



IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 1164 – 1166 OF 2023

THE STATE OF WEST BENGAL ... APPELLANT(S)

VERSUS

KADER KHAN **...RESPONDENT(S)**

JUDGMENT

SANJAY KAROL, J.

1. The present appeals have been preferred by the State against the impugned judgment and order dated 06.05.2022 passed in C.R.R. 3012 of 2018 by the High Court at Calcutta, wherein the order dated 05.09.2018, passed by the Additional District and

Sessions Judge, Fast Track, 2nd Court, City Sessions Court, Calcutta in Order No. 36 in Session Case No. 47 of 2012, came to be set aside.

2. The brief facts giving rise to this appeal are that on the basis of a written complaint, FIR No. 29/2012 was registered on 09.02.2012 under Sections 376/223/506/34 of the Indian Penal Code, 1860¹ and Section 25(ii)(a) & 27 of the Arms Act, 1959 against five accused persons, including the respondent herein. It was stated in the complaint that on 05.02.2012, the victim was returning home from *Tantra Disco Thek* in Kolkata at around 12:15 am at night, when one Lavi Gidwani offered to drop the victim home. Upon entering the car, the accused persons got into the car with her. Upon asking to be let out of the car, they refused and continued driving. Thereafter, she was threatened and gang-raped at gunpoint. Later, near the crossing of Exide House, she was pushed out of the running car.

3. Thereafter, on 18.02.2012, three out of the five accused persons, namely Nishad Alam, Sumit Bajaj and Md. Nasir Khan² were apprehended and taken into custody. As two accused could

¹ Hereinafter 'IPC'.

² Hereinafter 'apprehended accused persons'.

not be apprehended, namely, the present respondent and Md. Ali Khan, on 05.03.2012, warrant of arrest was issued by C.M.M., Kolkata *qua* them. As their presence could still not be secured, on 12.04.2012, proclamation was issued against these absconding accused. Proclamation notices came to be affixed on 12.04.2012 and 16.04.2012.

4. Upon the completion of investigation, on 10.05.2012, chargesheet was filed against the three apprehended accused persons under Sections 376(2)(g), 323 and 506 of the IPC. Importantly, the present respondent and Md. Ali Khan were shown to be absconding and a prayer was made for filing supplementary chargesheet *qua* them.

5. Thereafter, while considering the bail applications of two of the apprehended accused persons, the High Court at Calcutta directed the trial to be split *qua* the apprehended accused persons and absconding respondents, if they were not arrested before the next date of hearing. Accordingly, on 22.01.2013, the trial stood segregated. Charges were framed against the apprehended accused persons under Section 376(2)(g) of the IPC on 19.02.2013.

6. During the course of trial, the deposition of the victim lady took place from 13.03.2013 till 03.07.2013 on multiple occasions with the accused extensively cross-examining her. In all, the prosecution examined 45 witnesses throughout the course of the trial.

7. Unfortunately, post completion of her testimony, the victim passed away on 13.03.2015. *Vide* judgment and order dated 10.12.2015, the Trial Court convicted the three apprehended accused persons for offences of gang-rape, criminal conspiracy, hurt and criminal intimidation under Sections 376(2)(g), 120B, 34, 323, 506 of the IPC. They were sentenced to undergo ten years of rigorous imprisonment.

8. Since the respondent herein and Md. Ali Khan were finally apprehended and arrested on 30.09.2016 a supplementary chargesheet was filed against them on 24.11.2016 in relation to offences under Section 376(2)(g), 120B, 323, 506 and 34 of the IPC in which charges were framed by the Additional District and Sessions Judge, under all such aforesaid Sections.

9. During the course of this trial, the prosecution moved an application dated 20.04.2018 under Section 33 of the Indian Evidence Act, 1872, seeking admission of the statement rendered by the deceased victim in the earlier trial, admitted in the present trial. The Trial Court, *vide* order dated 05.09.2018 allowed the same.

10. Aggrieved thereof, the respondent filed a criminal revision application bearing number C.R.R. No. 3012 of 2018 before the High Court at Calcutta. *Vide* the impugned order, the High Court allowed the same by setting aside the order dated 05.09.2018 of the Trial Court. It was observed:

- The words of Section 299 CrPC cast an unambiguous duty on the prosecuting agency to obtain a direction from the Trial Court that the evidence may also be recorded against the absconder.
- The deposition of the victim in the earlier trial cannot be made admissible in the subsequent trial of the absconding accused.

11. We have heard learned senior counsel, Mr. Siddharth Aggarwal, for the appellant State, and learned advocate-on-record Mr. Satya Kam Sharma for the respondent.

12. A well-recognized facet of criminal jurisprudence is that in normal circumstances a witness in a trial must be examined in the presence of the accused and that such evidence given in one trial cannot be used against an accused in another trial. But, however, Section 299 of the CrPC is a departure from this rule. It reads:

“299. Record of evidence in absence of accused.—

(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try or commit for trial, such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits on India.”

