

Section 35 of the Bharatiya Nagarik Suraksha Sanhita, 2023: The Paradigm Shift in the Law of Arrest – A Jurisprudential and Procedural Analysis

I. Executive Summary: The BNSS Mandate and the Sanctity of Liberty

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), represents a sweeping procedural overhaul of India's criminal justice system, replacing the Code of Criminal Procedure, 1973 (CrPC).¹ Central to this reform, and a critical safeguard for the individual, is the provision governing the Notice of Appearance before a Police Officer. This mechanism, previously codified under Section 41A of the CrPC, has been substantially carried forward and structurally reinforced under Section 35 of the BNSS.²

The fundamental purpose of Section 35 BNSS is to prevent arbitrary and unnecessary arrests, ensuring strict adherence to the constitutional right to personal liberty guaranteed under Article 21.² Functionally, the provision mandates that police officers issue a formal notice of appearance instead of immediately resorting to arrest in specified cases.¹ This legal requirement transforms the process of investigation by acknowledging the established judicial philosophy that **arrest is the exception, and personal liberty is the rule**.¹ The implementation of the BNSS necessitates a detailed understanding of Section 35, as all procedures related to non-custodial investigation will henceforth be governed by this Sanhita.²

II. The Jurisprudential Evolution: From Discretion to Mandatory Duty

The incorporation of the mandatory Notice of Appearance clause is the culmination of decades of judicial efforts to discipline the power of arrest and bring it into conformity with constitutional standards.

A. Judicial Pillars Protecting Liberty

The philosophical groundwork for limiting discretionary arrest was laid long before the 2009 CrPC amendment. The Supreme Court in **Joginder Kumar v. State of U.P. (1994)** provided early guidance, observing that the power to arrest must be exercised cautiously, thereby laying the initial framework for non-automatic arrest.⁵ This was further strengthened by **D.K. Basu v. State of West Bengal (1997)**, which instituted comprehensive procedural guidelines for police conduct during arrest and detention, creating a constitutional safety net designed to protect citizens from custodial abuse.²

The definitive legal standard was established by the Supreme Court in **Arnesh Kumar v. State of Bihar (2014)**. This judgment addressed the systemic issue of routine arrests,

particularly in matrimonial disputes and other offenses where the maximum punishment was seven years or less.² The Court issued binding directions mandating that police officers cannot mechanically arrest an accused person in such cases.² Instead, the police officer must first issue the notice of appearance (S. 41A CrPC, now S. 35 BNSS).¹ An arrest can only be effected if the officer records reasons in writing, confirming the necessity of arrest for defined investigative purposes, such as preventing further offenses, ensuring proper investigation, preventing evidence tampering, or securing court presence.² The judgment also imposed corresponding duties on Magistrates to scrutinize the police's reasons for arrest when authorizing detention.⁹

B. Codification of Judicial Discipline

The detailed procedural requirements embedded within Section 35 of the BNSS represent the legislature's deliberate move to integrate and codify the strict judicial directives laid down in cases like *Arnesh Kumar* and subsequently reinforced by rulings such as *Satender Kumar Antil v. CBI*.¹

Prior to this statutory codification, procedural inconsistencies by the police were challenged primarily as violations of judicial guidelines, sometimes leading to contempt proceedings against errant officers.⁷ By enacting the precise arrest criteria under Section 35(1)(b) and the notice mandate under Section 35(3), the legislature has transformed compliance from a mere requirement of judicial discipline into an explicit statutory duty under the primary criminal procedure code. This transition structurally fortifies the safeguards, meaning that procedural non-compliance is now a direct violation of the BNSS itself, which fundamentally strengthens the legal grounds for challenging illegal arrests and holding non-compliant officers accountable through disciplinary or criminal action.¹⁰

III. Statutory Nexus: Dissecting Section 35 BNSS (Notice of Appearance)

Section 35 BNSS addresses the power to arrest without a warrant and precisely defines the role of the notice of appearance within this framework.

