'C.R.'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

MONDAY, THE 10TH DAY OF JANUARY 2022 / 20TH POUSHA, 1943

CRL.A NO. 860 OF 2021

AGAINST THE ORDER/JUDGMENT DATED 3.11.2021 IN CRL.MP NO.75/2021 IN SC 1/2015/NIA OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANTS/ACCUSED 7, 8, 10 AND 12:

1 MOHAMMED RAFI (A7) @RAFI,
AGED 40 YEARS
S/O. BEERAN, MATTUPPADI HOUSE, PERICKAPPALAM,
THOTTEKKATTUKARA, ALUVA, ERNAKULAM, PIN 683 101.

2 SUBAIR T.P (A8) @ SUBU,
AGED 40 YEARS
S/P PAREETH PILLAI, KARIMPANAKKAL HOUSE, NEAR ICE PLANT, SIMILIYA JUNCTION, WEST VELIYATHU NADU, ALUVA, ERNAKULAM, PIN 683102.

3 MANSOOR (A10),
AGED 52 YEARS
S/O. ALIYAR, KANJIRATHUNKAL HOUSE, KUNNATHERI,
CHOORNIKKARA, ALUVA, ERNAKULAM, PIN 683 106

4 P.M. AYOOB (A12)@AYOOB,
AGED 48 YEARS
S/O. MOIDEEN, PANIKKARU VEETTIL HOUSE, THAIKKATTUKARA,
ALUVA WEST ERNAKULAM, PIN 683 106.

BY ADVS.
V.JOHN SEBASTIAN RALPH
VISHNU CHANDRAN
RALPH RETI JOHN
APPU BABU
SHIFNA MUHAMMED SHUKKUR
MAMATHA S. ANILKUMAR
ANILA T.THOMAS

RESPONDENT/COMPLAINANT:

UNION OF INDIA,
REPRESENTED BY NATIONAL INVESTIGATION AGENCY, KOCHI,
REPRESENTED BY THE SPECIAL PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN 682 031.

BY ADVS.
MANU S., ASG OF INDIA
SINDHU RAVISHANKAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15.12.2021, ALONG WITH CRL.A.868/2021, THE COURT ON 10.01.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

MONDAY, THE 10TH DAY OF JANUARY 2022 / 20TH POUSHA, 1943

CRL.A NO. 868 OF 2021

AGAINST THE ORDER DATED 3.11.2021 IN CMP 75/2021 IN SC 1/2015/NIA OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANTS/ACCUSED NOS.2,3,4,5 AND 6:

1 SAJIL(A2), AGED 36 YEARS
S/O.MAKKAR, THOTTATHIKUDY HOUSE, RANDAR KARA, MUVATTUPUZHA VILLAGE, ERNAKULAM.

2 M.K.NZAR (A3), AGED 48 YEARS
S/O. KUNHAN PILLAI, MARANGATTU HOUSE, KUNHUNNIKKARA, ALUVA, ERNAKULAM.

3 SHAFEEQ (A4), AGED 31 YEARS
S/O. FRAKUDHEEN, THELAPPURAM HOUSE, EKKUNNAM BHAGOM, ODAKKALI, ERNAKULAM.

4 NAJEEB K.A.(A5), AGED 42 YEARS
S/O. ABDUL KHADER, HOUSE NO.VII/656, KARIMBERAPPADI HOUSE, ULIYANNORR KARA, KADUNGALLUR VILLAGE, ERNAKULAM.

5 AZEEZ ODAKKALIL (A6), AGED 36 YEARS
S/O.BAVA, KIZHAKKANAYIL HOUSE, VII/403, EKKUNNAM, PALLIPADY, ASAMANNOOR VILLAGE, KURUPPAMPADI, ERNAKULAM.

BY ADVS.
V.JOHN SEBASTIAN RALPH
VISHNU CHANDRAN
KEERTHANA SUDEV
APPU BABU
SHIFNA MUHAMMED SHUKKUR
ANILA T.THOMAS

RESPONDENT/COMPLAINANT:

UNION OF INDIA
REPRESENTED BY NATIONAL INVESTIGATION AGENCY, KOCHI,
REPRESENTED BY THE SPECIAL PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN-682031.

BY ADVS.
MANU S., ASG OF INDIA
SINDHU RAVISHANKAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15.12.2021, ALONG WITH CRL.A.860/2021, THE COURT ON 10.01.2022 DELIVERED THE FOLLOWING:

'C.R.'

