



2022 PLRonline 0597

PUNJAB AND HARYANA HIGH COURT
Before: Justice Arvind Singh Sangwan
 DARSHAN SINGH v. STATE OF PUNJAB
 CRM-M-27287-2020 CRR-849-2018 (O&M)
 AND CRM-M-14007-2019
 27.05.2022

Criminal Procedure Code, 1973, Section 82, 83, 174 - Witness - Whether action can be taken against him under section 82 or deals only with accused persons - Procedure against a witness, who has failed to appear despite notice of summons/warrants/bailable warrants, proclamation under Section 82(1) Cr.P.C., is to take action under Section 350 Cr.P.C. as well as Section 174 IPC - Admittedly, under Section 82(1) Cr.P.C., the Court can issue proclamation against any person against whom warrant has been issued and is avoiding execution of the warrant but Section 82(4) Cr.P.C., specifically deals only with accused persons, who are facing offence for heinous crime like Section 302 (in the present case) and subsequently, it is only Section 82(4) Cr.P.C., the accused can be declared a proclaimed offender and not a witness under Section 82(1) Cr.P.C.

Editors note: Directions set aside in (2023-4)212 PLR 291 (SC)

Mr. Ishan Gupta, for the petitioner. (in CRM-M-27287-2020 and CRM-M-14007-2019). Mr. Neeraj Jain, Advocate for the petitioner (in CRR-849-2018) and for the complainant (in CRM-M-27287-2020 and CRM-M-14007-2019). Mr. Joginder Pal Ratra, DAG, Punjab. Mr. A.S. Brar, for respondent No.2 (in CRR-849-2018) Mr. H.S. Deol, for respondent No.3 (in CRR-849-2018)

CRM-26855-2021 IN CRR-849-2018

Heard.

Allowed as prayed for.

Documents (Annexures R/2-1 and R/2-2) are taken on record subject to all just exceptions.

CRM-M-27287 of 2020 & 14007 of 2019 & CRR-849-2018 (O&M)

On 16.05.2022, the following order was passed by this Court:-

“Prayer in this petition, CRM-M-27287-2020, is to grant regular bail to petitioner Darshan Singh, who is facing a trial under Section 302 IPC and is in judicial custody for the last about 05 years and 03 months. The main grievance of the petitioner is that prosecution evidence is still not concluded.

During the course of arguments, learned State counsel has placed on record a certified copy of order dated 29.04.2019 passed by the trial Court, vide which non-bailable warrants were issued to two prosecution witnesses. Later on, vide order dated 24.05.2019, PW Amrik Singh and PW Harwinder Singh, who were present in Court, were not examined and they were bound to appear on 31.05.2019. Vide order dated 31.05.2019, it was noticed that an application was moved by PW Amrik Singh and PW Harwinder Singh seeking exemption from personal appearance, which was declined and proclamation under Section 82 Cr.P.C. was issued against the said witnesses. Thereafter, on 06.06.2019, statement of a Constable was recorded that both of the said witnesses have been served through proclamation and finally on 05.07.2019, the following order was passed by the trial Court:

Both PWs Amrik Singh and Harwinder Singh

stood served through proclamation on 04.05.2019 and statement of serving constable in that context also stood recorded on last date. Their presence is awaited for today but they preferred not to appear. They are declared proclaimed persons. Intimation in this regard be sent to concerned SHO and

SSP.

PW5 ASI Kaur Singh present and examined in chief. His cross-examination deferred at the request of proxy counsel for the accused. He is bound down for 26.07.2019. Summons issued to PW HC Satpal Singh received back unserved. Let fresh summons to him be issued. PW Dr. Rashmeet failed to appear despite service on summons. Let he be summoned through bailable warrants in the sum of Rs.5,000/- with one surety in the like amount for the date fixed.”

Learned counsel for the petitioner(s) as well as learned State counsel submit that since one of the eye-witnesses, namely Amrik Singh, was declared a proclaimed person by the trial Court, his statement has not been recorded and after 2019, no efforts have been made by the trial Court to summons aforesaid witnesses.

It is surprising that the trial Court has adopted a procedure under Section 82 Cr.P.C. against a witness, though the procedure under Section 82 Cr.P.C. is meant for appearance of an accused person.

Chapter VI of the Cr.P.C. deals with Process to Compel Appearance; Part-A issuance of Summons and Part-B warrants of arrest.