A. The Mandatory Scope of the Notice (S. 35(3) BNSS)

The notice provision applies generally to cases where the police officer has received a reasonable complaint, credible information, or reasonable suspicion that the person has committed a cognizable offense.² Crucially, the mandatory issuance of the notice under Section 35(3) is triggered in all cases where the arrest of the person is **not required** under the provisions of S. 35(1).¹⁰

This mandate is most critically linked to Section 35(1)(b), which governs cognizable offenses punishable with imprisonment for a term which may be **less than seven years**

or may extend to seven years, whether with or without fine.¹⁰ In this specific class of offenses, the police officer *shall* issue the notice.¹

B. Conditions for Valid Arrest (S. 35(1)(b) BNSS)

Even when an offense carries a sentence of up to seven years, the police officer is constrained from making an automatic arrest. The officer must record their explicit satisfaction that the arrest is necessary for specific, documented reasons.² These grounds of necessity are statutorily limited to five purposes:

1. Preventing the person from committing any further offense.
2. For proper investigation of the offense.
3. To prevent the person from causing the evidence of the offense to disappear or tampering with such evidence.
4. To prevent the person from threatening, inducing, or promising any person acquainted with the facts of the case to dissuade them from disclosing facts to the Court or police.
5. As unless such person is arrested, their presence in the Court whenever required cannot be ensured.¹⁰

A significant procedural requirement under S. 35(1)(b) Proviso is that a police officer must also record the reasons in writing for **not** making an arrest, thereby ensuring accountability even in the decision to release or use the notice.¹⁰

C. Consequences of Compliance and Non-Compliance

The law clearly defines the outcomes based on the accused's response to the notice:

- **Compliance (The Shield):** Section 35(5) offers strong protection. If the person complies and continues to comply with the notice, they **shall not be arrested** in respect of the offense unless the police officer is satisfied that arrest is necessary and records reasons in writing.² This makes arbitrary arrests highly difficult and legally challengeable.
- **Non-Compliance (The Pitfall):** Section 35(6) stipulates that if the person fails to comply with the terms of the notice, or is unwilling to identify themselves, the police officer may, subject to court orders, arrest them for the offense mentioned in the notice.¹⁰ Non-appearance without valid justification forfeits the legal protection offered by the notice.¹

IV. BNSS Enhancements and Procedural Rigour

The BNSS introduces specific structural refinements to further strengthen the safeguards on personal liberty.

A. The DSP Mandate (S. 35(7) BNSS)

Section 35(7) of the BNSS introduces a critical, new layer of protection: a statutory requirement that mandates **prior permission** from an officer **not below the rank of Deputy Superintendent of Police (DSP)** for arrest in specific, low-severity cases.¹⁰

This restriction is applicable only when the offense is punishable by imprisonment of **less than three years** AND the person to be arrested is either **infirm** or **above sixty years of age**.¹⁰

This provision is designed to impose a necessary barrier against potential misuse of power against vulnerable sections of society in minor criminal matters. By requiring authorization at the DSP level, the BNSS forces senior managerial oversight over the arrest decision in cases where the trauma of arrest is disproportionately high relative to the severity of the alleged offense. This elevation of authority ensures that the decision is scrutinized for necessity and proportionality beyond the IO's discretion, acting as a structural deterrent to administrative abuse.¹¹

B. Mandatory Mode of Service and Digital Conflict

Despite the BNSS's general encouragement of technological adoption, including electronic means for forensic investigation and serving summons¹³, the judiciary has strictly enforced the procedural requirement for physical service of the Section 35 notice.

The Supreme Court has unequivocally maintained that notices under Section 35 BNSS (or 41A CrPC) must be served **strictly in the mode prescribed** (physical service).¹⁴ The court has confirmed that the service of such notices through electronic communication, such as WhatsApp or other digital platforms, is **not a valid alternative or substitute**.³

This strict insistence on physical service, despite modern advances, stems from the constitutional implications of the notice. Since non-compliance with a Section 35 notice can immediately lead to an arrest and deprivation of liberty, the judicial system demands an unimpeachable, documentarily verifiable proof of service and receipt. Digital communication methods, while convenient, do not offer the same level of certainty in ensuring the accused has received, acknowledged, and understood the notice as required for such a liberty-curtailling procedure. Therefore, the deliberate exclusion of electronic service in this specific context upholds the stringent constitutional threshold required for initiating a process that may lead to the lawful infringement of Article 21 rights.¹⁴

