

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.112 OF 2008

SHRIMAN KISANLALJI SARDA PRATISHTHAN)...APPELLANT

V/s.

STATE OF MAHARASHTRA & ORS.)...RESPONDENTS

Mr.S.S.Kulkarni, Advocate for the Appellant.

Mr.Sachin S. Padhye h/f. Mr.Girish R. Agarwal, Advocate for
Respondent Nos.2 and 3.

Ms.S.S.Kaushik, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 23rd FEBRUARY, 2015.

ORAL JUDGMENT :

1 The appellant is the original complainant. On his
complaint, respondent nos.2 and 3 herein, were prosecuted vide
Regular Criminal Case No.100 of 1995. The Judicial Magistrate

First Class, who tried the said case, by an order dated 20th March 2006, acquitted respondent nos.2 and 3. Being aggrieved by the said order of acquittal, the appellant has filed the present appeal.

2 I have heard Mr.S.S.Kulkarni, the learned counsel for the appellant. I have heard Mr.Sachin Padhye, the learned counsel for respondent nos.2 and 3. I have heard Ms.S.S.Kaushik, the learned APP for the State.

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

4 The order passed by the Magistrate acquitting the accused reads as under :

“ ORDER
Complainant absent, his advocate
absent when called several times.
No application on record. No
steps taken. Matter is old one
filed in the year 1995. Matter

was kept for D.I.D. on various occasions, yet no positive steps taken by the complainant. Hence, in the circumstances the matter is dismissed in default.

The accused persons are hereby acquitted vide section 256(1) of the Criminal Procedure Code.

The bail bond of the accused persons stands cancelled."

5 It is clear that the order of acquittal passed by the Magistrate is not based on an assessment or evaluation of the evidence adduced before him. The order is passed on the ground of absence of the complainant and his advocate, and that, 'the matter was old' and 'no steps had been taken by the complainant' have been given as reasons justifying 'dismissing the matter in default.' Reference to Section 256 of the Code leaves no manner of doubt that the order of acquittal has been passed on the ground of the absence of the complainant and not on a consideration of the merits of the matter.

6 The order passed by the Magistrate is patently incorrect and contrary to law which can be demonstrated clearly just by referring to the provisions of Code of Criminal Procedure (Code) itself.

7 The case against the accused persons was in respect of offences punishable under Sections 419 read with 34 and 420 read with 34 of the IPC. Charge of these offences had already been framed in the matter on 17th February 2003.

8 The Magistrate has referred to Section 256 of the Code while acquitting the accused persons. Section 256 of the Code falls in Chapter XX thereof, which deals with 'Trial of summons cases by Magistrates.' The case in hand was not a summons case. It was a warrant case. Therefore, the reference to the provisions of Section 256 of the Code was uncalled for, and clearly incorrect.

9 The trial proceedings were governed by Chapter XIX of the Code. A perusal of the provisions of Chapter XIX indicates that the termination of proceedings of a warrant case can be either by way of '*discharge*' or '*acquittal*'. Termination by way of discharge is contemplated by Sections 245 and 249 of the Code. Section 249 of the Code permits termination of proceedings on the ground of absence of the complainant in certain cases, but such a termination would be by way of discharge, and the situation contemplated under the said Section can arise only before Charge is framed. This, even otherwise, is clear from the language employed in the said section. Similarly, termination of proceedings of a warrant case can take place under the provisions of Section 245 of the Code also, but such termination also would be by way of a '*discharge*' and not '*acquittal*'.

10 In this case, the Magistrate has clearly stated the order to be of '*acquittal*'. Even otherwise, as Charge had already been framed, the termination of the proceedings, as done by the Magistrate by the impugned order, has to be treated as by way of an *acquittal* only.

