Crl.O.P. No. 28952 of 2018

H. Aarun Basha v. State

2018 SCC OnLine Mad 12845

In the High Court of Madras
(BEFORE N. ANAND VENKATESH, J.)

H. Aarun Basha ..... Petitioner/Accused;

v.

State represented by The Inspector of Police ..... Respondent/Complainant.

Crl.O.P. No. 28952 of 2018

Decided on December 19, 2018, [Orders Reserved on: 17.12.2018]

Advocates who appeared in this case :

For Petitioner: Mr. M. Babu Muthu Meeran

For Respondent: Mr. M. Mohamed Riyaz, Additional Public Prosecutor

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to direct the learned Judicial Magistrate - II, Ponneri, to split up the above said P.R.C. No. 17 pending on the file of Learned Judicial Magistrate II, Ponneri and commit the case for trial.

The Order of the Court was delivered by

N. ANAND VENKATESH, J.:— This petition has been filed for a direction to the learned Judicial Magistrate II, Ponneri to split up the case in P.R.C. No. 17 of 2010 and commit the case for trial.

2. The learned counsel appearing for the petitioner would submit that the FIR was registered in the year 2010 and the final report was filed in the very same year and the same was taken on file in P.R.C. No. 17 of 2010 by the Court below for an offence under Section 147, 148, 341, 302 of IPC r/w Section 109 and 120(B) of IPC. This petitioner was shown as A10 in the final report. The learned counsel for the petitioner would submit that since some of the accused persons are absconding, the case is being kept pending for the last eight years without being committed to the appropriate Court. The learned counsel also submitted that this petitioner is already aged about 70 years and there is absolutely no progress in the case and the Court below instead of splitting up the case, continues to adjourn the case either on the ground that all the accused persons are not present or on the ground that Non Bailable Warrant is pending.

3. This Court has carefully considered the submissions made by the learned counsel for the petitioner and also the materials placed on record.

4. Several petitions of this nature are filed before this Court and it is clear that cases are kept pending on the ground that certain accused persons are absconding and the subordinate courts are finding it difficult to deal with the same. This adds up to the pendency of the case in the subordinate courts. Therefore, this Court takes this as an opportunity to issue certain guidelines for the Courts below to deal with the cases in which accused persons are absconding, in an effective manner:

5. The Criminal Rules of practice and Circular Orders, 1958 provides for dealing with cases where the accused persons have absconded. It will be relevant to extract Rules 16 to 20 hereunder:

16. Case in which accused has absconded - When process has been issued

for the attendance of the accused, but the case has remained pending for a long time owing to his non-appearance, and the Magistrate is satisfied that the presence of the accused cannot be secured within a reasonble time, or when an accused person found to be of unsound mind is released under Section 466(1) or detained in safe custody under Section 465(2) of the Code, the Magistrate shall report the case for the orders of the District Magistrate, through the Sub-Divisional Magistrate, if any, and the District Magistrate may, if he thinks fit, order that the case shall be removed from the register of cases received and omitted from the quaterly returns. The case shall, however, then be entered in a separate register of long pending cases which shall be maintained by all Magistrates in Administrative Form No. 26:

Provided that if the charge is withdrawn, or if the accused is reported dead, whether that be before or after the entry in the register of long pending cases, the case should be closed:

Provided further that if the District Magistrate is of opinion that the case against the absent accused is wholly false, he may direct that the case be omitted from the registers and the returns altogether, and he may, at any subsequent time, order the case to be entered in the register of long pending cases.

17. Cases in which some of the accused have absconded:

When there are several accused persons in a case, and only some of them have appeared or been produced before the Court, if the Magistrate is satisfied that the presence of other accused cannot be secured within a reasonable time, having due regard to the right of such of the accused as have appeared to have the case against them enquired into without delay, he shall proceed with the case as against such of the accused as have appeared and dispose of it according to law. As regards the accused who have not appeared, he shall give the case a new number and enter it in the register of cases received, and if it remains pending for a long time and efforts to secure the presence of the accused have failed and the case against the accused who have appeared has been disposed of, the Magistrate shall report the whole matter as regards all the accused to the District Magistrate through the Sub - Divisional case against the absent accused be removed from the "Register of long pending cases", or if the District Magistrate is of opinion that the case against the absent accused is wholly false, he may direct that the case be omitted from the register and the returns altogether, provided that he may, at any subsequent time order the case to be entered in the register of long pending cases.

18. Procedure to be observed before transfer of a case to the register of long pending cases: Before directing the transfer of a case other than a case dealt with under Section 466(1) or (2) of the Code to the "Register of long pending cases", the District Magistrate shall satisfy himself that all reasonable steps have been taken to follow the procedure prescribed in Sections 87 and 88, and also, when practicable, that provisions of Section 512 of the Code have been complied with.

19. Procedure on appearance or production of accused: If subsequently the absent accused or any of them are produced or appear before the Magistrate, or the accused who was insane ceases to be insane, the case against them shall be registered under a new number.

