

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.416 OF 2006

VIRENDRAKUMAR RATANCHAND BANTHIA)...APPELLANT

V/s.

AZIM BRADRUDDIN MUKHARI & ANR.)...RESPONDENTS

Mr.S.M.Kamble, Advocate for the Appellant.

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

CORAM : ABHAY M. THIPSAY, J.

DATE : 16th JUNE 2015.

ORAL JUDGMENT :

1 The appellant is the original complainant, who had filed the complaint alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act, against respondent no.1 herein. The trial remained pending before the Judicial Magistrate First Class, Panvel, from 10th November 1997 till 16th February 2006, on which date, the learned Magistrate, on

account of the absence of the appellant, passed an order of acquittal of respondent no.1, as contemplated under Section 256 of the Code of Criminal Procedure (Code). Being aggrieved thereby, the appellant has, after obtaining special leave of this court, filed the present appeal praying that the order of acquittal, as passed by the Magistrate, be set aside.

2 Since the counsel for respondent no.1 did not remain present before the court inspite of repeated calls and inspite of keeping the matter back for quite sometime, the appeal is being decided after hearing the learned counsel for the appellant, the learned APP and after perusing the record and proceedings.

3 For the sake of convenience and clarity, the appellant shall hereinafter be referred to as 'the complainant' and respondent no.1 as 'the accused.'

4 The learned counsel for the complainant submitted that the impugned order is incorrect and that the observations

made in the said order are factually incorrect. The learned counsel for the complainant did not dispute that on the given date the complainant was not present before the Magistrate, but pointed out that the impugned order proceeds on the basis that the complainant had remained absent on last three dates prior to the said date. The learned counsel for the complainant submitted that, that this is incorrect, is clear from the roznama of the case itself.

5 I have gone through the original record of the case. I find that the matter was on board of the Magistrate on 2nd February 2006, on which date, the complainant was not present before the Magistrate. It is on this date that the matter was adjourned to 16th February 2006, on which date, as aforesaid, the order of acquittal under Section 256 of the Code came to be passed. A reading of the roznama shows that before 2nd February 2006, the matter had appeared on the board of the Magistrate on 24th January 2006, when the complainant as well as the accused both were present with their respective advocates. Thus, it

transpires that prior to 16th February 2006, the complainant was absent only on the date immediately next before that, and that, before that date i.e. 24th January 2006, he was very much present. It also appears that the matter had appeared on the board of the Magistrate on 9th January 2006, and that, on that date also, the complainant as well as the accused, both were present before the court with their respective advocates. It is on this date i.e. 9th January 2006, that the matter was adjourned to 24th January 2006.

6 Thus, the impugned order is based on a totally wrong belief formed by the Magistrate, namely, that the complainant was absent on three consecutive dates, before the date, on which the complaint came to be dismissed. The impugned order which suffers from such a patent error, needs to be interfered with on that count itself.

7 Apart from this, this does not appear to be a case where the Magistrate should have exercised the discretion

available to him under Section 256 of the Code by acquitting the accused. It is because, the complaint was pending before him since the year 1997 and for most of the period of pendency of the said case, the complainant had been regularly remaining present before the Magistrate. On several occasions, the accused was absent. On 9th January 2006, it was the accused who had sought an adjournment. The Magistrate overlooked all these circumstances and appears to have passed an order of acquittal only in her anxiety to 'dispose of old cases' without realizing that the delay in disposal of the case could not be attributed to the act/acts of complainant.

8 The impugned order is patently erroneous. It has resulted in miscarriage of justice, in as much as, the complainant is deprived of an opportunity to establish his case on merits. The impugned order, therefore, needs to be interfered with.

9 The appeal is allowed.

 The impugned order is set aside.

The complaint is restored to the file of the Magistrate, who shall proceed further with the matter, expeditiously and in accordance with the law.

10 The appeal is disposed of in the aforesaid terms.

11 Record and proceedings be sent back forthwith.

(ABHAY M. THIPSAY, J.)