11 A perusal of the provisions of Chapter XIX leaves no manner of doubt that in warrant cases, there can be no acquittal of accused on the ground of default of complainant in appearance, or in adducing evidence or in 'taking steps'. The scheme of the provisions of Chapter XIX leaves no manner of doubt that once a Charge has been framed, the case can result into acquittal or conviction *only on the basis of the merits of the matter i.e. on a consideration of the evidence adduced.*

12 The acquittal in a warrant case is governed by the provisions of Section 248 of the Code, sub-section (1) whereof, reads as under :

“If, in any case under this Chapter in which a charge has been framed, the Magistrate **finds** the accused not guilty, he shall record an order of acquittal.”

(emphasis supplied)

13 The word “finds” used by the legislature is significant. It means that the Magistrate is expected to arrive at and record a

finding that the accused is not guilty. It, therefore, follows that, an order of acquittal cannot be passed *merely because* the complainant and/or the prosecution witnesses are not present. The use of the word “finds” in Section 248(1) implies that a finding of 'not guilty' shall be arrived at before an order of acquittal is passed. Obviously, such a conclusion can be arrived at by the Magistrate, after consideration of all the matters before him – such as, the evidence adduced by the prosecution, plea of the accused if any, the defence evidence if any, etc. It is a different matter that in a given case the Magistrate may arrive at a finding of 'not guilty', *inter alia* – or even primarily – on the consideration of the failure of the complainant, or of the prosecution to adduce evidence, but the fact remains that without arriving at and recording a finding of 'not guilty', he cannot pass an order of acquittal. This is an important difference between the procedure for trial of warrant cases and the trial of summons cases. Section 256 of the Code, which finds a place in Chapter XX of the Code dealing with trial of summons cases permits a Magistrate to pass an order of acquittal, without arriving at a finding of not guilty and only on the basis of

non-appearance of the complainant. The omission of the legislature to make a similar provision in respect of trial of warrant cases – which relate to more serious offences – is significant and speaks for itself.

14 The matter may be looked at from another angle also. That a Charge has been framed is indicative of the *prima facie* satisfaction of the Magistrate that the accused has committed an offence which needs to be tried. The matter is then not left solely to the complainant, or the prosecution. The Magistrate would, thereafter, be required to hold a trial, and it would be his bounden duty to ensure that evidence of guilt of the accused, as may be available, is brought before the court. To ensure this, he may have to take steps to compel the attendance of the witnesses *including the complainant in a complaint case*. If a complainant is deliberately remaining absent because of an illegal compromise arrived at between him and the accused persons, in respect of a non-compoundable offence, the Magistrate would have an undoubted power – and also a duty – to procure the presence of

the complainant and witnesses even by issuing coercive process, if necessary. This is not to suggest that in every such case, the Magistrate *must* exercise his power to compel the appearance of the parties and the witnesses, but it needs to be clearly understood, that, the Magistrate *does* possess such power and is expected to exercise it in appropriate cases.

15 Even if the Magistrate, in a given case, does not feel it worthwhile to issue process, or coercive process, to compel the appearance of the complainant or the prosecution witnesses, as the case may be, he cannot adopt an easy course of acquitting an accused on account of the default in appearance by the complainant, as can be done in summons cases. He must, then, consider whatever evidence / matters would be before him and proceed with the case in accordance with law. An acquittal in a warrant case is possible only after a Magistrate finds an accused not guilty, (except in cases covered by Section 320 and / or Section 321 of the Code).

16 In the instant case, if the Magistrate thought that the absence of the complainant and his failure to take necessary steps to adduce evidence was not justified, and that, it was not necessary or advisable to compel the appearance of the complainant by issuing coercive process against him, he could have closed the prosecution and could have decided the matter on merits, after taking into consideration whatever evidence had been adduced till then, and whatever was before him. He could not have, in any case, decided the matter only on the ground of absence of the complainant, or on the ground of the complainant's failure to take 'necessary steps' as has been done by him.

17 The appeal, therefore, succeeds.

18 The appeal is allowed.

 The impugned order is set aside.

19 The matter is remanded back to the Magistrate, who shall proceed further with the case in accordance with law.

20 The parties shall appear before the learned Magistrate
on 16th March 2015.

21 Record and Proceedings be sent back forthwith.

(ABHAY M. THIPSAY, J.)