20. Cases where an accused has absconded after appearance - Rule Nos. 16 to 19 shall apply, as far as may be, to cases where an accused person has appeared, but had subsequently absconded.

6. The following guidelines can be kept in mind while dealing with cases of absconding accused.

i. Where the Court has issued process for the appearance of an accused and the same could not be served and if the Court is satisfied that the accused is in abscondence, the Court may, after having waited for a reasonable time, proceed under Section 82 of the Cr.P.C.

ii. If the case involves a single accused against whom proceedings have been initiated under Section 82 of the Code, the Court shall shift the case from relevant register to the register of long pending cases.

iii. When there are several accused persons in a case and only some of them have appeared or have been produced before the Court and if the Court is satisfied that the presence of other accused cannot be secured within a reasonable time, having due regard to the right of such of the accused in attendance to have the case against them enquired into or tried without delay, the Court may split up the case if it is satisfied that such splitting up will cause no prejudice either to the prosecution or to the accused in attendance and proceed with the enquiry or trial as regards the accused who are in attendance.

iv. While splitting up the case as referred to in (iii), the Court shall assign a fresh number to the split up case relating to the absconding accused and enter the same in the relevant register of the current year.

v. In a case exclusively triable by a Court of session, when there are several accused persons and only some of them have appeared or have been produced before the Court, the Magistrate Court shall follow the same procedure *mutatis mutandirs* till the stage of splitting up of case, as provided in clauses (i) to (iv).

vi. The Magistrate Court shall thereafter comply with the provisions of Section 207 or Section 208, as the case may be, insofar as the accused in attendance and commit the case to the Court of Session.

vii. The Sessions Court shall be reported about the split up of the case and the Sessions Court shall assign a number to the split up case, enter the same in the sessions Register and communicate the number to the Magistrate Court forthwith. The Magistrate Court shall also indicate this number in brackets along with the fresh number assigned to the split up case relating to the absconding accused.

viii. As and when the absconding accused appears and is produced before the Magistrate Court, the Magistrate Court shall comply with clause (vi) and while committing the case to the Court of Session shall indicate the number assigned by the Sessions Court for the split up case.

ix. Clauses (i) to (vii) above shall apply, as far as may be to cases where an accused person has appeared, but has subsequently absconded.

x. If the accused has absconded after committal of the case, the Sessions Judge shall follow the same procedure under clauses (ii) to (iv).

7. This Court also takes this opportunity to insist upon Trial Courts to effectively put into practice the provisions of Section 299 of Cr.P.C. which deals with recording of evidence in the absence of accused.

8. The Court concerned must first record an order that in its opinion, it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. The Court can proceed to record depositions of prosecution witnesses and take as many copies as it deems necessary and attest the same and shall file, it in the split up case, for the purpose of furnishing the same to the absconding accused as and when they appear or are produced before the Court.

9. This deposition can be given in evidence against the accused in any inquiry or trial for the offence with which he is charged, provided that the witness is either dead or he is incapable of giving evidence or his attendance would cause unreasonable

delay, expense or inconvenience. This procedure contemplated under Section 299 of Cr.PC is thus an exception to the principle embodied in Section 33 of the Evidence Act.

10. The evidence which is recorded against an absconded accused can be read when he is apprehended later and tried even if such evidence is not tendered in his presence, on the fulfillment of the above said conditions. The provision is meant to take care of such eventuality when there are several accused to be tried for an offence and one or more has absconded as a result of which trial of others is likely to be staggered on that Count. The evidence which is tendered in such a trial of those accused who are available for trial, may be used against the absconding accused when he or they, as the case may be, is or are put on trial. The provision is in derogation of the normal procedure that evidence in trial of an accused shall be recorded in his presence but its justification lies in accused's default to take part in the trial.

11. It will be more apposite to extract the law as enunciated by the Hon'ble Supreme Court in *Nirmal Singh* v. *State of Haryana* reported in (2000) 4 SCC 41.

> *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 Subramanium, 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: (1973) 3 SCC 472 : 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 nonbailable 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 negatived 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 Subramanium, 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.*

12. The other important Judgment of the Hon'ble Supreme Court to which reliance can be placed is *Jayendra Vishnu Thakur* v. *State of Maharashtra* reported in (2009) 7 SCC 104.

18. The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is a valuable right. The Sixth Amendment of the United States Constitution explicitly provides therefor, which reads as under:

> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."*

We may, however, notice that such a right has not yet been accepted as a fundamental right within the meaning of Article 21 of the Constitution of India by the Indian courts. In the absence of such an express provision in our constitution, we have to proceed on a premise that such a right is only a statutory one.

23. An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum. The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.

24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and reexamination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion. (See Sarabjit Rick Singh *v.* Union of India *[(2008) 2 SCC 417: (2008) 1 SCC (Cri) 449].)*

25. It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus, scrupulous compliance therewith is imperative in character. It is a well-known principle of interpretation of statute that any word defined in the statutory provision should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character.

