
THE JURISPRUDENCE OF ABSENCE: A COMPREHENSIVE LEGAL AND CONSTITUTIONAL ANALYSIS OF TRIAL IN ABSENTIA UNDER SECTION 356 OF THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

Aishwarya Vucha, ICAFI Law School Hyderabad (Alumna) Advocate Telangana High
Court

ABSTRACT

The enactment of the *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS) marks a paradigm shift in Indian criminal jurisprudence, moving from an accused-centric model to a victim-centric "Crime Control" framework. At the helm of this transformation is Section 356, which institutionalizes *Trial in Absentia* for proclaimed offenders—a radical departure from the *audi alteram partem* principles of the Code of Criminal Procedure, 1973.

This research paper provides a comprehensive constitutional and operational analysis of Section 356. It dissects the statutory mechanics of the provision and its interplay with the Fugitive Economic Offenders Act, 2018, arguing that the "Doctrine of Deemed Waiver" is constitutionally better understood as "Forfeiture by Misconduct," a distinction that strengthens the state's justification against Article 21 challenges. The paper rigorously examines the retrospective applicability of the law to pre-2024 FIRs, contrasting the *Krishnan Joshi* (Rajasthan HC) and *Chowgule* (Bombay HC) doctrines, while highlighting the "Executive Bypass" utilized by states like Mizoram.

Crucially, the paper identifies a strategic "Extradition Trap": the lack of an automatic retrial right and the three-year appeal limitation may inadvertently block the extradition of fugitives from the UK and Europe under the *Bertino* standard. To resolve this, the paper proposes a "Middle Path" of Virtual Presence, arguing that technology can bridge the gap between domestic speed and international due process. Through a comparative analysis of the US, UK, France, and Bangladesh, this study concludes that while Section 356 is a necessary weapon against fugitives, its current architecture requires urgent judicial calibration to prevent it from becoming a procedural dead-end.

1. Introduction: The Paradigm Shift in Indian Criminal Procedure

The administration of criminal justice in India has historically been governed by the principle of *audi alteram partem* ("no one should be condemned unheard"), a cornerstone of natural justice that necessitates the presence of the accused during trial. Under the repealed *Code of Criminal Procedure, 1973* (CrPC), Section 273 mandated that all evidence must be taken in the presence of the accused, or, when their personal attendance is dispensed with, in the presence of their pleader.¹ The only exception provided was under Section 299 CrPC, which allowed a court to record the deposition of witnesses in the absence of an absconding accused. However, this was strictly a measure of evidence **preservation**, not adjudication. The evidence recorded under Section 299 could only be used against the accused in a future trial upon their arrest, and only if the witness had since died or become unavailable. The trial itself could not proceed to judgment, conviction, or sentencing.²

This legal limitation created a systemic vulnerability, allowing fugitives—ranging from high-profile economic offenders to organized crime syndicates—to hold the judicial process hostage. By evading arrest, an accused could effectively freeze legal proceedings indefinitely, leading to the degradation of evidence, the death of witnesses, and the denial of closure to victims. The Supreme Court of India, in *Hussain v. Union of India*, (2017) 5 SCC 702, expressed grave concern over this paralysis, noting that "speedy trial is a part of reasonable, fair and just procedure guaranteed under Article 21" and that the justice system cannot be allowed to be defeated by the evasion of the accused.³

The *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS) addresses this lacuna through **Section 356**, which introduces the concept of *Trial in Absentia*. This provision empowers the Court of Session and Judicial Magistrates to conduct a complete trial, record evidence, hear arguments, and pronounce judgment against a "Proclaimed Offender" who evades trial. This represents a fundamental shift from a "Due Process Model," which prioritizes the individual rights of the accused, to a "Crime Control Model," which emphasizes the state's interest in the finality of

1 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

2 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

3 *Hussain v. Union of India*, (2017) 5 S.C.C. 702 (India).

litigation and the victim's right to justice.⁴

2. Statutory Anatomy of Section 356 BNSS: The Mechanics of Absence

Section 356 of the BNSS is a non-obstante clause, granting it primacy over all other provisions of the Sanhita. It establishes a rigorous procedural framework that converts the physical absence of the accused into a legal presence through the fiction of waiver.

