BHARTIYA NAGARIK SURAKSHA SANHITA

(LAW 608)

UNIT I

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A. ATTENDANCE OF PERSONS CONFINED OR DETAINED IN PRISONS

INTRODUCTION

Chapter XXIV of **Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)** provides provisions for **attendance of persons confined or detained in prisons**. This chapter addresses six important sections that were introduced in the Code for the purpose of safeguarding the presence of people restrained and detained in prisons before the Criminal Courts. It lays down precise requirements and circumstances under which such persons are to be brought before the Courts. It appears that these sections have been incorporated having record to the provisions of the Prisoners (Attendance in Courts) Act, 1991 which also makes provision for the production of persons confined and detained in prisons.

This was earlier contained in **Chapter XXII** of **Criminal Procedure Code, 1973 (CrPC).**

Section 301 of BNSS provides for definition with respect to this Chapter:

- The word **"detained"** includes detained under any law providing for preventive detention.
- The word "prison" includes:
  - Any place which has been declared by the State Government, by general or special order, to be a subsidiary jail
  - Any reformatory, Borstal institution or other institution of a like nature.

- This was earlier contained in **Section 266 of CrPC.**

➢ POWER TO REQUIRE ATTENDANCE OF PRISONERS (SECTION 302)

- **Section 302 (1) of BNSS** provides that whenever, in the course of an inquiry, trial or proceeding under this Sanhita, it appears to a Criminal Court:

- That a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him; or
- That it is necessary for the ends of justice to examine such person as a witness.

- The Court may make an order requiring the officer in charge of the prison to produce such a person before the Court answering the charge or for the purpose of such proceeding or for giving evidence.
- **Section 302 (2) of BNSS** provides that where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be **forwarded to**, or acted upon by, the officer in charge of the prison unless it is **countersigned** by the **Chief Judicial Magistrate**, to whom such Magistrate is subordinate.
- **Section 302 (3) of BNSS** provides that every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, **decline** to countersign the order.
- This was earlier **contained in Section 267 of CrPC.**

➢ EXCLUSIONS OF CERTAIN PERSONS FROM ABOVE

- **Section 303 (1) of BNSS** provides that the **State Government or Central Government** may by general or special order direct that any person or class of persons **shall not be removed** from prison as long as the order remains in force.
    - No order made under Section 302 whether before or after the order of the State Government or Central Government shall have an effect in respect of such persons or class of persons.
- Before making an order under Sub section (1) the **State Government or Central Government** in cases instituted by its central agency shall have regard to following:

- The nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison.
- The likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;
- The public interest, generally.

- This was earlier contained in **Section 268 of CrPC.**

➢ OFFICER IN CHARGE OF PRISON CAN ABSTAIN FROM CARRYING ORDER

- **Section 304 of BNSS** provides that where the person in respect of whom an order is made under section 302:
  - Is by reason of sickness or infirmity unfit to be removed from the prison; or
  - Is under committal for trial or under remand pending trial or pending a preliminary investigation; or
  - Is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or
  - Is a person to whom an order made by the State Government or the Central Government under section 303 applies.
- The officer in charge of the prison **shall abstain** from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining:
- **Proviso to Section 304 of BNSS** provides that where the attendance of such person is required for giving evidence at a place **not more than twenty-five kilometers** distance from the prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (b).
- This was earlier contained in **Section 269 of CrPC.**

➢ PRISONER TO BE BROUGHT TO COURT IN CUSTODY

- **Section 305 of BNSS** provides that subject to the provisions of Section 304 the officer in charge of police station shall,
    - upon delivery of an order made under sub-section (1) of section 302 and
    - duly countersigned, where necessary, under sub-section (2) thereof
    - cause the person named in the order to be taken to the Court in which his attendance is required
    - and shall cause him to be kept in custody in or near the Court
    - until he has been examined or until the Court authorizes him to be taken back to the prison in which he was confined or detained.
- This was earlier contained in Section 270 of CrPC.

➢ POWER TO ISSUE COMMISSION

- **Section 306 of BNSS** provides that the:
    - Provisions of this Chapter shall be **without prejudice** to the power of the Court to issue, under section 319, a commission for the examination, as a witness, of any person confined or detained in a prison;
    - And the provisions of **Part B of Chapter XXV** shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person.
    - This was earlier contained in **Section 271 of CrPC.**

CONCLUSION

Chapter XXIV provides for provisions for attendance of persons confined or detained in prison. It consists of provisions from Section 301 to Section 306 of BNSS. The justification behind laying down this Chapter 22 is to guarantee the appearance of individuals or people who have been restrained, confined and apprehended in prisons, reformatories, or penitentiaries before the Criminal Courts. The detailed conditions under which this can be done along with the reasonable and valid justifications to do or not do so have also been laid down. It is a Chapter that complements the provisions laid down under the Prisoners (Attendance in Courts) Act, 1991 which was the first Act laid down for prisoners.