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

Crl.Appeal Nos.860 and 868 of 2021

Dated this the 10th day of January, 2022

J U D G M E N T

Jayachandran, J.

We, in these appeals, are called upon to answer an intriguing question on the interpretation of Section 299 of the Code of Criminal Procedure, 1973.

2. Facts:-

These Criminal Appeals stem from the impugned order passed in the infamous crime against Prof.T.J.Joseph, who was brutally attacked and right hand chopped off, alleging blasphemy in setting up a question paper for college examinations. The order impugned was passed in Criminal M.P.No.75/2021 (in S.C.No.1/2015), an application under Section 299 of the Code of Criminal Procedure ('Code' for short) seeking issuance of necessary orders to take the sworn in statement of PW1 (Smt.Salomi, wife of the victim) in S.C.No.1/2013 as evidence against 11

accused persons in the ongoing trial in S.C.No.1/2015 before the Special Court for trial of NIA Cases.

3. The case was registered as Crime No.704/2010 and investigated by Kerala Police at the first instance. The Police filed final report on 14.1.2011 arraigning 27 persons as accused and 27 others as suspects, who were not charge-sheeted. The investigation was thereafter taken over by the National Investigation Agency (hereinafter referred to as 'N.I.A.' for short) and the case was transferred to the Special Court. On 18.1.2013, the N.I.A filed the first supplementary final report against 9 other accused persons. Subsequently, on 12.4.2013 the N.I.A. filed the second supplementary final report against one more accused person, who was originally Accused No.31 in the Crime. In that supplementary final report, the names of the remaining 17 persons were shown as accused, who were not charge-sheeted.

4. Thus, altogether 37 accused persons (27+9+1) were called upon to face trial in S.C.No.1/2011 before the Special Court, of which six accused persons were

absconding. Their presence could not be secured, despite resorting to coercive steps, including the one under Sections 82 and 83 of the Code. In the trial against 31 accused persons, Smt.Salomi, the wife of the victim, was examined as PW1. The trial culminated in the conviction of 13 accused persons and acquittal of the remaining 18. The case against the six absconding accused persons was split up and re-filed as S.C.No.1/2015. After the judgment dated 30.4.2015 in S.C.No.1/2011, accused Nos.2, 3, 4 and 6 (originally A4, A28, A30 and A40 in the crime) had surrendered before the Special Court. The fifth accused (A35 in the crime) was arrested; the first accused remaining absconding.

5. On 1.6.2017, the N.I.A filed the third supplementary final report against six more persons, the case against whom was numbered as S.C. No.2/2017. This was thereafter clubbed with S.C.No.1/2015, the six accused persons in S.C.No.2/2017 being arraigned as accused Nos.7 to 12 respectively. Thus altogether 11 persons (5 out of the original six in S.C.No.1/2015 and 6 persons clubbed) were called upon

to face trial in S.C.No.1/2015. Accused 9 & 11 were arrested in 2011 and released on bail and they were continuing on bail when the trial in S.C.No. 1/2013 was commenced and concluded.

6. At this juncture, N.I.A. filed Criminal M.P.No.75/2021 in S.C.No.1/2015 seeking issuance of necessary orders to take the sworn-in-statement of Smt.Salomi (PW1) recorded in S.C.No.1/2013 as evidence against the 11 accused in the on-going trial in S.C.No.1/2015. The learned Special Judge, on a meticulous analysis of the facts and referring to the precedents cited, allowed Criminal M.P.No.75/2021 in part, by order dated 3.11.2021, allowing the deposition of PW1 to be given in evidence as against accused Nos.2 to 8, 10 and 12 in S.C.No.1/2015. The Criminal M.P. stood dismissed as against accused Nos.9 and 11 on the finding that they were not absconding at the time when final reports in S.C.No.1/2013 were filed, as they were on bail and no charge sheet was issued against them. Challenging the impugned order, accused Nos.2 to 6 filed Criminal

Appeal No.868/2021 and accused Nos.7, 8, 10 and 12 filed Criminal Appeal No.860/2021.

