

Latest HLJ 2025 (HP)(1) 60 In the High Court of Himachal Pradesh, Shimla.

Cr. Appeal No. 17 of 2017 with Cr. Appeal Nos.533 and 534 of 2016

Criminal Procedure Code, 1973 Section–284,285&286 read with Sections–395,396,460,302 and 120-B of Indian Penal Code, 1860– Legality of Commission Evidence–Procedure–Appointment of Local Commissioner–Accused had committed theft in the temple and murdered the chowkidar of the temple–The trial court convicted the accused based on evidence collected through a local commission– The ACJM, erroneously appointed a private individual as the Local Commissioner instead of a Magistrate–Appeal against Conviction– Held–That, where the essential prerequisites for issuing a commission are not complied with, the evidence so taken is inadmissible and cannot be used against the accused–A commission can only be issued to a CJM or a Metropolitan Magistrate, who must either execute it personally or appoint another Magistrate–Conviction and sentencing set aside–matter remanded for a fresh trial following due process of law. (Paras 15 & 16) Parties represented by:

For the Appellants: Mr. Manoj Pathak, Advocate, for appellant in Cr. Appeal No. 17 of 2017, Mr. O.C. Sharma, Advocate, for appellant in Cr. Appeal No. 533 of 2016. Mr. Vinay Thakur, Advocate, for the appellant in Cr. Appeal No. 534 of 2016.

For the Respondents: Ms Seema Sharma, Deputy Advocate General in all the Cr. Appeals.

Rakesh Kainthla, Judge:- The present appeals are directed against the judgment dated 27.07.2016 passed by learned Additional Sessions Judge-I, Shimla, H.P. (learned Trial Court) vide which the appellants (accused before learned Trial Court) were convicted of the commission of offences punishable under Sections 395, 396, 460, 302 and 120-B of Indian Penal Code (in short IPC) and order dated 01.08.2016 vide which they were sentenced as under:-

1. Convicts were sentenced to undergo rigorous imprisonment for life each and directed to pay a fine of ₹3,00,000/—each (Rupees three lakhs) for the commission of an offence punishable under Section 302 read with section 120-B IPC. In default of payment of the fine, they were further directed to undergo simple imprisonment for five years in addition to life imprisonment.
2. Convicts were further sentenced to undergo rigorous imprisonment for ten years each and directed to pay a fine of ₹1,00,000/- (Rupees one lakh only) each for the commission of an offence punishable under Section 395 read with section 120-B IPC. In default of payment of the fine, they were further directed to undergo simple imprisonment for three years in addition to the ten years imprisonment.
3. Convicts were further sentenced to undergo rigorous imprisonment for life each and were also directed to pay a fine of ₹3,00,000/-each (Rupees three lakhs) for the commission of an offence under Section 396 IPC. In default of payment of the fine, they were further directed to undergo simple imprisonment for five years in addition to life imprisonment.
4. Convicts were further sentenced to undergo rigorous imprisonment for 10 years each, and they were also directed to pay ₹1,00,000/- (Rupees one lakh only) each for the commission of

an offence punishable under Section 460 read with Section 120-B IPC. In default of payment of the fine, they were further directed to undergo simple imprisonment for three years in addition to the ten years imprisonment.

(Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the police presented a challan against the accused before the learned Trial Court for the commission of offences punishable under Sections 302 and 392 read with Section 34 of IPC. It was asserted that the accused had committed theft in the temple of village Devta Sahib Bondra Bachhunch and murdered Hira Lal, the chowkidar of the temple. The prosecution relied upon the recovery of the idols and other articles pursuant to the disclosure statement made by the accused. These articles were released during the investigation on Sapurdari by learned Judicial Magistrate First Class, Court No.II, Rohru, District Shimla, H.P. vide order dated 01.08.2013 after preparing the inventory, taking photographs and video recording of the idols.

3. The prosecution examined SI Deepak Dahiya (PW-7) on 13.11.2014. It was brought to the notice of the learned Trial Court that case property was released on sapurdari by the Investigating Officer and Judicial Magistrate First Class, Court No.II, Rohru, District Shimla, H.P. in favour of Shamsher Singh Thakur and Vijay Ram. Both the sapurdars were prosecution witnesses who had refused to produce the case property. The learned Public Prosecutor requested to discharge the witnesses and the examination of SI Deepak Dahiya (PW-7) was deferred.

4. The State filed an application before the learned Additional-Chief Judicial Magistrate First Class, Court No. 1, Rohru, District Shimla, on 17.11.2014, seeking direction to the Sapurdars to produce the case property. Learned Additional Chief Judicial Magistrate passed an order on 24.03.2015 that parties were made aware that they were bound to produce the case property during the trial of the case, failing which their bail bonds would be forfeited. However, the learned Assistant Public Prosecutor for the State submitted that the matter was listed for 12.05.2015; hence, the matter was adjourned for 17.04.2015 for the production of the case property.

5. Rameshwar Singh and others approached this Court by way of filing a Cr.MMO No. 79 of 2015, titled Rameshwar Singh & others vs State of H.P. against the order dated 23.03.2015 (sic 24.03.2015), asserting that Devta had refused to visit the Court and petitioners cannot compel him to do so. The

petitioners would have to pay ?25,00,000/-each. This would also hurt the sentiments of the residents. The issue could be resolved by appointing a Court Commissioner to ascertain/verify/examine the case property. The learned Court below has not exercised the power vested in it under Section 9(6) of Cr.P.C., which empowers the Court of Sessions to hold the sitting at any place in the Sessions Division with the consent of the prosecution and the accused.