B. MODE OF TAKING AND RECORDING EVIDENCE

INTRODUCTION

The system of criminal trial envisaged by the BNSS 2023 is the adversary system based on the accusatorial method. Under this system, the prosecutor contending on behalf of the State or the people accuses the defendant i.e. the accused of the commission of some crime and the law expects him to prove his case beyond reasonable doubt, in order to succeed. The law, while keeping in line with the notion of fair trial, also provides fair opportunity to the accused to defend himself. In order to either support their claims or to rebut the opposite party's claims, both the parties adduce evidences before the court. Evidences form a vital part of the trial as the final judgement is based on the same. In view of the above vitality of evidences, it becomes utterly important to have a uniform and mandatory record of the evidences as and when they are adduced before the courts. Section 307 to Section 318 of Part A of Chapter XXIII- A of CrPc deal with the mode of taking and recording of evidence during inquiries and trials.

Part 'A' deals with the mode prescribed by the Code for recording evidences in trials conducted before the following courts-

1. Magisterial Court
2. Court of Sessions
3. High Court

RECORD OF EVIDENCE IN TRIAL BEFOR A COURT OF MAGISTRATE-

Trials by a court of Magistrate can be further divided in two types-

1. Trial by summons
2. Trial by warrants

1. RECORD OF EVIDENCE IN SUMMONS CASES [Section 309]

In the summons trials, the Magistrate is required to make a memorandum of the substance of the evidence of a witness in the language of the court. It is further provided that if the Magistrate is unable to comply with the above requirement, he can cause the memorandum to be made in writing or from his dictation in open court[Section 309(1)]. The Magistrate shall then sign the memorandum [Section 309(2)]. Section 315 also applies to the summons trials and casts upon the Magistrate the requirement to record the remarks respecting the demeanour of the witness.

In S. Ramachandra v. State of Karnataka [1979 Cri LJ (NOC) 183] it was held that 'the Magistrate is under a legal duty to examine witnesses and to make a memorandum of the substance of their evidence in the language of the court.'

It is upon the State Government to determine, for the purpose of this code, the language of the courts other than High Court of such state. [Section 307]

2. RECORD OF EVIDENCE IN WARRANT CASES [Section 310]

The Magistrate trying the warrant cases, as he proceeds with the examination of the witnesses, shall note down the evidence of each witness in writing. The Magistrate is either required to take down the evidences by himself or by his dictation in open court or in case he is unable to do so due to his physical or other incapacity, can get the same done through any officer of the court as he deems fit.[Section 310(1)] In the latter case, the Magistrate is also required to record reason.[Section 310(2)]It is up to the Magistrate to either record the evidence in narrative form or in question answer form. [Section 310(3)] The Magistrate shall then put his signature on the evidences so recorded. [Section 310(4)] Here also, Section 315 applies and remarks respecting the demeanour of the witnesses are required to be recorded.

3. RECORD OF EVIDENCES IN SESSIONS TRIALS [Section 311]

Section 311(1) provides that as the examination of a witness proceeds, the presiding judge is required to jot down in writing the evidence of such witness. He can do so either by himself or by his dictation in open court. Alternatively, the judge may appoint any office of the court who

will proceed to record the evidences, under the direction and superintendence of the presiding judge. Clause 2 of the same section further requires such evidence to be ordinarily recorded in the form of a narrative. However, the presiding judge may exercise his discretion in the matter and opt for question and answer form instead. The presiding judge is also required to sign the evidences so recorded [Section 311(3)]. Section 315 of the code further imposes a mandate on the presiding judge to make a record of remarks (if any) that are in his opinion material respecting the demeanour of the witness under examination.

In the case of warrant trials and Sessions trial, the witness can either give the evidence in the language of the court or in any other language. In the latter case, a true translation of the evidence in the language of the court is to be prepared and is then required to be signed by the Magistrate or the Sessions Judge, as the case may be. [Section 312]

The code provides further procedures to be employed after the recording of evidences in case of Warrant trials and Sessions trials is completed through Section 313. It provides that the evidence so recorded shall be read over to the witness. The presence of the accused or his pleader is mandatory while the evidence is read out. [S. 313(1)] Clause 2 of the section deals with the circumstances where the witness objects to correctness of any part of the evidence. The Magistrate or the presiding judge, as the case may be, will make a memorandum of objection raised by the witness.