7. Appellants' Arguments :-

Sri.John S. Ralph, learned counsel for the appellants, first contended that going by the scheme of Section 299, the court, which records the evidence of witnesses, should necessarily pass an order recording its satisfaction that the accused person, in whose absence evidence is being recorded, has absconded and there is no immediate prospect of arresting him. This requirement, in fact, is a condition precedent to invoke Section 299. The evidence recorded as against the co-accused cannot be used against the absconding accused pursuant to his arrest, unless an order recording the existence of the factual parameters contemplated in Section 299 is passed, by the Court which conducted trial first, submits the learned counsel. This salutary requirement has not been satisfied in the instant case. Instead, the jurisdictional facts that the accused have absconded and there is no immediate prospect of arresting them, is found in the impugned

order by the court, before which the absconding accused are subjected to trial pursuant to their arrest, which course is surely impermissible. The order impugned is, therefore, illegal and invalid. Learned counsel would hasten to add that Section 299 of the Code, being an exception to the mandate in Section 273 Cr.P.C, as also, Section 33 of the Indian Evidence Act, is to be interpreted strictly, wherefore, the procedure envisaged in Section 299 of the Code has to be strictly complied with. If law prescribes a thing to be performed in a particular manner, then it shall be done in that manner only, or shall not be done at all is the argument of learned counsel relying upon the principle laid down in **Taylor v. Taylor [(1875) 1 Ch.D 426]**. To buttress his arguments, learned counsel relied upon the following judgments.

1. **Rustom v. Emperor [AIR 1915 All.411]**
2. **Jayendra Vishnu Thakur v. State of Maharashtra and Another [(2009) 7 SCC 104]**
3. **Vijay Ranglal Chourasia v. State of Gujarat [(2014) 12 SCC 400]**

8. Insofar as Crl.Appeal No.860/2021 is concerned, learned counsel for the appellants canvassed an additional ground to the effect that no final report has been laid arraigning the appellants concerned as accused persons, in the absence of which, Section 299(1) of the Code cannot be pressed into service. As against such unknown persons, the prosecution can only seek the remedy contemplated in Section 299(2) of the Code, provided the offence in question is one punishable with death or imprisonment for life. In this regard, learned counsel invited our attention to the language employed in Section 299(1) to point out that the one absconding should be an 'accused person'. A reading of Section 299(1) would amplify that the evidence to be recorded as against an absconding accused is only at the post final report stage, from which it is clear that Section 299(1) cannot be invoked against a person, who had not been arraigned as an accused in the final report.

9. N.I.A's Arguments :-

Sri.S.Manu, learned Assistant Solicitor General of India, appearing for the respondent/Union of India,

represented by the N.I.A. refutes all the above arguments. Learned A.S.G.I. submitted that while interpreting Section 299 of the Code, the purpose of the Section should necessarily be borne in mind. Section 299 deals with an exceptional situation, where the statute expressly provides for evidence being recorded in the absence of accused persons, as also, for its use at a subsequent inquiry/trial. Learned A.S.G.I. pointed out that such a pivotal provision, in apparent deviation from the accepted tenets of criminal jurisprudence, is incorporated to deal with a piquant situation, when a person accused of an offence absconds himself and there is no immediate prospect of arresting him. Then, the ends of justice and the course of law should not be impeded, wherefore, a special enabling provision is incorporated to record the deposition of the witnesses, either by the court competent to try the offence, or by the committing court and to use such deposition against the accused, once he is apprehended and called upon to face the trial, submits the learned A.S.G.I. Unless such a provision is there in the statute book, it will be easy for a

determined accused person to obstruct the course of law and justice by making himself unavailable for trial. The Section also facilitates the trial to proceed with in cases where there are more than one accused person, of which one or more may be absconding. In short, learned A.S.G.I. would submit that the courts should adopt a pro-active approach in interpreting Section 299, consistent with its purpose and to further the requirements of justice, once the jurisdictional fact that the accused had absconded and there is no immediate prospect of arresting him is established. The stage at which such jurisdictional fact is to be satisfied should not be given over emphasis, so as to frustrate the purpose of the section, besides giving a premium to accused persons, who successfully evaded the process of law. Learned A.S.G.I. would submit that there is no specific requirement to pass any formal order, if the jurisdictional facts are otherwise established by materials on record. The maintainability of the present appeals was also challenged on the premise that the order impugned is an interlocutory order -

pure and simple. Learned A.S.G.I. relied upon the following judgments in support of his arguments:

1. **CBI v. Abu Salem Ansari and Others [(2011) 4 SCC 426]**
2. **Nirmal Singh v. State of Haryana [(2000) 4 SCC 41]**
3. **Rashid Lakhere v. State of MP [MANU/MP/0258/2021]**
4. **A.T.Mydeen and others v. The Asst.Commissioner [MANU/SC/1021/2021]**

10. <u>The point</u> :-

The imbroglio before us are:

1) Whether it is mandatory for the court which records deposition of witnesses, in cases where one or more of the accused are absconding, to pass an order recording the existence of jurisdictional facts stipulated in Section 299 of the Code, that is to say, (i) the accused has absconded and (ii) there is no immediate prospect of arresting him; for such evidence recorded to be used subsequently in a trial against those who were earlier absconding, if by any eventuality of, death, incapacitation or any other

valid ground it is impossible to procure the presence of that witness?