Section 73 Cr.P.C. provides that the Court may direct a warrant to any person within its local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

Section 82 Cr.P.C. deals with the proclamation of an absconding person, against whom warrants have been issued and the Court may publish a written proclamation requiring him to appear as per the procedure. Section 82(4) Cr.P.C. clearly provides that where a proclamation published under subsection (1) in respect of a person accused of an offence punishable is made, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

Therefore, a perusal of Section 82(4)

Cr.P.C. clearly shows that a witness cannot be declared a proclaimed offender, if he fails to appear despite service of non-bailable warrants, rather the procedure to be adopted by the Court is provided under Section 350 Cr.P.C., wherein a summary procedure is provided for punishment to a witness for non-attendance in obedience to summons. This section clearly provides that where the witness is legally bound to appear before a criminal Court, without just excuse neglects or refuses to attend the Court, the Court may take cognizance of the offence and by giving an opportunity of showing cause as to why he should not be punished under this section, sentence him to fine not exceeding one hundred rupees.

It is also relevant to note that as per Section 311 Cr.P.C., any Court may, at any stage of any inquiry, trial or other proceedings, summon any person as a witness or recall and re-examine any person already examined as witness.

The trial Court, while declaring PW Amrik Singh as a proclaimed offender, has further failed to take notice of Section 174 IPC, wherein again a prosecution is provided regarding non-attendance in obedience to an order from a public servant. It is clearly provided under Section 174 IPC that where a witness, who is legally bound to attend the Court of justice, intentionally omits to attend the Court, he can be punished with simple imprisonment for a period which may extend to six months or fine which may extend to one thousand rupees or both.

The procedure adopted by the trial Court/Additional Sessions Judge, Mansa requires an explanation as to how vide orders dated 29.04.2019 and 31.05.2019, the Court has directed the presence of the said witnesses through proclamation under Section 82 Cr.P.C. as well as subsequent order dated 05.07.2019, vide which the prosecution witnesses Amrik Singh and Harwinder Singh were declared proclaimed persons. This has resulted in unnecessary delay in trial and long custody of the petitioner.

List again on 27.05.2022.

To be shown in the Urgent List.

The Registrar General of this Court is directed to ensure that explanation of the trial Court/Additional Sessions Judge, Mansa is received well before the next date of hearing."

In pursuance to the aforesaid order, the explanation has been submitted by the Additional District & Sessions Judge, Chandigarh, which reads as under:-

"I have the honour to humbly submit that during the period from April, 2019 till 01.04.2021 I remained posted as Addl. District & Sessions Judge at Mansa. The referred trial State vs Darshan Singh regarding offence u/s 302 IPC was pending in that Court at the stage of prosecution evidence. Referred witnesses Harwinder Singh and Amrik Singh were summoned for their depositions for 09.04.2019. They did not appear despite service on summonses. They were directed to be summoned through bailable warrants for 29.4.2019. Despite such service they yet did not appear and were directed to be served through non-bailable warrants and then were directed on 31.5.2019 to be served through proclamation as per section 82 Cr.P.C (82 (1) Cr.P.C) and ultimately were declared Proclaimed Persons on 05.07.2019. With all humility at my command I humbly submit that I had the bonafide impression from the provision of section 82 (1) Cr.P.C that a witness could be served through proclamation as this provision envisages that ANY PERSON, against whom warrant has been issued by the court, has absconded or is concealing himself, can be served through such written proclamation.

Section 82 Cr.P.C is being reproduced hereunder for ready reference please:-

Proclamation for person absconding:- (1) If any Court has reason to believe (whether after taking evidence or not) that any **person** against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a

specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:-

(1) (a) it shall be publicly read in some conspicuous

place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house:

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person **accused** of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).

I have the honour to humbly further submit that this proclamation is also provided as FORM No.5 in Schedule II of Cr.P.C (copy attached). As this FORM also is there in the Cr.P.C I remained under bonafide belief that a

witness can be served through proclamation as per section 82 Cr.P.C.