(emphasis supplied)

13. This Court had considered the import of Section 299 CrPC, in **Nirmal Singh v. State of Haryana**³ and observed:

“4. ...

Section 299 of the Code of Criminal Procedure consists of two parts. The first part speaks of the circumstances under which witnesses produced by the prosecution could be examined in the absence of the accused and the second part speaks of the circumstances when such deposition can be given in evidence against the accused in any inquiry or trial for the offence with which he is charged. This procedure contemplated under Section 299 of the Code of Criminal Procedure is thus an exception to the principle embodied in Section 33 of the Evidence Act inasmuch as under Section 33, the evidence of a witness, which a party has no right or opportunity to cross-examine is not legally admissible. Being an exception, it is necessary, therefore, that all the conditions prescribed, must be strictly complied with. In other words, before recording the statement of the witnesses produced by the prosecution, the court must be satisfied that the accused has absconded or that there is no immediate prospect of arresting him, as provided under the first part of Section 299(1) of the Code of Criminal Procedure...

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In the case in hand, there is no order of the learned trial Judge, recording a conclusion that on the materials, he was satisfied that the persons who are examined by the Magistrate under Section 299(1) are dead, though according to the prosecution case, it is only after summons being issued and the process-server having reported those persons to be dead, their former statements were tendered as evidence in trial and were marked as Exhibits PW-48/A

³ (2000) 4 SCC 41.

to PW-48/E. As has been stated earlier, since the law empowers the court to utilise such statements of persons whose statements were recorded in the absence of the accused as an exception to the normal principles embodied in Section 33 of the Evidence Act, inasmuch as the accused has been denied the opportunity of cross-examining the witnesses, it is, therefore, necessary that the preconditions for utilising such statements in evidence during trial must be established and proved like any other fact. There possibly cannot be any dispute with the proposition of law that for taking the benefits of Section 299 of the Code of Criminal Procedure, the conditions precedent therein must be duly established and the prosecution, which proposes to utilise the said statement as evidence in trial, must, therefore, prove about the existence of the preconditions before tendering the evidence. The Privy Council, in fact in the case of Chainchal Singh v. Emperor [AIR 1946 PC 1 : 1945 All LJ 550] AIR p. 1 in analysing the applicability of Section 33 of the Evidence Act, did come to the conclusion that when the evidence given by the prosecution witness before the committing Magistrate is sought to be admitted before the Sessions Court under Section 33 on the ground that the witness was incapable of giving evidence, then that fact must be strictly proved and this may be more so in those cases where the witness was not cross-examined in the committing Magistrate's Court by reason of the accused not having been represented by a counsel. In that particular case the process-server had been examined, who stated that he found the witness ill and unable to move from his house, but that was not treated to be sufficient to hold that the prosecution had discharged its burden of proving that the witness was not available. But having said so, their Lordships did not interfere with the conviction on the ground that the court can interfere only if it is satisfied that grave and substantial injustice has been caused by misreception of the evidence in the case. On a mere perusal of Section 299 of the Code of Criminal Procedure as well as Section 33 of the Evidence Act, we have no hesitation to come to the conclusion that the preconditions in both the sections must be established by the prosecution and it is

only then, the statements of witnesses recorded under Section 299 CrPC before the arrest of the accused can be utilised in evidence in trial after the arrest of such accused only if the persons are dead or would not be available or any other condition enumerated in the second part of Section 299(1) of the Code of Criminal Procedure is established...

...

...

...

The High Court in fact, on consideration of the entire materials did record a finding that the requirements of the first part of Section 299 of the Code of Criminal Procedure must be held to have been established and there was no illegality in recording the statements of the five persons as the accused had been absconding and there was no immediate prospect of the arrest of the said accused.”

(emphasis supplied)

14. From a conjoint reading of this elaborate discussion and the statutory provisions, it is clear that for statements of witnesses who are dead or otherwise incapable to be used in a trial after the arrest of the accused, two facts must be established before their deposition. The *first* being that the accused concerned is absconding; and *secondly*, that there is no prospect of their immediate arrest. There is no statutory requirement in the aforesaid Section, mandating the formal passing of an order by the Magistrate concerned, recording that the above two facts have been complied with, before the witness has deposed. What

would be relevant is whether these two essentials stood established on the date of the deposition of the witness.