6. This Court passed an order on 12.05.2015 that in the larger interest of justice, learned Additional Chief Judicial Magistrate, Court No. 1, Rohru, District Shimla, H.P. would not insist upon the production of items/idols detailed in paragraph three (3) of the application moved by the State, rather shall appoint a Local Commissioner, who shall be accompanied by the prosecution witnesses, defence counsel as well as the public prosecutor to the temple concerned where the items were kept and thereafter would submit the report to the Court.

7. Learned Additional Chief Judicial Magistrate, Court No.1, Rohru, appointed Sh. S.S. Deshta, Senior Advocate, Bar Association Rohru, District Shimla, H.P., as Local Commissioner to visit the spot. The Local Commissioner visited the spot and recorded the statements of Shamsher Singh, Rameshwar Singh and Bhagat Singh and also took photographs of the idols. Learned Trial Court examined Sh. Sh. S.S.Deshta (PW-30), who proved his report (Ext.PW30/A).

8. After hearing the parties and going through the records, we are of the opinion that the learned Additional Chief Judicial Magistrate, Court No.1, Rohru, H.P., erred in the appointment of Sh. S.S. Deshta as Local Commissioner. 9. Section 284 of Cr.P.C. deals with the appointment of a commission. It reads as under:

284. When attendance of witness may be dispensed with and commission issued.

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court of Magistrate that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

Provided that where the examination of the President or the Vice- President of India or the Governor of a State or the Administrator of a

Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The court may, when issuing a commission for the examination of a witness for the prosecution direct that such amount as the court 2025 Bharat V/s State of Himachal Pradesh 63

considers reasonable to meet the expenses of the accused including the pleader's fees, be paid by the prosecution.

10. It is apparent from the perusal of Section 284 of Cr.P.C. that the Court or the Magistrate where the matter is pending can appoint a Local Commissioner they are of the opinion that attendance of the witness cannot be procured without an amount of delay, expenses or inconvenience.

11. Section 285 of the Code of Criminal Procedure, 1973 provides that the person to whom the

commission can be issued. It reads as follows: 285. Commission to whom to be issued. —

(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.

(2) If the witness is in India but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf.”

12. It is apparent from the bare perusal of the Section that the commission can only be issued to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate.

13. Section 286 of CrPC provides the mode of the execution of the commission. It reads as follows: “286. Execution of commissions. —Upon receipt of the commission, the Chief Metropolitan Magistrate, or Chief Judicial Magistrate or such Metropolitan or Judicial Magistrate, as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials or warrant-cases under this Code.”

14. A perusal of this Section shows that the Chief Judicial Magistrate or the Chief Metropolitan Magistrate can execute the commission himself or appoint a Judicial Magistrate or the Metropolitan Magistrate to execute the commission.

15. In the present case, the prosecution could have filed an application for the appointment of a Local Commissioner before the learned Trial Court. Instead, it chose to file the application before the Additional Chief Judicial Magistrate, and the

parties were constrained to approach this Court. This Court in exercise of jurisdiction vested in it directed the Additional Chief Judicial Magistrate to appoint a Commission. An Additional Chief Judicial Magistrate exercises the powers of the Chief Judicial Magistrate as per Section 12(2) of Cr.P.C.; therefore, when this Court directed the Additional Chief Magistrate to appoint a Local Commissioner, the Additional Chief Judicial Magistrate was bound to act as per Section 286 of Cr.P.C. and appoint a Magistrate or to execute the commission himself. It was impermissible for the Additional Chief Judicial Magistrate to appoint the President of the Bar Association as a Local Commissioner.

16. It was laid down by the Hon’ble Supreme Court in *Dharmanand Pant v. State of U.P.*, 1957 SCC OnLine SC 57: 1957 SCR 321: 1957 CRI LJ 894: AIR 1957 SC 594 that where the essential pre-requisite of issuance of a commission has not been complied with, the evidence so taken would be improper and could not be used against the accused. It was observed:

“Such being the case, we are constrained to observe that an elementary rule of practice essential for justifying the examination of witnesses on interrogatories has not been conformed to. The point is of vital importance for the reason that if the essential prerequisite for the validity of the issuing of a commission has not been complied with, the evidence so taken would be improper and could not be used against the accused. This is a defect which goes to the root of the matter and is vital in content. Thus, the entire proceedings are vitiated, and the evidence of the witnesses taken on commission will have to be completely eschewed from the record.”

17. In the present case, Sh. S.S. Deshta could not have been appointed, and the statements recorded by him are inadmissible evidence and cannot be relied upon. Hence, the judgment and order based upon such statements are also not sustainable.

18. Consequently, the present appeal is allowed, and judgment and order dated 27.07.2016/01.08.2016, passed by the learned Trial Court, are ordered to be set aside. The matter is remitted to the learned Trial Court, who shall issue a commission to the learned Additional Chief Judicial Magistrate, Rohru, District Shimla, H.P., as per the order passed by this Court in Cr.MMO No. 79 of 2015, decided on 12.05.2015, titled Rameshwar Singh & others vs State of H.P. and the Additional Chief Judicial Magistrate shall thereafter execute the commission as per Section 286 of Cr.P.C. and other provisions of Cr.P.C. Learned Trial Court shall thereafter proceed to dispose of the matter afresh in view of the fresh report of the commission. The accused are in judicial custody. They be produced before the learned Trial Court on 02.01.2025, and the record of the trial Court along with a copy of this judgment be sent forthwith to reach before the learned Trial Court well before the date fixed.

19. Appeals stand disposed of along with pending miscellaneous application(s), if any.