IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.R. 3012 of 2018
With
CRAN 1 of 2019
(Old No: CRAN 1976/2019)
With
CRAN 2 of 2021

KADER KHAN
Vs.
STATE OF WEST BENGAL

For the petitioner	:	Mr. Aloke Sengupta, Sr. Adv. Mr. Suraj Prakash, Adv. Mr. Rajdeep Majumder, Adv. Mr. Amitabha Ray, Adv.
For the State	:	Mr. Saswata Gopal Mukherjee, Ld. P.P. Mr. Sandip Chakraborty, Adv. Mr. ParthaPratim Das, Adv.
Heard on	:	22.02.2022, 01.03.2022, 02.03.2022, 08.03.2022, 17.03.2022
Judgment on	:	06.05.2022

Joymalya Bagchi, J.:-

The case reminds me of an age-old adage 'to close the stable door after the horse has bolted'. Caught between an absconding accused and unfortunate demise of a rape victim, the prosecution belatedly took out an application praying the evidence of the rape victim recorded in the course of

trial of other accused persons (while the petitioner was absconding) be read in evidence in the subsequent trial of the absconder after his arrest.

For a better appreciation of the matters in issue, a brief sketch of events leading to the present imbroglio is desirable:-

On the basis of written complaint of the rape victim against the petitioner and one Nishad Alam, Sumit Bajaj, Md. Nasir Khan, and Md. Ali Khan, herein the Criminal Case being Park Street P.S. Case No. 29 dated 09.02.2012 under sections 376(2)(g)/120B/323/506/34 of the Indian Penal Code was registered for investigation. On 18.02.2012 three accused persons, namely, Nishad Alam, Sumit Bajaj and Md. Nasir Khan were arrested. As the petitioner and one Md. Ali Khan could not be arrested, on 05.03.2012 warrant of arrest was issued against them. On 12.04.2012 proclamation was issued against the absconding accuseds, that is, the petitioner and Md. Ali Khan. Proclamation was published on 13.04.2012 by fixing up notices at the residence of the petitioner and the other absconder, i.e., Md. Ali Khan. On 16.04.2012 a proclamation was affixed at the premises of the Court and published in The Kolkata Gazette as well as the Hindustan Times. Inspite of exhaustion of the aforesaid processes, petitioner and Md. Ali Khan could not be apprehended. Finally charge-sheet was filed against the co-accuseds Nishad Alam, Sumit Bajaj and Nasir Khan showing the petitioner and Md. Ali Khan as absconders. By order dated 10.05.2012 the committing Court took cognizance and since the petitioner and Md. Ali Khan were absconding and

there was no imminent chance of their apprehension, the case against them was segregated, that is, filed. Subsequently, upon supply of copies, the case along with the accused persons who were before the Court was committed to the Court of Sessions for trial and disposal. In the meantime, two of the co-accuseds, namely, Md. Nasir Khan and Sumit Bajaj preferred applications for bail before the High Court being C.R.M. 16294 of 2012 with C.R.M. 16608 of 2012. While rejecting their bail prayer on 19.10.2012, a Bench of this Hon'ble Court noted the abscondence of the petitioner and Md. Ali Khan and observed as follows:-

> ***"The Trial Court is directed that by next date if police is not able to apprehend the absconding accused, then in that case it would be proper for the Court to split up the case of the petitioners for trial from the absconding accused persons and to proceed with their trial strictly in terms of the provisions of section 309 Cr.P.C."***

Be it noted, the case against the absconders had already been segregated by then and committed to the Court of Sessions for a trial of other accuseds.

Thereafter, the trial Court proceeded to frame Charge under section 376(2)(g) of the Indian Penal Code against the co-accused persons who had been put on trial and under section 120B/323/506/34 of the Indian Penal Code against Nishad Alam and Md. Nasir Khan. In the charge, the petitioner and Md. Ali Khan were referred to as absconders. In the course of the trial, prosecution examined 45 witnesses including the de-facto complainant/ rape victim. However, no application under section 299(1) of Cr.P.C. was taken out

by the prosecution before the trial Court for a direction that the evidence recorded in the trial be recorded against the absconders.