It also is humbly submitted that Synopsis 4 of section 82 Cr.P.C in SOHONI'S Cr.P.C, 19th EDITION, VOL-1, also has commentary as per which this section 82 Cr.P.C read with section 83 Cr.P.C shows that even in summons-cases and as against witnesses, a proclamation may be issued for apprehension of a person against whom warrant has been issued. Synopsis 22 of this section (copies attached) in said book has reference of judgment Wilkins 92: (Smt) Sonakali V. State, 1974 All.Cr.R. 88 (despite my best efforts I could not trace copy of this judgment) relating to proclamation against an absent witness, and details out that when a proclamation has been issued for an absent witness, if he afterwards appears, the Court may order the witness to pay the cost of the proclamation. In judgment Birad Dan Vs. The State, AIR 1958 Rai 167 (copy attached) of Hon'ble Rajasthan High Court also, in para 4, it inter alia has been observed that sections 87 and 88 Cr.P.C (equivalent to sections 82 and 83 of Cr.P.C, 1973) make certain provisions for compelling the attendance of an accused or for that matter a witness who may be found to be absconding and evading his presence in the Court. As per said section 87 a proclamation can be issued against such wanted person. It is also humbly submitted that I had bonafide belief that as section 82 (4) Cr.P.C. is the provision where word accused is used but it is not so used in section 82 (1) Cr.P.C., and, hence, I took that latter provision is applicable to witnesses also against whom non-bailable warrants stood issued earlier. I have the honour to further humbly submit that the proclamations u/s 82 Cr.P.C were directed to be issued against PWs Amrik Singh and Harwinder Singh bonafidely believing that section 82 (1) Cr.P.C is applicable to witnesses also as is explained above please. With all humbleness it is submitted that my explanation may kindly be accepted. Despite my above-detailed submission if the explanation is not found satisfactory, I

undertake to be careful in future. Inconvenience caused by the undersigned to the Hon'ble High Court is deeply regretted."

Though in the aforesaid order, it was observed by this Court that the procedure against a witness, who has failed to appear despite notice of summons/warrants/bailable warrants, proclamation under Section 82(1) Cr.P.C., is to take action under Section 350 Cr.P.C. as well as Section 174 IPC, however, no reference is given in this regard and rather explanation is given that in terms of the judgment "Birad Dan vs The State", AIR 1958 Rajasthan 167, as well as the judgment "Sonakali vs State", 1974 All Criminal Reporters 88, the proclamation was rightly issued by the Court.

Admittedly, under Section 82(1) Cr.P.C., the Court can issue proclamation against any person against whom warrant has been issued and is avoiding execution of the warrant but Section 82(4) Cr.P.C., specifically deals only with accused persons, who are facing offence for heinous crime like Section 302 (in the present case) and subsequently, it is only Section 82(4) Cr.P.C., the accused can be declared a proclaimed offender and not a witness under Section 82(1) Cr.P.C.

Needless to say that both the judgments pertain to the Criminal Procedure Code prior to its amendment in 1973 wherein major amendments were made.

"Though, ordinarily if a mistake is committed and some explanation is called, while fairly admitting the mistake, which may be either on account of a typographical mistake; on account of some over-sight; on account of heavy pendency of the cases or even in some cases on account of not getting proper legal assistance from the counsels or the Public Prosecutors, the concerned Court give undertaking that in future, it will remain careful about any such mistake so that the matter may be closed."

However, in the instant case, it is apparent that in order to justify the mistake, the Additional Sessions Judge has relied upon 02 judgments,

which are prior to 1973 Amendment and this part of the explanation itself reflects that the concerned Judge has tried to find out some judgments to support his order, however, he could not find any judgment post 1973 Amendment and that is why, reference is made to the judgments under the old Criminal Procedure Code.

On the face of it, the explanation do not seems to be a bona fide explanation as despite an error committed by the Court, the Court is still trying to justify the same instead of undertaking that in future, it will be cautious about not committing any such mistake.

It is worth noticing that the Hon'ble Supreme Court in "**Rajesh Yadav and another vs State of U.P.**", 2022 Live Law (SC) 137, has observed as under:-

"39. Before we part with this case, we are constrained to record our anguish on the deliberate attempt to derail the quest for justice. Day in and day out, we are witnessing the sorry state of affairs in which the private witnesses turn hostile for obvious reasons. This Court has already expressed its views on the need for a legislative remedy to curtail such menace. Notwithstanding the above stated directions issued by this court in Vinod Kumar (supra), we take judicial note of the factual scenario that the trial courts are adjourning the cross examination of the private witnesses after the conclusion of the cross examination without any rhyme or reason, at the drop of a hat. Long adjournments are being given after the completion of the chief examination, which only helps the defense to win them over at times, with the passage of time. Thus, we deem it appropriate to reiterate that the trial courts shall endeavor to complete the examination of the private witnesses both chief and cross on the same day as far as possible. To further curtail this menace, we would expect the trial courts to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. A copy of this judgment shall be circulated to all the trial courts, to be

facilitated through the respective High Courts."

It is also to be noticed that certain guidelines have been issued by the Madhya Pradesh High Court in case of "Rambahor Saket and others vs State of M.P.**", passed in M.Cr.C.No.322718 of 2018, 25031 of 2018 and 17896 of 2018, decided on 04.12.2018, with regard to speedy trial and to check delay of recording of the prosecution evidence. The following guidelines have been issued by the Court:-**

"29. Under the circumstances, this Court feels that laying down certain broad guidelines which the trial court must make all efforts to follow mutatis mutandis, tailoring the same to special circumstances that a particular case may present, would be beneficial for all concerned. These guidelines are not exhaustive and are illustrative, which this court hopes, if put into practice, may result in the expeditious completion of prosecution evidence.