4. RECORD OF EVIDENCE IN HIGH COURT [Section 318]

The code leaves it upon the respective high courts to prescribe the manner in which the evidence of witnesses is to taken down in cases coming before them.

ALL EVIDENCES TO BE RECORDED IN THE PRESENCE OF THE ACCUSED

Section 308 makes it imperative that all the evidence must be taken in the presence of the accused. In case his presence is dispensed with, his pleader is required to be present. An exception in case of a minor girl who has been subjected to any sexual offence is made by the proviso to section 308.

In Ram Singh v. R [(1951) 52 Cri LJ 99,102] the court observed that the failure to record evidence in the presence of the accused will vitiate the trial and the fact that no objection was taken by the accused is immaterial.

However, it is to be pointed out that in the case of State v. Ananta Singh[1972 Cri LJ 1327] it was held that the obligation cast by the provision is not absolute in character i.e., its requirement can be dispensed with in cases where the accused by his own conduct makes recording of evidence in his presence an impossibility.

The right created by section 308 is further complimented by section 313 which requires that the reading of evidence shall be done in presence of the accused. However, if any evidence is given in a language not understood by the accused person, such evidence should be interpreted to the accused in the language understood by him in the manner provided in section 279.

CONCLUSION

The modes prescribed under part XXV of BNSS are wide enough to define a mechanism for recording of evidences in different types of trials as envisaged by the Code. Various provisions (like, presence of accused while recording of evidences etc.) incorporated in the present part of the Code are laid down in a way so as to help achieve the primary object of criminal procedure i.e. ensuring a fair trial of the accused person.

C. COMMISSION FOR THE EXAMINATION OF WITNESSES

In civil as well as criminal cases, the courts have power to issue commissions for examination of witnesses. The general rule is that the evidence of one party should not be received against another party without the latter having an opportunity of testing its truthfulness by cross-examination and the court's noticing of the witnesses' demeanour. Subject to certain safeguards, commissions for the examination of witnesses are issued and they may be considered as exceptions to the general rule.

As a general rule in criminal proceedings, the important witnesses on whose testimony the case against the accused has to be established must be examined in court and usually the issuing of commission should be restricted to formal witnesses or to such witnesses who cannot be produced without unreasonable delay or inconvenience [Dharmanand Pant State of UP AIR 1957 SC 594]. The witnesses on commission may be examined either interrogatories or viva voce by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the court or magistrate to adjourn the trial or inquiry for the reception of such evidence.

1. **When attendance of witness may be dispensed with and commission issued -** Whenever in the course of any inquiry/trial/other proceeding, it appears to a Court/Magistrate that the examination of a witness is necessary for the ends of justice, and his attendance cannot be procured without an unreasonable delay, expense or inconvenience, the Court/Magistrate may dispense with such attendance and issue a commission for the examination of the witness [Sec. 319(1)]. However, where the examination of the President/ Vice President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued [Proviso].

The court passes an order under Sec. 319 when it is satisfied not only about the necessity of such evidence but also about the effective enforceability of commission. If no particulars indicating willingness of the witness to be examined on commission are given and even his address is also not given, the court cannot issue a general or roving commission Hussain Umar v Dalipsingh AIR 1970 SC 45]. The taking of evidence on commission in criminal cases is most sparingly

resorted i.e. in extreme cases of delay, expense, or inconvenience eg. for a pardanashin lady or an ailing person. However, merely beca a witness is a Minister, his attendance cannot be dispensed with by issuing a commission for his examination [Gulabrao v S.D. Raje (1972) 74 Bom LR 720].

The discretion in issuing a commission has to be judicially exercised. The "inconvenience that has to be considered by the court, is not only the inconvenience to the parties but also the inconvenience that would be caused to the witness who is sought to be examined on commission. An apprehension of arrest, risk to the personal safety occasioned by threats given by accused, fear of losing job, etc. are some of the instances of "inconvenience" that is justified under this section [Raj Kumar Kochhar (1969) 72 Bom LR 797]

The High Court possesses, in cases not provided for in this section, the inherent power to make an order that it deems necessary. Sec. 319(2) empowers the court to direct the prosecution when issuing commission to pay such amount as the court considers reasonable to meet the expenses of the accused (including the pleader's fees).