2) If the same is not done by the court which recorded the deposition, but has only recorded the evidence of the witnesses in the trial against the co-accused, can the court which conducts the subsequent trial, after apprehending the absconding accused, pass an order recording the existence of the above referred facts and transfer such evidence to the subsequent trial on the strength of such an order?

On facts, it is not in dispute that in the impugned order, the course second above referred is adopted.

11. Section 299 of the Code is extracted hereunder:

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

12. A scrutiny of Section 299 would reveal that it spells out four pre-requisites for its application, which are culled out herein below:

(1) It is proved that an accused person in a given crime has absconded, and there is no immediate prospect of arresting him;

(2) Upon satisfaction of clause (1), the court competent to try, or commit for trial, such absconding person for the offence complained of may examine the witnesses produced on behalf of the prosecution and record their depositions, in the absence of the absconding accused;

(3) The absconding accused is subsequently arrested and is called upon to face the inquiry/trial for the offence charged;

(4) The witness, whose deposition was recorded vide Sl.No.(2) above, is either 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.

If all the above factual requirements are satisfied, then Section 299 enables giving in evidence the depositions of the witnesses already examined, *in absentia* the accused, in the inquiry/trial for which such accused is charged with.

13. <u>Section 299 - Scope and Object</u>:-

The scope and object of Section 512 of the old Code, corresponding to Section 299 of the new Code, is succinctly stated by the Allahabad High Court in **Tahsildar Singh v. State [AIR 1958 All 214]**, which is extracted herein below:-

> "**31.** This section engrafts an exception on the general rule that all evidence against an accused

should be tendered before the Court in his presence. The reason for this exception is not far to seek. The reason being that Courts always desire to have the best evidence about any matter and since there always is danger of evidence being lost if there is delay in recording it, the Legislature in its wisdom thought it proper to empower the Court to record evidence against a person who, by his own conduct, has chosen to be absent while such evidence is being recorded.

This rule is as much a rule of natural justice as the general rule that a man should have the opportunity of hearing the evidence against him before he is called upon to explain that evidence, for natural justice must equally take into account both sides of the picture because natural justice is essentially a rule of 'fair-play'. The ex parte recording of evidence permitted by S. 512, Cr. P. C. is necessitated by the conduct of the accused himself for, by his absconding, he creates a situation which faces the Court with two alternatives; first, either to record all the available evidence so that such evidence may not be lost due to the deaths of witnesses, or secondly, to stay its hands in recording that evidence till such time as the accused is apprehended and brought before it.

If the law did not provide for a situation which has been provided for by S. 512, Cr.P. C, then the law would have deprived the Court, without adequate justification, of having a record of the available evidence within a short time of the commission of the offence : at a time when the memory of witnesses was fresh and the details of

> the incident had not faded away from their memory due to lapse of time; and further it would have deprived the Court completely of the evidence of those witnesses who may the between the time of the commission of the offence and the apprehension and trial of the accused."

14. An analysis of Section 299 of the Code would also reveal that the Section operates in two different phases/stages in terms of points of time.

a) <u>The first phase:-</u>

The first phase is recording the deposition of the witnesses, subject to satisfaction of the jurisdictional facts specifically referred above. This can take place either at the pre-committal stage by the committing court; or at the trial stage by the court competent to try. If Section 299 is resorted to at the pre-committal stage, then such exercise will be exclusively for the purpose of Section 299. However, if Section 299 is resorted to at the trial stage, it can either be for the purpose of Section 299, as in the case of pre-committal stage; or, the same can be during the course of adducing evidence against the co-accused standing trial. In the latter case, it is imperative for the Prosecutor to bring it

to the notice of the trial Judge that evidence is proffered for the purpose of Section 299 as well and the trial Judge, in turn, has to pass an order satisfying itself of the factual requirements as to the abscondence of the accused and absence of immediate prospect of arresting him. Unless this onerous duty is performed by an astute Prosecutor or a vigilant court and a consequential order passed, the evidence recorded will fall short of the requirements of Section 299.

b) The Second phase:-

The second stage is when the absconding accused person is arrested and called upon to face the inquiry/trial. It is at this stage that the depositions already recorded is liable to be given in evidence against the accused person, who was absconding then and whose presence has been subsequently secured.