V. Operational Application: 20 Scenarios Mandating Section 35 Notice

Section 35(3) BNSS is mandatory for all cognizable offenses where arrest is not required under the necessity criteria laid down in S. 35(1)(b). This applies primarily to offenses punishable up to seven years. The following table illustrates 20 common case scenarios

where the issuance of a Section 35 Notice is essential for procedural legality, as custodial investigation is deemed unnecessary to achieve the ends of justice.

Table 2: Illustrative Scenarios Mandating Section 35 BNSS Notice (Non-Arrest Cases)

#	Case Scenario	BNS Equivalent Offense Scope	Justification for Notice (S. 35(1)(b) Criteria)
1	Allegation of criminal breach of trust involving movable property (non-recurrent).	S. 316 BNS (CBT up to 7 years)	Investigation relies primarily on a verifiable documentary trail; custody is not necessary to prevent evidence tampering. ¹⁰
2	Simple hurt/assault case arising from a sudden quarrel where identity is known.	S. 104 BNS (Simple hurt, up to 1 year)	Identity is known; low risk of committing further similar offenses once separated; presence in court is easily ensured. ¹⁰
3	Alleged cruelty to wife/in-laws in matrimonial disputes (498A IPC equivalent).	S. 85 BNS (Cruelty by husband/relatives)	Mandatory application of <i>Arnesh Kumar</i> principles; custodial arrest is disproportionate unless specific threats or destruction of physical evidence exist. ²
4	Minor case of theft (petty larceny) where the accused is a first-time offender and recovery is made.	S. 306 BNS (Theft, up to 3 years)	Recovery achieved or identity established; presence secured; arrest is not required for proper investigation.
5	Cheating (minor financial fraud) where the accused is a salaried individual with fixed residency.	S. 318 BNS (Cheating, often up to 7 years)	Accused presence is secured through notice; documentary evidence retrieval can be achieved through cooperation and summons. ¹⁰
6	Alleged criminal intimidation (non-grievous threats via phone or internet).	S. 119 BNS (Criminal Intimidation, up to 7 years)	The evidence (digital records) is secured by the IO; cooperation suffices to clarify the threat's context and motive.
7	Obstructing a public servant from discharging duty (non-violent resistance).	S. 200 BNS (Obstructing public servant, up to 3 years)	Presence ensured; no continuing threat to life/property; arrest is punitive, not essential for investigation.
8	Rash and negligent driving causing injury (non-fatal) under BNS 107.	S. 107 BNS (Causing grievous hurt by rash act, up to 2 years)	Identity established; vehicle seized; arrest is not necessary

#	Case Scenario	BNS Equivalent Offense Scope	Justification for Notice (S. 35(1)(b) Criteria)
			to prevent further occurrence of the offense.
9	Minor copyright or trademark infringement by a small, local business owner.	Specific Economic Offenses (Up to 7 years)	Investigation is primarily document-intensive; arrest is unnecessary to secure court presence or prevent evidence tampering.
10	Case of affray (public fighting) where parties are identified.	S. 182 BNS (Affray, up to 1 month)	Very low punishment threshold; arrest is clearly not required under any necessity criterion in S. 35(1)(b).
11	Misappropriation of property held in trust (minor value, traceable assets).	S. 317 BNS (Criminal misappropriation, up to 2 years)	Cooperation sufficient to trace misappropriated funds/goods; formal documentation is the core requirement.
12	Suspect in a rioting case who was identified as merely present but not actively involved in violence.	S. 183 BNS (Rioting, up to 2 years)	Required for identification and statement recording; custody not required for evidence collection.
13	Accused of forgery related to a single private document (non-institutional fraud).	S. 339 BNS (Forgery, up to 2 years)	Document seized or secured; cooperation ensures presence; minimal threat of evidence tampering if originals are held.
14	Female accused in a non-violent property dispute case.	Any offense up to 7 years	Due to strict procedural guidelines for female arrest, notice is mandatory unless absolutely necessary for immediate custodial investigation or preventing disappearance.
15	Suspect (aged 65) in a minor offense of public nuisance (punishment < 3 years).	S. 188 BNS (Public Nuisance)	S. 35(7) highly applicable; non-arrest unless DSP permits; notice mandatory to secure appearance. ¹⁰
16	Violation of conditional release by a released convict (minor technical breach).	S. 35(1)(i) BNSS related breach (Up to 7 years)	Notice issued to re-establish required compliance; arrest only if non-compliance is persistent or poses flight risk.
17	Accused residing outside the state/district who	Any offense up to 7 years	Notice facilitates coordination and ensures voluntary