2.1 The Threshold: Proclaimed Offender Status (Section 84 BNSS)

The power to try an accused in absentia is not absolute; it is triggered only upon the specific declaration of the accused as a "Proclaimed Offender."

- **Expansion of Scope:** Under Section 82(4) of the old CrPC, the status of "Proclaimed Offender" was limited to a specific list of IPC offenses (primarily heinous crimes like murder, kidnapping, and dacoity). Section 84(4) of the BNSS significantly broadens this ambit. It allows any person accused of an offense punishable with **imprisonment of ten years or more**, imprisonment for life, or death to be declared a proclaimed offender.⁵ This ensures that the provision covers not only violent crimes but also severe economic offenses, drug trafficking, and organized crime, provided the statutory punishment threshold is met.
- **Judicial Satisfaction:** The court must be judicially satisfied that the person has "absconded to evade trial" and that there is "no immediate prospect of arresting him".⁶ This requirement imposes a duty on the investigating agency to demonstrate that all reasonable efforts to secure presence have failed.

2.2 The Doctrine of "Deemed Waiver"

Section 356(1) introduces the **Doctrine of Deemed Waiver**. It explicitly states that when a

⁴ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

proclaimed offender has absconded to evade trial and there is no immediate prospect of arrest, such conduct "shall be deemed to operate as a waiver of the right of such person to be present and tried in person".⁷

This legal fiction is the jurisprudential bedrock of the new law. Previously, the right to be present was viewed as an inalienable right under Article 21 that could not be easily waived. The BNSS reinterprets this right as a privilege that is contingent upon the accused's submission to the rule of law. Once the waiver is deemed, the court proceeds "in the like manner and with like effect as if he was present," thereby satisfying the procedural requirement of recording evidence in the presence of the accused through a constructive presence.⁸

Constitutional Nuance: Waiver vs. Forfeiture While Section 356 utilizes the language of "deemed waiver," constitutional theorists argue the provision is better understood as "forfeiture by misconduct." A waiver implies a voluntary, known relinquishment of a right. However, fundamental rights under Article 21 are generally not waivable under Indian constitutional doctrine. By framing the procedure as forfeiture—where the accused loses the procedural benefit of presence due to deliberate evasion—the state stands on firmer constitutional ground. This distinction is critical because, as seen in comparative jurisprudence, a "waiver" requires unequivocal consent, whereas "forfeiture" justifies the state's action based on the accused's obstructionism.

2.3 Mandatory Procedural Safeguards and the Cooling-Off Period

To mitigate the risks of ex-parte proceedings and withstand constitutional scrutiny under the "procedure established by law" test of *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 9, Section 356(2) mandates a strict notification regime:

Procedural Requirement	Statutory Condition	Objective
Dual Warrants	Issuance of two consecutive arrest warrants within an interval of at least 30 days.	Demonstrates exhaustive executive effort; prevents "mechanical" abscondence declarations.

7 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 356(1), (8) (India).

8 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

9 *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

Public Notice	Publication in a national or local daily newspaper circulating in the place of the accused's last known residence.	Ensures "constructive notice" to the world and the accused.
Familial Intimation	Informing a relative or friend of the accused about the commencement of the trial.	Utilizes social networks to convey the legal threat.
Physical Affixation	Affixing notice on a conspicuous part of the accused's house and the local police station.	Traditional mode of service to ensure local awareness.
90-Day Embargo	The court shall not commence the trial unless a period of 90 days has lapsed from the date of framing charges.	A <i>locus poenitentiae</i> (opportunity to repent). It provides a final window for the accused to surrender before the irreversible step of trial commencement.

The newspaper notice must specifically inform the proclaimed offender that if they fail to appear within 30 days of publication, the trial shall commence in their absence. This specific warning is crucial for establishing the "knowing and voluntary" nature of the waiver.¹⁰

3. The Technological Imperative: Audio-Video Recording under Section 356(5)

A critical but often overlooked innovation in the BNSS is the integration of technology as a due process safeguard.

3.1 Statutory Mandate vs. Practical Implementation

Section 356(5) mandates: *"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"*.¹¹

This provision is distinct from the general recording of evidence. It specifically targets in-absentia trials to ensure that an unalterable digital record of the proceedings exists. The preference for "mobile phone" indicates a legislative intent to make this practicable even in resource-constrained lower courts, removing infrastructure as an excuse for non-compliance.

