

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.133 of 2023

Arising Out of PS. Case No.-145 Year-2020 Thana- SARSI District- Purnia

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Abhishek Kumar @ Sonu Singh S/O Late Pankaj Kumar Singh Resident Of
Village- Sarsi, P.S.- District- Purnea

... .. Petitioner/s

Versus

1. The State Of Bihar Through The Principal, Secretary, Home Department,
Government Of Bihar, Patna.
2. The Director General Of Police, Old Secretariat, Patna.
3. The Inspector General Of Police, Purnea.
4. The Superintendent Of Police, District- Purnea.
5. The Deputy Superintendent Of Police, Purnea.
6. The Station Head Officer (SHO), Police Station Sarsi, Purnea.
7. The Investigating Officer Of Sarsi P.S. Case No- 145/20
8. Leshi Singh W/O Late Madhusudan Singh @ Buttan Singh Resident Of
Village And P.S.- Sarsi, District- Purnea.
9. Markoni Singh @ Fauzi S/O Ram Rekh Singh Resident Of Village-
Guagachhi, P.S.- Amdabad, District- Katihar.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Manohar Prasad Singh, Adv.
For the Respondent/s : Mr. Manish Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN
ORAL JUDGMENT

Date : 12-04-2023

Heard learned counsel for the petitioner and
learned Mr. P. K. Shahi, A.G. Bihar with Mr. Manish Kumar
Gp-4.

Counsel for petitioner submits that present criminal
writ application has been filed directing the higher police
agency to make proper, impartial and fair investigation of Sarsi
P.S. Case No. 145 of 2020 dated 07.11.2020 instituted for the
offence punishable under Sections 147, 148, 149, 323, 302/
120(B) of the I.P.C. against F.I.R. named accused respondent no.
8, Leshi Singh, Ruling Party M.L.A. of Dhamdaha constituency

and Minister of the Government of Bihar, against whom no local police can dare to make proper, impartial and fare enquiry/ investigation and arrest her and her close relative, orderly and shooter (respondent no. 9) rather tried to save her by tempering the evidences even then there is direct allegation against them.

Counsel further submits that the police after investigation have filed the charge-sheet against some of the accused persons and trial has commenced against them but charge-sheet has not been filed against the private respondent nos. 8 and 9, the petitioner seeks direction to make proper investigation by the higher police agency. Counsel further submits that the private respondents are influential people, therefore, intervention of the Court is required.

Learned A.G. Bihar submits that final form has already been submitted against the named respondent no. 8 and charge-sheet has been filed against respondent no. 9. Learned A.G. Bihar further submits that the petitioner has filed the complaint-cum-protest petition before Trial Court which is pending.

Counsel for the State further submits that filing the present criminal writ petition is unnecessary, particularly, when the petitioner has already filed complaint-cum-protest petition before the Court of Judicial Magistrate, 1st Class, Purnea against said final form against accused no. 8 which is pending.

During the course of arguments, counsel also submits that at the time of adducing the evidence, some material has come against the respondent no. 8 and for which, he has also filed an application under Section 319 of the Cr.P.C. before the Trial Court which is also pending.

Upon going through the arguments and the documents, it transpires to me that the present criminal writ application is not proper to entertain, due to the reason that protest-cum-complaint of the petitioner is already pending before the Court as well as his application under Section 319 of the Cr.P.C. is also pending and hence, this Court is not inclined to entertain this criminal writ petition for respondent no. 8, at this juncture.

So far as respondent no. 9 is concerned, counsel submits that charge-sheet has been filed under Section 173(2) of Cr.P.C. against him vide charge-sheet no. 09 of 2021 but even after filing of the charge-sheet in Sarsi P.S. Case No. 145 of 2020, respondent no. 9 has started evading his appearance. Process of Section 82 and 83 of Cr.P.C. both were issued but he is not securing his appearance.

The present writ petitioner is the informant of the said Sarsi P.S. Case No. 145 of 2020. Counsel also submits to the Court that witnesses are coming on various dates but due to non-production of accused from jail custody, the witnesses are

returned back from the Court without examination.

