacity to reach normatively acceptable determinations on guilt and innocence within a reasonable timeframe – alongside CrPC

81 ibid.

82 For cases disabling an accused's production of evidence to show their innocence or non-involvement with the case at hand, see *Amrit Pal Singh v Union Territory of J&K* [High Court of Jammu and Kashmir], Bail App No 223/2020, holding that the accused's production of evidence demonstrating their disconnection with a murder case cannot be considered at the stage of bail; *Anees v State of Uttar Pradesh* [High Court of Allahabad], Crl Misc Bail Application 23624 of 2020, refusing to address the accused's arguments of a dying declaration's inadmissibility and unreliability at the bail stage.

83 ibid.

84 Abhinav Sekhri (n 8).

and its case-law envisioning a default denial of bail – creates a situation where courts engage in a form of punishment without condemnation. An accused, after having their bail denied, is presumed sufficiently guilty to warrant their detention till the trial's completion. This is because bail adjudication – done in line with case-law encouraging a merits-based review of the accused's likelihood of guilt – deems one sufficiently guilty to undergo imprisonment. The rejection of bail becomes a sufficiently institutionally acceptable measure of guilt, and prolonged pre-trial detention – based primarily on a court's assessment of the likelihood of the commission of an offence – becomes the norm. This highly tangible absence of a presumption of innocence also manifests statutorily: Section 436A of CrPC states that one can, if circumstances warrant, be detained for up to one-half of the total sentence carried by the alleged offence, and even beyond if the court deems fit – all without a judicial determination of guilt![85] This section comes into the limelight primarily when prison conditions become highly unmanageable, and the volume of detainees having undergone lengthy pre-trial detention overwhelms prison authorities. In[86] In re - Inhuman Conditions in 1382 Prisons, for example, the Court "requested" governments to "implement" Section 436A to "reduce overcrowding in prisons". Forgotten detainees enter judicial discourse only when they become too many, and it is not the loss of their dignity and a continual violation of their fundamental rights that necessitates their release. It is, instead, the objective of alleviating prison congestion. This is because they are, for all practical purposes, sufficiently guilty to warrant prolonged detention, for the "formal verdict of the court" is nowhere in sight[87]

II. CONCEPTUALIZING DEFAULT BAIL NORMATIVELY: A DURATION-DEFINITE LEGAL LIMBO, SECURING SYSTEMIC EFFECTIVENESS

Pre-trial detention, therefore, often serves the function of meting out punishment for wrongs likely to have been committed, with the bail enquiry evolving to ask this question consistently. In such a scenario, the role of default bail – the procedure enabling one's release based on their imprisonment for sixty/ninety days without the state's demonstration of interest in their case – becomes crucial. Since the persons availing default bail have, at minimum, been imprisoned for sixty/ninety days, and their bail on merits has also likely been rejected, should the law on default bail evolve with a conceptualisation of its recipients as persons that are likely guilty, and therefore minimize the possibilities of their release?

85 CrPC 1973, s 436A.

86 *In re - Inhuman Conditions in 1382 Prisons* (2016) 3 SCC 700 [16].

87 Duff (n 65) 120.

I propose this approach – discussed in the following section as having been adopted by the Supreme Court – to be incorrect, requiring a morally justifiable theoretical foundation for default bail, grounded in the presumption of innocence, capable of offering guidance for principled doctrinal developments. Such a theoretical foundation must contain, at the very least, two elements: first, a recognition that default bail signifies the normative impermissibility of detaining an individual in the state's breach of its duration-definite duty to actively pursue elimination of the "accused" label on the individual; and second, a recognition of its primarily procedural nature pursuing systemic effectiveness, which can be secured only through judicial interpretations emphasizing the absolute nature of the state's duty, and the unconditional nature of the right derived in its breach.

First, a conception of default bail as a windfall gain – an ill-gotten receipt of liberty, as discussed below – must cease. Default bail must not be considered merely an "order on default", i.e., the receipt of liberty based on the state's negligence in filing a document timely.[88] It should, instead, be considered reflective of the normative impermissibility of detaining an individual beyond a particular duration in the absence of a genuine enquiry into their guilt. An individual's unique normative position arising by virtue of being accused – an individual that is not legally guilty, yet must accommodate social fears by virtue of allegations – originates conditionally, with a corresponding duration-definite duty on the state to cease this legal limbo between guilt and innocence.[89] One's acquisition of the legal-normative status of the "accused", therefore, comes with a condition of this status not being indefinite, with the state committing to pursue this legal limbo's elimination.[90] Accordingly, one's accommodation of social fears based on the

88 This interpretation, as discussed in the following section, is a view adopted by the Court in laying down the law on re-arrests, and fails to adhere to the two normative underpinnings of default bail discussed in this section. For cases on this standard, see *Rajnikant Jivanlal v Intelligence Officer, Narcotic Control Bureau* (1989) 3 SCC 532 [11]-[13]; *T Gangi Reddy* (n 4) [26]–[27]. See also, *Raghubir Singh v State of Bihar* (1986) 4 SCC 481, whose observations constitute the basis for Rajnikant Jivanlal's holding on default bail.

89 See, for example, Ashworth and Zedner (n 44) 65-71, discussing the unique characteristics of pre-trial detention that prevent its normative characterization as a punishment, prompting an enquiry into legitimate justifications therefore that do not undermine persons' status as responsible agents. For the duration-definite nature of undergoing pre-trial detention under s 167(2), see Ramesh Vaghela, 'Default Bail: A Study of Case Law' (2003) 45(1) Journal of the Indian Law Institute 81, noting that the provisions on default bail, while not concerning the duration of the investigation itself, send a clear indication that the accused would be released but for the completion of a timely investigation.