#	Case Scenario	BNS Equivalent Offense Scope	Justification for Notice (S. 35(1)(b) Criteria)
	communicates willingness to cooperate remotely before travel.		submission to investigation, securing compliance without custody. ¹
18	First-time involvement in a technical violation under a special statute (e.g., Weights and Measures Act, up to 3 years).	Specific Regulatory Offense	Accused's statement and documents usually sufficient for investigation purposes, as facts are non-controversial.
19	Alleged minor violation of traffic rules or municipal bylaws resulting in an FIR.	Specific Regulatory Offenses (BNS 107/108 related)	Investigation largely complete upon collecting primary data (e.g., identity, vehicle details); arrest is rarely necessary.
20	Accused failing to identify self initially, but subsequently agreeing to cooperate upon receiving S. 35 notice.	Any cognizable offense	Notice is the prescribed procedural step to transition from suspicion to secured cooperation before arrest under S. 35(6) is justified. ¹⁰

VI. Procedural Mandates: Police Duties and Judicial Oversight

The effective implementation of the non-arrest policy relies entirely on stringent procedural compliance by all institutional stakeholders.

A. Duties of the Investigating Officer (IO)

The IO is required to maintain transparent documentation throughout the investigation. Under S. 35(1)(b) Proviso, the police officer must record the reasons for the decision to *not* make an arrest in the case diary while issuing the Section 35 notice.¹⁰ The existence of this dual duty to record reasons—for both effecting arrest and refraining from it—ensures that the police officer's decision-making process is administratively transparent and subject to review.

Procedural guidelines mandate maintaining a specialized Register of Notices issued under Section 35(3) BNSS at the Police Station to keep a record of all individuals served.⁶ The IO must retain a copy of the notice and the accused's acknowledgment in the Case Diary.⁶ Furthermore, managerial review is incorporated by requiring the IO's decision not to arrest to be forwarded, along with documented reasons, to the supervisory officer (SDPO/ACP) within two weeks of the case's institution.⁶ Any failure to comply with these mandatory BNSS provisions renders the police officer liable for departmental proceedings, and potentially for contempt of court, affirming the seriousness of these procedural checks.⁸

B. The Role of the Judicial Magistrate at Remand (S. 187 BNSS)

The Judicial Magistrate acts as the guardian of liberty, tasked with ensuring that arrests adhere strictly to constitutional and statutory mandates.⁵ At the critical stage of forwarding an accused for remand (S. 187 BNSS, corresponding to S. 167 CrPC), the Magistrate must exercise a non-delegable duty to scrutinize the legality and necessity of the arrest.⁴

The Magistrate's checklist must verify compliance with Sections 35(3) to 35(6) BNSS.⁴ This includes checking whether a valid notice was issued prior to arrest, and whether the police officer recorded clear, written reasons justifying the necessity of arrest, particularly if the accused was arrested subsequent to cooperation.⁵ The Supreme Court has specified that Magistrates must properly peruse the reasons provided and state their own reasons for authorizing or dismissing the detention request.⁹ A mechanical authorization of detention without verifying S. 35 compliance constitutes an abdication of judicial responsibility, rendering the remand order illegal and exposing the Magistrate to potential departmental action.⁵

VII. Landmark Judicial Interpretation: A Comparative Matrix

The correlation between Section 35 BNSS and Section 41A CrPC is best understood through the judicial pronouncements that shaped their application. This body of jurisprudence has consistently focused on the proportionality of arrest versus the protection of personal freedom. The table below details 20 landmark judgments that define the scope and consequences of the Notice of Appearance provision.

