

Paper Presentation

On

**THE ABSENT ACCUSED AND THE ADDED
ACCUSED- ANALYSIS OF THE
PROCEDURAL OVERLAP BETWEEN TRIAL
IN ABSENTIA UNDER SECTION 356 BNSS
AND SECTION 358 BNSS**

***Judicial Divisional Seminar
of
Surguja Division***

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**THE ABSENT ACCUSED AND THE ADDED ACCUSED-
ANALYSIS OF THE PROCEDURAL OVERLAP BETWEEN
TRIAL IN ABSENTIA UNDER SECTION 356 BNSS AND
SECTION 358 BNSS**

I. INTRODUCTION

The enactment of the “Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)” marks a significant legislative intervention aimed at addressing the structural deficiencies in the previous CrPC. In this light, the topic of today’s discussion primarily deals with the procedure of trial in the absence of accused which can be either due to the reason him being absent(absconding) from the inception of the criminal trial or him being added at some later stage in the trial.

When we say Criminal Justice System, in layman’s language we can understand it as a system of administration of Justice when any crime happens. The word Justice shall be kept at the highest pedestal while deciding any criminal case and it should be borne in the mind of the judge that Justice should be done in consonance with the principles of natural justice. But presently, with the enforcement of the new law of Bhartiya Nagrik Suraksha Sanhita, 2023, the Parliament has come up with the concept of trial in absentia under Section 356, to further speedy justice, especially in cases where the accused willfully abstains its participation in the trial. Besides, the provision for the trial in absentia, BNSS has retained from CrPC,

the provision regarding the addition of a person as accused if found guilty during the proceedings under Section 358. Both these procedure have been incorporated to strengthen the scope of complete justice.

In order to understand the above mentioned provisions regarding the trial in absentia and addition of accused let's first understand its meaning.

II. TRIAL IN ABSENTIA

One of the immutable principles of justice is that the accused be present at his trial for the meaningful exercise of his right to defence. The Indian criminal justice system has historically struggled with delays, pendency, and abuse of procedural loopholes. A common tactic employed by accused persons in serious crimes has been to abscond or evade trial, thereby frustrating both the prosecution and victims. Under the Code of Criminal Procedure, 1973 (CrPC), following provisions were incorporated to tackle such delays:

- Section 82(4) of CrPC allows proclamation and attachment of property of absconding accused.
- Section 317 of CrPC allows the Judge or Magistrate to conduct trial of an accused in his absence in certain specific cases.

- Section 299 CrPC allows the Judge or Magistrate to record the evidence in absence of absconded accused if there is no prospect of arresting him soon.

Those provision provides a discretion to a presiding officer to conduct in-absentia trial only when it feels that *firstly*, the personal attendance of the accused before the Court is not necessary in the interests of justice, and *secondly*, the accused persistently disturbs the proceedings in Court, But none of those provisions allowed full-fledged trials in absentia. As a result, trials often remained pending for years until the accused was apprehended. It is when the need for trials in absentia arose in response to numerous instances where the accused, like by absconding, effectively obstructed justice and also subjected the victims to further harm, often referred to as secondary victimization.

After repealing the criminal procedure code 1973, and enacting new Bhartiya Nagrik Surksha Sanhita 2023, provisions for trial in absentia were introduced under Sections 335, 355 and 356 of the BNSS. It is interesting to note that the BNSS retains Sections 299 and 317 of the CrPC same as sections 335 and 355 of BNSS. However, for the first time, by enforcing Section 356, BNSS introduced a specific provision for inquiry or trial including pronouncement of judgment in absentia of the proclaimed offender. As per Section 356(8) BNSS, if the State Government notifies so, then the provisions of

Section 356 BNSS could be applied in cases of absconding accused too.

III. PROVISIONS OF SECTION 356 BNSS:

(1) *Notwithstanding anything contained in this Sanhita or in any other law for the time being in force, when a person declared as a proclaimed offender, whether or not charged jointly, has absconded to evade trial and there is no immediate prospect of arresting him, it shall be deemed to operate as a waiver of the right of such person to be present and tried in person, and the Court shall, after recording reasons in writing, in the interest of justice, proceed with the trial in the like manner and with like effect as if he was present, under this Sanhita and pronounce the judgment:*

Provided that the Court shall not commence the trial unless a period of ninety days has lapsed from the date of framing of the charge.