90 CrPC provisions require the state to undertake an investigation into offences in the police's knowledge, with this process including all proceedings for the collection of evidence. The police, based on evidence collected that suggests an accused's commission of an offence, prepare a "police report", called a charge-sheet, under s 173. Based on the facts disclosed in the chargesheet, the Magistrate may, u/s 190 of the CrPC, choose to take cognizance of the offence and move towards the initiation of trial. The Magistrate may, however, find that the charge-sheet does not disclose an offence's commission, and refuse to take cognizance. For the steps available for the Magistrate in assessing a charge-sheet, see *Zunaid v State of UP* (2023) SCC OnLine SC 1082 [11].

factum of allegations is coextensive with the state's duration-definite pursuit of eliminating one's "accused" status through a genuine investigation. It is this prohibition on the state's conferral of an indefinite "accused" status on an individual, all while simultaneously making no genuine pursuit in eventually eliminating this status, that must be considered to conceptually underlie default bail. Since the judicial enquiry in assessing the availability of default bail is premised on an examination of the charge-sheet – the document containing the state's investigative work – it must necessarily evince material demonstrating a genuine investigative endeavour, ensuring that attempts to confer an indefinite "accused" status on an individual are not being made.

Second, a conception of default bail must be premised on a recognition of its principally procedural character that aims to secure justice systemically.[91] The nature of Section 167(2) is such that it regulates the conduct of state officials, mandating them to make genuine enquiries into an accused's guilt. The process of a duration-definite investigation, as discussed above, constitutes an obligation on the state's part, and the actors whose adherence therewith is expected are state officials.[92] This procedural rule mandating investigation, however, also confers a substantive right on the accused based on the procedural obligation's non-fulfilment, since the non-filing of the charge-sheet u/s 167(2), resulting from a lack of investigation, entitles the accused to be released. This procedural rule, like procedural rules generally, serves a systemic function, for it aims to secure compliance with legal norms at a structural level.[93] It requires the state machinery overall to fulfil the investigative task and enables every accused to be released based on its non-fulfilment. Legal norms aimed at securing the state machinery's overall compliance with a set of principles are considered as pursuing "systemic effectiveness", which is all state actors' well-accepted, imbibed adherence to certain legal requirements.[94] Sweet, in discussing the utility of the four-pronged proportionality

91 See, for example, Paul B Lewis, 'Systemic Due Process: Concepts and the Problem of Recusal' (1990) 38 University of Kansas Law Review 400, proposing the value of process and procedural law in creating a system that offers "long-term societal benefits", for it "establishes a stable mechanism by means of which the collective can effectively operate…"; Norman W Spaulding, 'The Ideal and the Actual in Procedural Due Process' (2021) 48 Hastings Constitutional Law Quarterly 261, proposing that due process norms in the United States are unable to secure justice in disputes that actually arise in American society, for these norms – instead of possessing a systemic nature – are confined to certain "ideal" forms of procedure.

92 As discussed in n , an offence's investigation is the state's prerogative, and a failure thereof entitles an individual to be released under s 167(2). Courts have also sought to create software that captures timelines for investigation and the availability of default bail, tracking both the state's fulfilment of investigative duties and the accrual of the right. For cases suggesting the creation of digital means to track investigations and bail, see *Arvind Kumar Saxena v State* (2018) SCC OnLine Del 7769 [21]; *Sher Singh v State* (NCT of Delhi) (2022) SCC OnLine Del 3745 [22].

93 See Lawrence Solum, 'Procedural Justice' (2004) 78 Southern California Law Review 188-9, noting the "action-guiding role of procedure" is such that it imposes obligations to comply both on state officials and citizens; Lewis (n 91) 399-400; Spaulding (n 91) 290.

94 Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (OUP 2019) 4.

standard in assessing the validity of state action, proposes that this enquiry's consistent and structured utilization in adjudication systemically alters state actors' behaviour, making adherence with proportionality the norm in their own governance and decision-making processes.[95] In case the procedural mandate of a genuine investigation, as well as the accused's corresponding right to be released, are to be offered an interpretation that enables their achievement of systemic effectiveness spanning across the state machinery, such an interpretation must necessarily emphasize default bail's absolute and unconditional nature.

Attempts at creating exceptions and riders to default bail, or undermining its theoretical foundation that requires the state's engagement in a genuine investigative endeavour, would necessarily conflict with a pursuit of systemic effectiveness, stymieing its ability to alter state actors' behaviour. It is only through the creation of an absolute requirement to complete an investigation within a specified duration, alongside an unconditional right to be released in this requirement's non-fulfilment, that can prompt state actors to move towards fulfilling it. In case exceptions and riders are created to either the state's duty or the individual's right, a defection from fulfilling the genuine investigative endeavour becomes acceptable, and the default bail regime loses its ability to secure state-wide acquiescence to its principles. Consider an example of the latter variety, which concerns the individual right being weakened, done through permitting "re-arrests" after release:[96] in this case, an accused who was released under default bail can simply be re-arrested any time thereafter, with the only condition being the state's filing of a charge-sheet before arresting.[97] This weakening of the individual right has the effect of detracting from the duration-definite nature of one's "accused" status, for it entitles the state to investigate for howsoever long as it desires, with the individual perpetually possessing the "accused" status, being ever-ready to surrender to prison when the state feels they might be guilty. Since the introduction of a "re-arrest" norm causes a failure of default bail's foundational underpinning to prompt a genuine investigative endeavour, it no longer encourages state officials to enquire into the individual's guilt in a duration-definite manner, failing in its pursuit of systemic effectiveness. Enabling re-arrests after release, therefore, would wholly conflict with default bail's principles and underpinnings, and would be an outcome that a judiciary cognizant of default bail's purpose and underpinnings will avoid. The Supreme Court, however, has chosen otherwise, enabling re-arrests, as well as weakening the default bail regime in two other crucial ways too. I discuss these in the next section.

