

RECORDING EVIDENCE IN THE PRESENCE OF THE ACCUSED: WITH RELEVANT CASE LAWS

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1. INTRODUCTION

Evidence is an essential part of a criminal trial. Courts consider oral testimony, documents and other legally admissible material to determine the facts of a case. Criminal procedure law sets out how evidence must be recorded to protect the fairness and integrity of the trial.

“Recording evidence in the presence of the accused” generally means that evidence during a trial or proceeding must be recorded while the accused is present before the court. Where the court lawfully dispenses with the accused’s personal attendance, evidence may be recorded in the presence of the accused’s advocate, subject to the applicable law.

This rule promotes transparency and allows the defence to know and respond to the evidence. It is connected with the principle of a fair trial. The current provision is Section 308 of the BNSS, 2023, in force from 1 July 2024. The corresponding earlier provision was Section 273 of the CrPC, 1973. ¹

2. RELEVANT LEGAL PROVISION

Section 308, Bharatiya Nagarik Suraksha Sanhita, 2023 — Evidence to be taken in the presence of the accused.

The general rule is that evidence in a trial or other proceeding must be taken in the presence of the accused, unless the law expressly provides otherwise. If personal attendance has been dispensed with, evidence may be taken in the presence of the accused’s advocate, including

through audio-video electronic means at a designated place notified by the State Government, subject to statutory conditions.¹

In simple terms:

- The accused should ordinarily be present when evidence is recorded.
- If personal attendance is lawfully dispensed with, the advocate may be present as allowed by law.
- Audio-video electronic means may be used where the statutory requirements are satisfied.
- Special measures may protect vulnerable witnesses while preserving the right of cross-examination.

Section 273 CrPC is the corresponding earlier provision. For proceedings governed by the current law, cite Section 308 BNSS where applicable.

3. OBJECT AND PURPOSE OF THE RULE

The purpose of this rule is to ensure a fair and transparent judicial process. The accused and the defence advocate can understand the testimony and, where legally permitted, test the witness's evidence through cross-examination.

- To protect the right to a fair trial.
- To prevent evidence from being recorded in a one-sided manner.
- To provide an opportunity for cross-examination where applicable.
- To maintain transparency in court proceedings.
- To assist the court in assessing the credibility of witnesses.

The rule does not mean that any procedural irregularity automatically results in acquittal. Its legal effect depends on the applicable law, facts and court orders.

4. PROCEDURE FOR RECORDING EVIDENCE

The ordinary process may be summarised as follows:

1. The case is called before the court for hearing or trial.
2. The witness appears and is identified in accordance with procedure.
3. The party calling the witness conducts examination-in-chief.
4. The opposing party may conduct cross-examination as permitted by law.
5. Re-examination may follow where necessary and legally permitted.
6. The court records the evidence in the prescribed manner and places it on the case record.

The presence of the accused, or the advocate where personal attendance has lawfully been dispensed with, helps ensure that the defence can deal with the evidence. Court directions and special statutory rules must be followed.

5. RIGHTS OF THE ACCUSED

The rule is closely connected with the procedural rights of an accused person. A charge is not proof of guilt; the court must evaluate the evidence and apply the law.

- The opportunity to know the evidence presented against the accused.
- The opportunity to obtain legal assistance, subject to law.
- The opportunity for cross-examination where the law provides for it.
- The right to a fair and impartial judicial process.

These rights operate alongside statutory exceptions and court orders. Where a witness is vulnerable, the court may need to balance the accused's fair-trial rights with the witness's safety, privacy and well-being.

6. EXCEPTIONS AND SPECIAL PROTECTION

The general rule is not absolute. Section 308 BNSS permits appropriate measures where the evidence of a female below eighteen years who is alleged to have been subjected to rape or another sexual offence is recorded. The court may ensure that she is not directly confronted by the accused while preserving the accused's right to cross-examination.¹

The provision also recognises audio-video electronic means at a designated place notified by the State Government, subject to legal requirements.