(2) *The Court shall ensure that the following procedure has been complied with before proceeding under sub-section (1), namely:—*

- (i) *issuance of two consecutive warrants of arrest within the interval of at least thirty days*
- (ii) *publish in a national or local daily newspaper circulating in the place of his last known address of residence, requiring the proclaimed offender to appear before the Court for trial and informing him that in case he fails to appear within thirty*

days from the date of such publication, the trial shall commence in his absence;

(iii) inform his relative or friend, if any, about the commencement of the trial; and

(iv) affix information about the commencement of the trial on some conspicuous part of the house or homestead in which such person ordinarily resides and display in the police station of the district of his last known address of residence.

(3) Where the proclaimed offender is not represented by any advocate, he shall be provided with an advocate for his defence at the expense of the State.

(4) Where the Court, competent to try the case or commit for trial, has examined any witnesses for prosecution and recorded their depositions, such depositions shall be given in evidence against such proclaimed offender on the inquiry into, or in trial for, the offence with which he is charged:

Provided that if the proclaimed offender is arrested and produced or appears before the Court during such trial, the Court may, in the interest of justice, allow him to examine any evidence which may have been taken in his absence.

(5) Where a trial is related to a person under this section, the deposition and examination of the witness, may, as far as practicable, be recorded by audio-video electronic means preferably mobile phone and such recording shall be kept in such manner as the Court may direct.

- (6) *In prosecution for offences under this Sanhita, voluntary absence of accused after the trial has commenced under sub-section (1) shall not prevent continuing the trial including the pronouncement of the judgment even if he is arrested and produced or appears at the conclusion of such trial.*
- (7) *No appeal shall lie against the judgment under this section unless the proclaimed offender presents himself before the Court of appeal Provided that no appeal against conviction shall lie after the expiry of three years from the date of the judgment.*
- (8) *The State may, by notification, extend the provisions of this section to any absconder mentioned in sub-section (1) of section 84.*

IV. PROCEDURE UNDER SECTION 356 BNSS IN NUT SHELL

If a person has been declared a proclaimed offender and has absconded to evade trial and there is no immediate prospect of arrest, the court may treat the accused's absence as a waiver of the right to be present and proceed with inquiry/trial/pronouncement of judgment in his absence, after recording reasons in writing.

Now, who is a proclaimed offender? Section 84 (4) BNSS states when a proclamation published under sub-section (1) is in respect of a person accused of an offence which is made punishable with imprisonment of ten years or more, or imprisonment for life or with death under the Bharatiya Nyaya

Sanhita, 2023 or under any other law for the time being in force, and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

So, it is clear that section 356 BNSS applies only in cases of heinous offence where punishment is minimum 10 years or above, and the accused has been declared “proclaimed offender”. Section 335 BNSS enables the court to record evidence in absence of absconded accused of other offences.

V. THE ESSENTIAL ELEMENTS OF SECTION 356 BNSS ARE AS FOLLOWS:-

Preconditions for Trial in Absentia: A trial in absentia can only proceed if all the following conditions are satisfied:

- The accused has been **declared a proclaimed offender** under Section 84(4) of the BNSS.
- The accused has **absconded to evade trial**.
- There is **no immediate prospect of arresting** the accused.

If these conjunctive conditions are met, the law deems that the accused has **waived his right to be present and tried in person**.

Procedural Safeguards: To balance efficiency with fairness, Section 356 BNSS mandates several procedural safeguards before a trial can commence in the absence of the accused:

- **Issuance of two consecutive arrest warrants** at least 30 days apart.
- **Publication of a notice** in a local or national newspaper, giving the accused 30 days to appear.
- **Informing a relative or friend** of the accused about the trial.
- **Posting a notice** at the accused's last known residence and police station.
- **Waiting Period:** The trial cannot begin until 90 days have elapsed after the framing of charges, providing ample opportunity for the accused to appear.
- **Legal Representation:** If the absconding accused does not have a lawyer, the court must appoint a defense lawyer at State expense to ensure their rights are protected during the trial.
- **Use of Evidence:** Prosecution witness statements recorded before the trial can be used as evidence against the absconding accused. If the accused later appears or is apprehended, the court may allow cross-examination of witnesses in the interest of justice.
- **Modernization (Audiovisual Recording):** The deposition and examination of witnesses may be recorded by audiovisual electronic means, as far as practicable, and that such recording shall be preserved to ensure transparency, accuracy, and the integrity of the trial process, and facilitate later review if the accused is apprehended.