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95 ibid 4-5.

96 For cases permitting "re-arrests" after release (discussed in Section III), see *Gangi Reddy* (n 4); *Aslam Babalal Desai v State of Maharashtra* (1992) 4 SCC 272.

97 The standard of a subsequent filing of a charge-sheet enabling re-arrests has been laid down, inter alia, in *Gangi Reddy* (n 4).

III. THE DEFAULT BAIL REGIME – ASSESSING THE RIPPLE EFFECTS OF THE ADJUDICATION OF GUILT IN THREE AVENUES

The Court's approach towards default bail, as seen from the re-arrest example above, is generally ignorant towards the normative considerations with default bail, and can, instead, be described as minimizing the avenues through which it can be availed. An underlying reason for its consistent weakening of the default bail regime – which I explore further in Section IV – is arguably the Court's cognizance of the institutional constraints necessitating the above-discussed semi-adjudication of guilt, creating an entrenched notion of default bail's recipients being likely guilty. The institutional attachment of guilt with pre-trial detention, therefore, may carry substantial ripple effects to the doctrinal development of default bail, offering an explanation for why the Court has consistently weakened it. I am, of course, not claiming this to constitute the sole explanation behind the Court's creation of exceptions to Section 167(2)'s legislatively-stipulated absoluteness, but one that traces the implications of the judicial characterization of its recipients on the interpretations offered to default bail. This explanation is derivable from the commonality of reasoning offered in case-law that weakens default bail, which affirms its character as a windfall gain for persons that otherwise deserved to be imprisoned, and case-law refusing bail based on their assessment of an individual's likely guilt. A sense of guilt attached to default bail's recipients, therefore, may explain why the Court has minimized the avenues through which it can be availed. In this section, I discuss three ways in which the Court has proceeded to weaken the default bail regime, bringing it close to toothlessness – first, its creation of the "extinguishing regime" (A); second, the possibility of "re-arrests" after release on default bail (B); and third, the Court's rejection of an enquiry into a "charge-sheet's" quality to assess its sufficiency to deny default bail (C).

A. The Extinguishing Regime: On the Rat Race of Filings

The first attack on Section 167's ostensibly unconditional character is done through the judicial creation of rules that define circumstances where the right to avail default bail is deemed forfeited, referred to as the "extinguishing" of default bail. The issue of extinguishing, whose problematized character was made most evident in State of M.P. v. Rustam, has been a highly contentious theme since the default bail regime's inception.[98] Since the filing of a charge-sheet is pivotal in determining one's eligibility to avail default bail, the issue of the charge-sheet being filed subsequent to the date on which default bail became available has always been contentious.

The factual basis of such cases lies in pre-trial detainees filing applications for default bail on the date that the sixty (or ninety) days – within which the police are bound to complete their investigation and file a charge-sheet – had elapsed, with such applications being listed in court subsequently. The police would file its charge-sheet in

98 *State of MP v Rustam* (1995) Supp (3) SCC 221.

the interim, and on the date of hearing, claim that the investigation had been completed and that the accused would no longer be entitled to their release. In Rustam, the Court approved of this scheme, holding that the charge-sheet's filing subsequent to the bail application (which, however, was filed timely, on the sixty-first or ninety-first day) prevented the accused from obtaining default bail.[99] The duration for which the accused underwent imprisonment – which exceeded the sixty/ninety days – would not be an obstacle in barring the accused's release, for the "default" on the part of the police, which concerned the lapse in the timely filing of the charge-sheet, had been remedied by the date of the hearing.[100] The underlying logic of Rustam's reasoning may lie in the same attachment of pre-trial notions of guilt: detainees are sufficiently guilty to warrant prolonged imprisonment, and deviations from this outcome must be doctrinally discouraged. Mistakes – in terms of "defaults" – of investigative agencies are insufficient to warrant one's release, for the moral position in which the accused stands – instead of being distinct from the convicted prisoner – as conceptually akin. The accused acts with no virtuosity in "accommodating social fears" in light of the allegations against them, and is, instead, the rightful recipient of pre-trial punishment.

The judgment in Rustam was overruled in Uday Mohanlal Acharya v. State of Maharashtra, where the Court noted that an interpretation of Section 167(2) "capable of being abused by the prosecution" should be disfavoured, and the filing of a default bail application on the date that it accrued would be sufficient for the accused to be released.[101] This position of law has been affirmed in Union of India v. Nirala Yadav, where the Court accepted that the relevant date to determine the availability of default bail is the date on which the application was filed and not the date when the case came up for hearing subsequently.[102] In M. Ravindran v. Directorate of Revenue Intelligence, the Court has also imposed an obligation on the Magistrate to inform the accused of the availability of default bail, so that underprivileged persons, who have insufficient legal aid, do not have to spend time in prison beyond the stage where default bail accrued.[103] Ultimately, however, default bail is still determined by a filing rat race on the sixty-first (or ninety-first) day: if the accused files their application first, bail can be availed; and if the police file their charge-sheet first, default bail extinguishes.