In conclusion of trial, three co-accused persons who were put on trial were convicted and sentenced for commission of offence under section 376(2)(g) of the Indian Penal Code. Two of them, namely, Nishad Alam and Md. Nasir Khan were also convicted and sentenced under section 120B/323/506/34 of the Indian Penal Code. All the convicts preferred appeals before this Court against their conviction and sentence while State has filed appeal for enhancement of their sentences. The appeals are pending consideration before this Court. Unfortunately, the rape victim died on 13.03.2015.

On 30.09.2016 petitioner and the other absconder Md. Ali Khan were arrested and put on trial. Charge was framed against them. In the course of trial, prosecution took out an application under section 33 of the Evidence Act praying that the evidence of the de-facto complainant/ rape victim, as well as her statement under section 164 Cr.P.C. be read into evidence against the petitioner and the other absconder as the victim lady had expired on 13.03.2015. Petitioner filed objection to such prayer. Upon hearing the parties, trial Court by the impugned order allowed the prayer of the prosecution and directed that the evidence of the rape victim who had admittedly expired on 13.03.2015 as well as her statement before Magistrate

be read into evidence against the petitioner. Challenging such order petitioner is before this Court.

Mr. Sengupta, learned Senior Advocate appearing for the petitioner submits prayer of the prosecution is wholly misconceived on various grounds. Firstly, application on behalf of the State was made under section 33 of the Evidence Act without reference to section 299(1) of Cr.P.C. Secondly and more fundamentally, it is argued prosecution was required to take out an application under section 299(1) of Cr.P.C. in the course of the earlier trial and prove that the petitioner was absconding and there was no imminent prospect of his arrest. Upon proof of the aforesaid facts the Court could have directed the evidence to be recorded against the absconder, that is, the petitioner. No such prayer was made and consequentially no direction was passed by the trial Court that the evidence recorded in the trial of the co-accuseds be treated to have been recorded against the absconding accused also. Having failed to do so, upon arrest of the absconding accused prosecution cannot, at this stage, invoke the aforesaid provision of law and pray that the evidence recorded in the earlier proceeding be used against the accused as the witness is dead. When the statute requires a thing to be done in a particular manner it must be done in that manner or not at all. Hence, he prayed that the impugned order be set aside.

Mr. Mukherjee, learned Public Prosecutor with Mr. Das argued it is self-evident that the petitioner had absconded and there was no imminent possibility of his arrest. Warrant had been issued but remained to be executed. Thereafter, proclamation was issued and published. Still then, petitioner could not be apprehended. Under such circumstances, the committing Court found that the petitioner was absconding and there was no imminent possibility of his arrest and directed the case of the absconders be filed, that is, segregated from that of the accused persons who were before the Court. These materials on record including the finding of the High Court in order dated 19.10.2012 in C.R.M. 16294 of 2012 with C.R.M. 16608 of 2012 leave no doubt in one's mind that the petitioner had absconded and there was no imminent possibility of his arrest. Even the trial Court while framing charge against the co-accused persons who were facing trial described the petitioner as an absconder. Hence, the preliminary fact that the petitioner had absconded and there was no imminent prospect of his arrest during the trial of other accused persons has been duly established. Nothing has been placed on record on behalf of the petitioner to show that he was available to investigating/prosecuting agency during the earlier trial but had not been arrested. The other condition that the victim lady had expired is undisputed. Thus, both the pre-conditions to invoke section 299(1) Cr.P.C. are satisfied. Petitioner had the opportunity to show that prosecution had failed to prove he had absconded and could have been brought on trial with due diligence but

has failed to do so. By his deliberate act of abscondence he had waived his right to be present and cross-examine witnesses. Hence, failure to invoke section 299(1) Cr.P.C. during the trial of the co-accuseds is an irregularity and has not prejudiced the petitioner. Under such circumstances, Trial Court did not fall in error in permitting evidence of the deceased victim to be used against the petitioner.

Section 33 of the Evidence Act provides that the evidence of a witness in a judicial proceeding is relevant and may be used in a subsequent judicial proceeding or a later stage of the same proceeding to prove the facts contained therein when the witness is dead or cannot be found or his presence cannot be obtained without unreasonable delay or expenses or is kept out of the way by the adverse party. To invoke the aforesaid provision, the following pre-conditions are to be satisfied:-

(a) Proceeding is between the same parties or their representatives;
(b) Adverse party in the first proceeding had the right and opportunity to cross-examine the witness;
(c) The questions in issue are substantially same in both the proceedings.

