

**In the High Court for the States of Punjab and Haryana  
At Chandigarh**

CRR-932-2022 (O&M)  
Date of Decision:- 24.11.2022

Rakesh @ Kala

... Petitioner

Versus

State of Haryana

... Respondent

**CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present:- Mr. Dushyant Rana, Advocate for the petitioner.

Mr. Rajiv Sidhu, DAG, Haryana.

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**GURVINDER SINGH GILL, J.**

1. The petitioner/accused Rakesh @ Kala assails order dated 10.2.2022 passed by the Court of learned Additional Sessions Judge, Sonipat whereby an application moved by the petitioner/accused under Section 311 Cr.P.C. for recalling three prosecution witnesses i.e. PW-2 Devender Singh, PW-4 Ranbir Singh and PW-6 Anand Singh for their further cross-examination has been dismissed.
2. The petitioner alongwith 12 co-accused is facing trial in a case arising out of FIR No. 163 dated 13.5.2016, Police Station Sadar Sonipat, District Sonipat, Haryana under Sections 212, 302, 120-B, 34 of Indian Penal Code and under Section 25 of the Arms Act wherein the allegations are broadly to the effect that on 12.5.2016 at about 6 p.m., when the complainant Ranbir Singh (PW-4) was present at his residence, he received information that some assailants have fired at his brother Jagbir and at his nephew Anil. The complainant

rushed to hospital where he found that his brother had already been declared dead. His nephew Anil was referred to a hospital in Delhi. When Anil was being taken in an ambulance to Delhi, complainant's brother Anand was also present and during the said period the complainant's nephew Anil disclosed that when he alongwith his father was going on a motorcycle at about 5:30 p.m., then a car hit them from rear and they fell down. He further disclosed that Ajay, Nitu, Saddam, Joginder accompanied by their friends alighted from the car and started firing at them while saying that they will be taught a lesson for not having voted in favour of Kannu's brother Sanjay. Later, Anil also succumbed to his injuries.

3. PW-2 Devender Singh, PW-4 Ranbir Singh and PW-6 Anand Singh were examined by the trial Court on 24.4.2018. A perusal of the testimonies of the aforesaid three PWs, which are annexed with the petition as Annexure P-1, Annexure P-2 and Annexure P-3, would indicate that the witnesses were duly cross-examined collectively on behalf of all the accused. In the said statements, the factum of cross-examination by the defence counsel after their examination-in-chief is recorded as follows :-

*“xxxxxxxxx by defence counsel.”*

4. A perusal of zimni order recorded by the trial Court on 24.4.2018 (Annexure P-4), wherein presence of the counsel has been recorded reads as follows :-

*“State Vs. Rohit and others*

*Present: Sh. Rajiv Kathpalia, Ld. PP for the State assisted by Sh. Parveen Rathi, Adv. for the complainant.*

*Accused Rakesh, Rohit, Deepak, Ashish, Bhola Singh and Sandeep are in custody Sh. N.K.Dahiya and Sh. Jatinder Kumar, Adv.*

*Accused Krishan Kumar, Karan Singh, Kishmat, Santosh, Neeraj, Raj Singh and Iqbal are on bail with counsel Sh. N.K.Dahiya and Sh. Jatinder Kumar, Adv.*

*Ld. PP has tendered on record FSL reports Ex.PX and Ex.PX/1 and give up PW Sukhbir being unnecessary vide his separately recorded statements of even date. Seven witnesses are present and have been examined. Let PWs mentioned at serial nos.11 to 25 be summoned for 18.05.2018.*

*(Dr. Sushil Kumar Garg),  
ASJ, Sonapat,  
(UID:HR0126)*

*Date of Order: 24.04.2018”*

5. The learned counsel for the petitioner has vehemently argued that although, as per the presence recorded in order dated 24.4.2018 (Annexure P-4), the petitioner Rakesh @ Kala as well as co-accused Rohit, Deepak, Ashish, Bhola Singh and Sandeep are shown to be represented by their counsel Shri N.K. Dahiya and Shri Jatinder Kumar, Advocates but as a matter of fact, he had never engaged the said counsel.
6. On the last date of hearing also, when the aforesaid contention had been raised before this Court, this Court had directed the trial Court to furnish information as regards the aforesaid fact. The relevant extract from order dated 28.7.2022 reads as follows :-

*“Since, the petitioner has raised a very specific submission that infact he had never engaged Sh. N.K. Dahiya, Advocate or Mr. Jatinder Kumar Advocate, whose presence is recorded in zimene order dated 24.4.2018 as his counsel, the trial Court is directed to examine the entire case file including remand papers etc. and to furnish information as to whether the petitioner had executed any “vakalatnama” in favour of the aforesaid two counsel or not.*