99 ibid [4], holding that "[t]he court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail."

100 ibid.

101 *Uday Mohanlal Acharya v State of Maharashtra* (2001) 5 SCC 453 [13], noting that "[s]ince the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution".

102 *Union of India v Nirala Yadav* (2014) 9 SCC 457 [28].

103 *M Ravindran v Directorate of Revenue Intelligence* (2021) 2 SCC 485 [18.10], noting that "the counsel for the accused as well as the Magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights."

Another factor that has stayed uniform in the law's evolution from Rustam to Raivndran is the continually conditional nature of one's release. This is because the accused is ineligible to be released until they furnish the bail amount, and also file an application for release prior to the police filing their charge-sheet.[104] It hinges the question of one's release, therefore, on the time differential of a few minutes or hours in a filing rat-race, as well as the accused's readiness to furnish the bail amount. This interpretation conflicts with the interpretive requirement of the investigative duty's absoluteness, as well as the accrual of an unconditional right on the accused. Most pre-trial detainees are disadvantaged and financially weak and are unable to furnish bail for their release.[105] By imposing a necessary requirement of the accused's furnishing of a sum for availing default bail, the state's defection from the bargain underlying default bail is again permitted, for a duration-definite investigation is obviated by the expectation that the accused cannot, in any case, afford to obtain default bail. The right, instead of being unconditional, hinges on the production of a sum for a release, which is also a statutory mandate106 Vaghela, however, proposes that this is not a hindrance to the grant of default bail, for the legal status of one's imprisonment must be deemed to cease from that of pre-trial detention and acquire the form of detention due to one's inability to furnish bail from the sixty-first or ninety-first day.[107] A legislative reconsideration of the requirement to furnish bail, and judicial recognition of its iniquitous implications would, therefore, be useful. Further, the concentration of the bail enquiry on the time of filing documents in court confers a veneer of equal opportunity on availing default bail, enabling an accused to precede the state in the filing battle. This does not, however, consider that the police could simply abstain from a duration-definite genuine investigation and file a document containing anything, just formally titled "charge-sheet", and still defeat default bail as discussed in sub-section C, or merely enable the accused's release for a moment, and effect their re-arrest whenever they feel the accused's possible involvement in the offence's commission. I discuss this below.

B. Re-Arrest after Default Bail – No Pre-Trial Presumption of Innocence

One way of rendering default bail ineffective is to apprehend the accused immediately after their release, subjecting them to pre-trial detention once again. Although this practice appears unfair as it renders the practical significance of default bail negligible, it has been consistently endorsed in case-law. In Rajnikant Jivanlal v.

104 *Ravindran* (n 103) [25.4], holding that "[i]f the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid."

105 Murali Karnam and Trijeeb Nanda, 'Condition of Undertrials in India: Problems and Solutions' (2016) 51(13) Economic and Political Weekly 14; Rahul Tripathi, 'Majority undertrials from poorer sections, shows NCRB data' (Economic Times, 3 September 2022) <https://economictimes.indiatimes.com/news/india/majority-undertrials-from-poorer-sections-shows-ncrb-data/articleshow/93958200.cms?from=mdr> accessed 18 June 2024.

106 CrPC 1973, explanation to s 167(2), stating that "the accused shall be detained in custody so long he does not furnish bail."

107 Vaghela (n 89) 93-4.

Intelligence Officer, the accused, who had been released u/s 167(2) due to the police's omission in filing the charge-sheet within ninety days, was "re-arrested" after the police's subsequent filing of the charge-sheet.[108] The only reason cited for the re-arrest was that the charge-sheet disclosed the commission of a non-bailable offence.[109] The Court held such a re-arrest permissible, because an order to release on default bail was merely an "order on default", and the accused had no guaranteed liberty by virtue of being released on default bail:

> "The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled."[110]

This observation may be premised on the same institutionalized notion of pre-trial detainees' likely guilt, deeming them beneficiaries of special privileges that accrued to them due to the police's mistakes. Default bail was ill-gotten and unearned, for the accused was sufficiently morally culpable to deserve pre-trial punishment. In terms of the position of law, the Court approved post-charge-sheet re-arrests, and the only relevant factor was whether the charge-sheet demonstrated the commission of a non-bailable offence.[111] This was too easy a threshold to meet, for the police only had to choose from any non-bailable offence in the IPC (of which there are 190) and describe its commission. A factor contributing further to how this threshold is highly skewed towards the state is the fact that the court – when deciding default bail based on the filing of the charge-sheet – does not enquire into the contents of the charge-sheet, enquiring only into its barebone, physical existence as discussed in sub-section C. Since the charge-sheet could contain any allegations, whose veracity would not be tested while deciding default bail, the police may virtually write anything about the commission of a non-bailable offence in the charge-sheet in order to effect a re-arrest, and the court would not enquire therein. This easy standard for effecting a re-arrest, which enabled the police to defeat default bail by merely writing about the commission of a non-cognizable offence in its charge-sheet – became a concern in Aslam Babalal Desai v. State of Maharashtra.[112] In that case, the Court overruled Rajnikant Jivanlal, holding that the standard for a re-arrest must not be the mere filing of a charge-sheet that identifies the commission of a non-cognizable offence, and must necessarily be something more:

> "We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime."[113]

108 *Rajnikant Jivanlal v Intelligence Officer* (1989) 3 SCC 532.

109 ibid [6].

110 ibid [14].

111 ibid.

112 *Aslam Babalal Desai v State of Maharashtra* (1992) 4 SCC 272.