Explanation to this section clarifies in a criminal trial or enquiry proceeding shall be deemed to be between the prosecutor and the accused.

As an absconding accused is not present in the course of trial of other accused persons and has no opportunity to cross-examine the witnesses

during the proceeding, there is difficulty in invoking section 33 of the Evidence Act in respect of an absconder. To obviate such difficulty, legislature incorporated section 512 in the Code of 1898. The same provision with slight modification (which may not be necessary for our deliberations) was incorporated as section 299 in the new Code of 1973.

Section 299 of the Code of Criminal Procedure reads as follows:-

> ***"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 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.***
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> ***(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 de*ad or incapable of giving evidence or beyond the limits of India."**

The provision, inter alia, provides in the event the prosecutor has proved that an accused has absconded and there is no imminent possibility of his arrest, the prosecution may call upon the committing or trying Court, as the case may be, to record the evidence of the witnesses in the absence of

the absconding accused and thereafter on the arrest of the absconding accused, if such witness is dead or incapable of giving evidence or cannot be found or his presence cannot be obtained or procured without unreasonable delay, expense or inconvenience, the evidence so recorded in the earlier proceeding may be used against the absconder who has been subsequently arrested. Thus, section 299 of the Cr.P.C. is not only an exception to the ordinary rule that evidence in a criminal trial is to be recorded in presence of an accused but also carves out an exception to the general rule of relevancy engrafted in section 33 of the Evidence Act and permits the evidence of a dead witness to be used against an absconder in a subsequent trial although the absconder did not have opportunity to cross-examine such witness in the earlier proceeding.

In this regard reference may be made to ***Nirmal Singh Vs. State of Haryana***[1] wherein the Apex Court held as follows:

> "***4. ... 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.***"

However, to resort to section 299(1) of the Cr.P.C. prosecutor is to establish two pre-conditions:-

[1] (2000) 4 SCC 41

(a) To prove before the committing/trying Court during the trial of other accuseds that an accused has absconded and there is no imminent possibility of his arrest and under such circumstances, obtain a direction from the committing/ trying Court the evidence of the witnesses be recorded against the absconder also.

(b) In the event a witness whose evidence has been so recorded against the absconder in the earlier proceeding is dead or incapable of being produced or his attendance cannot be procured without unreasonable delay and expenses or inconvenience during the subsequent trial of the said absconder, the evidence of such witness may be used against the absconder in the subsequent trial of the absconding accused upon arrest. Invocation of the aforesaid provision leads to the negation of the following rights of the absconding accused:

(i) A right of evidence being recorded in his presence[2]

(ii) A right of cross-examination of such witness[3]

In ***Jayendra Vishnu Thakur Vs. State of Maharashtra And Another***[4] the Court held the aforesaid rights are statutory in nature and form a part of the fasciculi of fair trial rights of an accused which are recognized by

[2] Section 273 of the Code of Criminal Procedure, 1973

[3] Section 137 of the Indian Evidence Act, 1872

[4] (2009) 7 SCC 104 [see para 25]

international instruments like International Covenant on Civil and Political Rights to which India is a signatory. It may not be out place to refer to Article 14(3)(d) of the International Covenant on Civil and Political Rights which encapsulates the aforesaid statutory rights as follows:-

> **"*Article* 14. *** *** ***
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> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**
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> **(a)** *** *** ***
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> **(b)** *** *** ***
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> **(c)** *** *** ***
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> **(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"**

Any procedure which negates the aforesaid fair trial rights of an accused must be strictly construed and scrupulous compliance thereof is imperative.

It is imperative that the prosecutor for invoking the provision under section 299(1) of the Cr.P.C. against an absconding accused must prove before the committing/ trying Court that the accused had absconded and there is no imminent possibility of his arrest and upon proof of such facts the Court may permit the prosecution evidence led during the trial of other accuseds be recorded against the absconding accused also. If the evidence is

so recorded against the absconder, it may be used against him in the subsequent trial upon his arrest if the witness is dead or incapable of giving evidence or is not found or his attendance cannot be procured without unreasonable delay, expenses or inconvenience. Admittedly, in the present case, prosecutor did not make any prayer before the trial Court during the earlier trial of the co-accuseds that the prosecution evidence recorded in the said trial be also recorded against the absconder.

