

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 20TH DAY OF FEBRUARY 2015/1ST PHALGUNA, 1936

CRL.A.No. 1051 of 2009 ()

(CC.NO. 132/2008 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, PUNALUR)

PETITIONER/COMPLAINANT:(LEGAL HEIR OF THIS COMPLAINANT):-

**RAFEEL, S/O.RAHIM, SHAHINA MANZIL,
PATHIRIKKAL MURI, PATHANAPURAM VILLAGE,
PATHANAPURAM TALUK.**

**BY ADVS.SRI.K.SHIBILI NAHA
SMT.A.LOWSY**

RESPONDENT(S)/ACCUSED & STATE:

- 1. FATHIMA MAJEED, W/O.MAJEED,
ATHEENA MANZIL, NADUKKUNNU, MANCHALLOOR MURI,
PATHANAPURAM VILLAGE, PATHANAPURAM TALUK.**
- 2. STATE,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

R2 BY PUBLIC PROSECUTOR SMT. BINDU GOPINATH

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 20-02-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

sts

K.ABRAHAM MATHEW, J.

Criminal Appeal No. 1051 of 2009

Dated this the 20th day of February, 2015

J U D G M E N T

The appellant was the complainant in C.C.No.132/2008 on the file of the Judicial First Class Magistrate - IV, Punalur.

2. The allegation was that the first respondent committed the offence under Section 138 of the N.I. Act. On 4.5.2009, the learned Magistrate acquitted the 1st respondent under Section 256(1) of the Code of Criminal Procedure for the reason that the appellant was absent to give evidence. The legality of this order is under challenge.

3. In spite of notice, the 1st respondent has not entered appearance.

4. Heard the learned counsel for the appellant.

5. The learned counsel for the appellant submits that the evidence in the case was recorded and the case was even posted for examination of the 1st respondent under S.313 of Code of Criminal Procedure and the order of acquittal passed under S.256(1) of the Code of Criminal Procedure is clearly illegal.

6. A perusal of the proceeding sheet in the case shows that on 13.2.2009 the appellant filed an affidavit in lieu of his examination in-chief and the Court marked Exts.P1 to P6. The case was adjourned to another day for cross-examination, on which day the first respondent prayed for time to cross-examine the appellant. The appellant was absent on some posting dates later. The endorsement made by the learned Magistrate on 23.3.2009 shows that the case was adjourned to 25.3.2009 for examination of the first respondent under

S.313 of the Code of Criminal Procedure. It means that the evidence had been closed before 25.3.2009. Whatever may be the reason for closing the evidence, the learned Magistrate was not at all justified in invoking the provision under Section 256 (1) of the Code of Criminal Procedure after the evidence was recorded. I have no doubt that the impugned order is illegal and liable to be set aside. What is the effect of the non-appearance of the appellant for cross-examination is a different matter. Having regard to the facts of the case, the learned Magistrate shall give an opportunity to the appellant to appear in person for his cross-examination.

In the result, this appeal is allowed. The impugned order is set aside. The learned Magistrate is directed to take back the case

to his file and issue notice to the 1st respondent-accused to appear in Court. The learned Magistrate shall give an opportunity to the appellant to appear before him for cross-examination. No adjournment shall be granted to the accused for the cross-examination of the appellant. If he appears for the cross examination, the case shall be disposed of within two months from the date on which the accused appears.

**Sd/-
K.ABRAHAM MATHEW
JUDGE**

rka

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