¹⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 356(2) (India).

¹¹ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhinyam, 2023, § 24 expl. II (India).

3.2 Evidentiary Value and Preservation for Appellate Review

The primary purpose of this audio-video record is preservation. In a trial where the accused is absent, the defense counsel (appointed by the State under Section 356(3)) may lack specific instructions to effectively cross-examine witnesses on demeanor or contradictions.

- **Appellate Review:** If the accused later appears and appeals the conviction (within the 3-year limitation under Section 356(7)), the appellate court can view the *demeanor* of the witnesses rather than relying solely on the written transcript.
- **Recall Mechanism:** Section 356(4) allows a court, "in the interest of justice," to allow an arrested accused to examine evidence taken in their absence. The audio-video record makes this "examination" substantive rather than theoretical, allowing the accused to see exactly how the testimony was delivered and potentially challenge it more effectively than a cold record would allow.¹²

3.3 The "Middle Path": Virtual Appearance as Constructive Presence A potential jurisprudential solution to the "Extradition Trap" lies in expanding the definition of presence. Indian courts have long recognized video conferencing (VC) as valid for recording evidence and remand. Before initiating a full Section 356 trial, courts could offer the absconder a "safe harbor" option: **Virtual Appearance**. Allowing an accused abroad to appear via VC to contest charges without immediate physical arrest could satisfy the "right to be present" requirement. This would align with the *Crosby* standard (US) by allowing the trial to "commence" with the accused constructively present, thereby reducing the risk of the proceedings being labeled a "flagrant denial of justice" in foreign courts. Admittedly, allowing such virtual participation effectively converts the proceeding from a rigorous 'Trial in Absentia' under Section 356 to a regular trial via electronic mode. However, this strategic conversion is precisely what is required to immunize the verdict against international 'denial of justice' claims, ensuring that the conviction remains enforceable for extradition purposes.

4. Interplay with Section 358 BNSS (Summoning Additional Accused)

The interaction between Section 356 (Trial in Absentia) and **Section 358 BNSS** (formerly

¹² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

Section 319 CrPC) presents a complex procedural challenge. Section 358 empowers the court to summon any person not being the accused to face trial if it appears from the evidence that such person has committed any offense.¹³

4.1 The Legacy of *Hardeep Singh* and *Sukhpal Singh Khaira*

The Supreme Court's Constitution Bench in *Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92, established that the power to summon an additional accused is "extraordinary" and requires evidence stronger than a mere prima facie case.¹⁴ Furthermore, in *Sukhpal Singh Khaira v. State of Punjab*, (2023) 1 SCC 289, the Constitution Bench clarified the timeline, holding that the power under Section 319 CrPC (now 358 BNSS) must be exercised **before** the pronouncement of the sentence or acquittal in the main trial. Once the trial concludes against the original accused, the court becomes *functus officio* regarding the summoning of new accused.¹⁵

4.2 Procedural Lag: Can a New Accused be Tried in Absentia Immediately?

If a person is summoned under Section 358 BNSS during an ongoing trial and subsequently absconds, can the court immediately proceed under Section 356? The statutory analysis suggests a distinct procedural lag:

1. **Summoning:** The court issues process under Section 358 based on evidence recorded.
2. **Evasion:** The newly summoned person evades service.
3. **Proclamation Cycle:** The court must initiate the Section 84 procedure afresh: issuance of warrants, followed by a proclamation requiring appearance within 30 days.
4. **Declaration:** Only if the person fails to appear after the proclamation period can they be declared a "Proclaimed Offender."
5. **Cooling-Off:** Crucially, the 90-day waiting period under Section 356(1) proviso applies *de novo*. The court cannot commence the in-absentia trial against the new accused until

¹³ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 358 (India) (corresponding to Code of Criminal Procedure, 1973, § 319).

¹⁴ *Hardeep Singh v. State of Punjab*, (2014) 3 S.C.C. 92 (India).

¹⁵ *Sukhpal Singh Khaira v. State of Punjab*, (2023) 1 S.C.C. 289 (India).

90 days have lapsed from the framing of charges against *them*.