To wriggle out of such situation, Mr. Mukherjee argued there was substantial compliance as the materials on record show beyond a shadow of doubt that the petitioner had absconded and there was no immediate chance of his apprehension. In support of his contention he took us through the orders of the committing Court particularly orders dated 05.03.2012, 12.04.2012 and 10.05.2012 wherefrom it appears warrant of arrest and proclamation were issued and published against the petitioner and finally charge-sheet was filed recording the petitioner was absconding and there is no imminent possibility of his arrest. Under such circumstances, he submitted the committing Court segregated/ split the case of the petitioner and committed the case of the other accuseds to the Sessions Court for trial. Upon commitment, the trying Court perused the aforesaid materials and being satisfied described the petitioner and Md. Ali Khan as absconders in the charge framed against the accused persons. Hence, the first pre-condition of section 299(1) of the Cr.P.C., that is, abscondence and abscondence

without imminent possibility of arrest are proved in the instant case. By the time the absconders were arrested and put on trial, the victim had expired. This is undisputed and therefore the trial Court was right in directing that her evidence be used in the trial of the absconder. He emphatically argued the absconders who had evaded the process of law cannot take advantage of their own wrong. By their conduct they had waived their right to cross-examination.

In this backdrop, let me consider whether in the present case the prosecution had complied with the first pre-condition under section 299(1) of the Cr.P.C. Although analysis of the materials on record would show that the petitioner had absconded and there was no imminent possibility of his arrest, it is an admitted position no effort was made in the course of trial of the co-accuseds to have the prosecution evidence recorded against the absconding petitioner. I am unable to accept the contention of the Public Prosecutor that such exercise could be undertaken during the subsequent trial upon the arrest of the petitioner and have the evidence in the earlier trial used against him in the event the witness is dead. A plain reading of section 299(1) Cr.P.C. would not yield to such interpretation. The provision is an enabling one which provides an opportunity to the prosecutor upon proof of abscondence and absence of any possibility of his immediate apprehension, to obtain direction from the trying Court that the prosecution evidence led against the co-accuseds in the trial be recorded against the absconder also. Thereupon, the

prosecution would be entitled to use such evidence in the subsequent trial upon the arrest of the absconder if the second condition, i.e., death or non-availability of the witness is proved. The law casts a burden on the prosecutor to invoke the aforesaid provision in the earlier trial and obtain a direction from the trying Court, as aforesaid. Once prosecutor fails to do so, it cannot during the subsequent trial upon arrest of the absconder retrospectively obtain a direction that the evidence recorded in the earlier case be used against the absconding accused upon his arrest. In this regard, reference may be made to ***Vijay Ranglal Chorasiya Vs. State of Gujarat***[5] wherein the Apex Court disapproved the High Court to rely upon the evidence recorded in an earlier trial of co-accuseds against the absconder although such evidence had not been transferred in accordance with the provisions of section 299(1) of Cr.P.C. The Court held:

> ***"21. The High Court does not appear to have taken note of the above rejection order. It has, on the contrary, proceeded on the basis that the evidence adduced in the previous trial was evidence in the case against the appellant validly transferred under Section 299 of the Code of Criminal Procedure. That apart even assuming that the deposition in terms of Section 299 of the Code of Criminal Procedure had been transferred to the case against the appellant, it may have been open to the petitioners to argue that such a transfer was not valid in the eyes of law and could not, therefore, be read against him."***

[5] (2014) 12 SCC 400

Reference may also may be made to ***A.T. Mydeen and Another Vs. Assistant Commissioner, Customs Department***[6] wherein the Apex Court held that evidence recorded during the course of trial of a co-accused cannot be used against an absconder who is tried separately but for the same offence.

