PETITIONER:
NIRMAL SINGH

Vs.

RESPONDENT:
STATE OF HARYANA

DATE OF JUDGMENT: 30/03/2000

BENCH:
R.P.Sethi, G.B.Pattanaik

JUDGMENT:

PATTANAIK,J.

The appellant was convicted by the learned Sessions Judge for the offence of murder under Section 302 IPC, on a finding that he shot at Surat Singh, Desh Raj, Lehna Singh and Ramesh, by means of his sten gun, on account of which, all these four people died. He was also found guilty under Section 307 IPC for having injured 12 other persons with the intention of killing them. For his conviction under Section 302 IPC, the learned Sessions Judge, awarded the extreme penalty of death. The conviction and sentence was assailed by the appellant in Criminal Appeal No. 261- DB of 1997 in the High Court of Punjab and Haryana and a Reference also had been made by the learned Sessions Judge under Section 366 of the Code of Criminal Procedure for confirmation, which was registered as Murder Reference No. 3 of 1996. Both these cases were heard together and the High Court of Punjab and Haryana by the impugned Judgment dated 11.7.1997, upheld the conviction of the appellant under Section 302 as well as under Section 307 IPC but so far as sentence is concerned, the High Court commuted the death sentence to imprisonment for life. Be it be stated, the appellant had also been convicted under Sections 25 and 27 of the Arms Act and that conviction had also been upheld by the High Court in appeal. On the basis of the First Information Report Exhibit PW44/A, a criminal case was registered under Section 302/34 in the Police Station Safidon, District Jind on 15th of September, 1980 at 8.20 p.m. The First Informant was one Chhotu, son of Indraj. According to the FIR version, while the informant along with two others were present at the flour mill of Gaje Singh in village Budha Khera, the appellant who was serving in Army, and his brother, one Vijay Singh with two other persons came before them and indiscriminately fired with the army weapon which hit Surat Singh and said Surat Singh fell down. In course of such firing, Desh Raj also was shot at and he died. The informant then rushed to the Police Station and lodged the report. It was also indicated that earlier, there was a fight between two groups of people, on account of which the accused persons had grudge and they took revenge of the same. On the basis of the aforesaid FIR, PW44 along with his police staff reached the place of occurrence and found four people dead. The dead bodies of the aforesaid four people were sent to hospital for post mortem examination and

autopsy was conducted by Doctors PW31, PW32, PW33 and PW34. The investigating Officer got a warrant of arrest against the appellant on 16th of September, 1980 and went to the Unit of accused and he was informed by the Officers that the appellant has not rejoined after availing leave from 15th of September, 1980. The Investigating Officer also requested to have the custody of the sten gun which had been issued to the appellant but the Army Officers, refused to hand- over the sten gun. However those Army Officers handed over the live cartridges which had been supplied to the accused along with the sten gun for the purpose of analyses and comparison with the leads removed from the dead bodies of the four deceased persons. But, FSL authorities intimated the Investigating Officer that no testing could be done as the firing had been done in sand and without the weapon concerned, it would not be possible to test and analyse. The Investigating Officer then again approached the Army Authorities and got eight sten guns. All those eight sten guns were tested by a test fire and the FSL people identified one of those sten gun which according to them had been used in firing at the deceased. Later on, the Army Authorities established that the said gun in fact had been issued to the accused appellant. After completion of investigation, charge sheet was filed against the appellant, his brother Vijay Singh and their father Rulia Ram but Rulia Ram had died by then. So far as the appellant is concerned, as he could not be found, he was declared proclaimed offender and his brother Vijay Singh was also declared as a proclaimed offender. Since one of the accused persons had already died and two others were declared as proclaimed offenders, the Sub-Divisional Judicial Magistrate, recorded the statement of 27 witnesses under Section 299 of the Code of Criminal Procedure. The present appellant was later on arrested on 11th of September, 1994 and then on being committed by the learned Magistrate to the Court of Sessions, the Sessions Judge tried him for the offences charged. Out of the 27 witnesses who had been examined under Section 299 of the Cr.P.C., five of them had died by the time charges were framed against the appellant. Their statements recorded under Section 299 Cr.P.C. were, therefore exhibited during the trial as PW48/A, PW48/B, PW48/C, PW48/D and PW48/E. 22 other witnesses who had also been examined under Section 299 Cr.P.C. were examined as prosecution witnesses during trial but they did not support the prosecution and, therefore, they were cross examined by the Public Prosecutor and were declared hostile. The appellant in his statement recorded under Section 313 pleaded innocence and denied of his complicity with the crime. On the basis of the medical evidence of the doctors who had conducted the autopsy over the dead bodies, the learned Sessions Judge came to hold that the four persons died on account of gun shot injuries and injuries were ante mortem in nature. So far as, the appellant being the author of the crime, the Sessions Judge relied upon the statement of the five deceased eye witnesses, which had been recorded under Section 299 Cr.P.C. and came to the conclusion that those evidence prove beyond reasonable doubt that on the date of occurrence, it is the appellant who fired at the deceased persons by means of his sten gun and in consequence of which the four persons died at the spot. The Sessions Judge also came to the conclusion on the self-said statement recorded under Section 299 Cr.P.C. and came to hold that the appellant also caused injuries by means of firing and as such committed the offence under Section 307 IPC. Ultimately, the Sessions Judge convicted the appellant under

