

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

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Reserved on: 27th August, 2018

Decided on: 19th August, 2019

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CRL.A. 47/2016

AFZAL @ AJMAL

..... Petitioner

Represented by: Mr. Ankur Sood and Ms.
Romila Mandal, Advocates.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
with SI Naveen Kuma, PS
Seelampur.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Based on the testimony of Aditya Kumar (PW-2) and subsequent identification of the appellant in the Court, Afzal @ Ajmal was convicted for the offences punishable under Section 392/397 IPC vide impugned judgment dated 29th September, 2015 and sentenced vide order on sentence dated 9th October, 2015 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹5000/- and in default whereof to undergo simple imprisonment for a period of six months for the offence punishable under Section 392 IPC and rigorous imprisonment for a period of seven years for the offence punishable under Section 397 IPC. Afzal @ Ajmal has challenged the impugned judgment of conviction and order on sentence in this appeal.

2. Learned counsel for the appellant contends that the learned Trial Court erred in basing the conviction by relying upon the testimony of Jyoti Gupta, mother of Aditya Gupta, which was recorded in the earlier trial where the appellant was neither tried nor declared a proclaimed offender, thus not meeting the pre-requisites of Section 299 Cr.P.C. Reliance is placed on the decision of the Supreme Court reported as AIR 2000 SC 1416 Nirmal Singh Vs. State of Haryana. Jyoti Gupta's testimony was never put to the Appellant during his examination under Section 313 Cr.P.C. He submitted that Jyoti Gupta and Aditya Gupta identified four persons who participated in the robbery, out of whom two i.e. Pankaj and Jitender pleaded guilty, who were convicted for offences punishable under Sections 392 and 397 IPC respectively while Subhash and Madan were convicted for offences punishable under Section 411 IPC. He further submits that the role of holding Aditya Gupta at gunpoint was assigned to Pankaj in the first trial for which he has already been convicted. Namrata Gupta, daughter of Jyoti Gupta who was present at the time of the incident has not been examined as a witness. Reliance has been placed on the decision of the Supreme Court reported as (2012) 4 SCC 722 Govindaraju Vs. State. Aditya Gupta has made substantial improvements in his statement before the Court as against the statement given by him to the police. He identified the appellant in Court after having seen him in the police station where he had gone to enquire about the status of the case. There was a gap of almost 10 years between the date of incident and the arrest of the appellant, thus identification is highly improbable. No recovery has been made from the appellant of the alleged weapon of offence.

3. Learned APP for the State on the other hand contends that the learned Trial Court has rightly convicted the appellant based on the testimony of Aditya Gupta who was an eye-witness to the incident and who identified the appellant in Court. He was cross-examined at length but his testimony could not be shaken. The appellant along with Ganga and Manoj were named in the disclosure statement of the convicts in the previous trial. She submits that Aditya Gupta has corroborated the testimony of Jyoti Gupta on the material aspects which was recorded in the earlier trial, however, she could not be examined in the trial of the appellant since she had passed away. The pre-requisites of Section 299 Cr.P.C. are satisfied in the present case as the appellant had been declared proclaimed offender by the learned Trial Court vide order dated 16th October, 2008. Furthermore orders dated 22nd September, 2014, 25th September, 2014, 29th September, 2014, 9th December, 2014 and 16th December, 2014 clearly show the fact of appellant being proclaimed offender was duly considered by the learned Trial Judge. Appellant was provided with all the documents of the previous trial at the time of filing of charge-sheet qua him, however he never objected against the use of evidence recorded in the previous trial.

4. Brief facts leading to the registration of FIR No. 139/2005 are that on 14th February, 2005, at around 8.00 PM Jyoti Gupta was present at her residence with her children and her son was about to leave for his tuition. He had barely opened the door when four persons armed with pistols and knives etc., forcibly entered into the house. They pushed her son and bolted the door from inside. Two of them were carrying country made revolver. The assailants then took Jyoti Gupta and her two children inside the room. One of the assailants put a country made revolver at the temple of her son,

another one put a knife on the neck of Jyoti Gupta and asked for the money. The assailants threatened Jyoti Gupta that if she did not give the money they would kill her and her family. Jyoti Gupta gave the key of the almirah to the assailants who took away ₹10 lakhs, one mangalsutra and gold jewellery from the almirah. They put the stolen articles in the school bag of her son on which “Aditya” was written. The assailants also took away the briefcase kept in another room which had important documents in it. The assailants escaped on gun and knife point and bolted the house from outside.