The proposition of learned Public Prosecutor if accepted would amount to re-writing section 299(1) of the Cr.P.C. The aforesaid provision of law does not provide for a trial in absentia of an absconding accused. In the event an accused is absconding and his immediate arrest is not possible, a right accrues to the prosecutor upon proof of such facts to have the evidence led in the trial of co-accused recorded against the absconder also. Such right, however, has to be exercised by the prosecutor in the course of the earlier trial. If the prosecutor opts not to exercise such right, it cannot lay the blame at the door of the absconding accused, if during the subsequent trial on his arrest vital evidence is lost due to death or non-availability of the witness. The facts of the present case show prosecution did not invoke the beneficial provision of section 299(1) of Cr.P.C. during the earlier trial to ensure evidence led in the said trial was recorded against the absentee accused so that the same may be used in the event of an unfortunate contingency. Section 299 Cr.P.C. is an enabling provision of abundant caution which the prosecutor must invoke in the course of the earlier trial of co-accuseds or not at all. Scheme of the aforesaid provision envisages an adverse order

[6] 2021 SCC OnLine SC 1017 (see para 40)

permitting recording of evidence behind the back of an absconder when the witness is available and not retrospectively after the witness has died. A direction must be obtained during the earlier trial when the witness is available and her evidence is recorded against the absconder also. Ex-post facto direction during subsequent trial is of no consequence as the witness is either dead or unavailable at that material point of time. Such a direction would certainly operate to the prejudice of an accused by retrospectively extinguishing his right to cross examine after the witness had died and not contemporaneously, that is, when she was available and examined during the earlier trial. Resort to such retrospective direction in the course of subsequent trial is clearly against the mandatory provisions of section 299 of Cr.P.C. It cannot be treated as substantial compliance or a curable irregularity protected under section 465 of Cr.P.C. In ***A. Devendran vs. State of Tamil* Nadu**[7] the Apex court held Section 465 Cr.P.C. cannot be treated to be a panacea for every illegality. When a proceeding is conducted in breach of a mandatory provision or suffers from jurisdictional error, such defect cannot be cured by reference to section 465 Cr.P.C. The Court held as follows:

> ***"15. ...Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. But by***

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[7] (1997) 11 SCC 720

> ***no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code. In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. The aforesaid provision cannot be applied to a patent defect of jurisdiction. Then again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice."***

In ***Atma Ram and Others vs. State of Rajasthan***[8] the Apex Court was called upon to decide whether non-examination of some witnesses in presence of the accused vitiates the entire trial. It held such defect to be a curable one as the prejudice caused to the accused may be remedied by directing re-examination of the said witnesses in the course of re-trial. The fact situation is entirely different here. If the prosecutor fails to record evidence against the absconder when witnesses are being examined during the trial of other accused persons, right of the absconder to have the said

[8] 2019 (20) SCC 481

witnesses examined in his presence subsists during his trial upon arrest even if the witnesses are dead. There is no provision in the Code which empowers the trial Court to forfeit such right by giving a retrospective direction in the course of subsequent trial that the evidence of the dead witness be deemed to have been recorded against the absconder in the earlier trial.

A direction by the trying Court in the course of subsequent trial of an absconder to treat the evidence recorded in an earlier trial of co-accused facing the same charge is an error in jurisdiction. No Court has jurisdiction to transfer evidence recorded in an earlier trial after its completion as evidence against an accused who had not been put up for trial in the earlier case even if both the trials are in respect of the self-same charge. This is against the fundamental principle of criminal jurisprudence that each criminal case has to be tried on the basis of evidence led in the said case and not by reference to evidence in other cases. Trial Court erred in law to hold such jurisdictional error was a curable irregularity and ought to be condoned under Section 465 Cr.P.C. in the interest of justice.

In ***State of Hyderabad Vs. Bhimaraya***[9] a Division Bench of the High Court held there cannot be an ex-post facto invocation of section 512 of the old Code. The Court held as follows:

> ***"5. It also appears to us that the evidence recorded in the case of the trial of a co-accused of the absconder or other persons***

[9] AIR 1953 Hyd 63

> ***cannot by 'ex-post facto' operation be treated as evidence recorded under Section 512 for the purpose of utilising it at the trial of the absconder when he is apprehended and tried subsequently. The prosecution should move the Court and prove by evidence before the recording of evidence against the co-accused that certain persons are absconding and that it is not possible to apprehend them. It is for the Court thereafter to give directions that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under Section 512 of the Cr.P.C as well as against the persons present and on trial. The above view was also expressed by a Bench of the Patna High Court in — 'Emperor v. Baharuddin', 39 Cri LJ 281 (Pat).***
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> ***6. Even though the prosecution has stated in the charge-sheet that the evidence to be recorded against the co-accused should be recorded under Section 512 of the Cr.P.C against the absconding accused, neither the proof relating to the absconding of the accused, nor the fact that there is no immediate prospect of their being apprehended in the near future was given. The direction of the court with respect to the recording of evidence under Section 512 of the Cr.P.C against the alleged absconding accused was also not sought, nor has the court given any such directions. In these circumstances, we cannot order the evidence already recorded as having been deemed to have been recorded under Section 512 of the Cr.P.C. We, however, accept the reference of the learned Sessions Judge and set aside the order contained in the passage of the judgment of the Munsiff-Magistrate, Yadgir dated 31-8-1951 cited above."***

