

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**APPLICATION FOR LEAVE TO APPEAL BY STATE NO.72 OF 2020**

The State of Maharashtra,  
Through Incharge Police Station  
Murud, Tq. and Dist. Latur.

.. Applicant

**Versus**

Sow. Daivshala w/o Sukhdev Ghodke  
Age: 50 years, Occu.: Agri.,  
R/o. Takli (S), Tq. and Dist. Latur.

.. Respondent

...

Mr. S. J. Salgare, APP for the applicant – State.

...

**CORAM : SMT. VIBHA KANKANWADI AND  
ABHAY S. WAGHWASE, JJ.**

**DATE : 21<sup>st</sup> June, 2023**

**JUDGMENT :- (Per Smt. Vibha Kankanwadi, J.)**

1. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal challenging the judgment and order dated 02.03.2020 passed by the learned Additional Sessions Judge, Latur in Sessions Case No.109 of 2014; thereby acquitting the respondent from the offence punishable under Sections 307, 147, 148, 149, 323, 324, 325, 326, 504 of the Indian Penal Code.

2. Heard learned APP Mr. S. J. Salgare for the applicant – State. With the able assistance of learned APP, we have gone through the record, which

was before the learned Trial Judge.

3. It will not be out of place to mention here that the present respondent appears to be the absconding accused No.9, but trial as against accused Nos.1 to 8 was conducted earlier i.e. Sessions Case No.74 of 2011 before the learned Additional Sessions Judge-3, Latur. Accused No.1 Lala Narayan Ghodke and accused No.2 Shivaji Narayan Ghodke were convicted for the offences punishable under Sections 307, 324, 325 read with Section 34 of Indian Penal Code. They have challenged their conviction by filing Criminal Appeal No.564 of 2012 before this Court. Original accused Nos.3 to 8 were acquitted of all the offences and it appears that the State has not filed any appeal challenging their acquittal. Now, the prosecution has come with the case that present respondent – original accused No.9 came to be arrested in 2014 and separate charge-sheet was filed. The said case has then been committed to the Court of Sessions.

4. After the committal of the case, charge was framed and when accused No.9 pleaded not guilty, trial has been conducted. Prosecution has examined in all seven witnesses to bring home the guilt of the accused and after taking into consideration their evidence and hearing both sides, the learned Trial Judge has acquitted original accused No.9. Hence, this application. (hereinafter the respondent is referred as accused No.9 for the sake of convenience).

5. Before we proceed, what we could find from the record is that the record and proceeding of Sessions Case No.74 of 2011 was before this Court. The learned Trial Judge had not taken pains to call for the record before the trial began. Rather, it appears that application Exhibit-39 was filed by the prosecution seeking permission to lead secondary evidence under Section 65(c) of the Indian Evidence Act and then after granting permission, the matter has proceeded. Section 65(c) of the Indian Evidence Act is reproduced for the sake of convenience :-

**“65. Cases in which secondary evidence relating to documents may be given.—** Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: –

(a) .....

(b) .....

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;”

Thus, it can be seen that in order to bring the case for application of Section 65(c), original should be either destroyed or lost or the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time. When the record is available with this Court and there are absolutely no efforts made by the learned Trial Judge to get the record, it cannot be said that the case

was befitting in Section 65(c). Merely because the prosecution could not have directly made an application to this Court (if that is the belief of the learned APP, who was conducting the matter before the learned Sessions Judge or even that of the learned Sessions Judge), in the interest of justice, the concerned presiding officer ought to have made a communication to this Court. Even if we take that it was the duty of the prosecution to make efforts to get the record, yet it ought to have been shown that the learned APP presenting the case before the Trial Court had made communication to the Government Pleader's office of this Bench and made a request to get the record and proceedings sent to the Trial Court for a specific purpose. Definitely, the Government Pleader/Public Prosecutor would have been then justified in making an application to this Court requesting for sending the record and proceedings to the Trial Court. When the procedure is not adhered to, we do not find that this was a case for granting permission to the prosecution to lead secondary evidence.

6. Another aspect that is required to be seen is that prosecution has examined in all 7 witnesses in the fresh case, whereas originally in Sessions Case No.74 of 2011, the prosecution had examined 13 witnesses. The procedure that is required to be adopted in recording the evidence against accused, who was allegedly absconding earlier, appears to have not been adhered to properly. We are not going into the merits of Criminal Appeal

No.564 of 2012 pending before this Court arising out of Sessions Case No.74 of 2011, but as against the present respondent is concerned, we have called the record to see as to how the Sessions Case proceeded as against the present respondent earlier. The record which we had called would show that the present respondent - Daivshala was never arrested at all. Though she was shown as accused No.9 in the charge-sheet, she was shown to be absconding and it was stated that the charge-sheet is filed under Section 299 of the Code of Criminal Procedure against her. After the charge-sheet was filed, the learned Chief Judicial Magistrate, Latur has taken note of their presence only and it appears that there was no effort to secure the presence of accused No.9. They then proceeded to make compliance under Section 207 of the Code of Criminal Procedure and then committed the case to the Court of Sessions for trial as contemplated under Section 209 of the Code of Criminal Procedure. Even after committal of the case, the then Additional Sessions Judge too had not taken pains to secure the presence of accused No.9 before framing charge. Charge was framed against accused Nos.1 to 8 only and even at the time of framing charge, the role allegedly attributed by prosecution to accused No.9 was not put to those accused Nos.1 to 8. In other words, the charge is framed by showing her as absconding accused, but no efforts were made for securing her presence, as it is apparent from the roznama. In this situation, we would refer to the decision in *Nirmal Singh Vs. State of Haryana (2000 (4) SCC*