15. This view is fortified by the view taken by this Court in ***CBI v. Abu Salem Ansari***⁴. We cannot find reason to agree with the High Court's observation that in ***Abu Salem*** (Supra) the "*said report by a cryptic order observed only upon compliance of requirements of Section 299(1) of the Cr.P.C. may evidence recorded in an earlier trial be used in the subsequent trial of the absconder.*" In our view, in ***Abu Salem*** (Supra), this Court permitted the evidence adduced in the earlier trial against the accused therein, upon an application in the subsequent trial, subject to the conditions discussed above. This Court observed therein:

"5. As regards the first respondent, sub-section (1) of Section 299 would apply as he, an accused person, was absconding, his case is already split up and has to undergo the trial. Obviously, the evidence adduced in the earlier trial cannot be used against the first respondent except as provided in sub-section (1) of Section 299 CrPC. In the circumstances if the absconding accused appears again, the prosecution witnesses have to be examined afresh. But, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, the prosecution would be justified in relying on the evidence already on record taken in the earlier trial in the absence of the absconding accused.

⁴ (2011) 4 SCC 426.

6. In the present case, sub-section (2) of Section 299 CrPC has no application. Therefore, we make it clear that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment of existence of any of the conditions precedent as described in first part of Section 299 CrPC.”

16. This interpretation of *Abu Salem* (Supra) has been followed by various High Courts of the country, in similar circumstances to the instant case, as rightly submitted by the appellant State. The High Court of Chhattisgarh at Bilaspur, in *Farida alias Farid Ahmed v. State of Chhattisgarh*⁵, while allowing the statements of witnesses in the earlier trial to be used against the accused therein observed:

“12. The accused person who avoids trial at the initial stage by remaining absconding and subsequently at a later stage when he knows that the material witnesses are not available on account of their death or being not traceable cannot be given the benefit of the evidence which was recorded at the first instance detrimental to the interest of the prosecution. If such an analogy is brought into force then the entire criminal jurisprudence system itself would get jeopardized and it would rather give a premium to the accused person wherein there are more than one accused available. They would make the accused against whom the gravity of offence is less to surrender and undergo the trial and thereafter the main accused after a considerable period of time when the material witnesses have either expired or are not traceable subject him to trial and in whose case the material witnesses already examined cannot be taken into consideration. It would result

⁵ 2016 SCC OnLine Chh 2343.

in the main accused getting scot-free easily and such a situation in the larger perspective would be dangerous in a civilized society governed by the rule of law.

14. On the basis of the discussions held in the preceding paragraphs as also the ratio laid down by the Supreme Court in the case of Abu Salem⁴ (supra), in the opinion of this Court the Trial Court also has not committed any error of law while rejecting the objection and the application moved by the Revisioner accused seeking not to accept the evidence of the witnesses who are not traceable or who have died as admissible. So far as the contention of the Counsel for the Reversioner in respect of the proceeding before the Committal Court being taken into consideration by the Trial Court for declaring the accused as an absconder being bad in law the same is not sustainable. From the record what is reflected is that before declaring the Revisioner accused as an absconder, the proceedings had in fact been complied with under the provisions of CrPC and such a proceeding once having already undertaken at the stage of committal of the trial would not be required to be undertaken again by the Trial Court where the matter is being subjected to trial or else it would amount to repeat of a procedure which has already been undertaken further resulting in more delay in the conclusion of trial.”

17. Similarly, the High Court of Judicature at Madras, in *Abdul Aziz v. State of Tamil Nadu*⁶ observed:

“10. In this case a valid proclamation was made against the appellant as proclaimed offender and he has not challenged the said proclamation. The CBI was unable to trace him during the trial and hence, the mother case in CC No. 6 of 1998 was split into CC No. 10 of 2010 against the appellant and evidence was recorded and his case was treated as “LPC” case (Long pending cases as per the above Rules) and

⁶ 2025 SCC OnLine Mad 2479.

case was split against remaining accused in mother case in CC No. 6 of 1998 and the same ended in conviction. During the course of the said trial, approvers were examined. As against one of the absconding accused also a separate trial was conducted and during the said course of trial also approvers were examined. Only during the present trial, one of the approvers died and the other approver was unable to be secured by the prosecution. The occurrence took place in the year 1993 and the approver was examined by CBI in the year 1994 and they were very much available till 2010 and only during examination of witness in the year 2017 in this split up case against the appellant, they were not available. In the said circumstances, the application filed under Section 391 CrPC to mark the deposition of the approver recorded in the mother case in CC No. 6 of 1998 is very much essential and necessary to decide the role of the appellant. Section 391 is enabling section in order to secure the ends of justice and to avoid the miscarriage of justice. The CBI has not newly introduced the said witness in the course of the appeal. The deposition of the approver PWs 1 and 2 were recorded during the course of the trial of the mother case in CC No. 6 of 1998. The present CC No. 10 of 2010 is continuation of the proceedings of mother case in CC No. 6 of 1998. Further under Section 299 CrPC it is clearly stated that recording of the evidence in the absence of the accused in special circumstances is permitted. Therefore, the present case comes under such special circumstances.

