

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON : 12th September, 2012

CRL.A. 523/2012

STATE

..... Appellant

Through : Mr.Sanjay Lao, APP for the State.

Versus

PUNNU

..... Respondent

Through : Mr.Sameer Chander, *Amicus Curiae*.

CORAM:

MR. JUSTICE SANJIV KHANNA

MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (OPEN COURT)

1. State has preferred this appeal against the judgment dated 16.03.2011 in FIR No.11/2003, police station Delhi Cantt. by which the respondent-Punnu has been acquitted for offences under Section 120B/376 (g)/344/506 of the Indian Penal code 1860 (IPC) and under Section 5 (1)(C) of the Immoral Traffic (Prevention) Act 1956.

2. The case of the prosecution as set out in the charge-sheet is that the prosecutrix a minor was brought up by her father. After the death of her

father, she was brought up by her grandmother. The respondent-Punnu and his wife Saroj (co-accused and who has already been convicted while judgment dated 24.02.2006), who are the real chacha and chachi, went to the village and brought the prosecutrix to live with them in their jhuggi at Bapu Dham. After about six months the respondent-Punnu raped her. When she informed the co-accused Saroj, the prosecutrix was scolded. Prosecutrix was used as a prostitute and the accused used to earn money.

3. One day she was made to dance naked after having liquor. After the Jhuggi were demolished, the two accused shifted to quarter No.114, Dhaula Kuan. The prosecutrix then started working as a domestic servant in the house of Dr.Shalini Monga. On 16.12.2002 the prosecutrix complained and informed Dr.Shalini Monga that she was harassed and tormented by the accused. Dr.Shalini Monga took the prosecutrix to the office of the Chairman, National Human rights Commission and made a written complaint. The complaint was marked to ASI Bal Kishan of Police Station Dhaula Kuan for investigation. Statement of the prosecutrix was recorded in the presence of Dr.Rajat Mitra, Director of an NGO and his wife Dr.Nidhi Mitra. The co-accused Saroj was arrested. Prosecutrix's medical examination was done and her statement was recorded under Section 164

Cr.P.C. The ossification examination revealed that the age of the prosecutrix on 15.01.2003 was between 14-17 years.

4. The respondent Pannu could not be arrested and was declared proclaimed offender. Initially non-bailable warrants for the arrest of the accused were issued and thereafter by order dated 10.02.2003 proceedings under Sections 82 and 83 of the Code of Civil Procedure 1973 were initiated after recording the statement of process server who had tried to serve the process. The respondent-Punnu was declared proclaimed offender on 24.04.2003.

5. As noted above the prosecutrix appeared as PW-1 and her statement in chief was recorded on 16.08.2004. She was cross-examined on 11.10.2004 on behalf of co-accused Saroj. Statements of other witnesses were also recorded. By judgment dated 22.02.2006, co-accused Saroj was convicted and sentenced to life imprisonment for the offence under Section 109 read with Section 376(g) IPC and to pay a fine of ₹1000/- and in default suffer rigorous imprisonment for two months.

6. The respondent Punnu had remained a proclaimed officer throughout the proceedings till the judgment was pronounced convicting co-accused Saroj on 22.02.2006. The respondent was arrested by ATS South on

28.04.2010. Thereafter, supplementary charge-sheet was filed on 15.05.2010 and the matter was remitted to Sessions for trial vide order of the Magistrate dated 07.10.2010. Charges were framed against the respondent on 03.02.2011. The respondent pleaded not guilty and claimed trial. The case was put up for prosecution's evidence on 24.02.2011. On the said date no witness except Inspector Rajinder Mani was present. Inspector Rajender Mani filed list of witnesses in the main case and of supplementary charge sheet. The same were kept on record. SI Ajay Kumar was absent despite service. He was directed to be summoned again. The case was directed for put up prosecution examination on 16th and 18th March, 2011.