Therefore, a Section 358 accused is entitled to the full suite of Section 356 safeguards. There is no "automatic" transition to in-absentia trial; the procedural clock resets for the newly added accused.¹⁶

4.3 Evidentiary Implications: The "Joint Trial" Fiction (Section 24 BSA)

A critical evidentiary corollary to Section 356 BNSS is found in the *Bharatiya Sakshya Adhiniyam, 2023* (BSA). The Explanation II to **Section 24 of the BSA** clarifies that a trial held in the absence of an accused under Section 356 shall be deemed to be a "**joint trial**" for the purpose of considering confessions. This nullifies the previous defense available under the Evidence Act, where a co-accused's confession could not be used against an absconder because they were not being "jointly tried." This provision significantly strengthens the prosecution's ability to secure convictions in conspiracy and organized crime cases using co-accused testimony

5. Intersection with Special Statutes: FEOA vs. BNSS

The introduction of Section 356 creates an overlap with the **Fugitive Economic Offenders Act (FEOA), 2018**, which was specifically enacted to deter economic offenders from evading Indian law.

5.1 Civil Forfeiture (FEOA) vs. Criminal Attachment (BNSS Section 107)

- **FEOA (Civil Nature):** The FEOA allows for the confiscation of properties of a declared "Fugitive Economic Offender" (where the offense value exceeds ₹100 Crores). This is a form of **civil forfeiture**; it does not require a criminal conviction, only the declaration of fugitive status and the existence of proceeds of crime.¹⁷
- **BNSS (Criminal Nature):** Section 356 allows for a full criminal trial and conviction. Simultaneously, **Section 107 BNSS** empowers a Magistrate, upon police request, to

¹⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

¹⁷ Fugitive Economic Offenders Act, 2018, No. 17 of 2018 (India).

attach "proceeds of crime" derived from *any* criminal activity (not limited to ₹100 crores or economic offenses). This attachment can occur during the investigation itself.¹⁸

Feature	Fugitive Economic Offenders Act (FEOA)	BNSS (Section 107 & 356)
Nature of Action	Civil Forfeiture (In Rem) – Proceedings against the property itself.	Criminal Attachment (In Personam) – Proceedings against the individual.
Monetary Threshold	Minimum ₹100 Crores .	No Minimum Limit (Applies to any offense).
Prerequisite	Declaration of "Fugitive" Status only; No Conviction Needed .	Conviction typically required for final forfeiture (though attachment can happen during investigation).
Judicial Authority	Special Court (PMLA).	Judicial Magistrate / Sessions Court.
Scope of Offense	Limited to Scheduled Economic Offenses (e.g., bank fraud).	Any offense punishable by 10 years or more .

5.2 The Question of Double Jeopardy

Does utilizing both laws violate Article 20(2) of the Constitution (protection against Double Jeopardy)? Legal consensus suggests not. FEOA proceedings are *in rem* (against the property), aiming to strip the offender of economic power. Section 356 proceedings are *in personam* (against the individual), aiming to impose penal sanctions (imprisonment). Therefore, the State can theoretically pursue both: confiscate assets under FEOA and convict under BNSS. However, legal experts argue that the broad powers of Section 107 BNSS might render the FEOA procedurally obsolete for domestic assets. Why would an agency navigate the rigorous Special Court process of FEOA when a simple Magistrate's order under Section 107 BNSS can attach property during the investigation? The FEOA may remain relevant primarily for its specific provisions regarding cross-border confiscation cooperation.¹⁹

¹⁸ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 107 (India).

¹⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

6. Constitutional Scrutiny: Article 21 and Natural Justice

The constitutional validity of Section 356 hinges on the "Golden Triangle" of Articles 14, 19, and 21.

6.1 The Conflict: Right to Presence vs. Right to Speedy Justice

Article 21 guarantees the right to a fair trial. The Supreme Court in *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158, held that a fair trial entails a balance between the rights of the accused, the victim, and society.²⁰

- **Accused's Perspective:** The right to be present is fundamental to an effective defense (instructing counsel, observing witness demeanor). Section 356 dilutes this by substituting "constructive presence" (waiver).
- **Victim's Perspective:** In *Hussain v. Union of India*, (2017) 5 SCC 702, the Supreme Court mandated that judicial processes cannot be held ransom by absconders. The Court directed that trials must proceed to prevent the "secondary victimization" caused by indefinite delays.²¹

The constitutionality of Section 356 will likely depend on whether the Supreme Court views the "Deemed Waiver" and the 90-day cooling-off period as "reasonable procedure" under *Maneka Gandhi*. Proponents argue that a fugitive who voluntarily rejects the court's jurisdiction cannot claim the benefit of its protections to stall the trial.