10.4. Further, it is the duty of the accused to be present during the trial. In spite of his knowledge about the trial, he did not appear and voluntarily waived his right of presence during the trial, hence, he cannot be allowed to turn around and say that proper procedure was not followed by the court and he lost the opportunity of fair trial. The Supreme Court also reiterated the principle that no one can be allowed to take advantage of his own wrong.

10.7. The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is

a valuable right. However, same is only a statutory right and has not yet been accepted as fundamental right in a case where accused had absconded within the meaning of Article 21 of the Constitution of India. As a sequel, right to confront a witness by an absconding accused is not a fundamental right. Even otherwise, fundamental rights are not absolute being subject to reasonable restrictions. The right of confronting by an accused is subject to just exceptions. In the event of abscondance for long years with intention to cause natural death to the witnesses is an exceptional circumstance to decline the right of confronting by accused.”

18. The High Court of Delhi at Delhi, has observed to similar effect. While following the expositions in *Nirmal Singh* (Supra) and *Abu Salem* (Supra), the High Court in *Afzal v. State*⁷ observed:

“12. Thus it has to be seen whether ingredients of Section 299 Cr. P.C. as noted above have been satisfied or not in the present case so that statement of Jyoti Gupta recorded during the trial of co-accused can be used in the trial against the appellant. The prosecution has proved on record that after the appellant was arrested on 29th September, 2014 in the above-noted FIR and after framing of charge when Jyoti Gupta was required to be examined, she could not be examined for the reason she had passed away. The first charge-sheet in FIR No. 139/2005 registered at PS Malviya Nagar was filed on 29th July, 2005 wherein it was clearly noted that one of the accused involved was Afzal and despite efforts he could not be traced and as and that supplementary charge-sheet will be filed against him. Proceedings to declare him a proclaimed offender were initiated and he was finally declared a proclaimed offender

⁷ 2019 SCC OnLine Del 9686.

by the learned ACMM on 14th October, 2008. Complainant Jyoti Gupta was partly examined in the Court as PW-3 on 5th May, 2006 and her further examination in chief and cross-examination were conducted on 4th December, 2009 and 28th May, 2010. It is thus evident that the evidence of Jyoti Gupta was completed only after the appellant was declared a proclaimed offender and hence her evidence in the trial of the appellant can be read against him for the reason after the appellant was arrested in the present FIR on 29th September, 2014 and Jyoti Gupta was required to be examined as a witness, she had passed away. It may also be noted that in the trial of the co-accused Aditya Gupta was not examined as a witness, however as Jyoti Gupta had passed away, in the trial of the appellant Aditya Gupta who was also a victim and eye-witness was examined as PW-2.”

19. Carrying the above expositions forward, in our view, if a restrictive view of Section 299(1) is taken, it would be against its purported intent. We find credence in the submission of the appellant that the question of transfer of depositions will only arise when the deponent thereof is no longer available.

20. From a reading of Section 299(1), it is clear that the purported intent is to ensure evidence against an accused is preserved, where he has deliberately absconded from trial. This Court cannot give an interpretation to this Section, which would defeat the very purpose behind it. The prosecuting agency cannot move an application in the first trial as a matter of rule in every trial where the accused is absconding, envisioning that by the

time they are apprehended, the concerned witness will not remain available due to death or other circumstances.

21. Such an interpretation finds no support in the text of Section 299(1), which makes no reference or limitation to the stage at which the Section may be invoked. If that were the case, the phraseology involved, would have been so. Moreover, such an interpretation may also prompt accused persons to wilfully abscond themselves for long periods and await the death of the witness concerned. We also note that the Legislature has made no change to the corresponding provision to Section 299 CrPC, in the recently enacted Bharatiya Nagarik Suraksha Sanhita, 2023 being Section 335.

22. Adverting to the facts at hand, it is borne from the record that proclamation notice was issued against the respondent herein on 12.04.2012. Thereafter, the chargesheet filed on 10.05.2012, showed the respondent as absconding. It cannot be disputed that no challenge has been laid by the respondent to these facts. The deposition of the deceased victim took place from 13.03.2013 till 03.07.2013. Admittedly, on such date there was no prospect of the respondent being apprehended soon. The respondent only came to be arrested on 30.09.2016, three years

thereafter. Consequently, the two facts required for invocation of Section 299(1) are met in the instant case. Furthermore, undisputably, the victim passed away on 13.03.2015. Therefore, in our view, the contours of Section 299(1) stand satisfied.

23. In view of the above, the present appeals are allowed. The impugned order dated 06.05.2022 passed in C.R.R. 3012 of 2018 by the High Court at Calcutta is set aside.

24. Pending application(s), if any, shall stand disposed of.

.....**J.**
(SANJAY KAROL)

.....**J.**
(VIPUL M. PANCHOLI)

New Delhi
July 17, 2026