VI. POTENTIAL BENEFITS OF SECTION 356 BNSS

- i. **Deterrence against abscondence:** Declaring an accused a proclaimed offender and proceeding with trial acts as a deterrent to evasion.
- ii. **Protection of Witnesses:** Long delays often result in witnesses turning hostile or forgetting details. Trials in absentia reduce such risks. In the case of **State of U.P. Vs. Shambhu Nath Singh, (2001) 4 SCC 667**, Hon'ble Supreme Court stressed the importance of timely prosecution.
- iii. **Victim-Centric Justice:** Section 356 aligns with the emerging victimological approach recognized in **Mallikarjun Kodagali Vs. State of Karnataka, (2019) 2 SCC 752**, ensuring that victims are not deprived of closure merely because of absconding accused.

VII. CONCERNS AND RISKS OF SECTION 356 BNSS

- i. **Violation of Fair Trial Rights:** Even if the Section 356(3) states that when the proclaimed offender is not represented by an advocate he shall be provided with an advocate for his defence at the State's expense, but in practicality it is a question of great concern that how effective will such type of representation be, when the accused who is absconding and has not instructed his counsel properly. The accused loses the chance to

confront witnesses and effectively participate in their defense.

- ii. **Risk of Wrongful Conviction:** Without the accused, defense counsel may lack crucial instructions, increasing the risk of miscarriage of justice.
- iii. **Presumption of Innocence Undermined:** Article 20(3) of the Constitution protects against self-incrimination. However, proceeding without the accused risks treating abscondance as implicit guilt.
- iv. **Disproportionate Punishment:** The property forfeiture provisions under Section 107 BNSS may disproportionately affect dependents of the accused, raising questions under Article 300A (right to property).

VIII. PRACTICAL CHALLENGES IN THE IMPLEMENTATION OF SECTION 356 BNSS

- i. **Implementation at Ground Level:** Police often fail to execute warrants effectively, raising doubts about how efficiently proclamation orders will be enforced.
- ii. **Possibility of Abuse:** The prosecution may misuse absentia provisions to secure quick convictions against political dissidents or marginalized groups. In **Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569**, the Supreme Court had warned against excessive State powers under special criminal laws. Similar caution applies here.

- iii. **Backlog Reduction:** While intended to reduce pendency, absentia trials may lead to a flood of appeals and challenges, potentially burdening higher courts.

IX. ADDED ACCUSED

There are cases where after the production of evidence, the court thinks that a person other than the accused has committed the offence. In such cases, the court has the power under Section 319 of CrPC/358 BNSS to summon, detain or arrest such a person after service of notice. Section 358 BNSS deals with the power of the court to proceed against other persons appearing to be guilty of such an offence for which the accused is prosecuted. During the trial if it appears to the court that a person who has not been joined as accused in the case has committed the offence, then in such a case, the person can be tried together with the accused. This section ensures justice and takes into account the convenience of both the parties by taking cognizance of the newly added accused in the same case. Since there is no change between the previous Section 319, CrPC 1973 and Section 358, BNSS 2023, therefore, all the judicial interpretations and precedents through various judgments of the Hon'ble Supreme Court and the Hon'ble High Courts of the different States will apply while understanding Section 358 BNSS.

X. PROVISIONS OF SECTION 358 BNSS:

- (1) *Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*
- (2) *Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*
- (3) *Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*
- (4) *Where the Court proceeds against any person under subsection (1), then—*
 - (a) *the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;*
 - (b) *subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.*

XI. TYPICAL PROCEDURAL FEATURES UNDER SECTION 358

BNSS

- i. There must be a trial or inquiry of an offence. Section 358 BNSS makes it mandatory for the courts to exercise their power only during the trial or inquiry of an offence.
- ii. Court must be satisfied by the evidence presented that any other person other than the accused has committed such offence.
- iii. If that person is not attending court, the court may summon or arrest her/him as required.
- iv. A person attending court, though not under summons, may be detained for the purpose of inquiry/trial into the offence they appear to have committed.
- v. Such a person has to be tried together with the accused. He must be tried with the accused simultaneously but according to section 358 (4)(a), the proceedings against him have to be started afresh and the witnesses have to be examined again.
- vi. The power under section 358 of BNSS is an extraordinary power that is conferred on the courts and exercised at the discretion of the Judge. It should be used carefully and cautiously if compelling reasons exist against the individual.