15. Grammatical Tense in the language of S.299:-

For this purpose, Section 299(1) is dissected and extracted herein below:

> "**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." (underlined for emphasis)

Dissection of Section 299, as depicted above, clearly spells out the two stages/phases of operation of Section 299, of which - it is important to note - the first stage/phase speaks about things *in praesenti,* whereas stage 2/phase 2 is couched *in futuro*, pointing to a future uncertain event. The words underlined, forming part of Section 299, would lend abundant support to our conclusion in this regard. Thus, the language employed in Section 299 itself would manifest that proof regarding the abscondence of the accused person and the negligible prospect of his

immediate arrest is something to be looked into and satisfied before recording the deposition of the witnesses. It could, therefore, be held as a corollary that such proof with respect to abscondence and lack of possibility of an arrest is not a matter to be gone into at the time of the subsequent trial, after apprehending the accused, who was absconding. In other words, proof with respect to abscondence of the accused is a condition precedent - for the trial Judge or the committing Judge, as the case may be - to record deposition of witnesses for the purpose of Section 299; enabling its use in the subsequent trial against those absconded but later apprehended.

16. In Section 299 of the Code, the power to record deposition of witnesses was originally given to the trial Judge alone. It is by virtue of amending Act 45 of 1978 that the committing Judge was also given a similar power. We have perused the statement of objects and reasons of the Code of Criminal Procedure (Amendment) Act, 1978. The notes on clause No.24 deals with the amendment to Section 299, which is extracted herein below:-

> "Clause 24: Under Section 299, evidence of witnesses can be recorded in the absence of the accused when he is absconding by the trying Magistrate and not by the committing Magistrate. The section is being amended to enable the committing Magistrate also to exercise the function of recording evidence of witnesses, when the accused is absconding."

This, again, is a sure pointer that it is before the trial Magistrate or the committing Magistrate, the proof with respect to abscondence of the accused has to be adduced, as a pre-condition for recording the deposition of the witnesses, *in absentia* the absconding accused. Had it been otherwise, the exercise of such power by the committing Magistrate is incomprehensible and unworkable.

17. **Precedents**:-

No judgment of the Hon'ble Supreme Court precisely on the point was brought to our notice by the learned counsel appearing on either side. However, the judgments in **Nirmal Singh** (supra) and **Jayendra Vishnu Thakur** (supra) would throw ample light to the issue under discussion. Before discussing the said judgments, this Court will refer to an old decision

of a Division Bench of Allahabad High Court, precisely on the point, **Emperor v. Rustom [AIR 1915 All 411 :: MANU/UP/0116/1915]**. The sole accused **Rustom** faced charges under Sections 302 and 307 of the Penal Code. The murder took place in the year 1897. The accused Rustom ran away from the place of occurrence and was not heard of till he was arrested in the year 1915. Soon after the murder, in 1897 itself evidence of witnesses, purportedly under Section 512 of the old Code (corresponding to Section 299 of the new Code) were recorded. Subsequently finding the proceedings taken in 1897 to be incomplete, the witnesses were re-examined in 1898. Finding the subsequent proceedings also to be legally incorrect, in 1911, fresh proceedings were recommended by which time the only surviving witness was one Musammat Vilayatan, whose deposition was recorded, under Section 512, finding the appellant/accused as having absconded. Upon apprehending the accused, the Sessions Judge recorded the evidence of Musammat Vilayatan, who was alive. Depositions of four other witnesses, who were examined earlier, were brought on record by virtue of

a formal order. The learned Sessions Judge rejected the evidence of Musammat Vilayatan, but convicted the appellant/accused on the statements of other witnesses recorded in the year 1897. However, in the record of evidence of four witnesses, whose depositions were recorded in the years 1897 & 1898, no order was there on the files showing how, when and under what circumstances those statements were brought on record. The Allahabad High Court found the evidence recorded in 1897 to be inadmissible on the following findings; which was held to be applicable even with respect to that recorded in 1898:-

> " … In Section 512, it is distinctly laid down that if it is proved that an accused person has absconded and 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. It is clear from the language of the section that the court which records the proceedings under it, must first of all 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.… "

18. In **Smt.Urmila Sahu v. State of Orissa [1998 Crl.LJ 1372]**, the Orissa High Court, after referring to Section 512 of the old Code and finding that there is no material change in the corresponding Section 299 of the new Code, held thus:

> "5. …… In that connection, not only the statutory provision is absolutely clear and unambiguous, but also it has been consistently held that at the time of trial of the co-accused if the prosecution does not seek for permission to simultaneously tender evidence against the absconding accused and if the trial Court does not record and/or pass order for recording that evidence in accordance with provision under Section 512 of the Old Code which corresponds to Section 299, Cr.P.C., then in such a case, the evidence recorded in the trial against the co-accused cannot be used against the absconding accused when he faces the trial."

