

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

**CRM-M-25557 of 2015
Date of decision : 04.08.2015**

Ashgar

..... Petitioner

Versus

State of Haryana and another

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr.Mohammad Arshad, Advocate
for the petitioner.

DARSHAN SINGH,J(Oral)

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C') to quash the FIR no. 331 dated 04.09.2013, under Sections 363, 366-A, 376-D of Indian Penal Code and Section 4/14 of The Protection of Children from Sexual Offences Act (for short 'POCSO' Act) 2012.

2. The brief facts of the prosecution case are that on 03.09.2013, at about 05.30 p.m, prosecutrix-respondent no. 2 along with her sister-in-law (Bhabi) namely Asmina had gone to the fields and were cutting the grass. Suddenly, petitioner Ashgar along with co-accused Hakku @ Zakir,

Javed, Farruk and one relative of Hakku @ Zakir came there. They gagged her mouth and put her in bolero vehicle. She was got alighted from the vehicle near the house of Hakku @ Zakir in millet fields. Hakku @ Zakir and his relative committed rape upon her many times and the prosecutrix was kept in millet fields for whole of the night. In the morning, they made her to sit in the vehicle of Sattar and she was dropped at her house. On the statement of the prosecutrix, the present case was registered.

3. Co-accused Farruk and Hakku @ Zakir were arrested. However, petitioner Ashgar, Javed and relative of Hakku @ Zakir could not be arrested and were declared as proclaimed offender by the learned Addl. Chief Judicial Magistrate, Mewat at Nuh, vide order dated 11.04.2014. After completion of the investigation, the report under Section 173 Cr.P.C. was presented against Farruk and Hakku @ Zakir, who were tried by learned Additional Sessions Judge, Mewat and were acquitted vide judgment dated 05.03.2015.

4. Mr. Mohammad Arshad, Advocate learned counsel for the petitioner contended that there were only the allegations of kidnapping against the petitioner. Co-accused Farruk and Hakku @ Zakir have already been acquitted by the learned trial Court. The version of the prosecution and

testimonies of the prosecution witnesses have not been believed. Thus, he contended that the FIR no. 331 dated 04.09.2013 and the subsequent proceedings arising thereto are liable to be quashed against the petitioner also. To support his contentions, he relied upon case **Sudo Mandal @ Diwarak Mandal Vs. State of Punjab 2011(2) R.C.R (Criminal) 453(D.B).**

5. I have duly considered the aforesaid contentions.

6. The quashing of the FIR and the subsequent proceedings thereto have been sought in the present petition simply on the ground that co-accused Farruk and Hakku @ Zakir, who had faced the trial have been acquitted by the learned Additional Sessions Judge, Mewat vide judgment dated 05.03.2015. This fact is not disputed that petitioner Ashgar was declared as proclaimed offender vide order dated 11.04.2014. That order still subsists and petitioner has not surrendered before the Court concerned.

7. Now, the question arises as to whether the petitioner, who is absconding and has been declared as proclaimed offender in the present case is entitled to get the first information report and the subsequent proceedings thereto quashed simply on the ground of the acquittal of the co-accused in the separate trial.

8. The fundamentals on which the criminal justice

system is based is that the persons who had committed the crime and against whom accusations appears to be well founded during the investigation of the case must face the trial. The person who absconds, escape and keeps himself away from the arms of law can not be given undue benefit or advantage or permitted to defeat the due process of law. One can not ignore that an absconder intentionally makes himself inaccessible to the process of law. If the prayer of the petitioner is accepted that would tantamount to rendering the criminal justice system at whims and mercy of the absconding accused that can never be the intention of law. It is very interesting to note that the present case was registered on 04.09.2013. The petitioner remained absconding and was ultimately declared as proclaimed offender vide order dated 11.04.2014. Co-accused Farruk and Hakku @ Zakir were acquitted on 05.03.2015. So, the petitioner was just waiting for the trial of the co-accused to be over to file the present petition for quashing the FIR and the proceedings on the basis of their acquittal.

9. In case **Rajan Rai Vs. State of Bihar, 2005(4) R.C.R (Criminal) 885**, the charge sheet was filed against six accused. Petitioner Rajan Rai was absconding, so his trial was separated from that of other five accused. In the separate trial, four co-accused were convicted. One of the

co-accused had died before the commencement of the trial. In the meanwhile, appellant was apprehended and was put on trial. He was also convicted by the learned trial Court. The appeal preferred by four convicted co-accused challenging their conviction was allowed by the High Court and the appeal filed by the appellant was taken up later on and his conviction and sentence was upheld by the High Court. He preferred appeal by special leave before the Hon'ble Apex Court. The Hon'ble Apex Court has laid down as under:

9. “The question had arisen before the Privy Council in the case of ***Hui Chi-ming V. R [1991]3 All E.R. 897***, wherein the Court was dealing with a case of murder trial. In the said case, principal offender was acquitted of murder, but convicted of manslaughter at a trial before the High Court of Hong Kong. The said order attained finality. Thereafter, another accused, who was facing trial arising out of the same very occurrence and whose trial was separated, was convicted for the charge of murder by the same High Court, ignoring the judgment of acquittal of the principal accused of the charge of murder, holding that the same was inadmissible. The application for leave to appeal against the conviction of the accused having been dismissed by the Court of Appeal of Hong Kong, the accused appealed by special leave to the Privy Council. In

that case, conviction for the charge of murder was upheld by the Judicial Committee holding that evidence of the outcome of an earlier trial arising out of the same transaction was irrelevant and therefore inadmissible since the verdict reached by a different jury, whether on the same or different evidence, in the earlier trial amounted to no more than evidence of the opinion of that jury. Further, it was laid down that a person could properly be convicted of aiding and abetting an offence even though the principal offender had been acquitted and accordingly, the trial judge had rightly excluded evidence of the principal offender's acquittal of murder.