6.2 The "Dual Justice System" Critique (Rich vs. Poor)

A significant Article 14 (Equality) concern is the disparate impact of the law. Wealthy economic fugitives (like Vijay Mallya or Nirav Modi) residing abroad have the resources to track legal developments in India. They can engage top-tier counsel to represent them under Section 356(3) even while absent. In contrast, an indigent accused—perhaps a migrant laborer who missed a summons due to relocation—may be declared a proclaimed offender via a newspaper notice they never read. They would be tried in absentia with a legal aid lawyer who

²⁰ *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 S.C.C. 158 (India).

²¹ *Hussain v. Union of India*, (2017) 5 S.C.C. 702 (India).

has no instructions or alibi evidence. This risks creating a dual system where the wealthy "manage" absence while the poor are "condemned" by it.²²

7. The Retrospective Conundrum: Old FIRs vs. New Law

A fierce legal battle is currently being waged in the High Courts regarding the retrospective application of Section 356. Does it apply to accused persons who absconded *before* the BNSS came into force on July 1, 2024?

7.1 The *Krishnan Joshi* Doctrine: Vested Rights

In **Krishnan Joshi v. State of Rajasthan**, 2024 SCC OnLine Raj 2042, the Rajasthan High Court took a strict interpretative stance. The Court held that the law applicable to a case is determined by the **date of registration of the FIR**. Since the right "not to be tried in absentia" was a substantive procedural right available under the CrPC at the time the FIR was registered (pre-July 1, 2024), Section 356 cannot be applied retrospectively to these cases. The repeal and savings clause (Section 531 BNSS) was interpreted to mean that pending investigations and trials must conclude under the old code.²³

7.2 The *Chowgule* Doctrine: Procedural Applicability

Conversely, the Bombay High Court in **Chowgule & Co. Pvt. Ltd. v. Public Prosecutor**, 2024 SCC OnLine Bom 2501, adopted a different approach. Distinguishing between substantive liability (the crime) and procedure (the trial method), the Court held that procedural applications (such as bail or the mode of trial) filed *after* July 1, 2024, are governed by the BNSS, even if the FIR predates the new code.²⁴ This interpretation implies that if the police file an application for trial in absentia *now*, Section 356 applies regardless of when the crime occurred.

7.3 Executive Bypass: The Mizoram Notification

Anticipating this judicial gridlock, the legislature provided a "backdoor" in **Section 356(8)**,

²² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); Code of Criminal Procedure, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); Bharatiya Sakshya Adhiniyam, 2023, § 24 expl. II (India).

²³ Krishnan Joshi v. State of Rajasthan, 2024 SCC OnLine Raj 2042 (India).

²⁴ Chowgule & Co. Pvt. Ltd. v. Pub. Prosecutor, 2024 SCC OnLine Bom 2501 (India).

which empowers the State Government to "extend the provisions of this section to any absconder mentioned in sub-section (1) of section 84" by notification.²⁵ Utilizing this power, the Government of Mizoram issued a notification **dated July 21, 2025 (published September 2025)**, explicitly extending Section 356 to pre-existing absconders. This executive action effectively overrides the "date of FIR" limitation within that jurisdiction, signaling a potential roadmap for other states to bypass the *Krishnan Joshi* restriction.²⁶

8. The Extradition Trap: Section 356 vs. International Law

While Section 356 aims to bring fugitives to justice, it may paradoxically hinder the extradition of high-profile offenders from Western jurisdictions due to a conflict with international human rights standards.