19. In **Sheoraj Singh v. Emperor [AIR 1926 All 340]**, the Allahabad High Court held thus:

> "The question of law, therefore, is this. When two witnesses who have given evidence at a previous trial against persons then on their trial happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, can their statements be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence? In other words, can evidence given at a trial for another purpose

> be by an *ex post facto* operation converted into an equivalent of what is called a deposition taken under S.512 when as a matter of fact everybody knows it was nothing of the kind and at the time they gave their evidence the question of recording a deposition under S.512 was never intended.
> We think clearly not. The provisions of the statute forbid it. The objection to the evidence is the fundamental objection, that statements made against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to that fundamental rule can only be created by statute and when a statute permits something to be done which a fundamental rule prohibits, that thing can only be done by strict compliance of the statute which creates the exception. … ”

20. In **Emperor v. Baharuddin [AIR 1938 Patna 49]**, the High Court observed thus at page No.51:

> “It is unfortunate that we have not evidence of Mohar Shaikh from whom Samaruddin got the clue which led to his second report on 27th May: Mohar was examined at the trial of Bara Raju in 1932, but his depositions cannot be used, the procedure laid down in S.512, Criminal P.C., not having been taken : *see* 10 Cal 1097[1] and 48 All 375[2]. The learned Sessions Judge rejected the evidence of Musammat Vilayatan, but convicted the appellant/accused on the statements of other witnesses recorded in the year 1897. It 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 48 All 375[2] nor is it in my view the law that for the purpose of being used under S.512 the depositions of witnesses must be recorded over again in a 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 S.512 as well as against the person present and under trial."

[1] Ghurubin v. Queen-Express, (1884) 10 Cal 1097.

[2] Sheoraj v. Emperor, (1926) 13 AIR All 340 = 96 I C 122 = 27 Cr LJ 874 = 48 All 375 = 24 ALJ 394.

21. In **Gavisiddiah v. State of Karnataka [1975 Crl.LJ 285]**, a Division Bench of the Karnataka High Court held thus:-

> "7..... The evidence recorded in the case of the trial of a co-accused of the absconder or other persons 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 Criminal Procedure Code, as well as against the persons present and on trial."

22. We will now examine the judgments of the Honourable Supreme Court.

Nirmal Singh (*supra*):-

In this case, one of the accused persons died and two others were declared as proclaimed offenders and therefore, the Special Divisional Judicial Magistrate recorded the statements of 27 witnesses under Section 299 Cr.PC. Five among the said 27 witnesses were no more at the time when the appellant/accused was apprehended and subjected to trial. The learned Sessions Judge relied upon the statements of the said five deceased eye witnesses to find the appellant/accused guilty of offences under Sections 302 and 307 of the Penal Code. The High Court on appeal upheld the conviction of the appellant relying upon the self same materials. The question which fell

for consideration before the Hon'ble Supreme Court was the circumstances under which and the method by which, the statements of five persons were tendered, for being admissible under Section 33 of the Evidence Act and whether it can form the basis of conviction.

23. Interpreting Section 299 of the Code, the Hon'ble Supreme Court held thus:-

> "4. ……..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 first part

of Section 299(1) of the Code of Criminal Procedure. ……." (underlined for emphasis)

24. Excerpts extracted above, particularly the portion underlined, would clearly indicate that before recording the statement of witnesses under Section 299 of the Code, the court must be satisfied that the accused has absconded and there is no immediate prospect of arresting him. It is therefore axiomatic that this exercise cannot be relegated to be considered by the Sessions Judge, who tries the absconding accused subsequently, pursuant to his apprehension.