(1). After framing of charges against the accused, summons be issued to the eye witnesses or, if its a case where there are no eye witnesses, then to those witnesses who are most material to prove the case of the prosecution,

(2). If summons are returned unserved for whatever reasons, instead of wasting further time by resorting to the same process time and again, the next summons must be served through the office of Superintendent of Police to the witnesses where the Trial Court is situated in the District Headquarters and through the office of the SDOP, in the Tahsil Courts. If those summons are also not served, the report of the police must reflect the reasons why they have not been served,

(3). If the reasons given by the police in the report returning the summons unserved, reflect that the witnesses are unreachable/untraceable and that service cannot be effected on them on account of their non-availability and there is no prospect

of them being found within reasonable time, then the trial court must skip those witnesses and proceed to the next set of witnesses by issuing summons to them. The Trial Court must realise that the case of the prosecution is actually the case of the State through the police, against the accused persons. It is the duty of the police to produce their witnesses before the trial Court. By skipping a set of witnesses, the court is not closing their evidence but merely keeping them in abeyance, to be recorded as and when they are found by the police or appear on their own before the Trial Court at any stage before the conclusion of the trial. In such a case, skipping of such witnesses would necessarily need the consent of Counsel for the defence and if opposed by the defence Counsel, for whatever strategic reasons the defence may have, then the court may issue fresh summons to the same set of witnesses. However, in such a situation, the delay in conduct of trial would then be on account of the conduct of the defence for which accused cannot claim violation of the right to a speedy trial at a later point of time,

(4). If material witnesses cannot be procured without delay, the court must explore the possibility of examining formal witnesses and expert witnesses if any and conclude the same. Thereafter, the remaining witnesses for the prosecution who have not been examined on account of the inability of the police to produce them for reasons reflected in the report of the police, the court must close the case of the prosecution and proceed to the next stage of the case. However, if any of the prosecution witnesses appears at a subsequent stage, before passing of the judgment by the trial Court, the court shall be free to exercise its jurisdiction under section 311 Cr.P.C., 1973 and record their statements in the interest of justice after considering opposition of the defence counsel, if any.

(5). The police on its part, must secure the

mobile number and E-mails ids of all witnesses, if they possess the same. This must be retained by them in the inner case diary to

be used for transmitting the summons or messaging the witness regarding their date and time of appearance before the Trial Court to testify. The police must take care that the aforementioned details are NOT disclosed in the charge-sheet in order to ensure that the access of the accused to the witnesses is minimised to the greatest extent possible.

(6). The Trial Court must also resort to the

option of delivering summons through SMS and Email in addition to the conventional process, wherever possible. The purpose of the endeavour must be to secure the presence of the witnesses in the shortest possible time to complete the trial. The Courts must be bear in mind that as long as the trial is in progress, presumption is always of innocence and not of guilt.

(7). It shall not be open to the police to put forward reasons of law and order work or any other of their functions as excuses for not complying with the order of the Trial Court to secure the presence of their witness. Such non compliance on the part of the police may constitute contempt or the Trial Court's order, and the Trial Court shall be at liberty to initiate such proceedings against the police if it is not satisfied with the reply of the police for not complying with the order passed by it."

The said Court has released the accused on bail considering that there was inordinate delay in recording of the statement of the witnesses like in the present case, the accused is in custody for more than 05 years and even the eye-witness has not been recorded.

This Court deem it appropriate to reiterate the said directions.

List again on 03.08.2022.

In the meantime, a copy of this order be placed before the concerned Hon'ble Administrative Judge.

Till the next date of hearing, considering the fact that a petition challenging the order under Section 319 Cr.P.C. filed by the complainant is also

pending in which passing of the final order is stayed and also in view of the fact that the petitioner is in long custody of more than 05 years and 03 months, he is ordered to be released on interim bail subject to his furnishing bail/surety bonds to the satisfaction of the trial Court/Duty Magistrate concerned.

a

A photocopy of this order be placed on the file of other connected cases.

b

A copy of this order be placed before the Registrar General of this Court for circulation to all the District & Sessions Judges in the States of Punjab, Haryana and U.T., Chandigarh, as well as to the Director General of Police, Punjab, Haryana and U.T., Chandigarh for further transmitting the same to all the Investigating Officers to follow the guidelines of the Hon'ble Supreme Court as well as this Court.

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