5. On the complaint Ex.PW-4/A and endorsement vide Ex.PW-2/B, FIR No. 139/05 (Ex.PW-1/A) was registered. The site plan was prepared vide Ex.PW-2/C. During the course of investigation four accused persons namely Jitender Kumar, Subhash Kumar, Madan Yadav and Pankaj Yadav were arrested and robbed articles were recovered at their instance. Jitender Kumar and Pankaj Yadav pleaded guilty and they were convicted for the offences punishable under Section 397/392 IPC vide judgment dated 7th December, 2009 while Madan Yadav and Subhash Kumar were convicted for the offence punishable under Section 411 IPC vide judgment dated 21st March 2011. The remaining persons involved in the robbery evaded arrest and were declared proclaimed offender including Afzal @ Ajmal, the appellant herein.

6. On 22nd September, 2014, after the receipt of secret information a team was constituted consisting of ASI Jitender Kumar and HC Rupesh for apprehending proclaimed offenders and at about 10:40 AM, Afzal @ Ajmal was apprehended from near the Red Light at Village Khirki on pointing out by the secret informer.

7. On 29th September, 2014, disclosure statement of Afzal @ Ajmal was recorded vide Ex.PW-3/A. He was arrested vide arrest memo Ex.PW-3/B. An application for TIP was moved however he refused to participate in the TIP proceedings. Copy of TIP proceedings were proved vide Ex.PW-3/C. After completion of investigation, charge sheet was filed and charge was framed vide order dated 17th January, 2015 for the offences punishable under Sections 392/397 IPC.

8. Aditya Gupta (PW-2) in his testimony during the course of trial of Afzal stated that on 14th February 2005, he was residing at House No.152, Sector-7, Pushp Vihar, New Delhi. On that day, at about 8:00 PM, he was present at his house with his mother and sister. At that time he was 13/14 years of age, was studying in 7th Standard and was in the process of leaving the house for taking tuition along with his bag. When he opened the door the person standing outside pushed him inside and forcibly came inside the house with 3 other persons. One of the assailants put a pistol on his head and closed the door of the house from inside. His mother Jyoti Gupta was pushed inside the room on knife point and the hands of his sister were tied with her chunni. The assailants demanded the money and valuables from them however they replied saying that they did not have money or valuables. On this the assailants started abusing his father and asserted that they were aware of as to how much money was there with them. The assailants threatened to kill them and due to the threat his mother Jyoti Gupta handed over the key of the almirah to them. They took out the stuff from the almirah, but could not find anything however some of the articles i.e. a packet having cash of ₹10 lakhs and his mother's kangan fell down. They

took the money and put it in a bag and the gold kangan alongwith silver idols which were in the small temple in the house were also taken. The articles robbed by the assailants were put in his school bag. They also snapped wire of the landline telephone. One of the assailants was searching the other room and they also took away a briefcase which was lying in the other room. The assailants were talking amongst themselves that '*hamara kaam ho gaya hai, ab inko maar dete hain*' but he along with his mother and sister prayed for mercy and not to kill them. He further added that after the assailants left, his mother made a call to his father from the other landline, which was not tampered by the assailants. In the end of September, 2014, he visited the Crime Branch, Chanakyapuri in order to know the status of the robbery case, where he found the appellant in the police station. He identified him in Court as the same person who had put him on gun point while robbery was being committed by his other 3 associates. In his cross examination, he denied the suggestion that he had gone to the police station on being called by the Investigating Officer after the arrest of Afzal @ Ajmal. He stated that he visited the police station in September, 2014 in order to find out the developments in the present case.

9. One of the principle contentions of learned counsel for the appellant is that the deposition of Jyoti Gupta cannot be read against him as he was not facing trial at the time of her deposition. Section 299 Cr.P.C. reads as under:-

“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 try², 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 of India.”

10. Supreme Court in the decision reported as (2011) 4 SCC 426 CBI Vs. Abu Salem Ansari while dealing with the relative scope and applicability of Section 299 Cr.P.C. and admissibility of evidence against absconding accused brought to trial later on held as under:-

“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 Cr.P.C. 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.”

