



**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**Criminal Appeal No.3566 of 2026
(@ Special Leave Petition (Crl.) No.6741 of 2026)**

Mahendra Singh

....Appellant

Versus

The State of Chhattisgarh

....Respondent

J U D G M E N T

K. VINOD CHANDRAN, J.

Leave granted.

2. Whether the evidence recorded in a trial against one of the accused; the case against the absconding accused having been split up, can be used against that accused when he is arrested later and a fresh trial is conducted, is the question arising, which can be answered on a correct interpretation of Section 299 of the Code of Criminal Procedure, 1973 (Cr. PC).

3. The issue is no longer *res integra*, this Court having interpreted Section 299, Cr.PC in a number of decisions. First, we refer to the decision in ***Nirmal Singh v. State of Haryana***¹

¹ (2000) 4 SCC 41

wherein one of the accused died and two others were declared as proclaimed offenders. The Special Judicial Magistrate recorded the statement of twenty-seven witnesses under Section 299, Cr.PC. The absconding accused were apprehended later and subjected to trial, wherein the evidence recorded of five of the twenty-seven witnesses under Section 299 was relied upon to convict the accused. The High Court having upheld the conviction and sentence, the case travelled up to this Court. This Court found that Section 299 has two parts, one, the circumstances under which evidence of witnesses can be recorded in the absence of the accused and the second part, the circumstances in which the said evidence can be used in the subsequent trial without affording an opportunity to the accused to cross-examine. Hence, prior to recording of the statement of witnesses under Section 299, the Court must be satisfied that the accused is absconding and there is no immediate prospect of arresting him. This procedure under Section 299 was held to be an exception to Section 33 of the Indian Evidence Act, 1872. Section 33 makes admissible the testimony of a witness examined in a judicial proceeding, relevant as proof of the truth

of the facts it states, in a subsequent proceeding, if that witness cannot be found or his presence cannot be procured, provided the adverse party had the right and opportunity to cross examine that witness in the first proceeding. The right or opportunity to cross-examine a witness deposing against one is an indefeasible right to that person which is non-negotiable. Section 299 being an exception, it was held as under: -

“... 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...”

4. In that case the first part was complied with and the argument was of the Sessions Judge having not recorded an order that the second part stood satisfied; ie: the witness is dead, incapable of giving evidence, cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, which would be unreasonable. Though such an order was absent, the High Court had found on a perusal of the original records that repeatedly summons were issued to the five witnesses which were returned with the report that they were

dead and hence the use of their prior testimonies was found justified by this Court.

5. *Jayendra Vishnu Thakur v. State of Maharashtra & Another*² dealt with the jurisdictional facts envisaged under Section 299, Cr.PC. The order impugned in that case found eight accused persons to be absconding in a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987. The order passed, while recognizing the right of the absconding accused to cross-examine the witness, if they are alive at the time of the trial, contemplated a situation where the said witness dies or becomes incapable of giving evidence. Noticing the order passed under Section 82 of the Cr.PC, without any further material regarding the abscondence or the impossibility of their apprehension, evidence was directed to be recorded under Section 299. It was noticed by this Court that in fact the absconding accused was arrested way back in 1993, in Delhi and the fact was brought to the notice of the Designated Court by none other than the I.O in the TADA case, before the order under Section 299 of the Code was issued on 01.04.1994.

² (2009) 7 SCC 104

6. Dilating upon the expression 'proved' as appearing in Section 299 of the Code, this Court observed thus in paragraph 16, after extracting Section 299 & paragraph 25 of the judgment, as under: -

16. "... It is neither in doubt nor in dispute that sub-section (1) of the said provision is in two parts—the first part provides for proof of jurisdictional fact in respect of abscondence of an accused person and the second that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in the absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

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25. "...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."

7. We find it apposite to extract paragraph 29 also from **Jayendra Vishnu Thakur²** which emphasise the requirement to

find the existence of both the jurisdictional facts, conjunctively and not disjunctively as under: -

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 be not 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.

8. ***Sukhpal Singh v. NCT of Delhi***³ relied on both the above decisions. Therein, the offence committed in the year 1980 was of the husband murdering his wife, who fled from the scene of occurrence. The efforts to trace him out having turned futile, proceedings under Section 82 and 83 of the Cr. PC was initiated against him. The accused was declared as a proclaimed offender. A chargesheet came to be filed under Section 299 Cr.PC. The crucial witness, who was the complainant, a neighbor, along with two Head Constables and the Inspector who investigated the case, were examined in the proceedings before the Magistrate. Later, the accused was apprehended in