*It be also informed as to whether any other counsel was ever representing the petitioner and as to whether his presence was ever recorded and if so, on which dates.”*

7. Report of the learned Presiding Officer, Sonipat has been received, which is reproduced herein under :-

*"I have the honour to submit, in compliance of order dated 28.07.2022 passed by Hon'ble High Court, received vide endorsement No.7228 dated 30.07.2022 through Id. District and Sessions Judge, Sonapat that in this sessions case power of attorney has been filed by Shri R.S Dahiya, Adv and Shri Rakesh Kumar/Shri Vikas Lathwal, Adv on behalf of accused Rakesh.*

*It has been further submitted that Shri Rakesh Kumar/Shri Vikas Lathwal, Adv and Shri.N.K Dhaiya, Adv have filed their power of attorney on 10.06.2016 and also moved application for bail and for transfer of jail on behalf of accused and their attendance has been marked in the order dated 10.06.2016 of Shri Rakesh Kumar/ Shri Vikas Lathwal, Adv. On 13.07.2016 attendance of Shri N.K Dahiya, Adv and Shri Rakesh Kumar, Adv have been marked.*

*With regard to order dated 24.4.2018 is concerned, in this order presence of Shri N.K Dahiva Ady and Shri Jatinder Kumar Adv been marked on behalf of all the accused and this order has been passed by Dr. Sushil Kumar Garg, the then Id, ASJ, Sonapat, the Id Predecessor of this Court.*

*It is further submitted that evidence of PW1 to PW 29 has been recorded up to 28.11.2018 in the court of Dr. Sushil Kumar Garg, the then Id Predecessor of this court and PW29 has been examined in the court of Dr. D.N.Bhardwaj, the then Id. Addi. Sessions Judge, Sonapat the Id Predecessor of this court in presence of Id. Defence counsels. Witnesses no. 31 to 45 have been examined before the undersigned, in presence of defence counsels.*

*It is further submitted that as per record/file accused Rakesh has not executed any vakalatnama in favour of Shri N.K Dahiya Adv and Shri Jatinder Kumar Adv. However, as per record, Shri Rakesh Kumar/Shri Vikas Lathwal, Adv and Shri R.S Dahiya, Adv, are representing accused Rakesh....."*

8. A perusal of the aforesaid report shows that Shri R.S. Dahiya, Advocate and Shri Rakesh Kumar and Shri Vikas Lathwal Advocates had filed power of attorney on behalf of the accused. Infact Shri N.K. Dhaiya, Advocate is also reported to have filed power of attorney on 10.6.2016 when an application for grant of bail and for transfer of jail had been filed.

9. Although, on 10.6.2016, the presence of Shri N.K.Dhaiya, Advocate is not stated to have been recorded but his presence is stated to have been recorded subsequently on 13.6.2016. In any case, the fact that the accused has been represented by Shri R.S. Dhaiya, Rakesh Kumar, Shri Vikas Lathwal, Advocates who had filed power of attorney on his behalf is clearly evident. The contention of the petitioner that he was unrepresented cannot be accepted as it is unbelievable that during all these years when the trial was pending and a large number of witnesses had been examined, he would not have got in touch with his counsel.
10. During the course of arguments, the learned counsel for petitioner submitted that he stands seriously prejudiced inasmuch as he was never present at the spot and no question as regards his absence at the spot has been put to any of the witnesses during cross-examination and he has been unable to build up the said defence. This Court is unable to accept the said contention so as to justify recalling of witnesses. The proposed defence of petitioner's absence is a plea of 'alibi' which is required to be established by concrete evidence which shows that the accused, under no circumstances could have been physically present at the spot. Such plea can be established by leading convincing defence evidence to negate the assertions of PWs regarding presence and participation of petitioner. The petitioner, in any case, shall get opportunity to lead defence evidence. It has been informed by learned State counsel that as on date all the 47 prosecution witnesses already stands examined and the matter is at the stage of recording statement under Section 313 Cr.P.C.

11. In view of the aforesaid discussion, this Court does not find any special ground for recalling the aforesaid PWs, who have been cross-examined at length on behalf of all the accused.
12. The petition is sans merit and is hereby dismissed.

**24.11.2022**

kamal

**( Gurvinder Singh Gill )  
Judge**

Whether speaking /reasoned  
Whether Reportable

Yes / No  
Yes / No