11. In 2000 CrI.L.J 1803 (SC) Nirmal Singh Vs. State of Haryana Supreme Court dealing with the evidence recorded under Section 299 Cr.P.C. held that use of deposition of witnesses recorded in the absence of an accused being an exception to the principle embodied in Section 33 of the Evidence Act, before such statement can be used as evidence, pre-conditions for applicability of Section 299 Cr.P.C. must be strictly complied. It was held:

“4. 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 CrPC 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 CrPC. 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 CrPC. 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 of 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 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 48A to PW 48E. 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 possible cannot be any dispute with the proposition of law that for taking the benefits of Section 299 of the CrPC, 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 v. Emperor MANU/PR/0034/1945 , 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 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 misperception of the evidence in the case. On a mere perusal of Section 299 of the CrPC 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 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 CrPC 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 CrPC on the application of the prosecution, the said statements were tendered as evidence and have been exhibited as Exhibits PW48A to PW 48E. 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 CrPC. 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 CrPC 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 CrPC 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."

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 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.

13. Main case of the appellant is that Aditya Gupta who was examined as PW-2 in the trial against the appellant stated that the appellant was the person who had put pistol on his head. However, during the trial of the co-accused he stated that it was Pankaj who had put pistol on his head. This Court has perused the statements of the witnesses recorded during the trial of the other accused. During that trial statement of Aditya Gupta was not recorded as a witness and only statement of Jyoti Gupta was recorded as PW-3. Further if as per the learned counsel of the appellant Aditya Gupta had deposed about the pistol being put by Pankaj, the same being a previous statement the witness was required to be confronted with the said statement. It may be noted that in the earlier trial two accused namely Pankaj and Jitender who were allegedly present at the spot pleaded guilty and were convicted for offence punishable under Sections 392/397 IPC and the two other accused namely Subhash and Madan from whom stolen properties

were recovered and claimed trial were convicted for offence punishable under Section 411 IPC. Further it is the case of the prosecution that two of the accused were armed with pistols. Thus there is no contradiction on this aspect in the testimony of Aditya Gupta.

14. Learned counsel for the appellant also challenges the improbability of Aditya Gupta having identified the appellant in the Court after a gap of nearly 10 years and states that he had seen him in the Police Station. A perusal of the file of learned Chief Metropolitan Magistrate would reveal that the appellant was produced along with the Kalandra under Section 41(1)(c) Cr.P.C. having been arrested by H.C. Luv Kumar of PS Mehrauli and produced before the learned CMM who issued notice to the investigating officer through ACP Crime Branch returnable on 25th September, 2014 at 2.00 PM, when S.I. Data Ram appeared and stated that the Police file of FIR No. 139/2005 PS Malviya Nagar investigated by Crime Branch was not traceable and applied for certified copy of the record. Hence the judicial file was summoned for 29th September, 2014 at 2.00 PM till when the appellant was in judicial custody. On 29th September, 2014 S.I. Data Ram sought permission to arrest the appellant and interrogate him, and permission was granted to interrogate the appellant in Court complex for 30 minutes and the appellant was remanded to judicial custody. The application to conduct the Test Identification Parade of appellant was moved on 29th September, 2014 itself and was marked to the other Magistrate on the same date who noted that the appellant was produced in judicial custody and he refused to join the TIP proceedings. While refusing TIP, plea of the appellant was that the Police officials have already taken his photographs and thus he has an apprehension that those might have been shown to the

witness. As noted above, S.I. Data Ram got permission for only half an hour to interrogate the appellant in custody in Court premises itself and immediately thereafter the application for TIP was moved, TIP proceedings were conducted when the appellant refused to undergo TIP. Thus the plea that since Aditya visited the Police Station in September 2014 and saw the appellant making the identification futile deserves to be rejected.

15. Learned counsel for the appellant has also contended that since the deposition of Jyoti Gupta has not been put to him under Section 313 Cr.P.C. the same cannot be used against him. This Court has gone through the statement of the appellant recorded under Section 313 Cr.P.C. which reveals that circumstances which have been proved on the basis of deposition of Jyoti Gupta and Aditya Gupta have been duly put to the appellant clearly and cogently giving him sufficient opportunity to render an explanation, hence the deposition of Jyoti Gupta which can be used in terms of Section 299(1) Cr.P.C. against the appellant is not required to be thrown out on the ground that the same has not been put to the appellant under Section 313 Cr.P.C. Further, not examining the daughter of Jyoti Gupta who was present at the scene of occurrence as a witness in the trial either earlier or subsequently qua the appellant would not cast doubt on the prosecution case in view of the cogent testimonies of Jyoti Gupta and Aditya Gupta.

16. In view of the evidence on record of the eye-witness i.e. Aditya Gupta who had sufficient time to see the appellant, this Court finds no error in the impugned judgment of conviction or order on sentence. Appeal is accordingly dismissed.

17. Copy of this judgment be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 19, 2019
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