Therefore, "in the presence of the accused" does not necessarily require direct physical confrontation in every situation. Any protective arrangement must be authorised by law and consistent with a fair trial.

7. RELEVANT CASE LAWS

1. State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601.

Principle: The Supreme Court accepted that evidence can be recorded through video-conferencing in appropriate circumstances. Physical presence is not always the only way to satisfy the requirement of presence, provided the process safeguards fairness and allows effective examination of the witness. This case is relevant to the use of technology in recording evidence.²

2. Atma Ram and Others v. State of Rajasthan, (2019) 20 SCC 481.

Principle: The Supreme Court treated the accused's right relating to the recording of evidence in their presence as a valuable procedural right. The case is relevant to the importance of complying with Section 273 CrPC and ensuring a fair trial. ³

3. A.T. Mydeen v. Commissioner of Customs, (2022) 14 SCC 392.

Principle: The Supreme Court discussed Section 273 CrPC and its exceptions, including situations where personal attendance is dispensed with under the Code. The case explains that evidence should not be recorded without the accused's presence unless the statutory basis for doing so exists. ⁴

8. CASE LAW ANALYSIS AND ILLUSTRATION

The above decisions illustrate two related points. First, the presence requirement is an important safeguard for the accused and should be followed. Secondly, presence may in appropriate circumstances be achieved through legally recognised electronic methods, and the law also provides specific exceptions.

Illustration: An eyewitness gives testimony in a criminal trial. Ordinarily, the accused is present while the evidence is recorded, and the defence may cross-examine the witness as permitted by law. If personal attendance has lawfully been dispensed with, the court may proceed in the presence of the advocate under the relevant provision. If a vulnerable child witness needs protection, the court may use a lawful arrangement that avoids direct confrontation while preserving cross-examination.

The cases above were decided under the former CrPC or in the context of the former provision. They remain useful for understanding the substantially corresponding Section 308 BNSS, but the current statute and the procedural law applicable to the particular case must be checked.

9. CONCLUSION

Recording evidence in the presence of the accused is an important safeguard in criminal procedure. It promotes transparency, supports the right to a fair trial and enables the defence to deal with the evidence. Section 308 BNSS, 2023 is the current corresponding provision, while Section 273 CrPC, 1973 is the earlier provision.

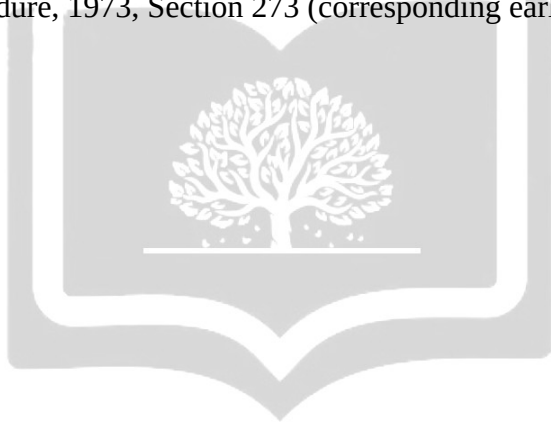
The Supreme Court decisions discussed above explain the importance of the presence requirement, the accused's procedural rights and the possible use of video-conferencing where

legally permitted. Special protection for vulnerable witnesses may also be necessary, provided the accused's right to cross-examine is preserved.

In brief: Evidence should ordinarily be recorded in the presence of the accused. If personal attendance is lawfully dispensed with, evidence may be recorded in the presence of the advocate or through legally permitted audio-video means. Statutory exceptions and witness-protection measures must be followed.

REFERENCES / BIBLIOGRAPHY

1. Bharatiya Nagarik Suraksha Sanhita, 2023, Section 308. Read Section 308
2. State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601.
3. Atma Ram and Others v. State of Rajasthan, (2019) 20 SCC 481.
4. A.T. Mydeen v. Commissioner of Customs, (2022) 14 SCC 392.
5. Code of Criminal Procedure, 1973, Section 273 (corresponding earlier provision).



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