7. On 16.03.2011 the following order was passed:-

"State Vs. Punnu

FIR No.11/03

16.03.2011

Present: Ms. Satwinder Kaur, Ld. Addl. PP for state.

Accused from J/C with Sh. Amit Chaudhan, Adv.

No PW present.

Inspt. Rajender Meena, IO of the case is present. He has submitted that the prosecutrix Ms. Ritu Devi is not traceable and has been searched for at various addresses. To this effect his detailed statement has been recorded on oath.

In view of his statement, the prosecutrix being not traceable, is dropped.

IO as well as Ld. Addl. PP for State have been asked to point out if there is any other incriminating evidence available on record from which the accused can be connected with the alleged commission of offence in the absence of the examination of the prosecutrix.

IO has gone through the file and has pointed out that there is no such evidence which can be led by the prosecution other than the prosecutrix to prove that the accused is guilty of the offence he is charged with.

In these circumstances, the prosecution evidence is closed. No witness has been examined by the prosecution. As such, the statement of the accused is dispensed with.

Vide separate judgment dictated and announced, accused Punnu is acquitted of the charges u/s 120-B/376(g)/344/506 IPC and 5(1) (c) of the Immoral Traffic (Prevention) Act, 1956.

File be consigned to the Record Room.”

8. In his statement Inspector Rajender Mani on 16.03.2011 had stated as under:

“FIR No.11/03

PS Delhi Cantt.

16.03.2011

Statement of Inspector Rajender Meena, No-D3058, Inspector Investigatin, PS Delhi Cantt.

On S.A.

I am IO of this case. The summons of the prosecutrix Ms. Ritu Devi, d/o Late Harparsad Kashyap, r/o village

Tilokpur, P.O. Alipur, P.S. Bara Sagver, Distt. Unnao, U.P. were given to me for here service. I had sent Ct. Sheoraj to the said aforesaid address for effecting the service of summons. Ct. Sheoraj had met with Rajkumar s/o Sh. Ayodhaya, Sh. Suresh s/o Sh. Gangaram, Gram Pradhan Ms. Gudiya Devi and inquired about the prosecutrix from them however she could not be traced. The statements of Rajkumar s/o Sh. Ayodhaya, Gram Pradhan Ms. Gudiya Devi Ex. PX to PX2 bearing my signatures at point A and that of Ct. Tejpal Singh at point A1 were recorded by him.

On 04.03.2011, Ct. Sheoraj Singh on my directions had gone to H.No.1261, Block A, Phase-II, Holambikala where accused Punnu was residing to find out any clue about the prosecutrix from the said address or nearby places to trace her out however we could not succeed. DD No.66 B was recorded to this effect on his return true copy of which is Ex.PX3 bearing my signatures at point and the signatures of Ct. Sheoraj Singh at point A1.

On 25.02.2011 and 01.03.2011, I had gone to Balika Greh Pratham, Mahila avam bal vikas Vibhagh, after care home for women, Department of Women and Child Dev, Nirmal Chhaya Complex, Jail Road, N. Delhi-64 in search of the prosecutrix. However, it was reported by the Superintendent of Balika Greh Pratham that she remained there from 25.10.2004 to 03.09.2006 and thereafter went from there of her own will to H.No.46, Gali No.4, Sagarpur, Gandhi Market, Delhi. The reports given by the Superintendent, Balika Greh Pratham are Ex.PX4 and PX5 which were duly attested by me at point A. Thereafter I went to East West and Main Sagarpur, Delhi in search of the address of the prosecutrix given by the Superintendent, Balika Greh Pratham and met there with Sh. Bhishan Das, Umesh Kumar, Ishwar Das and Sh. Panna Lal and interrogated them about the prosecutrix and H.No.46, Gali No.4, Sagarpur, Gandhi Market, Delhi, however, this address was found to be incorrect as it was not in existence. I recorded the statements of Sh. Bhishan Das, Umesh Kumar, Ishwar Das and Sh. Panna

Lal Ex.PX6 to PX9 all bearing my signatures at point A. Despite my best efforts the prosecutrix could not be traced out. My detailed report to this effect is Ex.PX10 bearing my signatures at point A.”