113 ibid (emphasis mine).

The Court, per majority, changed the standard from one that only requires the filing of a charge-sheet, to one that requires the production of "special reasons" for cancellation. This was because Section 167(2) states that a person released thereunder shall be "deemed to be so released under the provisions of Chapter XXXIII", which is the chapter on ordinary bail for non-bailable offences.[114] The Chapter, u/ss 437(5) and 439(2), empowers the court to cancel bail, which is, in turn, done through an enquiry akin to the risk-based enquiry on bail – the court assesses whether the accused tampered with evidence, influenced witnesses, or acted contrary to their bail conditions.[115] It is only when their release, which may have been decided through either factual or objective enquiries, turns risky to society that one's re-arrest is authorized through the cancellation of bail. On this basis, the majority in Aslam Babalal incorporated the objective standard to determine the circumstances for cancellation of bail.[116] Puncchi, J., however, authored a dissent: he affirmed Rajnikant Jivanlal, holding that the charge-sheet's subsequent filing would be sufficient to re-arrest, and the "special reasons" requirement offered by the majority was incorrect.[117] In State v. T. Gangi Reddy, the Court – after discussing both the majority and minority judgments in Aslam Babalal – has created an ambiguity as to the standards for re-arrest after the availing of default bail, effectively turning Punchhi, J.'s dissent into the majority holding.[118] This is because the Court noted that while the standard for re-arrest is the existence of "special reasons", such reasons can include an assessment of whether the "accused has committed a non-bailable crime" based on the contents of the charge-sheet.[119] This phraseology affirms the minority in Aslam Babalal – as well as Rajnikant Jivanlal – for effectively, the only relevant enquiry is whether the charge-sheet discloses the commission of a non-bailable offence.[120]

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114 CrPC 1973, s 167(2) states that a person released on default bail shall be deemed to be released under the CrPC's chapter on bail for non-bailable offences.

115 *Aslam Babalal* (n 96) [11], noting that "bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vii) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc." These factors resemble the objective enquiry into the grant of bail, for they examine the risks associated with the accused's release.

116 ibid [11]-[14].

117 ibid [28].

118 Abhinav Sekhri, 'Section 167, 'Default Bail', and its Cancellation' (The Proof of Guilt, 16 February 2023) <https://theproofofguilt.blogspot.com/2023/02/section-167-default-bail-and-its.html> accessed 18 September 2023. The essay, referring to the Court's sleight-of-hand in T Gangi Reddy, argues that "[t]his is clearly not what was held by the majority in Aslam Babalal Desai, but speaks to the minority."

119 *Gangi Reddy* (n 4) [31].

120 Abhinav Sekhri (n 118).

The law on re-arrests, therefore, substantially undermines the default bail regime, rendering it virtually toothless – one can be arrested right after being released, for the subsequent filing of a charge-sheet is the sole factor controlling one's liberty. The charge-sheet's contents, as discussed below, are beyond judicial review when assessing default bail, centering the decision on one's release wholly on the police's undisputed actions. Akin to the extinguishing regime, the law on re-arrest insufficiently conceptualizes the role of the presumption of innocence, for it indicates that the sixty/ninety-day detention – during which the police attempted to investigate the accused's guilt – was too minimal a pre-trial punishment. Once the police develop any belief in the accused's guilt, which they express through the filing of a charge-sheet, even greater pre-trial punishment is warranted. The state's defection from its end of the bargain, which requires it to undertake a duration-definite investigation into the accused's wrongdoing, is authorized by the Court, enabling the imposition of an indefinite "accused" status on the individual. The state can develop a suspicion into one's guilt at any moment, enabling a re-arrest and continued pre-trial detention. More importantly, however, an interpretation of Section 167(2) that enables re-arrests departs from the foundational requirement of interpreting the investigative duty absolutely, and the right unconditionally. Re-arrests enable a defection from the duty and render the right largely meaningless since a re-arrest can be undertaken at any moment of the state's choice.

C. Sufficiency of the Charge-Sheet to Deny Default Bail

The charge-sheet, therefore, is the most significant document for the accused's liberty, for the time of its filing governs their release. The question, therefore, is what is a charge-sheet – what must it necessarily comprise to defeat the accused's right to be released? Can it be a mere replica of the "First Information Report",[121] or consist of the police's conjectures without the investigation's completion?

This issue was discussed in Ritu Chhabaria v. Union of India, whose facts involved the filing of a charge-sheet that explicitly admitted to the investigation's pendency.[122] The Trial Court, relying on this charge-sheet, refused to grant default bail, holding that the requirement of a charge-sheet being filed – irrespective of the nature of its contents – had been fulfilled.[123] The Supreme Court, reversing this order of the Trial Court, held that no charge-sheet can be filed without the investigation's completion, and if done, would not defeat the accused's right to be released on default bail:

> . "…a chargesheet, if filed by an investigating authority without first completing the investigation, would not extinguish the right to default bail under Section 167(2) CrPC…"[124]

121 The "First Information Report" is a document containing the allegations about the commission of an offence, which are given by an informant. See s 154, CrPC 1973.

122 Ritu Chhabaria (n 6).

123 ibid.

124 ibid [33].