41), wherein certain guidelines are given or provisions of Section 299 of the Code of Criminal Procedure with Section 33 of the Indian Evidence Act have been elaborated, which are as follows :-

“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 they 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 the first part of Section 299(1) of the Code of Criminal Procedure. In the case in hand, there is no grievance about non-compliance with 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 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 argument 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 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-48/A to PW-48/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 the opportunity of cross-examining the witnesses, it is, therefore, necessary that

the preconditions 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 preconditions before tendering the evidence. The Privy Council, in fact in the case of Chainchal Singh v. Emperor [AIR 1946 PC 1 : 1945 All LJ 550] AIR p. 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 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 had discharged its burden of proving that the witness was 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 misreception 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 preconditions 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 Code of Criminal Procedure is established. In the case in hand, after the process-server reported the fact of death of the persons concerned, 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 PW-48/A to PW-48/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 compliance with the first part of Section 299(1) is concerned, the same is established through the evidence of PW 28, who at the relevant time was working in the army as well as the SHO, 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 the 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 requirement of the 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 had already died. The High Court has also indicated as to how on each occasion, summons issued to the five witnesses had been returned back with the report that the persons were dead.

5. It is true as already stated that the Sessions Judge had not recorded an order to that effect and it would have certainly been in compliance with the requirement of Section 299 that the Court, while such statements are tendered in evidence should have recorded as to how the preconditions of the second part of Section 299 of the Code of Criminal Procedure had been complied with. But when the appellate court examines the records of the proceedings and comes to a conclusion that in fact those persons have died long before the summons on them to appear as witness, could be issued, the evidence thus tendered cannot be ignored from consideration, particularly, in a case like the one where all other eyewitnesses, 22 in number did not support the prosecution on being examined and there has been a gruesome murder inasmuch as the appellant killed four persons by indiscriminately shooting at them from his rifle, which was given to him in the cantonment. The High Court has recorded a finding that the factum of death of five witnesses, namely PW 2 Chhotu, PW 12 Jai Lal, PW 15 Prem, PW 10 Zohri Singh and PW 11 Jage Ram, has been established for the purpose of Section 299 of the Code of Criminal Procedure. In fact in the case of Jose v. State of Kerala [(1973) 3 SCC 472 : 1973 SCC (Cri) 372 : AIR 1973 SC 944] this Court had occasion to examine the question of treating the

evidence of a witness in the committal court as substantive evidence in trial under Section 33 of the Evidence Act. This Court had recorded the fact that at the time of trial, the witness had left for Coorg and was not available and it was not possible to serve summons on him and even a non- bailable warrant issued by the Court was returned with the endorsement “not available” and it is under those circumstances, the learned Sessions Judge brought on record the statement made by the eyewitness before the committal court as substantive evidence and marked the same as P-25. This Court negated the contention of the accused and held that the said statement had rightly been treated as evidence during trial. The circumstances under which the statement of the witness in the committal court had been tendered and treated as substantive evidence during trial are almost similar to the case in hand and rather in the case in hand, the accused never raises the contention even in this Court that the persons are not dead but raises the sole contention that it has not been established by the prosecution that the persons are not dead. As has been stated earlier, the High Court did record a conclusion on examining the records of the proceedings that the witnesses are dead and, therefore, their former statements under Section 299 could be treated as evidence. We see, no infirmity with the said conclusion of the High Court and we are, therefore, not in a position to sustain the argument of Mr. Gopal Subramaniam, learned senior counsel appearing for the appellant that the preconditions of Section 299 CrPC have not been complied with. Once the statements of those witnesses, exhibited as Exhibits PW- 48/A to PW-48/E, are considered, and the Sessions Judge as well as the High Court have relied upon the same and based the conviction, we see, no infirmity in the same, requiring our

interference with the conviction and sentence recorded by the High Court. In the aforesaid circumstances, it must be held that the prosecution case has been proved beyond reasonable doubt.”