This Court is concerned with the present situation from which our judicial system is suffering and wants to quote the relevant part of Article published by Gautam Kumar Chaudhary (now Hon'ble Justice, Jharkhand High Court) in SCC online under heading "***Absenteeism from Criminal Justice: A Plea for Reform***", where he has mentioned that

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“There is wide gap between idealism and reality and it has become incumbent to bridge this gap and strike a balance to actualise the ideals in its execution. This is so because law and justice is not about only the high ideals as avowed in an enactment, but the way it really works out in achieving the ideals of speedy justice which has been accepted as a fundamental right of the citizen. Procedural laws are not an end in themselves, but are means to an end to achieve justice. There can be no two views that the criminal justice dispensation suffers from inordinate delays, low conviction rates and uncertainty about its final outcome. Inordinate delays not only cause hardship to the parties, loss of critical

evidence and compelling the informant/victim to succumb midway, but they also result in the loss of public confidence in the criminal justice system. A close examination of the delays can reveal a pattern of blatant misuse of the provisions by the accused persons to delay and scuttle criminal trials.

Our experience in Jharkhand is that in a very large number of cases the accused persons abscond at different stages resulting in the cases being delayed for want of appearance of the accused. In cases of multiple accused, when one or more accused abscond their case is split up from those in attendance before the court leading to multiplicity of cases arising from the same incidence. One criminal case leads to offshoot of different split up records in which the trial is to be conducted all over again with the arrest of the absconding accused.

Once the accused does not appear, the process is issued against the non-appearing accused and if it is proved that the accused has absconded, and that there is no immediate

prospect of his arrest, the court may draw a proceeding under Section 299 CrPC to record the evidence of the witnesses in absentia of the accused. The evidence so recorded does not finally dispose of the cases against the absconding accused, but are kept on record till the arrest or surrender of the absconding accused irrespective of the fact whether the accused is arrested after a long gap or is not arrested at all. Even after the appearance of the absconding accused is secured, the evidence recorded cannot be used unless and until the witness has died or his appearance cannot be secured without undue delay. The net result is that once the accused absconds, the criminal proceeding goes in limbo and criminal trial cannot crawl forward, the charge cannot be framed, evidence cannot be recorded, statement under Section 313 Cr.P.C. cannot be recorded, defence evidence cannot be recorded and judgment cannot be delivered. The entire process of criminal adjudication goes in hibernation till the arrest of the accused. This is how offenders of serious

offences, be it million dollars financial fraud cases, murder cases and sexual assault cases, the accused is able to evade adjudication and the entire adjudicatory process precariously remains poised at the will of the accused to appear before the court.

The main question that confronts us is the rationale behind the stay of the trial till the apprehension of a willfully absconding accused. It is quite understandable that the accused should be given a proper notice regarding the pendency of charge against him in a court of law, but the pertinent question is whether it is justifiable to put on hold the proceedings of the case till the appearance or arrest of the accused, even in cases where after a reasonable notice, the accused avoids appearance before the court. It will be gainful to review law and practice which is prevailing in other countries. The right of the accused to be present and be heard during criminal trial, which is the most important facet of fair trial, is not absolute and is subject to the condition that the accused is required to co-operate

during investigation, inquiry and trial. It cannot be made a pretext to abscond, delay and ultimately frustrate the criminal adjudication.

Some of the leading cases in UK, Australia and Canada mentioned below will show that in case the accused absconds deliberately, the trial proceeds in absentia and even judgment and sentence are also pronounced against such absconding accused.

*In **R v. Jones (Robert)**(No. 2)[11] (1972) 1 WLR 887 (CA): [1972] 2 All ER 731 as has been reported in the Halsbury's Law of England, "if the accused during the trial absents himself from court voluntarily, however, as, for example, by escaping from custody or failing to surrender to custody whilst on bail, the Judge, in his discretion may allow the trial to continue; and, if the accused is convicted, the Judge may sentence him in his absence."*[12] Para 945, p. 803, Halsbury's Law of England, 4th Edn., Reissue 11(2).

*In **R v. Jones (Anthony)**,[13] (2003) 1 AC 1 :*

(2002) 2 WLR 524 (HL) : [2002] UKHL 5, [2002] 2 All ER 113, the House of Lords dealt with the question, ‘Can the Crown Court conduct a trial in the absence, from its commencement, of the defendant?’