The Court, therefore, encouraged an enquiry into the qualitative sufficiency of the charge-sheet to determine whether it resulted from the investigation's completion, or whether it was filed "only to scuttle the right of statutory bail".[125] The Court also examined the legislative history of Section 167(2), noting the past practice of indefinite adjournments sought by the state to enable the investigation's completion, for the Code of Criminal Procedure, 1898 stipulated an investigative time-period of only 15 days.[126] On this basis, the Court noted that the sixty/ninety-day limit was meant for investigations to be completed within the stipulated time, and no charge-sheet could be filed without the investigation's completion.[127] This meant that the product of an incomplete investigation could not defeat default bail, for that would be antithetical to Section 167(2)'s purpose. This judgement was, however, "recalled" in a procedurally dubious manner in Directorate of Enforcement v. Manpreet Singh Talwar,[128] with the Court later clarifying that this recall would not affect independent considerations of Section 167(2) applications. Reliance on Ritu Chhabaria, however, has been forbidden by the Court, meaning that courts are discouraged from enquiring into the contents of charge-sheets when deciding default bail applications.[129] Recently, in CBI v. Kapil Wadhawan, the Court has affirmed the prohibition on qualitative assessments of the contents of charge-sheets, holding that even if charge-sheets' content may appear subpar, indicative of an investigation's incompleteness, it is only the bare, formal filing of a document titled "charge-sheet" that is relevant in assessing default bail's availability u/s 167(2).[130]

The Court, therefore, appears unconcerned with default bail's theoretical underpinning lying in the imposition of an obligation on the state to undertake a genuine investigative endeavour, finding that the filing of any document by the police formally titled the charge-sheet would be sufficient to defeat the accused's right to be released. The state's defection from the bargain symbolized by default bail is being authorized, for the Court accepts the outcome of pre-trial detention without the state undertaking a genuine investigation process.

In other cases, however, courts have held that the charge-sheet must be "proper", meaning that they must not suffer from procedural infirmities. In Achpal v. State of Rajasthan, for example, – a peculiar case where the High Court mandated the charge-sheet to be filed only by a particular officer – the Court noted that the charge-sheet's filing by a different officer meant that no charge-sheet had been filed, and default bail would

125 ibid [29].

126 s167, Code of Criminal Procedure, 1898.

127 Ritu Chhabaria (n 6) [21].

128 *Directorate of Enforcement v Manpreet Singh Talwar* (2023) SCC OnLine SC 545.

129 *Directorate of Enforcement v Manpreet Singh Talwar* (2023) SCC OnLine SC 751.

130 *CBI v Kapil Wadhawan* (2024) 3 SCC 734 [23]. For a critique of this judgment, see Kartik Kalra, 'The Supreme Court, Default Bail, and the Question of 'Incomplete' Chargesheets' (The Proof of Guilt, 4 February 2024) <https://theproofofguilt.blogspot.com/2024/02/guest-post-supreme-court-default-bail.html> accessed 17 June 2024.

accrue.[131] The Court, however, remarked that once the appropriate officer filed the charge-sheet anew, nothing precluded a re-arrest on "cogent grounds".[132] The underlying reasoning of such remarks lies in the same conceptualization of default bail as an undeserved and ill-gotten receipt of liberty, as an exception to the prolonged pre-trial punishment that is due to each accused.

IV. MELANCHOLY TAKEAWAYS ON DEFAULT BAIL – CRIMINAL JUSTICE AND THE ASSUMPTION OF CRIMINALITY

The Court, therefore, has weakened default bail substantially in these three facets, rendering the regime largely toothless. At a conceptual level, case-law has consistently positioned default bail as a lower-tier concept than regular bail, repeatedly affirming its status as an "order-on-default", accruing only because of an error on the police's part.[133] Case-law on these three facets shows little concern with the underlying normative considerations with default bail discussed in Section II, being wholly ignorant towards the normative impermissibility of detailing an individual in the absence of a genuine investigative endeavour being undertaken by the state. It appears accepting towards the imposition of an indefinite "accused" status on an individual without the state's pursuit of its elimination, refusing to assess the content of charge-sheets to determine whether the state has, in fact, completed its end of the bargain to undertake a genuine investigation. Case-law does not recognize default bail to be a principle of procedure that pursues systemic efficiency, not having regard to a system-wide breakdown that the creation of riders and exceptions to Section 167(2) risks.

This interpretive look towards weakening default bail – apart from being vulnerable to critique based on its unprincipled and normatively unjustifiable nature – also prompts a question into why a negative institutional outlook towards default bail has emerged and solidified. One possible response in explaining such institutional behaviour, I propose, concerns the predominance of a factual, merits-based enquiry in assessing the availability of regular bail. An individual who stands accused of a non-bailable offence, and has been arrested by the police, would first file an application for regular bail, arguing that the allegations against them are factually untrue and that their release poses minimal risks to society. It is a rejection of this application – which, I have discussed above, results from a court's assessment of the allegations being likely – that causes their imprisonment for a duration that entitles them to be released on default bail, provided, of course, that a charge-sheet within this duration was not filed. The persons availing default bail are, therefore, persons who have suffered a rejection of regular bail, which is likely to have occurred on their case's merits.

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131 *Achpal v State of Rajasthan* (2019) 14 SCC 599.

132 ibid [24] "…it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds…".

133 See *Gangi Reddy* (n 4); *Rustam* (n 98); *Aslam Babalal* (n 96).

A notion that the recipients of default bail have been deemed sufficiently guilty to warrant pre-trial detention, therefore, may possibly develop in adjudicating default bail cases, and consequently in shaping its doctrine. In an economy of criminal justice where the bail hearing screens persons to impose a sentence akin to pre-trial punishment, all those screened by it become sufficiently guilty for the criminal justice machinery to regard them as such, and the doctrine on default bail develops accordingly. Herbert Packer, in explaining the "crime control model" of criminal procedure, notes that such a system operates on the overarching assumption that the persons it governs are guilty since they have been screened by the state with this belief.[134] While an overall characterization of the Indian criminal justice machinery across Packer's (or other) theories is beyond the scope of this article, a tendency to treat persons screened once by the system as likely guilty might carry explanatory value for why default bail has received the judicial treatment that it has.