The bench had drawn inspiration from the decision of the Patna High Court in ***King Emperor Vs. Baharuddin***[10] wherein the Court had lamented the lack of promptitude of the prosecutor to invoke the aforesaid provision:

> "**...I*t is regrettable that so often in cases where an accused person is tried and other persons accused are absconding, it is subsequently found that no proper steps have been taken at the time of the former trial to prevent necessary evidence from being lost by death of the witnesses or otherwise. I do not understand it to be laid down by the Judges in Sheoraj's case, nor is it in my view the law that for the purpose of being used under section 512 the depositions of witnesses must be recorded over again in a***

[10] 1939 Cri LJ 281 (Pat)

> ***separate proceeding. It will suffice if at the commencement of the hearing the prosecutor brings to the notice of the court the fact that such a person is absconding, examines a witness or witnesses to prove that fact and obtains a direction of the court that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under section 512 as well as against the person present and under trial.***"

Karnataka High Court in ***Gavisiddiah vs State of Karnataka***[11] has reiterated the ratio in ***Bhimaraya*** (supra).

I respectfully concur with the ratios laid down by the aforesaid High Courts.

Words used in section 299 of the Cr.P.C. cast an unambiguous duty on the prosecutor to obtain a direction from the committing/trying Court that prosecution evidence led in the trial of co-accused be also recorded against the absconder. When words of a statute are clear and unambiguous and no alternate intention can be contextually derived therefrom, it is not within the domain of a Court to re-write the statute and hold that evidence recorded in the course of an earlier trial against co-accused be deemed to have been automatically recorded against the absconder even when the prosecutor has not chosen to invoke the aforesaid provision of law.

It is true Courts have the power to interpret a provision purposively so as to give effect to the intention of the legislature and remedy the wrong which the lawmaker seeks to correct. However, it cannot stretch the words of

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[11]1975 Cri LJ 285

the statute to such an extent that an enabling provision to be invoked at the discretion of a party and to the prejudice of his adversary is converted to a mandatory one. Hence, I am unable to accept the ratio in ***Farida @ Farid Ahmad Vs. State of Chattisgarh***[12] wherein the Chattisgarh High Court referring to ***Central Bureau of Investigation Vs. Abu Salem Ansari And Another***[13] held as follows:

> ***"11. If we peruse the proceedings it would reflect that the Revisioner had deliberately avoided his arrest and remained an absconder for a long time. In the event if some of the evidence have been recorded the witness of which now cannot be produced before the Court for reasons beyond the power and authority and control of the prosecution, the same cannot be taken into consideration for the advantage of the accused person for the simple reason that if the same is permitted then every accused in a criminal case would try to evade arrest and would wait till the material witnesses have either expired or are not traceable and then surrender before the Court and subject to trial which would be always detrimental to the interest of the prosecution to prove a case against an accused person on account of either the death of the witnesses or they getting untraced.***
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> ***13. The accused person who avoids trial at the initial stage by remaining absconding and subsequently at a later stage when he knows that the material witnesses are not available on account of their death or being not traceable cannot be given the benefit of the evidence which was recorded at the first instance detrimental to the interest of the prosecution. If such an analogy is brought into force then the entire criminal jurisprudence system itself would get jeopardized and it would rather give a premium to the accused person wherein there are more than one accused available. They would make the accused against whom the gravity of offence is less to surrender and undergo the trial and thereafter the main accused after a considerable period of time when the material witnesses have either expired or are not traceable subject him to trial and in whose case the material witnesses already examined cannot be taken into consideration. It would result in the main accused getting scot-free easily and***

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[12] Criminal Revision No. 511 of 2016 order dated 26.08.2016
[13] (2011) 4 SCC 426