The facts of this case which can be culled out from the judgment are as follows: Mr. Jones allegedly robbed a post office in Liverpool and stole 87,000 pounds on 18th August, 1997. Mr. Jones and his co-accused were arrested, charged for the offence and granted bail. Both the defendants pleaded not guilty, therefore, a trial date was fixed for 1st June, 1998. However, warrants were issued for their arrest as both the defendants did not surrender themselves before the Crown Court for the trial. No arrest could be made, neither there was any surrender on the part of the defendants and the trial date continued to be relisted.

The Court transcripts as mentioned in the House of Lords’ judgment showed the initial reluctance of the Judge to proceed with the trial in those circumstances. However, when it

was pressed before him that “further delay would be very unfair to a large body of witnesses, some of whom had undergone a very traumatic experience, and after reference to the decided cases” it was ruled that the trial should begin after considering that the defendants had “deliberately frustrated the attempt of the prosecuting authorities to have the case finally concluded”. Both were convicted of conspiracy to rob and sentenced to 13 years’ imprisonment. An appeal was preferred against the conviction which was dismissed.

In the opinion rendered by Lord Bingham it has been observed that, ‘if a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended’. Further, in para 12

of the judgment he stressed:

[...] it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant. Happily, cases of this kind are very rare. But a system of criminal justice should not be open to manipulation in such a way.

*In **R v. Jones (Robert) (No. 2)**[14], (1972) 1 WLR 887 (CA) : (1972) 2 All E R 731, the House of Lords laid down the principles which should guide the courts in relation to the trial*

of the defendant in his absence. Some of those factors as enlisted in Point 5 of the Appendix attached with the judgment are being reproduced for ready reference:

- The nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be, and in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;*
- Whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;*
- The likely length of such an adjournment;*
- Whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;*
- Whether an absent defendant's legal representatives are able to receive*

instructions from him during the trial and the extent to which they are able to represent his defence;

- *The extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;*
- *The risk of the jury reaching an improper conclusion about the absence of the defendant;*
- *The seriousness of the offence, which affects defendant, victim and public;*
- *The general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;*
- *The effect of delay on the memories of witnesses;*
- *Where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.*

*In Australia, it was in **R v. McHardie and Danielson**[15] (1983) 2 NSWLR 733 (CCA) that the Court of Criminal Appeal in New South Wales recognised that a court might proceed with an accused's trial even in the case of a felony where the accused was absent. In that case the accused had escaped from lawful custody during the course of the trial. The Court said, "We accordingly find, in the ultimate, that on the weight of judicial authority absconding on bail during a trial amounts to a waiver by the accused to his right to be present at trial....We hold that the trial Judge had the discretion to continue the trial in the absence of the accused."*

*This case was referred to and followed by the South Australian Court of Criminal Appeal in **R v. Jones**[16] 1998 SASC 7021 (Aust) wherein Lander, J. stated the relevant principles as follows:*

"In my opinion a Court may proceed with a trial in the absence of an accused person. It may do so in circumstances where the accused person has indicated that he or she

waives a right to be present. An accused person will waive a right to be present when that person during the currency of the trial, for example, escapes from custody, or where the accused person unlawfully absents himself or herself in breach of a bail agreement, or where, without any good excuse or explanation, the person absents himself or herself from the proceedings. In any of those cases if the Court is satisfied that the accused has waived his or her right to be present during the trial, and that the trial may proceed without any injustice to that person except the injustice caused by the accused's own waiver, then the Court may proceed with the accused's trial. Any discretion to proceed in the absence of the accused however should be exercised sparingly.

As a general principle in Canada the accused has to be present during the trial. However, it is relevant to note Section 544 of the Canadian Criminal Procedure[17] S. 544(1):- Notwithstanding any other provision of this Act, where an accused, whether or not he is

charged jointly with another, absconds during the course of a preliminary inquiry into an offence with which he is charged, (a) he shall be deemed to have waived his right to be present at the inquiry, and (b) the justice –

(i) may continue the inquiry and, when all the evidence has been taken, shall dispose of the inquiry in accordance with Section 548, or

(ii) if a warrant is issued for the arrest of the accused, may adjourn the inquiry to await his appearance, but where the inquiry is adjourned pursuant to subparagraph (b)(ii), the justice may continue it at any time pursuant to subparagraph (b)(i) if he is satisfied that it would no longer be in the interests of justice to await the appearance of the accused.

(2) Adverse inference: Where the justice continues a preliminary inquiry pursuant to sub-section (1), he may draw an inference adverse to the accused from the fact that he has absconded.