The permeation of the likely guilty logic in adjudicating default bail can be seen in action in a few cases discussed above. First, Gangi Reddy – the case primarily responsible for permitting re-arrests after obtaining default bail – arose from high-profile murder allegations levelled against a politician-accused, with an order of remand – a stage where the accused makes their case to be released on grounds akin to those of bail –[135] being passed by a court.[136] The police, however, were unable to file a charge-sheet within ninety days of remand, and the trial court released the accused on default bail.[137] Investigative agencies, after undertaking greater investigation and developing evidence suggesting the accused's involvement, filed an application to cancel the accused's default bail to re-arrest them, which the trial court, and correspondingly the High Court, rejected.[138] The High Court's reasoning was premised on the unconditional

134 Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 11, noting that in an ideal-type "crime control" model, a "presumption of guilt" operates on the understanding that the "screening processes operated by police and prosecutors are reliable indicators of probable guilt".

135 The "remand" hearing enables a court to assess whether an accused's detention is required, or whether they can be released pending trial. Apart from arguing for bail during the remand hearing, an accused may also argue that their arrest was procedurally unsound, necessitating release. For case-law on the enquiry during remand, and the grounds for bail to be considered therein, see *Satender Kumar Antil* (n 2) [47], noting that a person may argue for bail, and may be released accordingly by the Magistrate during a remand hearing, even without the filing of a formal application; *Gautam Navlakha v NIA* (2022) 13 SCC 542 [73], relying on *CBI v Anupam J Kulkarni* (1992) 3 SCC 141 for the proposition that bail's availability must be assessed, and bail accordingly granted at the remand stage itself. For making the argument of an arrest's vitiation due to its procedural conditions being unfulfilled, see *Prabir Purkayastha v State (NCT of Delhi)* (2024) SCC OnLine SC 934 [16]-[20], holding that the police's failure from furnishing the written grounds of arrest, at least for offences under the UAPA, vitiates it, and should be assessed during remand.

136 Gangi Reddy (n 4) [3].

137 ibid.

138 *CBI v Thummalapalli Ganga Reddy* (2021) Crl MP 791 of 2021 [District and Sessions Judge Kadapa, Andhra Pradesh]; *State of AP v T Gangi Reddy,* (2022) 1 HCC (AP) 293 [29]-[31].

nature of one's release under default bail that prevented a re-arrest, and risk-based grounds concerning the accused's release – the risk of them fleeing, influencing witnesses, and tampering with evidence – being minimal.[139] The Supreme Court, however, took a view that a serious offence's commission should be a factor sufficient to cancel bail, for justice would be frustrated by a view that disables courts from analyzing the case's merits – assessing factual allegations and evidence – in determining whether an accused should remain at liberty.[140] The High Court undertook this analysis subsequently, finding that the accused was likely guilty, cancelling his bail on this basis. The Court's view towards enabling a merits-based enquiry into cancelling bail,[141] it appears, may be traceable to its view of individuals already involved in the criminal justice machinery – through approval of remand, refusal of bail, or otherwise – being probably guilty, since the ends of justice require such persons to be continually imprisoned.[142] This may also be verifiable from the Court's subsequent treatment of the same case: the High Court, in its same order finding the accused likely guilty of having committed the offence, also remarked that the accused may still remain at liberty on furnishing bonds of Rs. 1 lakh.[143] In appeal, the Court stayed the operation of this segment of the judgment, directing the accused to be re-arrested after having been released on default bail.[144] Its postulation of a standard to re-arrest on merits, the High Court's merits-based finding of the accused's guilt, and the Court's ultimate direction to re-arrest the accused – all go to show the creation of doctrine influenced by notions of guilt attached to default bail's recipients, the Court directing particular outcomes to be achieved using this doctrine, and stepping-in to ensure that these outcomes are, in fact, achieved.

Second, consider the judgment in CBI v. Kapil Wadhawan, a similarly high-profile case, which arose from allegations of grave financial fraud. The accused's remand had been authorized, with ninety days in custody complete.[145] Though a charge-sheet had been filed by the investigating agency within ninety days, the trial court found the charge-sheet incomplete, for it did not show the investigation's completion.[146] The High Court concurred, finding that a substantial chunk of the investigation required was

139 *Gangi Reddy – HC I* (n 4) [29]-[31].

140 *Gangi Reddy* (n 4) [29]-[30].

141 State through CBI v T. Gangi Reddy @ Yerra Gangi Reddy (2023) Criminal Petition No 2995 of 2023 [High Court of Telangana] [45]-[46], noting that the "prima facie participation of [the] accused…in the commission of crime" can be seen, cancelling their release under default bail.

142 *Gangi Reddy* (n 4) [29].

143 *Gangi Reddy – HC II* (n 4) [59].

144 *Suneetha Nareddy v T Gangi Reddy @ Yerra Gangi Reddy* (2023) Special Leave to Appeal (Crl) No 6294/2023.

145 *Wadhawan* (n 130) [2]-[3].