³ 2024 SCC OnLine SC 800

the year 2000 and put to trial wherein 24 witnesses were examined and 48 documents were exhibited. The complainant could not be produced in the trial, but his statement was relied on by the trial court to convict the accused. The defense argued that the statement was one recorded under Section 161, Cr.PC which was resisted by the prosecution pointing out the proceedings under Section 299. It was found that after the accused absconded on 18.03.1991, the accused was declared an absconder and permission was granted by the Court to proceed with the trial by resorting to procedure under Section 299 Cr.PC. It was held so: -

31. Sub-section (1) of Section 299 CrPC is in two parts, the first part provides for proof of jurisdictional fact in respect of abscondence of an accused person and the second that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in the absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

9. Invocation of Section 299 hence is possible only when two jurisdictional facts are established which leads to two

consequences, one in *praesenti* and the other in *futuro*. The proof of jurisdictional facts required for invocation of Section 299 are on two aspects, one that the accused is absconding and the other that there is no immediate prospect of arresting him. The consequence, *in praesenti* is that the evidence of the witnesses are recorded in the absence of the accused and the consequence, *in futuro* is that such testimony can be used at a trial after the apprehension of the absconding accused, which again can only be done, if the court is satisfied that the presence of that witness cannot be procured, because he is dead, incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, which in the circumstances of the case, would be unreasonable. The very intention of the provision is to ensure that, by deliberately taking flight, the accused does not frustrate the prosecution and thus puts in jeopardy the very criminal justice delivery system. It is also founded on the principle that an accused who deliberately goes undercover, attempting to frustrate the investigation and the trial, cannot claim the right of cross examining every witness, as provided under Section 33

which though a valuable right available to the accused, would not be available, if by his own actions, the accused remains absconding. It is founded on the principle that no man can claim the benefit of a wrong committed by himself.

10. The order under Section 299 has to conclusively find proof of both the jurisdictional facts for invocation of Section 299, which has to be passed at the first stage; at the committal stage or at the trial stage, when the accused is found absconding and not when he is subsequently apprehended. If there is only one accused, there is no question of committing the case for trial if he is absconding and then the evidence could be taken by the Magistrate himself. On the other hand, if after committal, the accused absconds, again the same procedure has to be followed by the Sessions Court which would go into the two jurisdictional aspects and on finding the same, proceed to examine the witnesses. When there are more than one accused and one of them absconds, then, after finding proof of the jurisdictional facts; of the flight and the impossibility of immediate arrest, the trial could be proceeded against the accused brought before the Court and concluded. Then, the testimony of such witness can

be relied on in the fresh trial, after arrest of accused, without giving the accused an opportunity of cross examination if the Court concludes that the said witness cannot be found or their presence cannot be procured.

11. The above interpretation is crucial insofar as the decision in the present case. Two accused were arrayed, charging them for the offence of murder of a person on 01.04.1999. The prosecution case was that some of the prosecution witnesses were coming after a fair, when they witnessed an incident where the appellant herein was assaulting a person, sitting on his chest and strangulating him. The other accused was found exhorting the assault and he threatened the passersby. Frightened by the threats hurled, the witnesses left the scene. The appellant who was alleged with the overt act absconded and the other was tried, but acquitted. The appellant was arrested on 11.09.2017 and he was tried for the murder of the victim.

12. At the trial stage, after more than a decade and a half, the crucial witness PW1 was not available, having expired. There were other eyewitnesses who turned hostile. PW2 was one eyewitness who though spoke of having seen the assault, did not

identify the accused, who was not produced from judicial custody. The cross examination of the said witness also indicated that there were two persons by the name Mahendra Singh in the village, the locality in which the crime occurred. The identification or the absence of it hence becomes critical and the eyewitness's testimony cannot inculcate the accused. As we noticed, the other witnesses turned hostile.

13. The reliance by the trial court and the High Court was on the testimony of PW1 at the earlier instance where he clearly narrated about the first accused having committed the murder. However, there was no order passed under Section 299 in the year 1999 when the matter was brought before Court, either at the time of committal or at the time of commencement of trial. The flight of the accused, the appellant herein, and the impossibility of apprehending him immediately had to be urged before that Court and it has to be proved to the satisfaction of that Court. Only an order passed, finding proof of both the jurisdictional facts would enable testimony of the witness recorded at that stage to be relied on at a later stage; when the presence of that witness cannot be procured.

14. In the present case, we do not find such an order having been passed in the earlier trial against the second accused. The prosecution, hence, as against the first accused, the appellant herein, fails. The appellant would stand acquitted of the charges framed against him. He would be released, if in custody, or if already released on bail, his bail bonds shall stand cancelled.

15. The Appeal is allowed.

16. Pending applications, if any, shall also stand disposed of.

..... J.
(J. B. PARDIWALA)

..... J.
(K. VINOD CHANDRAN)

**NEW DELHI;
JULY 31, 2026.**