25. Jayendra Vishnu Thakur (*supra*) is an important decision to be noted on the topic. In this case, the sufficiency of the order passed under Section 299 of the Code before recording the deposition of the witnesses, with particular reference to satisfaction over the existence of the jurisdictional facts envisaged in Section 299, was the question before the Hon'ble Supreme Court. In the order under Section 299 passed by the designated Judge under the Terrorist

and Disruptive Activities (Prevention) Act, 1987, it is stated that eight accused persons have been shown as absconding. The right of the said absconding accused to have the witnesses examined in their presence, if the witnesses are alive at the time of trial, is also seen recognized in the order passed by the designated Judge, which, however, refers to the situation where the deponent dies or become incapable of giving evidence, etc., in which case, the evidence recorded as per that order can be used under Section 299 of the Code. Apart from a declaration under Section 82 of the Code, no other material was available before the designated Judge in passing the order under Section 299 Cr.PC. This fact is taken note of by the Hon'ble Supreme Court in paragraph 40 of the judgment. As a matter of fact, the so called absconding accused was arrested way back in July, 1993 [the order under Section 299 of the Code is dated 1.1.1994] by the Delhi Police, wherefore, it was contended that the finding regarding abscondence of the said accused persons was *per se* illegal. It is in this back drop that the Hon'ble Supreme Court interpreted Section 299 of the Code, as also Section

33 of the Indian Evidence Act and Section 14(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, as indicated in paragraph No.2 of the judgment. In the context of the expression 'proved' as appearing in Section 299 of the Code, the Hon'ble Supreme Court observed thus in paragraph 38 of the judgment:

> "38. ..... 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."

26. In paragraph 43 of the judgment, the Hon'ble Supreme Court emphasized the requirement for the court to apply its mind as regards the existence of the jurisdictional facts to pass an order under Section 299 of the Code. The relevant findings in paragraph 44 are extracted herein below:-

> "44. 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."

27. The Hon'ble Supreme Court referred to the judgments in **Rustom** (*supra*), as also, the judgment in **Mysore v. Sanjeeva [AIR 1956 Mys. 1]**. As laid down in the latter judgment, the Hon'ble Supreme Court took note of the requirement that the court recording the evidence should explicitly state that it has so satisfied itself about the jurisdictional facts that the accused person is absconding and that there is no immediate prospect of arresting him. A slightly discordant note in **BhagWati v. Emperor [AIR 1918 All 60],** to the effect that if clear evidence is before the Magistrate as regards the abscondence of the accused, from which it could reasonably being inferred that there was no immediate prospect of his arrest, then, the mere fact that the Magistrate did not recite a finding in this regard does not render the

evidence inadmissible, has not been accepted by the Hon'ble Supreme Court, as could be seen from paragraph 48 of the judgment. Unfortunately, the dictum laid down in **Bhagwati** (supra) has been misread by the Special Court, as a declaration of the Supreme Court in **Jayendra Vishnu Thakur** (supra) (see paragraph No.23 of the impugned order). The Hon'ble Supreme Court emphasized on the requirement of total application of mind, insofar as an order in the nature of the one under Section 299 is concerned. In other words, the foundational jurisdictional facts should be 'proved' as required in Section 299. The dictum laid down in **Nirmal Singh** (*supra*) that before recording the statement of witnesses, the court must be satisfied that the accused has absconded and there is no immediate prospect of arresting him, is referred to by the Hon'ble Supreme Court in paragraph 53 of the judgment.

28. Reliance placed by the learned A.S.G.I. in **Abu Salem Ansari and Others** (*supra*), in our analysis, will not obviate the above requirements as laid down in **Nirmal Singh** and **Jayendra Vishnu Thakur** (both-*supra*).

Reference to one sentence in paragraph 6 of **Abu Salem** *(supra)* would make it clear that the prosecution was permitted to rely on the evidence recorded under Section 299(1), subject to establishment of the existence of any of the conditions precedent as prescribed in first part of Section 299 of the Cr.P.C. The condition precedent, whether was available in that case was not enquired into in **Abu Salem** *(supra);* which was left to be answered by the Court below, which could only have been as declared in **Nirmal Singh** *(supra)* and **Jayendra Vishnu Thakur** (both-*supra*).

29. As regards **Rashid Lakhere** (*supra*), with due respect, we are unable to persuade ourselves to accept the manner in which the judgments in **Nirmal Singh** and **Jayendra Vishnu Thakur** (*both-supra*) have been conceived by the Madhya Pradesh High Court. That apart, the precise issue as to whether the court which records the deposition of prosecution witnesses under Section 299 should pass an order as regards the existence of the jurisdictional facts has not arisen for consideration in that case.