8.1 The "Right to Retrial" Requirement (ECHR Article 6)

Under the European Convention on Human Rights (ECHR), specifically Article 6 (Right to a Fair Trial), a conviction in absentia is considered a "flagrant denial of justice" *unless* the legal system of the requesting state guarantees the accused a **full retrial** (fresh determination of the merits) upon their return. This standard was solidified by the European Court of Human Rights in *Sejdovic v. Italy* (2006) and *Colozza v. Italy* (1985).²⁷

8.2 The *Bertino* and *Merticariu* Precedents (UK Supreme Court, 2024)

The United Kingdom, a primary destination for Indian economic fugitives, classifies India as a 'Category 2' territory. While **Section 20 of the Extradition Act 2003** strictly bars surrender for in-absentia convictions within Europe, extradition to India is governed by **Section 87**, which mandates compliance with the European Convention on Human Rights (ECHR). Consequently, the courts apply the same rigorous Article 6 standards to Indian requests. In two landmark judgments delivered in 2024—***Bertino v. Public Prosecutor, Italy***, UKSC 9, and

²⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 356(1), (8) (India).

²⁶ Gov't of Mizoram, Home Dep't, Notification Extending § 356 BNSS to Absconders (July 21, 2025) (India) (published Sept. 2025), available at <https://home.mizoram.gov.in/uploads/qms/f154782c1b42ff939f4f9abb02493d9a/sub-section-8-of-section-356-of-bnss-2023.pdf>.

²⁷ *Sejdovic v. Italy*, App. No. 56581/00, Eur. Ct. H.R. (2006); *Colozza v. Italy*, 7 EHRR 516 (1985)

Merticariu v. Judecatoria Arad, Romania, UKSC 10—the UK Supreme Court significantly raised the bar.²⁸ The Court held that:

1. **Deliberate Absence:** The burden is on the requesting state to prove "unequivocal waiver" of the right to be present. A mere "manifest lack of diligence" by the accused is insufficient (overturning previous case law).
2. **Retrial vs. Appeal:** Crucially, the Court held that a right to **appeal** is *not* equivalent to a right to **retrial**. An appeal typically reviews the record for errors of law; a retrial allows for a fresh examination of evidence and witnesses. If the requesting state only offers an appeal, extradition must be refused. The UK Supreme Court explicitly held that a 'manifest lack of diligence' by the accused is no longer sufficient to infer a waiver of rights, significantly raising the burden of proof for the Indian Government."

8.3 The Trap

Section 356(7) of the BNSS grants the proclaimed offender a right to **appeal** upon surrendering. It does *not* grant an automatic right to **retrial**. Furthermore, Section 356(7) imposes a **limitation period of three years** from the date of judgment for filing an appeal. This creates a procedural dead-end: if a fugitive is extradited four years post-conviction, they may find their statutory remedy time-barred. Foreign courts, when assessing 'risk of flagrant denial of justice,' will view this hard limitation as a failure to guarantee the *restoration* of rights required by the *Bertino* standard. By convicting a fugitive in absentia under Section 356, India effectively converts them from an "accused" (who can be extradited for trial) to a "convict" (who cannot be extradited because the BNSS remedy—appeal—fails the *Bertino* retrial standard). Thus, Section 356 creates a strategic "Extradition Trap" where obtaining a domestic conviction may legally block the international return of the fugitive.²⁹

8.4 The Legislative Trade-Off: Domestic Closure vs. International Return

It is pertinent to note that this "Extradition Trap" may be a calculated legislative trade-off rather

²⁸ *Bertino v. Pub. Prosecutor, Italy*, [2024] UKSC 9 (U.K.); *Merticariu v. Judecatoria Arad, Romania*, [2024] UKSC 10 (U.K.).

²⁹ *Bharatiya Nagarik Suraksha Sanhita*, 2023, No. 46 of 2023, §§ 84, 107, 356, 358 (India); *Code of Criminal Procedure*, 1973, No. 2 of 1974, §§ 273, 299, 319 (India); *Bharatiya Sakshya Adhiniyam*, 2023, § 24 expl. II (India).

than an oversight. The **Statement of Objects and Reasons** of the BNSS30 explicitly prioritizes a "**victim-centric**" approach and the "**deterrence**" of crime. By enabling Trial in Absentia, the State secures two immediate domestic victories:

1. **Finality of Verdict:** The victim receives a judgment and closure, ending the indefinite "pending" status of the case.
2. **Asset Seizure:** A conviction facilitates the immediate attachment and forfeiture of the fugitive's Indian assets under **Section 107 BNSS**, hitting the offender financially even if they remain physically out of reach. Thus, the legislature appears to have chosen the certainty of **domestic punishment (dispossession and stigma)** over the uncertainty of **international extradition**.

