Orissa High Court
Smt. Urmila Sahu vs State Of Orissa on 19 September, 1997
Equivalent citations: 1998 CriLJ 1372, 1997 II OLR 426
Author: P Tripathy
Bench: P Tripathy
ORDER P.K. Tripathy, J.

1. Heard learned counsel for the petitioner and the learned Addl. Standing Counsel for the State.

2. The facts in brief involved in this case are that G.R. Case No. 214 of 1989 corresponding to Digapahandi P. S. Case No. 77 of 1989 was registered against the petitioner and the co-accused for the offences under Sections 498A/34, IPC read with Section 4 of the Dowry Prohibition Act. Charge-sheet was filed on 30.6.1991 showing the petitioner as an absconder. It is not disputed at the Bar that the attendance of the petitioner could not be secured. Thus, the G.R. Case was splitted and G.R. Case No. 214/A of 1989 against the petitioner was sent to the dormant file. So far as the co-accused is concerned, the trial of G.R. Case No. 214/89 is presently pending at the stage of hearing argument.

3. Learned counsel for the petitioner states that the petitioner was not aware of the pendency of the case and she was wrongly shown as an absconder. He further states that in G.R. Case No. 214/89 since last about one year argument has not been heard because of non-posting of a Magistrate. He argues that from the evidence available in G.R. Case No. 214/89 there is no material evidence to support the allegation against the petitioner regarding demand of dowry and torture and, therefore, the proceeding against her be quashed or dropped. He contends that, alternatively, a date may be fixed when the petitioner shall surrender before the lower Court and the lower Court may be directed to call for the case record of G.R. Case No. 214/A of 1989, so that on account of non-availability of the case record hearing of the petitioner's bail petition need not be deferred.

Learned Addl. Standing Counsel while strongly objecting to the aforesaid argument to quash the proceeding against the petitioner has, however, no objection to the alternative prayer made by the petitioner.

4. Contention of the petitioner that she was not aware of the pendency of the case is of no relevance in this case. At proper stage that contention, if raised, may be appropriately considered by the trying Magistrate.

5. Petitioner's contention to peruse the evidence in G.R. Case No. 214 of 1989 recorded in the trial against the co-accused i.e. the petitioner's son and to quash or drop the criminal proceeding against her for absence of clinching evidence against her, is devoid of merit for the reasons stated hereinafter. Section 299 of the Code of Criminal Procedure 1973 (for short 'Cr.P.C.') which corresponds to Section 512 of the Code of Criminal Procedure, 1898 (for short 'the Old Code') with no material change in the object, prescribes the procedure for recording of evidence in absence of the accused i.e. absconding accused. 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. (See AIR 1926 Allahabad 346 in the case of Sheoraj Singh v. Emperor and AIR 193S Patna 49 in the case of Emperor v. Baharuddin).

That being the settled legal position in this case it is not permissible to consider such evidence by this Court either to quash to drop the proceeding in exercise of power under Section 482, Cr.P.C.

6. Section 299, Cr.P.C. (Section 512 of the Old Code) has a limited application inasmuch as if it is proved that an accused person has absconded and there is no immediate prospect of arresting him or that it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown and there is no immediate prospect of arrest of such offenders, the Court competent to try or commit for trial may examine the witnesses produced on behalf of the prosecution and record their depositions. After apprehension of the accused or when the accused is available to the Court for trial at that stage if any of such witnesses examined under Section 299, Cr.P.C. is not available being dead or incapable of giving evidence or cannot be found or if his presence cannot be procured without an amount of delay, expense or inconvenience, then circumstances should be taken into consideration and the evidence recorded under Section 299, Cr.P.C. may be accepted in evidence to be used against such accused persons. In that sense, Section 299, Cr.P.C. is an exception to the general rules and criminal jurisprudence regarding recording of evidence in presence of the accused. It thus, follows that even if evidence is recorded under Section 299, Cr.P.C., but if after the apprehension of the accused if such witnesses are available and are capable of giving evidence, then the evidence recorded under Section 299, Cr.P.C. cannot be utilised as substantive evidence. The aforesaid legal proposition is apparent on a bare reading of Section 299, Cr.P.C. (i.e. Section 512 of the Old Code). In the case of State of Hyderabad v. Bhimaraya (AIR 1953 Hyderabad 63) a Munsif-Magistrate, recording statement of witnesses under Section 512 of the Old Code with respect to certain absconding accused, passed order to delete the name of such absconding accused persons on the ground that no sufficient proof of their participation was available. On the reference being made by the Sessions Judge, Gulbarga, a Division Bench of the Hyderabad High Court had examined the legality of the aforesaid order of the Munsif. Magistrate and have held that Section 512 of the Code does not authorise the Magistrate to delete the name of an absconding accused on the basis of evidence so recorded. This Court respectfully agree with the above view and for that reason the prayer to quash or drop the proceeding is accordingly rejected.

7. So far as it relates to the alternative contention regarding fixation of a date for appearance when the petitioner is to surrender before the lower Court and issue of direction to the lower Court to call for and retain the split up case record, there is no legal impediment to consider that prayer and more so when learned Addl. Standing Counsel has fairly conceded to that submission.

8. Rule 326 of General Rules and Circular Orders of the High Court of Judicature, Orissa (Criminal Vol. I), hereinafter referred to as the 'G.R. & C.O. provides regarding the type of the cases which can be sent to Dormant file. Cases relating to absconding accused is covered by that provision. In that connection. Rule 327 of the G.R. &C.O. provides that after the appearance or the production of the accused, concerned Magistrate would call for the record and proceed with the case, according to law, in its original number. Therefore, it will neither be illegal nor unjust in this case if the learned lower Court will be asked to call for and keep the record on a given date on which the petitioner undertakes to surrender before the learned Magistrate. Taking that view in the matter, the petitioner is permitted to surrender before the lower Court on 20.10.1997 forenoon. The J.M.F.C., Digapahandi is directed to call for and retain the record of the spilt up case by that date.

9. Learned counsel for the petitioner argued that a direction be issued to the lower Court to hear the bail application on that date. In that connection, it may be observed that if the petitioner will surrender before the lower Court on the aforesaid date and file bail petition, the same may be considered on merits taking all the facts and circumstances into consideration.

The Criminal Misc. Case is accordingly disposed of.