29. Indisputably both the conditions contained in the first part of Section 299 of the Code must be read conjunctively and not disjunctively. Satisfaction of one of the requirements should not be sufficient. It was thus, obligatory on the part of the learned court to arrive at a finding on the basis of the materials brought on record by bringing a cogent evidence that the jurisdictional facts existed so as to enable the court concerned to pass an appropriate order on the application filed by the Special Public Prosecutor.

30. Section 299 of the new Code corresponds to Section 512 of the old Code. The applicability of the aforementioned provisions came up for consideration before some of the High Courts. We will notice a few of them.

32. To the same effect is the decision of the Madras High Court *in* State of Mysore *v.* Sanjeeva *[AIR 1956 Mys 1] wherein it was held: (AIR p. 5, para 14)*

> *"14. The question also arises as to what constitutes absconding. The word 'absconder' is not defined in the Code of Criminal Procedure. It occurs in other provisions of criminal law e.g. Sections 87 and 90(a) CrPC and Section 172 IPC. From the context and object of these provisions an absconder may be said to be one who intentionally makes himself inaccessible to the processes of law. Hence it is not enough if it is shown that it was not possible to trace him soon after the occurrence.*
>
> *It has also to be established that he was available at or about the time of the commission of the alleged offence and ceased to be available after the commission of the offence, before he can be treated as an absconder. Similarly, it has to be established that there is no immediate prospect of arresting the accused. Then the question arises whether it is enough if the material on record shows that these conditions have been fulfilled or whether it is necessary that the recording court should explicitly state that it has so satisfied itself before the deposition is actually recorded."*

35. *In* Manbodh *v.* Emperor *[AIR 1944 Nag 274]*, Nazir Ahmad *v.* Emperor *[AIR 1936 PC 253 (2): 17 Lah 629] and* Rustom *[AIR 1915 All 411] was followed. We must, however, notice that in* Bhagwati *v.* Emperor *[AIR 1918 All 60], the Allahabad High Court held: (AIR p. 61)*

> *"The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear that in our opinion a Magistrate before recording evidence under Section 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest, and it is certainly advisable that he should recite in his order that he finds this to be the case. However in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under Section 512. The presumption is that the Magistrate did his duty and did not record the evidence under Section 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible."*

We, with utmost respect, do not agree. There is no such presumption in law. An order of that nature must exhibit total application of mind. A judicious approach is imperative. For the said purpose the courts must bear in mind that an accused has a fundamental right as also human right. The term "proved" having been used in the section, providing for an exception to the general rule, was required to be strictly construed. It was not an ipse dixit of the Magistrate that would be sufficient for attracting an extraordinary provision. The Magistrate was required to apply his mind to arrive at a definitive finding on the basis of the materials on record, in absence whereof, his order must be held to be arbitrary and, thus, without jurisdiction.

37. *We may, at this stage, also notice a decision of this Court in* Nirmal Singh *v.* State of Haryana *[(2000) 4 SCC 41: 2000 SCC (Cri) 740] wherein it was held that Section 299 of the Code is in two parts. In that case the Magistrate, who had recorded the statements under Section 299 of the Code, was examined to indicate that in fact he had recorded the statements. Cross-examination of the said Magistrate was necessary as there was a dispute as to whether there was any material that the persons whose statements had been recorded were dead or not. It was in that context this Court opined: (SCC p. 46, para 3)*

"3. … The Magistrate who has recorded the statement under Section 299 of the Criminal Procedure Code, has been examined to indicate that in fact he has recorded the statements. He also further contended that the process-server did submit the report that the persons are dead, whereafter the statements recorded under Section 299 CrPC were tendered in evidence in the course of trial. It is true that the learned Sessions Judge has not passed any order to that effect but non-passing of such order would at the most be an irregularity which is curable under Section 465 of the Code of Criminal Procedure, more so, when the accused had not raised any objection at any earlier stage of the proceeding."

38. This Court in Nirmal Singh *[(2000) 4 SCC 41: 2000 SCC (Cri) 740] did not say as was contended by Mr. Naphade that non-compliance with Section 299 would be an irregularity. What was considered to be an irregularity was non-recording of a statement that the persons concerned were dead. In fact the discussions on Section 299 of the Code and Section 33 of the Evidence Act starts from para 4 wherein it was categorically held*: (Nirmal Singh case *[(2000) 4 SCC 41: 2000 SCC (Cri) 740], SCC pp. 46-47, para 4)*

"4. … 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 [sic and] 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 Subramanium, 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."

13. The above two judgments gives a clear picture on the ambit and scope of Section 299.

14. A copy of this order shall be circulated to all the subordinate Courts dealing with criminal trials. The issue of absconding accused, is one of the major cause for pendency of criminal cases before trial Courts. Therefore, it is important that trial courts equip themselves well to deal effectively with this issue. This issue shall also be discussed regularly in the Judicial academy so that there is more clarity in dealing with the issue and solutions can be found out for certain practical difficulties faced by the learned Judges in this regard.

15. In the result, the Court below is directed to follow the above guidelines and proceed further immediately to ensure that the accused is committed to the appropriate Court, as expeditiously as possible.