

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.143 OF 2000

Nusli Wadia**.. Appellant***Versus***S.Phiroze J. Dastur and ors****.. Respondents**

Mr.Abhijeeet K. Mangade, Advocate for the appellant.

Mr.Prakash Naik with Mrs.Vrishali Raje, Advocate for respondent nos.1 and 2.

Mrs.S.Gajare-Dhumal, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.**DATED : 23rd SEPTEMBER, 2015**

ORAL JUDGMENT :-

1 The appellant is the original complainant. He had filed a complaint against respondent nos.1, 2 and 3 herein. Respondent nos.1 and 2 were summoned to appear and to answer to the charge of an offence punishable under Section 500 of the IPC read with Sections 34 and 109 of the IPC. Respondent no.3 was summoned to appear and to answer to the charge of the offences punishable under Sections 500 and 501 of the IPC read with Section 34 and/or Section 109 of the IPC. By an order dated 10th February 2000, the Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, acquitted the respondents under the provisions of Section 256 of the Code of Criminal Procedure

(Code). The complainant has, after obtaining special leave of this Court, filed the present Appeal challenging the said order of acquittal.

2 The Appeal was listed for final hearing yesterday. When it was called out, none appeared for the appellant. The matter was kept back for some time, and again called out, but at that time also, the counsel for the appellant was absent. The Appeal, therefore, was heard in the absence of the counsel for the appellant. After going through the Appeal Memo and the annexures thereto, and after hearing Mr. Prakash Naik, learned counsel for respondent nos. 1 and 2, an order dismissing the Appeal was pronounced in the morning session.

3 However, before the order could be transcribed, the matter was mentioned by the learned counsel for the appellant, praying that he be heard in the matter. In the presence of the counsel for both the parties, it was decided that the matter be placed on board today, and would be heard afresh.

4 Though technically, an order dismissing the Appeal had been pronounced, since the order had not been signed, and had not even been transcribed, I have thought it fit to recall the said order for the reason that the same had been passed without hearing the counsel for the appellant. In the interest of justice, therefore, the Appeal is today heard again after giving an opportunity to the learned counsel for the appellant to argue the matter.

5 For the sake of convenience and clarity, the appellant shall be referred to as 'the complainant' and the respondent nos.1, 2 and 3 as 'the accused'.

6 The question is whether the order passed by the Magistrate acquitting the accused persons, needs to be interfered with or not. For deciding this, reference to a few facts and dates would be necessary.

7 The process against the accused was issued by an order dated 26th August 1993. The plea of the accused persons was recorded on 7th April 1994. The roznama of the said data indicates that the case was thereafter kept for recording of evidence.

8 I have carefully gone through the roznama of the case, a certified copy of which is annexed to the Appeal Memo. It appears that the complainant did not remain present before the Magistrate at any time after the issuance of process, except, perhaps on 8th December 1994. It appears that totally 29 adjournments were granted by the Magistrate after the plea of the accused persons was recorded, and the case was kept for recording of evidence. It is on the 30th date given i.e. 10th February 2000 that accused came to be acquitted as contemplated under section 256 of the Code of Criminal Procedure.

9 Mr.Naik contended that the order passed by the Magistrate is proper and legal. He submitted that the case was

continuously kept for hearing, but the complainant did not remain present before the Court at any time during the span of 5 years and, that therefore, the learned Magistrate was quite justified and right in acquitting the accused in view of the absence of the complainant. Undoubtedly, there is substance in the contention advanced by Mr.Naik, and that is why this Court was inclined to accept the contention and dismiss the Appeal. However, after hearing the learned counsel for the appellant, I am of the view that it would be in the interest of justice to allow the Appeal and remand the matter back to the Magistrate for proceeding further with the complaint in accordance with law for the following reasons.

10 The learned counsel for the complainant has pointed out that even the accused persons have been remaining absent on the dates of hearing as were being fixed by the Magistrate from time to time. A perusal of the roznama indicates that this is factually correct. The accused persons had never been remaining present in person before the Magistrate on any of the dates. Thus, though the absence of the complainant for a long period has been highlighted, the fact that even the accused had not been remaining present before the Magistrate, cannot be overlooked.

11 A perusal of the roznama indicates that on a number of dates, the case was adjourned by consent of the counsel for both the parties. In fact, apparently, there was no grievance expressed by any of the parties at any time about the fact that no progress was being made in the case.

