

Trial in Absentia [S.356 of BNSS, 2023]

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Abstract: *This article examines the concept of trial in absentia introduced under Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023. It analyses the rationale behind the provision, particularly its objective of preventing unnecessary delays caused by absconding accused persons while ensuring effective criminal justice administration. The study examines Indian judicial precedents, the legislative framework, and comparative legal approaches adopted in England, South Africa, the United States, and Canada. It also evaluates international legal standards relating to fair trial rights and due process. The article discusses both the advantages and potential constitutional concerns associated with conducting criminal trials in the absence of an accused. It concludes that the provision can promote speedy justice when applied with adequate procedural safeguards to preserve the rights of the accused while protecting victims and the public interest.*

Keywords: Trial in Absentia; BNSS 2023; Criminal Procedure; Speedy Trial; Fair Trial; Proclaimed Offender; Criminal Justice; Due Process

1. Introduction

For any offense as defined in S.2(24) of BNS, 2023 (analogous to S.40 IPC, 1860) the procedure for punishment is mentioned in the BNSS, 2023 (analogous to CrPC, 1973). A potential misuse of the CrPC came to lime light with passage of time which was the accused person were absconding the trial and holding the criminal justice system at halt.

In other cases where there existed more than one accused in a trial and due to bail of one of the accused others got bail on application of doctrine of parity but the one accused absconded the whole trial was put to halt and the trial was needed to be separated u/s.317(2) of CrPC, 1973 due to which a trial was delayed and there occurred reverse victimization of the victim by the delayed justice.

Need for trial in absentia

The provisions of **Sec.356 of BNSS, 2023** are developed on repeated persuasions from various High Courts¹ and guidelines from the Supreme Court²; Furthermore in absence of these provisions the protection accorded to the accused for his rights are used for reverse victimization of the complainant.

IN, Kader Khan –vs. – State of WB (supra),

A, B, C and D were accused of s.376(2)(g)/120B/323/506/34 on apprehension A, B and C were arrested and taken into custody whereas against D neither a warrant of arrest could be executed nor he could apprehended whereas the trial was separated and proceeded against A, B and C leading to their punishment against which they preferred an appeal, meanwhile the victim died and D was apprehended and due to some procedural technicalities of S.299 CrPC, 1973 r/w. S.33 of IEA, 1872 the victims testimony could not be taken into account in trial of D and thereby causing loss of valuable evidence. The court observed in the following manner;

- “This unfortunate loss of valuable evidence of a rape victim arises due to the prevalence of an archaic law relating to trial of absconders which does not recognize the evolution of law relating to waiver of fair trial rights of an absconder justifying trial in absentia and emergence of rights of victims, particularly victims of sexual abuse, against secondary victimization by giving repeated depositions in Court.”

The court further observed that various other jurisprudences allow for the procedure of trial in absentia.

IN, Hussain and Anr –vs. – UOI (supra),

In this case an issue as to bail pending trial was put up before the Division Bench of SC observed in Para – 21 the comparative jurisprudential analysis of CrPC, 1898 of Bangladesh which contains such provisions and highlighted the need for such.

IN, Bachelal Yadav –vs. – Akhanda Pratap Singh³,

In the SLP a final judgment dt.03.10.2016 a direction was given to conclude the trial within 6 months but the trial court could not completed within due time and I.A. was filed to provide additional time to complete the trial which was provided.

Analysis of S.356 BNSS, 2023:

S.356(1) has the effect of mandating of waiver of right to be present at trial when the person charged is either charged for the offence severally or jointly and has absconded and there is no immediate prospect of arresting him then the court has a statutory right to proceed the trial as if the accused was present but puts a proviso that a proceeding could begin only once 90 days has elapsed from the framing of charge.

Sub-section 2 provides the condition precedents required for such a trial to proceed being among them is the condition of declaring him a proclaimed offender u/s.84 and requisites to be done under that respective section for such proclamation and further provides conditions to ensure proper notice of such events such as informing to friends and family, pasting

¹ Kader Khan –Vs.-State of West Bengal [(2022) SCC Online Cal 1038]

² Hussain and Anr –Vs.- Union of India [(2017) 5 SCC 702]

³ Misc.App – 862/2022 in SLP(Crl) – 7951/2016 Order Dt. 20-05-2022.

notices at conspicuous part of homestead, notice in daily, etc so as to validly construe substituted service or constructive notice.