9. Comparative Jurisprudence: The Global Landscape

9.1 United States: The *Crosby* Commencement Rule

The US system, governed by **Federal Rule of Criminal Procedure 43**, mandates the defendant's presence at the commencement of trial. In **Crosby v. United States**, 506 U.S. 255 (1993), the US Supreme Court established a strict rule: A trial may **continue** in absentia if the defendant flees *after* it begins (waiver), but it can never **commence** in absentia.³¹ Section 356 BNSS, which allows trial initiation against a fugitive who has never appeared, is fundamentally incompatible with US due process standards.

9.2 United Kingdom: Judicial Discretion

In **R v Jones (Anthony)**, UKHL 5, the House of Lords held that trial in absentia is permissible but is a matter of **judicial discretion**, to be exercised with "great care" after balancing the public interest against the disadvantage to the accused.³² The BNSS differs by making the procedure a statutory mandate ("shall be deemed to operate as a waiver") once the conditions are met, removing much of the discretionary balancing required in the UK.

30 The Bharatiya Nagarik Suraksha Sanhita, 2023, Bill No. 122 of 2023, Statement of Objects and Reasons (India)

31 Crosby v. United States, 506 U.S. 255 (1993).

32 R v Jones (Anthony), [2002] UKHL 5 (U.K.).

9.3 France: The Right of Opposition - The Retrial Safeguard

France permits *jugement par défaut* (judgment by default). However, French law retains a critical safeguard under **Article 489 of the CPP**: the '**Right of Opposition**'. If a person convicted in absentia is subsequently arrested, the judgment is automatically voided, and they are entitled to a trial *de novo*.³³ The lack of this **automatic retrial** mechanism in the BNSS makes the Indian law significantly harsher than the French civil law model it partially resembles.

9.4 Bangladesh: The International Crimes Tribunal

The closest parallel to Section 356 is found in Section 339B of the Bangladesh Code of Criminal Procedure and **Section 10A of the International Crimes (Tribunals) Act, 1973**.³⁴ These provisions allow for trial in absentia after newspaper publication. This mechanism was famously utilized against Abul Kalam Azad (alias Bachchu Razakar) and, more recently, invoked against former Prime Minister **Sheikh Hasina (who fled in 2024, with in-absentia proceedings reported in 2025)**. However, the International Bar Association has criticized these trials (e.g., against Jamaat-e-Islami leaders) for violating ICCPR Article 14, citing the structural inability of state-appointed defense counsel to effectively challenge witness testimony—a critique that applies with equal force to the Indian Section 356 framework.³⁵

9.5 Data Appendix: Comparative Legal Matrix

Feature	India (BNSS S. 356)	USA (Fed. R. Crim. P. 43)	Canada (Cr. Code S. 475)	France (CPP Art.489)	UK/ECHR Standard
Trial in Absentia Permitted?	Yes (Proclaimed Offenders)	Restricted (Only if present at start)	Restricted (Only if absconds <i>during</i> trial)	Yes (Default Judgment)	No (Unless unequivocal waiver)

33 Code de procédure pénale [C. pr. pén.] art. 489 (Fr.), available at <https://french-business-law.com/french-legislation-art/article-410-of-the-french-code-of-criminal-procedure/>.

34 Code of Criminal Procedure, 1898, § 339B (Bangl.); International Crimes (Tribunals) Act, 1973, § 10A (Bangl.).

35 See, e.g., Human rights lawyers condemn Bangladesh trials, LAW SOC'Y GAZETTE (Feb. 2013), available at <https://www.lawgazette.co.uk/news/human-rights-lawyers-condemn-bangladesh-trials/5125363.article>; Trial in Absentia Under the Bangladesh International Crimes (Tribunals) Act 1973, EJIL: TALK! (Apr. 2013), available at <https://www.ejiltalk.org/trial-in-absentia-under-the-bangladesh-international-crimes-tribunals-act-1973/>.