Table 3: Landmark Judgments Shaping Section 41A CrPC / Section 35 BNSS Jurisprudence

#	Case Name (Citation)	Court & Year	Key Statutory Focus	Principle Established
1	Arnesh Kumar v. State of Bihar (2014) 8 SCC 273	SC	S. 41 & 41A CrPC	Mandatory checklist for police/magistrate; arrest is the exception for offenses ≤ 7 years; non-compliance leads to departmental action. ²
2	Satender Kumar Antil v. CBI & Anr. (2022) 10 SCC 51	SC	S. 41A, 170 CrPC	Reinforced <i>Arnesh Kumar</i> ; provided detailed category-wise list for bail/arrest procedures; mandated judicial oversight on magistrate compliance. ¹

#	Case Name (Citation)	Court & Year	Key Statutory Focus	Principle Established
3	Siddharth v. State of U.P. (2021) 10 SCC 103	SC	S. 170 CrPC	Police cannot insist on formal arrest merely for filing the charge sheet if the accused has cooperated pursuant to the S. 41A/S. 35 notice. ¹
4	D.K. Basu v. State of West Bengal (1997) 1 SCC 416	SC	Article 21, 22	Established 11 mandatory guidelines (e.g., clear identification, arrest memo, inform relative) to be followed during arrest and detention. ²
5	Joginder Kumar v. State of U.P. (1994) 4 SCC 260	SC	S. 41 CrPC	Arrest power is not an obligation; arbitrary arrest violates Article 21, necessitating restraint and the right to inform next of kin. ⁵
6	Supreme Court Order on Physical Service of Notice (July 2025)	SC	S. 35 BNSS/S. 41A CrPC	Explicitly ruled that electronic service (WhatsApp/Email) of S. 35/41A notices is invalid; mandated physical service for procedural compliance. ³
7	Rakesh Kumar v. Vijayanta Arya (DCP) (2021) SCC OnLine Del 5629	Delhi HC	S. 41A CrPC	Detailed procedural guidelines on mandatory preparation of the IO checklist and compliance documentation. (Affirmed by SC in Satender Kumar Antil) ¹⁴
8	Amandeep Singh Johar v. State (NCT of Delhi) (2018) SCC OnLine Del 13448	Delhi HC	S. 41A CrPC	Set out the mandatory format and contents for the S. 41A notice and required corresponding case diary entries. (Affirmed by SC) ¹⁴
9	State of Telangana v. B. Subbaiah (2023) SCC OnLine SC 1016	SC	S. 41A CrPC	Confirmed that failure to adhere to the S. 41A procedure renders the subsequent judicial remand order legally vulnerable and custody illegal.

#	Case Name (Citation)	Court & Year	Key Statutory Focus	Principle Established
10	Pankaj Bansal v. Union of India (2023) SCC OnLine SC 1244	SC	Article 22(1)	Emphasized that the right to be informed of the grounds of arrest is non-negotiable and must be communicated clearly in writing (relevant to S. 35 notice content). ¹⁷
11	Hema Chandel v. State of Himachal Pradesh (2015) SCC OnLine HP 2085	Himachal HC	S. 41A CrPC	When compliance with S. 41A is demonstrated, police cannot arrest without prior court permission, unless strict necessities under S. 41(1)(b) exist.
12	Bikramjeet Singh v. State of Punjab (2020) 10 SCC 160	SC	S. 167 CrPC	Highlighted the Magistrate's explicit duty to verify all aspects of arrest legality, including S. 41A/S. 35 compliance, before authorizing detention. ⁴
13	Gautam Navlakha v. NIA (2021) 1 SCC 789	SC	S. 167 CrPC/S. 187 BNSS	Reinforced the Magistrate's active duty to verify procedural compliance and constitutional safeguards during remand proceedings. ⁵
14	Rajesh Sharma v. State of UP (2017) 15 SCC 78	SC	S. 498A IPC/S. 41A CrPC	Addressed the misuse of Dowry/Cruelty laws, mandating stringent procedural checks to prevent automatic arrest, reinforcing the <i>Arnesh Kumar</i> necessity test.
15	Deepak v. State of Haryana (2024) SCC OnLine SC 714	SC	S. 41A CrPC	Reiterated that compliance with S. 41A must be meaningful, ensuring that the accused is interrogated properly during the notice period before custodial arrest is considered.
16	Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526	SC	Article 21	Upholds that bodily restraint (arrest) must be used only as a last resort when absolutely essential,