30. We are afraid whether the decision in **A.T.Mydeen** (*supra*) would come to the assistance of the N.I.A. in any manner. In paragraph 39 of the said judgment, the Hon'ble Supreme Court only concludes that the distinctiveness of the evidence is paramount in the light of the right of the accused for fair trial, which encompasses two important facets, (1) recording of evidence in the presence of the accused and his pleader and (2) the right of the accused to cross-examine the witnesses. The Hon'ble Supreme Court concluded that the culpability of an accused cannot be decided on the basis of any evidence which was not recorded in the presence of himself or his Pleader, unless the case falls under any exception of law as noted in the judgment. Nowhere in the judgment does the Hon'ble Supreme Court dilute the requirement of the court recording the deposition being satisfied of the existence of the jurisdictional facts required for invoking Section 299 of the Code.

31. The maintainability:-

The last contention of the learned A.S.G.I. is that the present appeals are not maintainable, since the order impugned is nothing but an interlocutory order, from which no appeal lies, going by Section 21 of the N.I.A Act. According to the learned A.S.G.I., the impugned order only permits giving in evidence the deposition of PW1, the probative value of which will be adjudged later. We find it difficult to endorse the arguments. Section 21(1) is extracted herein below:

> "21. **Appeals**.—(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law."

32. The Section is couched in a positive and enabling manner to further the right of appeal, subject to the solitary exception culled out with respect to interlocutory orders – pure and simple. In the same context and setting, we find the expression 'interlocutory order' in Section 397(2) of the Code, whereby the powers of revision has been excluded with respect to an interlocutory order. In **Amarnath v.**

State of Haryana [AIR 1977 SC 2185], the Hon'ble Supreme Court held that the term 'interlocutory order' is used in a restricted sense. It denotes an order of purely interim or temporary nature. It is not always converse of the term 'final order'. An order which overrides important rights and liberties cannot be termed as interlocutory. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals. It may thus be conclusive with reference to the stage at which it is made. [See in this regard **Parmeshwari Devi** v. **State** - AIR 1977 SC 403]. In **Madhu Limaye v. State of Maharashtra [AIR 1978 SC 47]**, the Hon'ble Supreme Court pointed out the nature of certain orders which are neither 'final' nor 'interlocutory', but of an 'intermediary' nature, that is to say, an order of the type falling in the middle course. It was also held that the bar under Section 397(2) is not attracted in the case of intermediate orders. On the strength of that finding, the Hon'ble Supreme Court concluded that an order framing charge against an accused is an intermediate order, revisable under Section 397(1) of the Code.

This principle was approved by a Four Judges Bench of the Hon'ble Supreme Court in **V.C.Sukla v. State, through CBI [(1980) Suppl. SCC 92]**. Both the decisions above referred were cited and followed by a Full Bench of this Court in **Mastiguda Aboobacker and Another v. N.I.A. and Others [2020 (6) KHC 265]**. The policy of law is thus clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary delay. At the other extreme, final orders are clearly capable of being considered. In between, is *tertium quid,* where it is more than a purely interlocutory order and less than a final disposal. [See **Gulaba Ram v. Hiri [1991(2) Crimes 521(HP)]**

33. Coming to the facts of the impugned order, we are least hesitant to point out that the same visits the accused persons with serious consequences, which even impinges on the settled rights of an accused, as conceived in criminal jurisprudence. That apart, the evidence of PW1 is found admissible under Section 299 of the Code as against the accused persons mentioned and the same has been marked as Ext.C1, vide the

impugned order. In such circumstances, we cannot but hold that the instant appeals are maintainable, the same not being of a purely interlocutory nature, but of an intermediate nature. Point concluded accordingly.

34. Conclusion :-

We are, therefore, of the definite opinion that the satisfaction of the facts specified in Section 299, [i.e. (1) a person accused of having committed an offence has absconded and (2) there is no immediate prospect of arresting him] should necessarily be recorded in the first stage itself, that is to say, before recording the deposition of the witnesses. The order impugned cannot be sustained inasmuch as the jurisdictional facts under Section 299 was not gone into or satisfied by the trial Judge, who recorded the deposition of the witnesses. As a matter of fact, the trial Judge was not recording depositions for the purposes of Section 299, but was recording the evidence as against the co-accused persons in the same crime, who had absconded earlier. The exercise which ought to have been done by the trial Judge

while recording the depositions of witnesses, *in absentia* the absconding accused persons, in terms of Section 299, cannot be done by the Judge when the absconding accused is put to trial, pursuant to his apprehension. As already found in the decisions referred above, Section 299, being an exception to Section 273 of the Code and Section 33 of the Evidence Act, besides being apparently in conflict with the foundational tenets of criminal jurisprudence, requires strict compliance.

We, therefore, allow the above appeals, setting aside the impugned order, answering the first question posed by us in the affirmative and the second, in the negative.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
C.JAYACHANDRAN
JUDGE

jg