2. **Commission to whom to be issued -** If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan/Judicial Magistrate within whose local jurisdiction the witness is to be found.

If the witness is in India, but in a State or an area to which this Code does not extend the commission shall be directed to such court or officer as specified by the Central Government. Similarly, where the witness is in a foreign country, and reciprocal agreement with that country exists, the Central Government shall determine the matter [Sec. 320).

3. Execution of commission- On receipt of the commission, the Magistrate to whom the commission is addressed must summon the witness before him, or alternatively proceed to the place where the witness is, and take down his evidence in the same manner as a trial of warrant-case [Sec. 321].

4. Parties may examine witnesses via interrogatories - The parties to any proceeding in which a commission is issued may forward interrogatories in writing, which the court directing the commission may think relevant to the issue, and in such case, it would be lawful for the court to whom the commission is directed to examine the witness upon such interrogatories.

Any such party may appear before the court (by pleader or in person) and may examine, cross-examine and re-examine the said witness (Sec. 322)

5. Return of commission - After any commission has been duly executed, it is to be returned, together with the deposition of the witnesses examined to the court issuing the commission. The commission, the accompanying return, and the deposition are to be kept open for inspection of the parties at all reasonable times and may be read in evidence by either party, and form part of the record of the case [Sec. 323].

(6) Adjournment of proceeding - The court issuing the commission is empowered to adjourn the inquiry, trial, etc. for a specified time reasonably sufficient for execution and return of commission [Sec. 324].

(7) Execution of foreign commissions - The provisions of Sec. 286-288 shall apply in respect of commissions issued by any of the courts, judges or magistrates (exercising jurisdiction in an area where the Code does not extend, or in a foreign country) as they apply to commissions issued under Sec. 319 [Sec. 325].

D. SPECIALS RULE OF EVIDENCES

The following special rules of evidence would facilitate proof and reduce the time and expenditure in the production of evidence in criminal cases:

(1) Deposition of medical witness - The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission, may be given in evidence in any inquiry, trial, etc., although the deponent is not called as a witness [Sec. 326(1)]

This section confines itself to 'expert evidence' tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man [Waris Khan (1940) 15 Luck 429].

Under the old Code, the court was given discretion to summon and examine a medical witness, but the present Code makes it obligatory upon the court to do so if desired by the prosecution/accused. Under Sec. 326(2), the court may, if it thinks fit, and shall on the application of the prosecution/accused, summon and examine any such deponent as to the subject matter of his deposition.

(1) Identification Report of Magistrate (Sec. 327)

(1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of Section 19, Section 26, Section 27, Section 158 or Section 160, as the case may be, of the BSA 2023, apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.

(2) The court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report."

Before the enactment of this amendment, an 'identification memo' is required to be proved in the court by examination of the Magistrate, who conducted the proceeding These facts are generally not disputed. In order to save time of the Court, Sec. 327 has been inserted with a view to making memorandum of identification prepared by the Magistrates admissible in evidence without formal proof of facts stated therein. However, the Court may if it thinks fit, on the application of the prosecution/accused, summon or examine the Magistrate as to the subject matter contained in the memorandum of identification.

(2) Evidence of officers of the Mint-Sec. 328 deals with admissibility and use of any document purporting to be a report of the officers of the Mint/Indian Security Press (including office of the Controller of Stamps and Stationary) without the examination in court of the officer concerned.

The court is, however, given discretion to summon and examine any such officer as to the subject matter of his report, but it has no power to direct such officer to produce any records on which the report is based. The officer is not bound to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing or to give any evidence derived from any unpublished official record on which the report is based except with the permission of the Master of the Mint, etc.

(3) Report of Government scientific experts –

Like Sec. 328, under Sec. 329 also, reports made by certain Government scientific experts may be used as evidence in any inquiry or trial, but the court has discretion to call and examine such experts in suitable cases. If such expert is unable to attend personally, he may, in the absence of any express direction to appear personally, depute any responsible officer to attend the court.

The above provisions apply to the following Government experts:

(ii) any Chemical Examiner/Asst. Chemical Examiner to Government,
(iii) the Chief Inspector of Explosives,
(iv) the Director of the Fingerprint Bureau,
(v) the Director, Haffkeine Institute, Bombay.
(vi) the Director Deputy Director/Assistant Director of a Central State Forensic Science Laboratory,

(vii) the Serologist to the Government.