> ***such a situation in the larger perspective would be dangerous in a civilized society governed by the rule of law."***

It appears that the Court was persuaded to come to such a conclusion primarily on the premise that not reading the evidence of a witness in an earlier trial against the absconder would give premium to abscondence. The Court appears to have lost sight of the enabling/discretionary nature of law which gives the option to the prosecutor to invoke the said provision and obtain a direction to record the evidence against the absconder. Loss of evidence is not on the ground of abscondence alone but complemented by the failure of the prosecutor to invoke section 299(1) of the Cr.P.C. in the course of the earlier trial and have the evidence recorded against the absconding accused. In ***Abu Salem Ansari*** (supra) no proposition of law permitting automatic recording of evidence against an absconding accused is laid down. On the other hand, in the said report the Supreme Court by a cryptic order observed only upon compliance of requirements of section 299(1) of the Cr.P.C. may evidence recorded in an earlier trial be used in the subsequent trial of the absconder.

For the aforesaid reasons, I am unable to agree with the trial Court that the deposition of the rape victim recorded in the course of earlier trial and her statement before the Magistrate exhibited therein, can be said to be admissible in the subsequent trial of the absconding petitioner. This

unfortunate loss of valuable evidence of a rape victim arises due to the prevalence of an archaic law relating to trial of absconders which does not recognize the evolution of law relating to waiver of fair trial rights of an absconder justifying trial in absentia and emergence of rights of victims, particularly victims of sexual abuse, against secondary victimization by giving repeated depositions in Court.

In ***Regina Vs. Jones***[14], the House of Lords per majority[15] held when an accused deliberately chooses to absent himself from trial, his complete indifference to the consequences of his actions would lead to an inference of waiver of his right to be present and legal representation during trial. Hence, discretion of the Court to try an absconder in absentia, when exercised with due care and circumspection, cannot be said to be incompatible with common law or Article 6 of the European Convention of Human Rights. Trial in absentia is also recognised in other common law countries, e.g. New Zealand[16], Canada[17] under certain circumstances and categories of offences. In Bangladesh section 339B of Bangladesh Cr.P.C. has been incorporated to provide for trial in absentia. Noticing the alarming trend of abscondence affecting delay in trials, the Apex Court in ***Hussain and Another Vs. Union of***

[14] [2002] UKHL 5
[15] (Per Lord Binghanm, para 15; Lord Nolan, para 18 and Lord Hutton, para 35)
[16] Section 124 of the Criminal Procedure Act, 2011
[17] Section 475 Criminal Code (RSC, 1985)

India[18] quoted section 339B of the Bangladesh Cr.P.C.[19] and observed that appropriate authority may take cognizance of the said law.

Inspite of such observation of the Apex Court no amendment has been made to Section 299(1) Cr.P.C to provide for trial in absentia of an absconder which may avoid unfortunate loss of valuable evidence due to death of a witness as in the present case.

Taking note of the pernicious impact of abscondence on speedy justice and rights of victims, this Court proposes that appropriate amendments be made to the Code of Criminal Procedure for incorporating provision for trial in absentia of an absconding accused for better administration of criminal justice.

With the aforesaid observations, impugned order dated 05.09.2018 is set aside.

Application is allowed. Connected applications being CRAN 1 of 2019 (Old CRAN 1976 of 2019) and CRAN 2 of 2021 stand disposed of.

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[18] (2017) 5 SCC 702

[19] "339-B. Trial in absentia.—(1) Where after the compliance with the requirements of Section 87 and Section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order published in at least two national daily Bengali newspapers having wide circulation, direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence.

(2) Where in a case after the production or appearance of an accused before the Court or his release on bail, the accused person absconds or fails to appear, the procedure as laid down in sub-section (1) shall not apply and the Court competent to try such person for the offence complained of shall, recording its decision so to do, try such person in his absence."

Registrar General is directed to send a copy of the judgment to the Principal Secretaries to the Ministry of Home Affairs and Ministry of Law and Justice, Union of India for consideration of the proposal to amend the Code of Criminal Procedure and incorporate provision of trial in absentia of an absconding accused therein.

I agree.

(Bivas Pattanayak, J.) **(Joymalya Bagchi, J.)**

PA (Sourav/Sohel)