Sub-Section 3 provides for valid representation by an advocate and under sub-section 4 and 5 the matter of evidence and witness are mentioned in the case where the accused is absent voluntarily and gives discretion upon the court to allow the accused if he presents himself to cross-examine such witness or evidence also further it puts the court under obligation to record to witness audio visually if possible.

Sub-section 6 removes the pendency of proceedings and casts a mandate to the effect of conclusion of the trial.

Sub-section 7 provides for appeal for punishment under this section and thus making the section in line with constitutional mandate of remedy.

Historical Aspect of Speedy Trial: Fundamental Right of Victim

That the court in Hussainara Khatoon⁴ was of the opinion that "No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Art.21. There can, therefore, be no doubt that speedy trial.....is an essential part of fundamental right enshrined in Art.21."

In the case of Imtiyaz Ahmad⁵ it was observed that long delay has effect of blatant violation of rule of law and adverse impact on access to justice which is a fundamental right (both victim and accused). Similar stance was taken in Bhim Singh⁶ case in which central government was issued directions for fast tracking of criminal justice administration.

2. Contemporary International Statutory Understanding

1) English Jurisprudence:

That the majority provisions of the constitution and other laws are taken from English jurisprudence and a comparison of the Indian laws with the English law is best point to start. In England In R v Jones⁷ the defendant absconded during his trial which the judge ordered should continue in his absence. He was convicted and eight months after his conviction applied for an extension of time for leave to appeal, and his application was refused by the Court of Appeal. The Court of Appeal held that the judge had exercised his discretion properly.

2) South African Jurisprudence:

That South Africa follows a model of transformative constitutionalism and it has been held in a number of cases by the Supreme Court⁸ and there exists a historical similarity of colonial legislations between the two countries and a comparison is warranted. The **Criminal procedure code of**

South Africa U/S. 159⁹ mentions grounds for trial be conducted in absentia and the court has held that the right to be present is not absolute. Indeed, the Act prescribes a number of exceptions to the general principle that an accused must be present at all stages of the proceedings except for when he misbehaves, has physical incapacity or when accused has accepted guilt.¹⁰

3) American Jurisprudence:

That the concept of due process of law has been incorporated in the US constitution by the **5th Constitutional amendment of US¹¹** and the protection of the accused are basic right conferred by the **(6th)¹² and [14th(Sec.1)]¹³ Constitutional amendment of US** which are analogous to the **Art.20,21 and 22 of the Constitution of India** and the US courts in the following cases held that the trial in absentia is constitutionally valid;

- a) Diaz-Vs.- US¹⁴ before the Supreme Court of United States an appeal by an accused who had knowledge about his trial being conducted in the trial court in Philippines had continued his trial by a counsel but had himself absconded, the court held that the accused has waived his right to be present and correctly he had been not allowed an appeal on grounds of his absence from trial as such absence was voluntary.
- b) Similar decisions have been held in the American law from time to time ¹⁵ and in these cases the trial-in-absentia has been held to be constitutionally valid ¹⁶.

⁹ • in the absence of an accused who misbehaves (s. 159(1)); • where an accused cannot attend the trial on account of his own physical condition or illness or death of a member of his family (s 159(2)); • or where an accused is convicted on an admission of guilt without appearing in court (s 57).

¹⁰ S -Vs.- Roman [(1994) 1 SACR 436 A]

¹¹ Amendment V – "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹² Amendment VI – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

¹³ Amendment XIV Section 1 – "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁴ Diaz -Vs.- United States [223 U.S. 442 (1912)]

¹⁵ Synder -Vs.- Massachusetts [291 US 97 (1934)] ;also see Illinois -Vs.- Allen [397 US 337 (1970)]

¹⁶ Taylor -Vs.-US [414 US 17 (1973)]; also see Crossby -Vs.- United states [506 US 255 (1993)]

⁴ Hussainara Khatoon -Vs.- State of Bihar [1979 AIR 1360]

⁵ Imtiyaz Ahmed -Vs.-Sate of U.P. [AIR 2012 SC 642]

⁶ Bhim Singh -Vs.- Union of India [1985 AIR SC 1650]

⁷ R-Vs.-Jones [1972] 1 WLR 887

⁸ Navtej Singh Johar -Vs.- Union of India [AIR 2018 SC 4321]

The decisions have transpired to take shape in the form of **Rule 43 of Federal rule of criminal procedure** which mentions grounds when the accused may tried without his presence.