9. In the impugned judgment acquitting the respondent, the Trial court recorded as under:

“5. Today the matter is fixed for recording the testimony of the prosecutrix. Inspt. Rajender Meena, IO of the case is present. He has submitted that the prosecutrix is not traceable and has been searched for at various addresses. To this effect his detailed statement has been recorded on oath. In view of his statement, the prosecutrix being not traceable, is dropped.

6. IO as well as the Ld. Addl. PP for State have been asked to point out if there is any other incriminating evidence available on record from which the accused can be connected with the alleged commission of offence in the absence of the examination of the prosecutrix.

7. IO has gone through the file and has pointed out that there is no such evidence which can be led by the prosecution other than the prosecutrix to prove that the accused is guilty of the offence he is charged with.

8. In these circumstances, the prosecution evidence is closed. No witness has been examined by the prosecution, as such there is no incriminating evidence on record against accused Punnu, hence his statement u/s 313 Cr.P.C. is dispensed with. Accused Punnu is acquitted of the charges u/s 120-B/376(g)/344/506 IPC and 5(1) (c) of the Immoral Traffic (Prevention) Act 1956.

9. Direction be issued to the Superintendent Jail to release accused Punnu in case he is not wanted in any other case.

10. File be consigned to Record Room.”

10. Additional Public Prosecutor has relied upon Section 299 of Cr.P.C and Section 33 of the Evidence Act, 1872 and has submitted that the impugned judgment and the reasoning given therein cannot be sustained. The said provisions have not been examined. The statement of PW-1 recorded on 16.08.2003 and 11.10.2003 in the proceedings against co-accused Saroj-wife of the respondent can be read in evidence.

11. We have heard the learned counsel for the respondent who has drawn our attention to the decision of Supreme Court in *Jayendra Vishnu Thakur v. State of Maharashtra and Anr.* (2009) 7 SCC 104.

12. Section 299 of Cr.P.C. and Section 33 of the Evidence Act read as under:

Section 229 (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 reasonable*

(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 of India.

Section 33

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross- examine;

that the questions in issue were substantially the same in the first as in the second proceeding.”

13. Referring to the said provisions, Supreme Court in the case of *Nirmal Singh vs.State of Haryan*, 2000(4) SCC 41 has held:-

In view of the rival stand of the parties, the sole question that arises for consideration is under what circumstances and by what method, the statements of five persons could have been tendered in the case for being admissible under Section 33 of the Evidence Act and whether it can form the basis of conviction. 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 first part of Section 299(1) of the Code of Criminal Procedure. In the case in hand, there is no grievance about non-compliance of any of the requirements of the first part of sub-section (1) of Section 299 Cr.P.C. When the accused is arrested and put up for trial, if any, such deposition of any witness is intended to be used as an evidence against the accused in any trial, then the Court must be satisfied that either 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 would be unreasonable. The entire arguments of Mr. Gopal Subramaniam, appearing for the appellant is that any one of these circumstances, which permits the prosecution to use the statements of such

witnesses, recorded under Section 299(1) must be proved and the Court concerned must be satisfied and record a conclusion thereon. In other words, like any other fact, it must first be proved by the prosecution that either the deponent is dead or is 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 would be unreasonable. 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 Sec.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 PW48/A to PW48/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 of the opportunity of cross-examining the witnesses, it is, therefore, necessary that the pre-conditions 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 pre-conditions before tendering the