12 When so much latitude was being shown to the parties by the learned Magistrate, as is evident from the fact that he freely entertained the requests for adjournment of the case, and did not insist on the complainant proceeding with the matter, the complainant could not have anticipated that on a given date, the accused would suddenly be acquitted on the ground of his absence. The impugned order came to be passed on 10th February 2000, and before that, the case had appeared on the board of the Magistrate on 23rd December 1999. On that day, the complainant was exempted from personal appearance. The accused were also absent, though their counsel was present. The roznama of 23rd December 1999 does not show that the Magistrate had indicated to the counsel for the complainant, and/or to the counsel for the accused that on the next date, no adjournment in the matter would be granted. In fact, the roznama shows that the matter was, simplicitor, being adjourned without any specific directions or instructions.

13 When the case had been technically appearing before the Magistrate for recording of evidence since June 1994, and when no objection was raised by any of the parties about the fact that no evidence was being adduced, and when adjournments were being taken and granted by consent of the parties, it was not proper on the part of the Magistrate to have suddenly focused on the absence of the complainant on a given date and to have taken an extreme step of acquitting the accused. Incidentally, it may be observed that the roznama of any of the dates since June 1994 does not specifically state that the case was kept for recording of

evidence, making the personal presence of the complainant, essential.

14 The learned counsel for the appellant has brought to my notice the nature of the alleged defamatory publication. He submitted that the imputations are of a serious nature, and that, the complainant would be seriously prejudiced if he is not allowed to prosecute the complaint against the accused persons.

15 An order of acquittal passed under section 256 of the Code does not involve adjudication of the merits of the matter. Such order is passed on account of the absence of the complainant. Therefore, while dealing with an Appeal from an order of acquittal passed under section 256 of the Code, the Appellate Court should have due regard to the reasons for the absence of the complainant on a given date, as may be put forth before it, and also to the prejudice that is likely to be caused to the complainant by being deprived of an opportunity to prosecute the matter on merits, and bring it to a logical conclusion.

16 Mr.Prakash Naik has placed reliance on two decisions rendered by this Court.

(i) **Smt.Prema Ramanand Hattangadi Vs.**

State of Maharashtra & Anr ¹

(ii) **Shankarlal Bisanlal Kamad Vs. State**

of Maharashtra & Anr²

¹ 2012 All MR (Cri) 2394

² 2001 All MR (Cri) 1700

However, these decisions have been rendered on the facts that were before this Court in those Appeals. None of the observations made therein apply to the instant case, where as aforesaid, the accused had also been remaining absent before the Magistrate and adjournments, without any protest from any party were freely being granted by the Magistrate. The complainant had no reason to anticipate a sudden change in the attitude of the Magistrate.

17 In my opinion, in the circumstances of the case, the Magistrate ought to have forewarned the complainant – and even the accused – that no further adjournments would be granted, and that the matter would be proceeded with by recording the evidence. Even the presence of the accused would be necessary if evidence was to be recorded.

18 In my opinion, it would be in the interest of justice to set aside the order of acquittal and remand the matter to the Magistrate for proceeding further with the complaint in accordance with law. However, since the matter has already remained pending before this Court for a period of 15 years, and since the complaint had been filed in the year 1993, it would be necessary to give appropriate directions to the learned Magistrate and to parties to ensure an early disposal of the case.

19 In the peculiar facts of the case, though the Appeal is being allowed, it would be proper to award suitable costs to the respondent nos.1 and 2 who had been defending the Appeal since last about 15 years.

20 In the result, the Appeal is allowed.

21 The impugned order is set aside.

22 The matter is remanded back to the Magistrate with a direction to proceed further with the complaint in accordance with law.

23 The learned Magistrate shall expedite the trial of the case and complete it within a period of one year from the date of receipt of the Record and Proceedings by him.

24 The appellant shall appear before the Magistrate on 12th October 2015. The appellant shall pay costs of Rs.25,000/- each to the respondent nos.1 and 2 by depositing the same in the Court of the learned Magistrate within a period of two weeks from today.

25 The costs shall be paid by the Magistrate to the respective respondents as soon as they appear before the Magistrate.

26 Appeal is disposed of in the aforesaid terms.

27 Record and Proceedings be sent back forthwith.

(ABHAY M. THIPSAY,J)

CERTIFICATE

Certified to be true and correct copy of the original
signed Judgment/Order.