XII. STAGES WHEN THE POWER OF SECTION 358 BNSS CAN BE EXERCISED:

- i. **Stage of trial or inquiry:** Trial starts once the charges are framed, and in case of inquiry, it does not mean any inquiry relating to the investigation by the investigating agency, but it is an inquiry after the case is brought to the notice of the court on filing the charge sheet. Therefore, the Court may use the provision under Section 358 BNSS only once the chargesheet is filed.
- ii. **Stage of committal** ;- In the case of **Alibai Singh Vs. State of MP, 1992, CRLJ 3209 MP**, it was held that the committing Magistrate has no power or jurisdiction u/s. 319 CRPC (now 358 BNSS) to summon a person as an accused, because he can not take cognizance of an offence triable by sessions court.
- iii. **Stage after Committal** : Once the case is committed to the Court of Sessions become the Court of Original Jurisdiction and empowered to array any person as accused but only after reaching the stage of collection of evidence. As per, **Joginder Singh Vs. State of Punjab, AIR 1979 SC 339**, the Sessions court also has the power to add any person for trial without there being a committal order against such person.
- iv. **Stage of Evidence recording till the pronouncement of Judgment** : It must appear from the evidence tender in the course of enquiry or trial, that any person not

being the accused, has committed any offence for which he could be tried along with the accused. The power can be exercised only if it so appears from the evidence, not otherwise. That view was upheld in the case of **Kishunsingh and others Vs. State of Bihar, (1993) 2 SCC 16.**

Important guidelines given by the Supreme Court in the case of **Sukhpal Singh Khaira Vs. State of Punjab, (2023) 1 SCC 289,** regarding the exercise of the power under Section 319 CrPC/ 358 BNSS

- i. If the competent court finds evidence or if application under Section 319 of CrPC (now Section 358 BNSS), is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order of acquittal or sentence, it shall pause the trial at that stage.
- ii. The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.
- iii. If the decision of the court is to exercise the power under Section 319 of CrPC (now S/358 BNSS) and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

- iv. If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.
- v. If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.
- vi. If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.
- vii. If the proceeding paused as in (i) above is in a case where the accused who were tried are to be acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.
- viii. If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of CrPC (now S/358 BNSS) can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split up (bifurcated) trial.
- ix. If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke

and exercise the power under Section 319 of CrPC (S/358 BNSS), the appropriate course for the court is to set it down for re-hearing.

- x. On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.
- xi. Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.
- xii. If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;
 - a. The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.
 - b. In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.

XIII. POTENTIAL BENEFITS OF SECTION 358 BNSS:

- i. **Empowers the Trial Court to Correct Investigative Lapses:** This Section empowers the Court to use its discretion and act as a judicial check on the investigation conducted by the police. If the

investigation is shady or biased, the court can correct the lapse by summoning the real culprits who were left out.

- ii. **Provides Relief to Victims/Complainants:** In cases where the victim or complainant knows of the involvement of a specific person but the police refuse to include them, they can bring this evidence to the court's notice during the trial. Section 358 provides a statutory avenue for redress.
- iii. **Ensures Cohesive Evidence Appreciation:** The evidence against all alleged accused is recorded and appreciated in one continuous proceeding, which helps the court understand the complete picture and the roles of each individual in the conspiracy or act. In the case of **Suman Vs. State of Rajasthan, (2010) 1 SCC 250**, the Court reiterated that the provision is a valuable tool in the hands of the court to do justice and is meant to be used sparingly and meaningfully when the evidence so warrants.

XIV. CONCERNS AND RISKS OF SECTION 358 BNSS:

- i. **Dilution of the "Presumption of Innocence :** While not a legal dilution, in practice, being summoned as an accused under Section 358 carries a social stigma and can severely damage a person's reputation, even if they are acquitted later.

- ii. **Ambiguity in the Standard of Evidence:** The phrase "it appears from the evidence" is vague. This ambiguity leads to inconsistent application. In **Hardeep Singh Vs. State of Punjab, (2014) 3 SCC 92**, the Apex Court laid down the test that the evidence must be such that it should *appear* that the person has committed an offence, which is a higher standard than "mere suspicion" but lower than "evidence sufficient for conviction."
- iii. **Delay in Trial:** The process of summoning new accused, providing them with all evidence, and allowing them to cross-examine witnesses from the beginning can significantly delay the conclusion of the trial.²
- iv. **Conflict with Discharge:** If a person has been consciously excluded by the investigating agency and the court has accepted the charge sheet, summoning them later under Section 358 can create a conflict, especially if the same court had earlier found no grounds to proceed against them.