7. We refer this case only to point out that the efforts should be made to arrest the absconding accused and those efforts should be till the proclamation is issued and upon the proper service of proclamation, the evidence can be recorded and under the circumstances of Section 299(1) of the Code of Criminal Procedure, the evidence can then be used. No doubt, in this case, the learned Trial Judge dealing with the fresh matter has not used the earlier evidence, but if there would have been the circumstance i.e. in case the deponent would be dead or incapable of giving evidence or cannot be found and his presence cannot be procured without an amount of delay, expense or inconvenience, then the evidence led earlier could have been read now also. Now, in the present case, the prosecution has given given explanation as to why all those 13 witnesses, who were examined in Sessions Case No.74 of 2011, were not examined. Withholding of the other witnesses was fatal to the prosecution case itself. Learned APP has brought to our notice the decision by the Hon’ble Single Bench of Madras High Court in *H. Aarun Basha Vs. The State*, [MANU/TN/7330/2018], wherein light has been thrown as to how to record evidence in such cases, where one of the accused is absconding and if he is traced out later, then how the

evidence already recorded can be used. It is observed that when there are several accused persons in a case and only some of them have appeared or even produced before the Court, then in that case, the Court should get itself satisfied that the presence of other accused cannot be secured within a reasonable time, having due regard to the right of such accused in attendance to have the case against them separated, the Court may split up the case and then proceed. We agree to those observations. In ***Central Bureau of Investigation Vs. Abu Salem Ansari and Another, [(2011) 4 Supreme Court Cases 426]*** also it was observed as follows :-

“5. 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 CrPC. 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.”

8. After noticing that in the case before it there was no application of sub-section (1) of Section 299 of the Code of Criminal Procedure, the

Hon'ble Supreme Court made it clear that the prosecution may rely on earlier evidence recorded in the earlier trial against the first respondent, subject to establishment of existence of any of the conditions precedent as described in first part of Section 299 of the Code of Criminal Procedure. We must also take note of the fact that Section 299 of the Code of Criminal Procedure tries to avoid calling the witnesses again and again. Of course, it can be used only when the conditions enumerated are fulfilled and, therefore, in the present case also, it ought to have been seen that whether Section 299 of the Code of Criminal Procedure could be properly pressed into service. With these preliminary objections, we would like to see whether any case is made out for grant of leave to file appeal challenging the acquittal of the respondent.

9. PW.2 Trimbak informant, in fresh case, has stated that on the day of incident when he was returning from the field around 7.00 p.m., the accused persons started abusing him. Accused - Shivaji Ghodke has assaulted on the head of his son Manik and when informant tried to intervene, two sons of Sukhdev assaulted him on his hands by stick. At that time, accused Daivshala hit a stone on his head. His son and wife came there. Thus, he had tried to say that when accused Shivaji was assaulting PW.3 Manik, informant had tried to intervene and then two sons of Sukhdev assaulted him by stick on his hand. P.W.3 Manik is consistent in

saying that Daivshala had hit the stone. Important point to be noted is that both of them have not uttered the word 'pelted'. Even if it is taken that the stone was pelted and it had hit Trimbak on his head, it is hard to believe that the injury would fall within the purview of Section 307 of Indian Penal Code. Another fact to be noted is that the two accused persons, who have been convicted earlier for the offence punishable under Sections 307, 324 and 325 of Indian Penal Code; Section 34 of Indian Penal Code has been invoked for convicting them and not Section 149 of Indian Penal Code. Those two accused persons as well as the other accused i.e. accused Nos.3 to 8 all have been acquitted of the offence punishable under Sections 147, 148, 149 of Indian Penal Code. That means, there was absolutely no unlawful assembly. At the cost of repetition, we would say that the prosecution has not challenged the said acquittal. We are of the opinion that when those facts were before the learned Additional Sessions Judge, who conducted subsequent trial, then he ought not to have framed the charge for the offence punishable under Sections 147, 148, 149 of Indian Penal Code.

10. The learned Judge of the fresh trial against accused No.9 has taken note of the contradictions and omissions in the testimony of P.W.1 to P.W.3 and it is mainly harped that all of them except P.W.1 admitted that there was darkness. In the said set of facts, a doubt has been raised as to

whether throwing of stone would have resulted in grievous injury. Several stones were lying at the spot and when it is said by P.W.2 Trimbak and P.W.3 Manik, the stone was allegedly hit by accused No.9, when only two of them were present. The other persons came later on at the spot. Later on, the facts are developed that accused No.9 had also hit stone to the wife of P.W.2 Trimbak. The panchas to the spot panchanama admitted that there were several stones lying on the ground and, therefore, the learned Trial Judge says that possibility cannot be ruled out that after Trimbak was assaulted by other accused, he would have fallen on those stones causing him injury. The evidence of independent witness P.W.5 Babruwan Bachate would show that he has turned hostile. Therefore, the learned Trial Judge has not relied on the interested words of the informant and his son P.W.1 Hanmant and alleged injured P.W.3 Manik. One more important aspect has not been clarified by the prosecution is as to what was the strong motive for accused No.9 for committing offence under Section 307 of Indian Penal Code. The scanning of the evidence would show that there is no perversity, though it appears that the procedure that has been undertaken was somewhere wrong. Investigating Officer has also not explained as to what efforts he had taken to secure the presence of accused No.9 till the filing of the charge-sheet, thereafter till the evidence began, till the date of his deposition in the fresh trial. Therefore, it was not brought on record by the prosecution that the accused No.9 was absconding. No case is made out for grant of leave when

there are such inherent lacunas in the procedure at the time of trial. The application stands rejected.

**[ ABHAY S. WAGHWASE ]**  
**JUDGE**

**[ SMT. VIBHA KANKANWADI ]**  
**JUDGE**

scm