4) Canadian Jurisprudense

The position under Canadian law is that the accused has the right to be present at the trial as long as he does not interfere with the proceedings. The trial of an accused cannot proceed in his absence unless in the case of a misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the court's permission. Therefore, the accused is deemed to have waived the right to be present if he absconds during the course of the trial. The trial can then be conducted in the accused's absence.¹⁷

5) International Journal

In the **Harvard Law Review**¹⁸ - 'The extent of valid waiver must be determined by the purpose of the procedural system and its particular elements. The system itself aims to secure a rational trial. The protection of the accused is the basis some of its incidents¹⁹; that of others is said to be a public interest in assuring to him such protection, even against his own will²⁰. In so far any rule is for the benefit of the accused alone, the validity of his waiver should be unquestioned²¹. But the basic theory of our trial procedure requires that his waiver shall not make the trial irrational. The only other limitations arise from the theory of public interest, and are ascertainable by determining its meaning, its reasonableness, and its present scope.'

6) International Covenants

That the European Convention on Human Rights (ECHR), 1950 U/A. 6(3)(c) also provide for the procedure of fair trial to be supreme and the basic of civil and political rights that are to be upheld in every criminal trial²², furthermore the International Convention on Civil and Political Rights (ICCPR) U/A. 14(3) and (4) provides that the accused has a right to be tried in presence²³.

Arguments in Favor:

Repeatedly when the accused has disobeyed the judicial processes s/he must not be given the due advantage under law.

Arguments Against:

- "The natural law rights were meant to be converted into our constitutionally recognized fundamental rights, at least they are expressly mentioned so they may be found within it and not outside it. A divorce between Natural Law and Constitutional Law will be disastrous."²⁴

- It is a cardinal principal of criminal administration of justice that the accused be represented although the **Sec.356(3) of BNSS, 2023** provides for the representation of accused in case of trial in absentia, but it is important to note that a representation without the actual information from the accused himself would be as good as no representation under law as there would be lack of material information which the accused could have provided to the counsel due to lack of which he may be charged and punished, for otherwise he could have been discharged and acquitted.
- Furthermore, the provisions of **Sec.356 (7) of BNSS, 2023** i.e. an appeal can only be preferred when the accused presents himself before the court of appeal contravenes the provision of Art.22 the right to be defended by a legal practitioner and the right to be represented is basic fundamental right²⁵. A representation is a valid medium of presence and all actions done by the person acting in capacity of attorney are held as the acts of the person who confers such powers and to debar the appellant of such a right would be not in line with Art.22.
- It will be a gross miscarriage of justice in cases where the accused is put under burden of guilt than on burden of innocence due to use of such sections such as **Sec(s).119 and 109 of BSA, 2023** through the use of which, it is neither fair to punish the accused without even according him opportunity to be heard in person, be inquired and be adjudged.

3. Conclusion

In conclusion, a trial in absentia raises significant legal and ethical considerations. While it is essential to uphold the rule of law in the pursuit of justice, the absence of the defendant during the trial challenges the fundamental principles of due process. In such cases, the court must ensure that all procedural safeguards are in place to guarantee a fair trial, including the right to legal representation and the opportunity to present a defense. The trial in absentia can be a necessary tool in specific situations where a defendant actively avoids the legal process, but it should be employed with caution and in accordance with the law, taking into account both the rights of the accused and the interests of justice.

¹⁷ R –Vs.- McDougall [(1904) 8 OLR 30]

¹⁸ 'Extent of Valid Waiver Of Criminal Procedure' Harvard Law Review Dec. 1911 Vol.25 No.2 Pg179-181.

¹⁹ State-Vs.-Wooding 53 Minn. 142, 54 N.W. 1068

²⁰ Cancemi –Vs.- People 18 N.Y. 128

²¹ Schick –Vs.- United States 195 U.S. 65

²² Wolf –Vs.- Panama [Comm No. 289/1988 UNDoc. CCPR/C/44/D/289/1988]

²³ Perez –Vs.- Uruguay [Comm No. 109/1981 UNDoc. A/39/40 at 164 (1984)]

²⁴ Menka Gandhi – Vs.- Union Of India [(1978) 1 SCC 248] (Para 206); also see R.C.Cooper-Vs.-UOI [(1970) 2 SCC 298];

I.C.Golaknath –Vs.-State of Madras [AIR 1967 SC 1643]; A.D.M. Jabalpur – Vs.- S. Sukhla [(1976) 2 SCC 521]

²⁵ R.M.Wasawa –Vs.- State of Gujrat [(1974) SCC 3 581]