Section 302 and under Section 307 IPC as well as under Sections 25 and 27 of the Arms Act. On appeal, the High Court upheld the conviction of the appellant, relying upon the self-same materials namely the statement recorded under Section 299 Cr.P.C. of those five persons but as has been stated earlier for the conviction under Section 302, instead of awarding sentence of death, the High Court commuted the same to the life imprisonment. These appeals have been presented in this court on getting special leave.

Since the conviction is essentially based on the statements of five witnesses recorded under Section 299 of the Code of Criminal Procedure, Mr. Gopal Subramanium, the learned senior counsel, appearing for the appellant contended before us that Section 299 of the Criminal Procedure Code, empowers a Magistrate to take the deposition of witnesses in the absence of the accused being an exception to the principle embodied in Section 33 of the Evidence Act, before such statement can be used as evidence in any trial, the prosecution must strictly comply with the pre- conditions for applicability of Sec. 299. According to the learned counsel, the deposition recorded by the Magistrate under Section 299 can be given in evidence against an accused in any 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. But in the case in hand, there is no material to establish that the deponent namely those five persons whose statement had been recorded under Section 299 of the Cr.P.C. are dead and, therefore, their deposition recorded under Section 299 of the Cr.P.C. cannot be utilised as evidence in trial and the conviction of the appellant, therefore is vitiated.

Mr. Mahabir Singh, the learned counsel, appearing for the State-respondnet, on the other hand contended that the five persons having been reported to be dead, their statements recorded under Section 299 Cr.P.C. were tendered in evidence, which had been exhibited as Exhibits PW48/A to PW48/E. At no point of time, the accused has made any grievance that these persons are not dead. It is too late for the appellant to contend in this Court that there is no material to establish that the persons whose statements were recorded under Section 299 Cr.P.C. and those statements were tendered in evidence during trial, are not dead. According to Mr. Mahabir Singh, the appellant in this Court also does not contend that the persons concerned are not dead. But what is contended is that the prosecution has not established the fact that the people are not dead. 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 Cr.P.C. were tendered in evidence in 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.

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 it 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 first part of Section 299(1) of the Code of Criminal Procedure. In the case in hand, there is no grievance about non-compliance of any of the requirements of the first part of sub-section (1) of Section 299 Cr.P.C. When the accused is arrested and put up for trial, if any, such deposition of any witness is intended to be used as an 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 arguments 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 Sec.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 PW48/A to PW48/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 of the opportunity of cross-examining the witnesses, it is, therefore, necessary that the pre-conditions 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 pre- conditions before tendering the evidence. The Privy Council, in fact in the case of Chainchal Singh vs. Emperor, AIR (33) 1946 PC, Page 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 Magistrates 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 has discharged its burden of proving that the witness is 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 mis-reception 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 pre- conditions in both the Sections must be established by the prosecution and it is only then, the statements of witnesses recorded under Section 299 Cr.P.C. 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 concerned persons, who were summoned as witnesses and whose statements had already been recorded under Section 299 Cr.P.C. on the application of the prosecution, the said statements were tendered as evidence and have been exhibited as Exhibits PW48/A to PW48/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 the compliance of the first part of Section 299 (1) is concerned, the same is established through the evidence of PW28, who at the relevant time was working in Army as well as the S.H.O., 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 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 requirements of 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 have already died. The High Court has also indicated as to how on each occasion, summons issued to the five witnesses have been

returned back with the report that the persons are dead.

It is true as already stated that the Sessions Judge has not recorded an order to that effect and it would have certainly been in compliance of the requirement of Section 299 that the Court, while such statements are tendered in evidence should have recorded as to how the pre-conditions of the second part of Section 299 of the Code of Criminal Procedure have 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 eye witnesses, 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 PW2 Chhotu, PW12 Jai Lal, PW15 Prem, PW10 Zohri Singh and PW11 Jage Ram, has been established for the purpose of Section 299 of the Code of Criminal Procedure. In fact in the case of Jose vs. The State of Kerala, AIR 1973 SC 944, this Court had an 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 non-bailable 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 eye witness 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 an 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 is 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 pre-conditions of Section 299 Cr.P.C. have not been complied with. Once the statements of those witnesses, exhibited as Exhibits PW48/A to PW48/E, are considered, and the Sessions Judge as well 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. These appeals fail and are accordingly dismissed.

JUDIS