146 *CBI v Kapil Wadhawan* (2023) SCC Online Del 3283 [High Court of Delhi], extracting in [8] segments of the trial court's judgment releasing the accused on default bail, citing the charge-sheet's incompleteness as against the accused.

incomplete and that a charge-sheet premised on an incomplete investigation could not defeat default bail.[147] The Supreme Court's judgment – in echoing the likelihood of the accused's guilt – proceeds to deny default bail, laying down as a matter of principle that no enquiry can be undertaken into a charge-sheet's contents to assess an investigation's completeness.[148] The implications of a systemic imposition of a "likely guilty" label are decipherable in two ways in Wadhawan. First, the Court finds that a Magistrate had already taken cognizance of the offence based on the charge-sheet, and the fact that the criminal justice machinery had been set in motion meant that the court was "satisfied about the commission of an offence".[149] The possible commission of an offence, evident from a Magistrate's cognizance of the offence against the accused, meant that default bail should anyways be unavailable. Such reasoning is clearly premised on default bail being unavailable[150] for those likely guilty, and this status being derivable from various stages of the criminal justice process – remand or cognizance. Second, and more importantly, the Court substantially twists the factual matrix of the instant case to deny the accused default bail, trivializing the extent of the investigation's incompleteness to shape the law in prohibiting an enquiry into charge-sheets' contents. While the trial court and High Court found the investigation incomplete as against the accused in the instant case, and the charge-sheet "piece-meal", intended to "ruse" their right to be released, the Supreme Court wholly ignores this finding, holding that the only possible infirmity with the charge-sheet was its alleged incompleteness against other accused.[151] Since the alleged financial fraud had multiple parties accused, the Supreme Court transformed the accused's allegation into one easily susceptible to rejection, which it then utilizes to comment on the legal prohibition of enquiring into the charge-sheet's contents to assess the investigation's completeness.[152] In other words, the Court builds a strawman of the accused's case to wholly forbid a charge-sheet's qualitative assessment, achieved through ignoring the argument that urges the investigation's incompleteness against the accused in this case, which it then invokes to comment on the legal unavailability of assailing a charge-sheet on grounds of its insufficiencies.[153] A likely reason for this

147 ibid [34]-[35], finding that "a major part of the fraud is yet to be investigated", that "the charge sheet so filed on the face of it was incomplete", and that it was filed "merely to ruse the statutory and fundamental right of default bail…"

148 ibid [25]-[26], holding that the accused has no "right to get default bail on the ground that the charge-sheet was an incomplete charge-sheet".

149 ibid [23].

150 ibid [25], noting that since "cognizance [had] been taken by the Special Court of the offences allegedly committed by [the accused], [they] could not have claimed the statutory right of default bail…"

151 The Supreme Court frames the issue to be the availability of default bail because of the "investigation qua some of the accused named in the FIR [being] pending", contrary to the judgment in Wadhawan – HC (n 145), assessing the investigation's incompleteness as against the accused in the instant case.

152 ibid [23].

153 For an expanded version of this argument, see Kalra (n 130), noting that "the Court's trivialisation of the instant chargesheet's flaws transform[ed] into a general legal prohibition on enquiring into its contents…"

sleight of hand, I consider, was the Court's specific unwillingness to release the accused on bail, based on its assessment of the likelihood of their guilt – which, in turn, could be derived from a failure of their arguments at remand, as well as a court's acts of having taken cognizance against them.

An analysis of the Court's reasoning, observations and underlying premises in Gangi Reddy and Wadhawan, therefore, offers insights of the role that a systemic allocation of pre-trial guilt has on doctrinal developments on default bail. A sense of guilt attaches to the accused through the rejection of their bail, continued remand, and, as seen in Wadhawan, a court's cognizance over the allegations against them. This sense of guilt becomes influential in the outcomes of cases before the Supreme Court, and consequently plays a substantial role in shaping doctrine, having the effect of weakening the default bail regime to minimize avenues for the release of those deemed likely guilty.

CONCLUSION

The judicial treatment of default bail, therefore, has rendered the regime very weak, and the Supreme Court's case-law has persevered to undermine its dimensions that are touted to claim its "indefeasibility". While cases such as Ravindran retain the accused's eligibility to obtain default bail as long as they outpace the police in submitting a timely application, the fact that the charge-sheet could be anything and the court is forbidden from enquiring into it makes the state's job quite easy, authorizing the state's defection from the bargain that default bail symbolizes. An individual faced with allegations of an offence becomes an "accused" indefinitely, for the state may develop a suspicion of their guilt at any moment, and take them into custody again. Even if an accused succeeds in the filing rat race, their release is futile if a re-arrest could occur any moment, the only procedural requirement for which is a charge-sheet's filing whose contents are to be unquestionably accepted. This legal landscape – apart from being influenced by a notion of the likely guilt of its recipient class – is based on minimal normative reasoning of the purposes, compromises, and larger interpretive principles relevant in deciding the law on default bail. Case-law enabling re-arrests and prohibiting an enquiry into charge-sheets' contents authorizes the state's defection from a duration-definite duty to eliminate the legal limbo between guilt and innocence, and the extinguishing regime concentrates institutional attention towards the otherwise irrelevant variable of the moment of filing a document in court. The game, therefore, becomes rigged in the state's favour, with a veneer of opportunity to the accused in filing a document a minute early than the police being invoked to tout the regime's fictional "indefeasibility".[154] The Court's initial observations of Section 167(2) serving as a "paradise for criminals", I submit, appear to be the overarching interpretive framework with which the law on default bail has developed.

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154 See *Kapil Wadhawan* (n 130) [15] and *Gangi Reddy* (n 4) [28], referring to default bail as an "indefeasible" right of the accused, yet arriving at conclusions discussed in Section IV.