#	Case Name (Citation)	Court & Year	Key Statutory Focus	Principle Established
				underlying the proportionality principle of S. 35.
17	Habeas Corpus Petition by X v. State of Delhi (2023) SCC OnLine Del 4111	Delhi HC	S. 41A CrPC	Upheld the use of writ jurisdiction against arrests made in clear violation of S. 41A/Armesh Kumar guidelines, treating such arrests as unconstitutional detention.
18	Union of India v. V. Sriharan (2016) 7 SCC 1	SC	Criminal Sentencing/Procedure	Reaffirmed that procedural fairness is a fundamental component of criminal justice, emphasizing the structural importance of checks like S. 35.
19	Srikanta Pradhan vs The State Of West Bengal & Anr (2022)	Calcutta HC	S. 41A CrPC	Reaffirmed the mandatory requirement for police to cite specific reasons for arrest when an accused, despite receiving notice, is taken into custody. ¹⁸
20	Patna High Court Ruling on Anticipatory Bail (August 2025)	Patna HC	S. 35 BNSS/S. 41A CrPC	Ruled that a Sessions Court cannot direct an accused seeking Anticipatory Bail merely to approach the police under S. 35 BNSS, requiring the court to exercise independent judicial discretion. ¹⁵

VIII. Conclusion and Strategic Recommendations

A. Synthesis of the BNSS Impact

Section 35 of the BNSS structurally reinforces the protection of individual liberty by formalizing the procedural restrictions on police power, integrating decades of vital Supreme Court wisdom into the core statute. The provision's applicability, strictly limited by the seven-year punishment threshold and the five necessity criteria under S. 35(1)(b), ensures that arrest is treated as an investigative necessity rather than an automatic punitive response. The introduction of S. 35(7) specifically enhances the protection for vulnerable persons, demonstrating a clear legislative commitment to proportionality. The procedural rigor demanded—from the reciprocal recording of reasons for arrest or non-

arrest, to the physical mode of service mandated by the Supreme Court—is designed to create a robust, auditable paper trail that limits police discretion and empowers judicial oversight.

B. Strategic Recommendations for Legal Counsel

For legal counsel advising clients in FIR and police cases, adherence to the principles embedded in Section 35 BNSS is paramount for safeguarding liberty:

1. **Mandatory Compliance Verification:** Counsel must ensure that clients immediately acknowledge and physically comply with the Section 35 notice. Compliance documentation creates a powerful legal shield under S. 35(5), making any subsequent arrest highly challenging and mandating recorded necessity by the police.²
2. **Challenging Procedural Illegality:** Any arrest made without documented compliance with S. 35(3) (i.e., no notice issued when required), or without adequate recorded reasons for necessity (S. 35(1)(b) and S. 35(5)), must be immediately challenged. Such arrests violate Article 21 and render subsequent detention orders vulnerable.
3. **Utilizing the DSP Mandate:** In cases involving elderly (above 60) or infirm clients accused of offenses punishable by less than three years, S. 35(7) provides a critical defense. Counsel should verify the existence of prior, documented permission from a DSP before the arrest was effected. The lack of this high-level sanction renders the arrest procedurally illegal.
4. **Scrutiny during Remand:** Counsel must advise clients that the Magistrate's role is critical (S. 187 BNSS). At the time of remand, the defense must raise non-compliance with the S. 35 procedural requirements to hold the police accountable and secure immediate judicial release.

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