(3) Accused not entitled to re-opening: Where an accused reappears at a preliminary inquiry that is continuing pursuant to subsection (1),

he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the justice is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the inquiry which provides for the procedure to be followed in cases where accused is absconding during inquiry.

*In the **United States**, Rule 43 of the Federal Rules of Criminal Procedure talks about the defendant's presence: when required, when not required and waiving the continued presence.*

[18] Rule 43. Defendant's Presence. —

- **When required *****
- **When not required *****
- **Waiving Continued Presence.**

(1) In General.— A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. –If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

*In **Taylor v. US**, [19] 1973 SCC OnLine US SC 224 : 38 LEd 2d 174 : 414 US 17 (1973) : 94 SCt 194 the Supreme Court of the United States rejected the petitioner's claim that mere voluntary absence from his trial cannot be construed as an effective waiver, unless it could be shown that he had knowledge or had been warned in express terms by the trial court about his right to be present at the trial but also that in his absence the trial would continue.*

From the above discussion, it is crystal clear that criminal jurisprudence world over does

not accord the accused persons an unfettered and absolute right to derail a criminal trial by absconding from it. In case of willful absconders, the trial proceeds and sentence is pronounced in the absence of the absconding accused.

In India, Section 299 Cr.P.C. is the only provision which addresses the issue, but in its present form it is ineffectual, because as stated earlier, it does not conclude the trial but merely records the evidence in the absence of an accused which cannot even be used after the arrest or appearance of the accused unless the conditions specified thereunder is present. Criminal adjudication hangs in uncertainty and with every passing month and year the prospect of justice becomes even more distant and dim. After a long lapse of time, vital evidence is lost, and the victim is too demoralised to appear before the Court to state the truth. In case of multiple accused, the agonies of the victim are further multiplied by being forced to depose in one case multiple times after the successive arrest of the accused

persons. The situation can be well imagined in gang rape cases where the prosecutrix can be subjected to the trauma of repeated cross-examinations after the arrest of different accused persons. Section 33(5) of the POCSO Act, 2012 mandates that the Special Court shall ensure that the child is not called repeatedly to testify in the court. This provision does not answer as to how the child can be saved from the agonies of repeated testimony, in cases of gang rapes where multiple trials take place against the accused who abscond and are apprehended after the trial commences against one or more accused.

We have been witness to high stake, multi-million financial fraud cases where the accused persons, having swindled huge public money, have absconded abroad and the trial has not commenced for want of appearance of the accused. Why should the law look askance and permit such dilatory tactics of the outlaws? The cases that hit the headlines are not the only ones, but our research revealed that they represented only the tip of the proverbial

iceberg and there are plenty of such cases where the trial of criminal cases suffer due to absconding of the accused.

*The menace of absconding of accused, the magnitude of its problem and its implication on criminal adjudication came in sharp notice of the High Court of Jharkhand in its order dated 14th September, 2018 in **Hari Singh v. State of Jharkhand**[20] 2018 SCC OnLine Jhar 2534 in which it was inter alia observed that “The Home Secretary, Government of Jharkhand is also expected to place this fact before the Government so that there may be some State amendment under Section 299 Cr.P.C.” In this case, it was noted by the Court that while appeal of some of the convicts was being heard by the Court, one of the accused who was declared an absconder was yet to be arrested. Consequently, directions were issued in this appeal to the Director-General of Police to apprise the Court regarding the status of absconders register (Form 16 of the Police Manual) of the entire State.*

*In yet another criminal appeal, **Gorkha Gope***

*v. State of Jharkhand[21], 2019 SCC OnLine Jhar 2221 the Division Bench of the Jharkhand High Court noted that the appeal was pending against some of the accused, whereas two accused persons had never submitted to the jurisdiction of the criminal justice system. This case involved Sections 302, 201, 307, 120-B and 34 IPC for which the FIR was instituted on 7th November, 2006. In this case, reference was made to three other similar criminal appeals where some of the accused were still at large, whereas the trial had culminated in case of the others. In this case, the DGP, Jharkhand filed an affidavit stating, inter alia, that pursuant to directions in **Hari Singh v. State of Jharkhand[22]**, 2018 SCC OnLine Jhar 2534 special drive for arresting absconders was undertaken and out of total 31,481 absconders verified till 31.3.2019, 17,669 absconders were either arrested or had surrendered or were declared dead as on 16.2.2019.”*

In addition to that the judgment of the Jharkhand State had proposed an amendment which has been notified as Code of Criminal Procedure, Jharkhand Amendment Act, 2020

(Jharkhand Act, 6 of 2022) reads as follows:

“An Act to further amend the Code of Criminal Procedure, 1973 (Act No.-2 of 1974) in its application to the State of Jharkhand.