10. A three Judges' Bench of this Court had occasion to consider the same very question in the case of ***Karan Singh V. The State of Madhya Pradesh, AIR 1965, Supreme Court 1037***, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial Court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149 Indian Penal Code. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial Court

recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 Indian Penal Code could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial Court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 Indian Penal Code. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not permissible in law for the High Court to uphold conviction of accused Karan Singh. This Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused Ram Hans depended upon evidence led there while the case of accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of

evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of Karan Singh, who was appellant before this Court. This Court observed at page 1038 thus:-

“As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ram Hans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ramhans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ramhans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case.”

10. In case **T.Moosa and etc. etc. Vs. Sub-Inspector of Police, Vadakara Police Station, Ernakulam and etc. 2006(3) R.C.R(Criminal) 221**, the Full Bench of Hon'ble Kerala High Court has laid down as under:-

52. “To quash the proceedings after referring to the overt act of the petitioner with reference to the evidence tendered in the judgment rendered in a case of a co-accused who faced the trial and based on evidence therein case of the accused cannot be done as the judgment in the earlier case is not judgment relevant within the meaning of Sections 40 to 44 of the Evidence Act. To do so will be in

the realm of appreciation of the evidence which has to be done by the trial Judge. In the above view, with great respect we can not agree with the proposition of law thus stated in Arunkumar's case. The acquittal of some of the co-accused based on appreciation of evidence in their case is no ground to bar a criminal trial as the appreciation by the concerned Judge in a criminal trial is not binding when the latter case is tried in the case of the other co-accused and it is for the learned trial Judge to appreciate the evidence adduced in the latter case. In that regard possibly a particular witness may or may not be believed and his reliability may also be tested in the light of what he has stated in the earlier case etc. But those are all matters for the trial Judge to do. All that we want to say is that it will not preclude the trial of the case for the mere reason that the co-accused were acquitted.”

11. This Court in case **Javed and others Vs. State of Haryana and another, Criminal Misc. No. 3447 of 2011(O&M), decided on 18.11.2011** also dealt with the similar question wherein the quashing of the FIR and the subsequent proceedings were sought on the ground of the acquittal of the co-accused by the petitioners, who were the proclaimed offender. This Court laid down as under:-

5. “The petitioners were declared proclaimed offender but never chose to appear before the Court, waited for the outcomes and now are

seeking their acquittal on the basis of parity by moving this petition under Section 482 Cr.P.C. The petitioners are seeking premium over their misconduct in not showing any respect to law. They have remained absent, evaded the trial and their prosecution and now they seek advantage of this illegal act on their part. What would have been the plea of the petitioner, if the outcome of the trial against Abbas would have been converse? Would the petitioners then had come forward to seek their conviction and sentence by filing petition under Section 482 Cr.P.C. on the ground their co-accused similarly situated has been convicted” The prosecution could also not have been permitted to seek conviction of petitioner on the ground that their co-accused is convicted and so they should be convicted on the ground that evidence would be same. They could neither have thought of making this approach nor it would have been legally justified for this Court to convict them and to sentence them on the basis that their co-accused have been convicted. If the prosecution had made any approach in such eventuality to seek conviction and sentence for the petitioners, then they would have cried hoarse to say that they ought to be put to trial and proved guilty before the prosecution could seek their conviction or pray for sentence being imposed on them. That alone is the legal course available and that would also be the legal course now available for the petitioners to submit

themselves before the Trial Court and face the consequences of trial. The petitioners have to face the rigors of a trial where the prosecution ought to be given an opportunity to produce the evidence against them.”

12. Same legal position has been reiterated by this Court in case **Roku Sandhu Vs. State of Punjab 2012(4) AICLR 758** and case **Munfed Vs. State of Haryana 2014(4) Law Herald 2970**. In all the three judgments referred above, case Sudo Mandal @ Diwarak Mandal Vs. State of Punjab (Supra) relied upon by learned counsel for the petitioner was duly considered and distinguished. In Sudo Mandal @ Diwarak Mandal's case (Supra), the absconding accused were acquitted while dealing with two appeals against conviction filed by the co-accused which were decided on appreciation of evidence recorded therein. Whereas, in the present proceedings, this Court is not sitting in appeal.

13. The Hon'ble Apex Court in case **Yanab Sheikh @ Gaggi Vs. State of West Bengal 2013(3) R.C.R (Criminal) 898** has also laid down that acquittal of co-accused would not automatically lead to the acquittal of the other accused.

14. Thus, in view of the consistent ratio of law laid down in the cases referred above by this Court as well as Hon'ble Apex Court, Sudo Mandal @ Diwarak Mandal's case (Supra) is of no help to the petitioner and he can not claim

the quashing of the FIR No.331 dated 04.09.2013 and subsequent proceedings thereto simply on the ground of acquittal of his co-accused in the separate trial particularly when there are the specific allegations of kidnapping against the petitioner.

15. Resultantly, the present petition is without any merits and the same is hereby dismissed.

04.08.2015

s.khan

**(DARSHAN SINGH)
JUDGE**