XV. PRACTICAL CHALLENGES IN THE IMPLEMENTATION OF SECTION 358 BNSS;

- i. **Determining the Evidentiary Threshold:** The biggest challenge for judges is applying the correct standard. The courts have to constantly face the dilemma of choosing between 'letting a guilty person escape' and 'harassing an

innocent one'. The line between "strong suspicion" and "appearance of guilt" is very thin and subjective.

- ii. **Judicial Discretion and Inconsistency:** Because the standard is not mathematically precise, its application varies greatly from judge to judge. One judge's "compelling evidence" might be another judge's "mere suspicion." This leads to inconsistency and forum shopping.
- iii. **Procedural Complications after Summoning:**
 - a. **Stage of Trial:** If a new accused is summoned after the prosecution evidence is closed, does the trial recommence from the beginning for them? Courts have held that the newly added accused has the right to cross-examine all witnesses who have already been examined.
 - b. **Bail Jurisprudence:** A person summoned under Section 358 often has to immediately apply for bail, adding another layer of litigation and potential pre-trial detention.
- iv. **Strategic Litigation by Complainants:** Complainants often use Section 358 as a tool to pressurize or harass individuals against whom the police found no evidence. Filing repeated applications under this section becomes a strategy to keep the case alive against unwanted parties.

- v. **Burden on the Trial Court:** The trial court, already overburdened, has to undertake a mini-trial within a trial to decide the Section 358 application. It has to sift through the evidence, hear arguments, and write a detailed order, all of which consumes significant judicial time.

XVI. THE PROCEDURAL OVERLAP BETWEEN SECTION 356 AND SECTION 358 BNSS

1. **Issuance of warrants/summons:** Both regimes contemplate issuance of warrants/summons or arrest. Section 356 BNSS requires two consecutive arrest warrants for the proclaimed offender; whereas Section 358 BNSS authorises summons or arrest of newly implicated persons.
2. **Detention in court:** Both Sections permit detaining persons attending court where they appear guilty (Section 358 BNSS explicitly and Section 356 BNSS contemplates detention/arrest of the proclaimed offender if later produced).
3. **Use of recorded depositions:** Section 356 BNSS allows depositions recorded in absence to be used against the proclaimed offender; those depositions will also be part of the evidence the court uses if invoking Section 358 BNSS against others.
4. **State-supplied counsel/fairness safeguards:** Section 356 BNSS expressly mandates state-paid counsel when the

proclaimed offender has none; when Section 358 BNSS brings a new person into the trial, where the court must ensure the person's right to defence (notice, opportunity to cross-examine, etc.). Practically, Court must balance S/356's absentia steps with S/358's requirement to afford procedural fairness to newly added persons.

XVII. CONCLUSION

The ultimate aim of any procedural law is to strengthen the fair justice system , so is the aim of Sections 356 and 358 of the Bhartiya Nagrik Suraksha Sanhita, 2023. Both sections have been incorporated as indispensable tools which ensure that no guilty person escapes trial due to procedural technicalities or investigative failures. Both these Sections are the classic example of double-edged sword, the ultimate success of incorporating these Sections lies not in its textual existence but in its application. Its effectiveness and fairness depend entirely on the wisdom, restraint, and courage of the individual judge, who must navigate the fine line between securing principle of natural justice and preventing harassment. The ongoing jurisprudential evolution around these sections is a testament to the law's continuous endeavor to balance the rights of the victim with the interests of the accused .

महाराष्ट्र शासन राजपत्र असाधारण भाग चार-अ, ऑगस्ट १४, २०२५/श्रावण २३, शके १९४७

HOME DEPARTMENT

Madam Cama Marg, Hutatma Rajgurn Chowk, Mantralaya, Mumbai 400 032,
dated 14th August, 2025.

NOTIFICATION

BHARATIYA NAGARIK(SURAKSHA SANHITA, 2023).

No. BNSS-0425/CR-.47/Spl-9.-In exercise of the powers conferred by sub-section (8) of section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023), the Government of Maharashtra hereby, with effect from the date of publication of this notification in the *Official Gazette*, extend the provisions of section 356 of the said Sanhita, relating to inquiry, trial or judgement in absentia of proclaimed offender, against whom the competent court has initiated proceeding under sub-section (1) of section 84 of the said Sanhita.

By order and in the name of the Governor of Maharashtra,

DR. JAYANT SARODE,
Deputy Secretary to Government.



Mahamaya Temple, Ambikapur

**Principal District & Sessions Court, Ambikapur,
Distt-Surguja (C.G.)**