Be it enacted by the Legislative Assembly of the State of Jharkhand in the Seventy One Year of the Republic of India as follows:-

1. Short Title, Extent and Application-

(1) This Act may be called the Code of Criminal Procedure (Jharkhand Amendment) Act, 2020.

(2) It extends to the whole of the State of Jharkhand.

(3) It shall come into force from the date of its publication in the official gazette.

2. The existing provision of sub section (1) of Section 299 of the Code of Criminal Procedure, 1973 (hereinafter referred as the Code) alongwith its heading shall be substituted as follows:-

“299. Inquiry and Trial in absence of accused

:- (1) Notwithstanding anything contained in the Code, if it is proved that an accused person has absconded, and there is no immediate

prospect of arresting him, trial of the case shall proceed in absentia in the Court of competent jurisdiction for the offence complained of and the Court shall not be bound to recall or rehear any witness, whose evidence has already been recorded or to reopen proceedings already held, but may act on the evidence already produced or recorded and continue the trial from the stage which the case has reached and pronounce Judgment at the conclusion of the trial.

Provided that the Court may assign a pleader for the defence of the absconding accused at the expense of the State.

Explanation : *The trial in absentia shall include framing of charges or explaining the substance of accusation, as the case may be against the absconding accused”*

3. After above sub section (1) a new sub section shall be inserted in the Code as follows:-

“(1) A – Notwithstanding anything contained in the Code, where a person accused of an offence and released on bail or on bond with or without sureties, fails to appear in Court

without any sufficient cause in accordance with the terms of the bail or bond, the Court may after service of summons to the accused proceed with the inquiry or trial in his absence and the Court shall not be bound to recall or rehear any witness, whose evidence has already been recorded, or to reopen proceeding already held, but may act on the evidence already produced or recorded and continue the trial from the stage which the case has reached and reached and pronounce judgment at the conclusion of trial.”

In the above background, this Court is referring this matter to the State of Bihar through its Law Secretary-cum-L.R. Government of Bihar to look into the matter seriously and enact and consider for enacting the law by Bihar Amendment at two or more places more specifically in Section 299 of Cr.P.C. where Section 1(A) has been added as like that of Jharkhand Amendment Act, 2020 (Jharkhand Act, 6 of 2020) as well as Amendment in Section 173(2)(e) of Cr.P.C. by which the word segment *“whether the accused has been arrested may be modified as whether the accused has been arrested or not”*.

By virtue of changing the above said provisions, the problem of absentism from criminal justice system shall be

resolved and the problem of criminal justice system that due to non-appearance/ absconding of accused persons, the criminal proceeding goes in limbo, criminal trial cannot crawl forward, charge cannot be framed, evidence cannot be recorded, statement under Section 313 of Cr.P.C. cannot be recorded, defence evidence cannot be recorded, judgment cannot be delivered, same witnesses have to come again and again for every bifurcation of trial which is practically not possible and trial and hearing be delayed years and years. The entire progress of criminal adjudication goes in hibernation till the arrest of accused.

The offenders of series offences, big financial fraud cases, murder cases, sexual assault cases, the accused became able to evade adjudication and the entire adjudicatory process precisely remain stopped at the will of the accused to appear or not to appear before the Court.

This Court is of the view that the above two amendment at the level of Bihar Legislative Assembly is possible to make criminal justice system fast and shall acquire finalization within a fixed span of time following due process of law.

This court refers this matter before the State of Bihar through its Law Secretary-cum-L.R. Government of Bihar for consideration to speed up the Criminal Justice System.

So far as the criminal writ petition for respondent no. 9 is concerned, this Court hereby direct the Director General of Police, Old Secretariat, Patna to take all possible steps to secure presence of respondent no. 9 before Court of law to face trial within four weeks’ from the date of production of this order.

With this direction, the present criminal writ application stands partially dismissed and partially allowed.

(Dr. Anshuman, J.)

sadique/-

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CAV DATE	
Uploading Date	
Transmission Date	