

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.359 OF 2013
(For Leave to file Appeal)
IN
CRIMINAL APPEAL NO..... OF 2015

Govindji Trikamdas and Co .. Applicant
Versus
The State of Maharashtra & ors .. Respondents

Mr.Jatin P. Shah, Advocate for the applicant.
Mrs.S.V.Gajare, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 27th JANUARY, 2015

ORAL ORDER :-

1 Heard.

2 The respondent nos.2 and 3 are absent in spite of service and in spite of indication having been given to them that the matter would be decided finally at the admission stage itself.

3 In the circumstances, keeping in mind the order dated 14th August 2013 passed by this Court, leave granted.

4 The Application is treated as a Memo of Appeal.

5 The Appeal is admitted.

6 The applicant hereinafter be referred to as 'the complainant' for the sake of convenience and clarity.

7 In accordance with the said order dated 14th October 2013, the Appeal is taken up for final hearing forthwith.

8 The applicant – a partnership firm – had filed a complaint against the respondent nos.2 and 3 herein, alleging commission of an offence punishable under section 138 of the Negotiable Instruments Act, by them. The respondent no.2 is a proprietary concern of which the respondent no.3 is the proprietor. The learned Magistrate had issued process against the respondent nos.2 and 3, and the respondent no.3 had entered her appearance for herself, and also for and on behalf of the respondent no.2 in obedience to the summons issued by the learned Magistrate. It appears that, thereafter, the respondent no.3 who was also representing the respondent no.2, remained absent before the trial court, and made an application for exemption which was rejected by the learned Magistrate. This was on 23rd January 2012. It appears that thereafter, a non bailable warrant came to be issued against the respondent no.3 herein to secure her presence before the trial court. This warrant was duly forwarded to the police, but it remained unexecuted.

On 3rd January 2013, when the matter was on board of the learned Magistrate, the complainant was present in the Court with his advocate and the accused i.e. respondent nos.3 for herself, and for the respondent no.2 was absent. The learned Magistrate then adjourned the matter to 22nd March 2013 with the following observation:

“complainant failed to take proper steps for securing presence of accused”

9 On 22nd March 2013, the Magistrate passed an order of acquittal which reads as under :-

“complainant absent. His advocate present.
Accused absent. Complaint is dismissed and
accused is acquitted”.

It is being aggrieved by this order of acquittal that the present appeal has been filed.

10 The order passed by the learned Magistrate is patently illegal. It is not clear under which provision of law, the learned Magistrate recorded this acquittal. It, however appears from the tenor of the order, and the order passed on 3rd January 2013 that the accused came to be dismissed 'on the complainant's failure to take steps to secure the presence of accused'.

11 In the first place, it is not clear what the complainant was expected to do after handing the non-bailable warrant of arrest against the accused to the police. The repeated reference to the *failure of the complainant 'to take steps'* by the Magistrate in the roznamas of various dates, gives an impression that the Magistrate expected the complainant to run behind the police and keep on urging or pleading that they should execute the warrant against the accused. Once a warrant of arrest had been issued against the applicant it was as much the requirement of the Magistrate himself

as that of the complainant that the accused be produced before the Court by executing the warrant. The steps were to be taken by the police to comply with the order of the Magistrate. The Magistrate did not question the police as to why they were not executing the warrants, but expected the complainant to do something without clarifying what it was. The record does not show that the police had submitted any report as to why the warrant could not be executed, or had submitted that they had made any efforts to apprehend the accused. How the complainant was responsible for the failure of the police to arrest the accused is difficult to understand.

12 Apart from this, the Code of Criminal Procedure does not recognize that an order of acquittal can be passed under such circumstances. It is not that the acquittal was ordered on account of the absence of the complainant on the given date. On that date the complainant's Advocate was present before the Magistrate. The order passed by the Magistrate does not indicate that the acquittal was ordered under section 256 of the Code, but even otherwise, the Magistrate could not have ordered acquittal under that provision without questioning the Advocate for the complainant (who was present) about the complainant's absence, and without recording a finding that the absence was unjustified. If the complainant was to be treated as present, through his Advocate, there was no question of passing an order of acquittal. It is apparent that the order of acquittal came to be passed only because of the failure of the police to execute the warrant of arrest.

13 This was patently illegal.

14 The Appeal is allowed.

15 The impugned order is set aside.

16 The complaint be restored to the file of the Magistrate, who shall proceed further with the matter in accordance with law, and by keeping the observations made in this order in mind.

17 Appeal is disposed of accordingly.

(ABHAY M.THIPSAY, J)