Pre-Trial Absconcion?	Trial proceeds	No Trial (Crosby v. US)	No Trial (R v. Hampton)	Trial proceeds	No Trial generally
Remedy upon Return	Appeal (S. 356(7))	None (Waiver is final)	None (Unless exceptional)	Retrial (Right of Opposition)	Retrial (Mandatory for Extradition)
Legal Representation	State Appointed (Mandatory)	Voluntary	Counsel may continue	Counsel presence validates trial	Mandatory for fair trial
Extradition Compatibility	Low (Due to Appeal vs Retrial gap)	Medium	Medium	High (Due to Retrial guarantee)	N/A (Sets the standard)

10. Operationalizing the Law: The *State v. Jitendra Mehto* Precedent (2025)

The theoretical debates surrounding Section 356 transitioned into reality with the case of **State v. Jitendra Mehto** (FIR No. 34/2025, PS Narela), the first recorded invocation of the law in Delhi.

- **Facts:** Jitendra Mehto, accused of kidnapping and murder, successfully evaded arrest. His son was arrested and confessed to the conspiracy.
- **Procedure:** The Delhi Police, citing Section 356, moved the Sessions Court. On **November 18, 2025**, the court framed charges against Mehto in absentia, despite him never having participated in the investigation.³⁶
- **Implication:** This case confirms that Indian courts are willing to apply Section 356 to "common" heinous crimes (not just high-profile economic offenses) and will proceed even if the accused has *never* submitted to the court's jurisdiction. It sets a precedent for the "Commencement" of trial in absentia, distinguishing Indian practice from the US *Crosby* standard.

36 For the first time in Delhi, 'in absentia' trial invoked against absconding murder accused, THE HINDU (Nov. 24, 2025), available at <https://www.thehindu.com/news/cities/Delhi/for-the-first-time-in-delhi-in-absentia-trial-invoked-against-absconding-murder-accused/article70318016.ece>; Delhi Police secures first-ever BNSS trial In-Absentia charge framing in a murder case, ANI (Nov. 24, 2025), available at <https://www.aninews.in/news/national/general-news/delhi-police-secures-first-ever-bnss-trial-in-absentia-charge-framing-in-a-murder-case20251124233722/>.

11. Conclusion and Future Outlook

The introduction of Section 356 in the Bharatiya Nagarik Suraksha Sanhita, 2023, is a defining moment in the evolution of Indian criminal law. It represents a bold legislative attempt to cut the Gordian knot of judicial delay caused by absconders. By explicitly prioritizing the victim's right to speedy justice and the state's interest in finality, the BNSS dismantles the paralysis that previously characterized cases involving fugitives.

However, this efficiency comes at a high constitutional and strategic price. The "deemed waiver" of the right to be present challenges the traditional contours of Article 21. While safeguards such as the 90-day cooling-off period, mandatory state-funded defense, and audio-video recording of evidence (Section 356(5)) attempt to mitigate the risks, the lack of an automatic **right to retrial** remains a critical vulnerability. This omission creates a direct conflict with international human rights standards (ECHR) and extradition laws (UK Extradition Act, Section 20), potentially creating a safe harbor for fugitives abroad who can claim their Indian trial was "unfair" by Western standards.

Recommendations:

1. **Judicial Interpretation of "Appeal":** The Supreme Court of India must interpret the "Appeal" under Section 356(7) expansively to function as a *de facto* retrial for extradited persons, allowing the introduction of new evidence and the recalling of witnesses. This is essential to cure the "Extradition Trap."
2. **Strict Scrutiny of "Proclaimed Offender" Status:** Courts must exercise extreme caution under Section 84 BNSS. The declaration of a proclaimed offender should not be mechanical; courts must verify digital evidence of service and genuine efforts to trace the accused to ensure the law is not weaponized against those who are merely unaware rather than willfully evasive.
3. **Robust Legal Aid:** The efficacy of the "shadow defense" depends entirely on the quality of legal aid. Senior practitioners, rather than junior empanelled lawyers, should be appointed as *amicus curiae* in Section 356 trials to ensure a robust challenge to the prosecution's case.

In the final analysis, Section 356 is a powerful tool, but like all powerful tools, it requires a

steady hand—both legislative and judicial—to ensure it serves the cause of justice rather than becoming an instrument of oppression.