evidence. The Privy Council, in fact in the case of *Chainchal Singh vs. Emperor*, AIR (33) 1946 PC, Page 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 Magistrates 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 has discharged its burden of proving that the witness is 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 mis-reception 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 pre-conditions in both the Sections must be established by the prosecution and it is only then, the statements of witnesses recorded under Section 299 Cr.P.C. 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. In the case in hand, after the process server reported the fact of death of the concerned persons, who were summoned as witnesses and whose statements had already been recorded under section 299 Cr.P.C on the application of the prosecution, the said statements were tendered as evidence and have been exhibited as Exhibits PW48/A to PW48/E. The learned Sessions Judge as well as the High Court relied upon the said statements for basing the conviction of the appellant. So far as the compliance of the first part of Section 299 (1) is concerned, the same is established through the evidence of PW28, who at the relevant time was working in Army as well as the S.H.O., Safidon also submitted before the Magistrate that the arrest of the accused

could not be procured, as he was absconding and in fact there was an order from the Magistrate for issuance of proclamation under Section 82 of the Code of Criminal Procedure. The High Court in fact, on consideration of the entire materials did record a finding that the requirements of 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. So far as the requirements of second part of Section 299 of the Code of Criminal Procedure is concerned, the impugned Judgment of the High Court indicates that the Court looked into the original records and it was found that the summons had been sent by the learned trial Judge, summoning the witnesses repeatedly to appear before the trial Court and on every occasion, the summons were received back with the report that the persons have already died. The High Court has also indicated as to how on each occasion, summons issued to the five witnesses have been returned back with the report that the persons are dead.”

14. *In Jayendra Vishnu Thakur v. State of Maharashtra and Anr.*

(supra) the two provisions were again examined by the Supreme Court and reference was made to the case law on the subject. It has been held that Section 299(1) is in two parts and can be applied when there is proof that the jurisdictional facts are satisfied. First, it must be proved that the accused had absconded and secondly there was no immediate prospect to arrest him. If these two conditions are satisfied, then the deposition of witness taken in the absence of the accused can be used against him, 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. It has been also observed that Section 299 must receive strict interpretation and scrupulous compliance. It is obligatory on the part of the court to verify the pre-requisite facts on the basis of material brought on record by cogent evidence that the aforesaid facts exist so as to enable the court to pass an appropriate order.

15. In the present case the trial, after the charges were framed against the appellant, has proceeded in haste and hurry. Only one opportunity was granted to the State to produce the prosecutrix. On failure, the prosecution evidence was closed. It is noticeable that as per the prosecution version and court record the respondent Punnu was a proclaimed offender who was arrested after seven years in 2010. The prosecutrix had changed her residence/address in the meantime. It is also apparent that Section 299 Cr.P.C. and Section 33 of the Evidence Act have escaped notice and were not considered and examined. This is inspite of the fact that statement of Inspector Rajender Mani was recorded on 16.03.2011. On the same day itself for reasons given in the judgment the order of

acquittal was passed. No opportunity or chance was given to the prosecution to move any application or decide or make any further attempt to prove and establish the case. We do not think the aforesaid order should have been passed without examining and considering, whether conditions stipulated in Section 299 of Cr.P.C. and Section 33 of the Evidence Act were satisfied in the present case. This has resulted in miscarriage of justice.

16. In these circumstances, the impugned order dated 16.03.2011 and the judgment dated 16.03.2011 are set aside and the matter is remitted to the learned Sessions Judge to examine the said matter afresh keeping in mind Section 299 Cr.P.C. and Section 33 of the Evidence Act. Trial Court will examine whether the conditions of Section 299 of Cr.P.C. and Section 33 of the Evidence Act are satisfied and the statement of the prosecutrix recorded on earlier occasion in the same proceedings on 16.08.2003 and 11.10.2003 can be taken into consideration. Of course, it will be also open to the prosecution to produce the prosecutrix if possible. The Trial Court will also record evidence of other witnesses if deemed necessary and appropriate.

18. The appeal is accordingly disposed of.

19. To cut short the delay we direct that the respondent will appear before the District Judge, Dwarka on 20th September, 2012 and before the Additional Sessions Judge when the date of hearing will be fixed.

SANJIV KHANNA, J.

S.P.GARG, J.

SEPTEMBER 12, 2012

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