

279

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-62987-2023 (O&M)
Date of decision: 12.02.2024

Atma Singh

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR. JUSTICE KARAMJIT SINGH

Present: Mr. J.S. Gill, Advocate for the petitioner.

Mr. Jai Narain, AAG, Punjab.

Mr. A.S. Rai, Advocate for respondents No.2 & 3.

KARAMJIT SINGH, J. (ORAL)

CRM-3121-2024

1. This is an application filed under Section 482 of Cr.P.C for preponement of the date of hearing in the main case from 21.03.2024 to an early date.
2. For the reasons stated in the application, the same is allowed and the date of hearing in the main case is preponed from 21.03.2024 to today and the same is taken on board today itself for hearing.

CRM-M-62987-2023

1. Instant petition has been filed by the petitioner/co-complainant under Section 482 Cr.P.C seeking quashing of order dated 14.11.2023

Annexure P-3 whereby the application filed by petitioner under Section 33 of Evidence Act for proving the previous statement of PW-Gurdial Singh (since deceased) recorded in the present case having FIR No.37 dated 18.02.2013 registered under Section 302, 201 read with Section 34 of IPC, Police Station Dakha, District Ludhiana was dismissed by the learned trial Court of Additional Sessions Judge, Ludhiana.

2. The brief facts of the case are that FIR No.37 dated 18.02.2013 under Section 302, 201 read with Section 34 of IPC, Police Station Dakha, District Ludhiana was registered against Deepak Kumar, Manjit Singh and respondents No.2 & 3 namely Balbir Singh and Sarabjit Singh @ Sarba. During investigation, police failed to arrest respondents No.2 & 3 as well as Manjit Singh and finally they were declared proclaimed offenders vide order dated 27.07.2013. Co-accused Deepak Kumar was arrested and challaned by police and he faced trial and was acquitted by the learned trial Court vide judgment dated 04.10.2021. That during the aforesaid trial PW-Gurdial Singh was examined on behalf of the prosecution and he was also cross-examined by defence counsel appearing on behalf of Deepak Kumar.

3. Subsequently, both respondents No.2 & 3 were arrested and supplementary challan was presented against them and now they are facing trial in the Court of Additional Sessions Judge, Ludhiana. In the meantime, Gurdial Singh who earlier appeared as a prosecution witness against co-accused Deepak Kumar, died. The prosecution/petitioner filed an application under Section 33 of Evidence Act to prove the previous statement of PW-Gurdial Singh (since deceased), recorded in the trial conducted against co-accused Deepak Kumar. The said application was contested by respondents

No.2 & 3 and was dismissed by the learned trial Court vide order Annexure P-3 dated 14.11.2023 on the ground that PW-Gurdial Singh has since died but earlier when co-accused Deepak Kumar faced trial, respondents No.2 & 3 were proclaimed offenders and thus, had no opportunity to cross-examine the said prosecution witness and that the case law referred by the State counsel is not applicable to the facts of the present case and the statement of PW-Gurdial Singh recorded in previous proceedings is not relevant and cannot be read against the present accused.

4. Being aggrieved, petitioner has filed the present petition.

5. I have heard the counsel for the parties.

6. The counsel for the petitioner submits that the impugned order is totally illegal and deserves to be set aside. The statement of PW-Gurdial Singh, so recorded in earlier proceedings should be read in evidence under Section 299 Cr.P.C and Section 33 of Evidence Act as after recording of his statement PW-Gurdial Singh died. That the said statement of PW-Gurdial Singh recorded by the trial Court even if the witness was not cross-examined on behalf of respondents No.2 & 3, is relevant and admissible in evidence as per the law laid down by Hon'ble Supreme Court in ***V.M. Mathew Vs. V.S. Sharma 1995 (6) SCC 122.***

7. The counsel appearing on behalf of the State also supported the case of petitioner and submitted that the impugned order is not sustainable in eye of law.

8. The counsel for respondents No.2 & 3, on the other hand contended that there is no illegality or perversity in the impugned order. It is further contended that at the time when the statement of PW-Gurdial Singh

was recorded before the trial Court in a trial against co-accused Deepak Kumar, respondents No.2 & 3 were not available and as such they were not afforded any opportunity to cross-examine PW-Gurdial Singh, who has now died. It is further submitted that the incomplete statement of PW-Gurdial Singh is not admissible in evidence. It is further contended that the present petition deserves to be dismissed being devoid of merits.

9. I have considered the submissions made by counsel for the parties.

10. In order to decide the present controversy, it is relevant to refer to Section 299 Cr.P.C and Section 33 Evidence Act which read as under:-

Section 299 Cr.P.C. – 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 try [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 witness 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 limit of India.

AND

Section-33, Evidence Act-Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated-

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or

expense which under the circumstances of the case, the Court considers unreasonable :Provided that the proceeding was between the same parties or their representatives in interest;that the adverse party in the first proceeding had the right and opportunity to cross-examine;that the questions in issue were substantially the same in the first as in the second proceeding.Explanation. - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

11. On conjoint reading of the above statutory provisions, it is apparent that if, the accused has absconded in a criminal case and there is no immediate prospect of arresting him, the witnesses produced by the prosecution can be examined in the absence of accused and the depositions of such witnesses can be given in evidence against him in subsequent trial conducted on his arrest, if the witness is dead or has become incapable of giving evidence or in other circumstances as prescribed. Thus, the provision of Section 299 Cr.P.C carves out exception to the general provisions of Section 33 of the Evidence Act with the object to secure the ends of justice, so that an accused, who was earlier absconding, cannot take advantage of his own wrong and may not succeed in frustrating the very purpose of criminal justice system.

12. Undoubtedly, the accused has every right and opportunity to cross-examine the prosecution witnesses, but if he himself does not avail any such opportunity and avoids from appearing in the trial Court to cross-examine the witnesses, then it could be easily taken that he has waived his right to cross-examine the witnesses recorded under Section 299 Cr.P.C. However, to protect the rights of the accused, the depositions of only such witnesses recorded in absence of the accused, under Section 299 Cr.P.C are admissible in subsequent proceedings on the arrest of the absconded

accused, who are dead or incapable of giving evidence or in similar other circumstances. If such circumstances do not exist at the time of subsequent proceedings, the witnesses already examined under Section 299 Cr.P.C have to be re-examined in subsequent proceedings on arrest of the accused who was earlier absconding.

13. The Hon’ble Supreme Court in *Nirmal Singh Vs. State of Haryana 2000 (4) SCC 41* has held that the procedure provided in Section 299 Cr.P.C is thus, an exception to the principle embodied in Section 33 of the Evidence Act, inasmuch as under Section 33 of Evidence Act, the evidence of a witness, to 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.

14. In the present case, all the conditions prescribed under Section 299 Cr.P.C and Section 33 of the Evidence Act are fulfilled.

15. In light of the above, the learned trial Court has erred in dismissing the application filed by the prosecution under Section 33 of Evidence Act. Consequently, the present petition is hereby allowed and impugned order dated 14.11.2023 Annexure P-3 is hereby set aside. The learned trial Court is directed to permit the prosecution to tender and prove in evidence, the deposition of PW-Gurdial Singh recorded during trial of co-accused Deepak Kumar, against respondents No.2 & 3 and proceed further in accordance with law.

12.02.2024
Yogesh

(KARAMJIT SINGH)
JUDGE

Whether speaking/reasoned:-
Whether reportable:-

Yes/No
Yes/No