(viii) any other government scientific expert specified by notification, by the Central Government for this purpose) (Added by the Amendment Act, 2005)[Sec. 329(4)]

The expression 'Director' in Sec. 329(4) includes a Joint Director also [Ammini v State of Lala 1998 CrLJ 481 (SC)]. Though the report as such is admissible in evidence, its probative value depends upon several circumstances, such as the data available, the method of analysis, the fullness of the conclusion, and speaking generally, the vulnerability which the expert's premise is subject [Prabhu Babaji Navale v State of Bombay AIR 1956 SC 511

In HP Administration v Om Prakash (AIR 1972 SC 975), it was held that as long the report of the expert shows that the opinion is based on observations which leads conclusion that opinion can be accepted, there is no necessity of examining the person making report. But should there be any doubt, it can always be decided by the calling of the person making the report. The report is not conclusive evidence; any evidence to rebut or contradict it may be given.

In the absence of any request from the accused for summoning the Chemical Analyzer and unless he shows that the report is deficient and needs personal elucidation, the trial court can admit it in evidence and need not call the Analyzer for examination Dav State, 1985 CrLJ 1933]. An objection cannot be taken at the appellate stage against non-examination of the expert [Phool Kumar AIR 1975 SC 905]. The accused has a right to call Public Analyst to be examined and cross-examined, unless the prayer to amine the Analyst is made for the purpose of vexation and delay or for defeating the ends of justice [Ram Dayal v M.C.D. AIR 1970 SC 366]. In case of contradiction between the report of the Chemical Examiner and the Serologist, the report would be treated as ufficient [Tulsi Ram Kamu v State AIR 1954 SC 1).

(4) No formal proof of certain documents –

Where any document is filed before any court by any party, the particulars of every such document shall be included in a list in the prescribed form, and the other party shall be called upon to admit or deny the genuineness of such document. If undisputed, it may be read in

evidence in any inquiry/trial without proof of the signature of the person to whom it purports to be signed. The court may, however, in its discretion require the signature to be proved [Sec. 330)

Thus, the documents produced in the court regarding whom no formal proof was required and they were admitted by the opposite party as genuine, they could be read by the court substantive evidence [Shabbir Md v Stare, 1996 CLJ 2015 (Rap) Where the post- tem report was admitted in evidence without being proved and no opportunity was eded to the accused to admit or deny its genuineness, it was held to be inadmissible being violative of Sec. 330 [PC Pondse v State, 1996 CILJ 203 (Ker

(5) Evidence of formal character on affidavit-

Where an application is made to any court in the course of any inquiry or trial, and allegations are made therein respecting any public servants, the applicant may give evidence of the facts alleged in the application by affidavit [Sec. 331]

The evidence of any person whose evidence is of a formal character may be given by affidavit and may be read in evidence in any inquiry/trial. The court shall on the application of any party, or may in its discretion, summon and examine any such person as to the facts contained in the affidavit [Sec. 332]. If, however, evidence of a person not of a formal character, but goes to the very root of the matter, no resort can be made to this section meant for accelerating the disposal of cases [Nirmaljit Singh Hoon AIR 1972 SC 2639)

Affidavits to be used before any court under the Code may be sworn or affirmed before any of the following three authorities: 112(a) any Judge or Judicial Executive Magistrate, (b) any Commissioner of Oaths appointed by a High Court Sessions Court, (c) any Notary appointed under the Notaries Act [Sec. 333].

(6) Proof of previous conviction or acquittal –

A previous conviction can be proved by an extract from the court record (copy of the sentence or order) or by a certificate from the jailor or by warrant of commitment. A previous acquittal can be proved by an extract from the court record. Previous conviction or acquittal should be proved together with the evidence as to the identity of the accused person with the person so convicted

or acquitted. It may also be proved by any other mode provided by any law for the time being in force [Sec. 334)

(7) Record of evidence in absence of the accused –

Where the accused has absconded and there is no immediate prospect of his arrest, the court may, in his absence, record depositions of prosecution witnesses. On the arrest of the accused, such depositions can be given in evidence against him if the deponent (witness) is dead/ incapable of giving evidence/ cannot be found/ procured without unreasonable delay, expense or inconvenience [Sec. 335(1)].

If it appears that an offence punishable with death or life-imprisonment has been committed by some unknown person, the High Court/Sessions Judge may direct any First Class Magistrate to hold an inquiry and examine any witness who can give evidence concerning the offence Depositions so recorded may be used at the trial if the witness is dead or is incapable of giving evidence or is beyond the limits of India [Sec. 335(2)).