

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE**

APPLICATION FOR LEAVE TO APPEAL (PVT) NO.32 OF 2015

Mr.Vijay Sanghavi

Having address at, Room No.19,

1st Floor, Sumeri Sadan,

Behind Tripathi Bhavan,

Aarey Road, Goregaon (W),

Mumbai 400 062.

... **Applicant**

V/s.

1. The State of Maharashtra
Through Public Prosecutor

2. Mr.Mahesh M.Udani
(Proprietor of M/s.R.A.International)
Having address at,
D/204, Ghatkopar Industrial Estate,
L.B.S.Marg, Ghatkopar (W),
Mumbai – 400 086.

... **Respondents**

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Ms.Kavita M.Pawar, Advocate for the Applicant.

Mrs.P.P.Bhosale, APP for the Respondent No.1./State.

Mr.Anand Talreja, Advocate for the Respondent No.2.

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CORAM : ABHAY M. THIPSAY J.

DATED : 9th MARCH 2016.

ORAL JUDGEMENT :

1. Heard Ms.Kavita M. Pawar, the learned counsel for the appellant. Heard Mr.Anand Talreja, the learned counsel for the Respondent No.2.

2. Leave granted.

3. The application for leave to appeal is treated as a memo of appeal. It be numbered accordingly. Necessary amendments be carried out forthwith.

4. The Appeal is admitted and heard finally by consent. By consent, calling for Record and Proceedings dispensed with, the counsel for the parties agreeing that the same is not necessary.

5. The appellant is the original complainant. He had filed a complaint against the respondent No.2 herein alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act. On 31/01/2014, the Metropolitan Magistrate 28th Court, Esplanade, before whom the said complaint case was pending, passed an order of acquittal as contemplated under Section 256 of the Code of Criminal Procedure (For short, "the Code"). Being aggrieved thereby, the appellant has approached this Court, by filing the present Application, seeking special leave to appeal from the said acquittal.

6. The impugned Order reads thus :

"Complainant absent when called out. No steps taken since long. Hence case dismissed for want of complainant u/sec.256 of the Cr.P.C.

Accused is hereby acquitted for the offence punishable u/sec.138 of the Negotiable Instruments Act, 1881.”

7. For the sake of convenience and clarity, the applicant/appellant shall, hereinafter, be referred to as “the complainant” and the respondent No.2 as “the accused”.

8. The learned counsel for the complainant contended that the impugned order is not just and proper. She submitted that the accused himself was not present before the Court and that, a warrant had been issued to procure his presence. She submitted that the warrant had been duly collected by the complainant and had been handed over to the police for execution on 12/08/2013 itself. She also submitted that complainant had lost the track of the matter for various reasons, and that, therefore, the complainant could not remain present before the Court on the given date. She submitted that the impugned order, having been passed by observing, *inter alia* that 'no steps taken since long', is bad and needs to be interfered with.

9. The learned counsel for the accused contended that the impugned order is proper and legal. He submitted that the complainant had throughout been negligent in the matter. It is pointed out that previously also the accused had been acquitted under Section 256 of the Code and that, it is only after the said

order of acquittal was set aside by this Court on an appeal filed therefrom, that the matter was restored and was pending before the Magistrate. It is submitted that the complainant had been remaining absent before the Magistrate since quite some time before 31/01/2014 – the date on which the order of acquittal was passed – and that, the averments made in the Application for special leave/Appeal Memo themselves indicated that there was no valid reason for the complainant's absence and his failure 'to take steps'. It is submitted that since the impugned order is proper and legal, no interference therewith is warranted.

10. I have carefully considered the matter. With the assistance of the learned counsel for the parties, I have gone through the Application and the annexures thereto, which include the copies of *roznama* of the case.

11. It is clear that the accused was even earlier acquitted by the Magistrate by an order dated 07/09/2009 on the ground of absence of the complainant and his advocate before the Court on that date. The said order of acquittal was set aside by this Court by an order dated 21/04/2011, and pursuant thereto, the proceedings before the Magistrate were revived. The parties were directed to remain present before the Magistrate on 15/06/2011.

12. I find that on 15/06/2011, the complainant and the accused were present before the Court, but the Court was vacant.

The *roznama* shows that the Court continued to be vacant till 05/10/2012 and the matter was repeatedly being adjourned on the ground that the Court was vacant. On 05/10/2012, the matter was adjourned to 01/11/2012, by noting in the Roznama that the Court was vacant.

13. In the meantime, by an order dated 13/08/2012, passed by the Chief Metropolitan Magistrate, the case was transferred to the Metropolitan Magistrate, 28th Court, Esplande. The matter actually appeared before the transferee Court on 01/11/2012. On that date, neither the complainant nor the accused was present before the Magistrate, and as such, the Magistrate directed notices to be issued to both the parties making the same returnable on 15/12/2012. Evidently, the case was transferred on a general order passed by the Chief Metropolitan Magistrate and there was no notice of the transfer to either of the parties.

14. The *roznama* dated 15/12/2012 shows that on that date, though the complainant was absent, his advocate was present before the Magistrate. *The accused was absent.* The Magistrate ordered a warrant of arrest to be issued against the accused and adjourned the case to 02/03/2013.

15. On 02/03/2013, the complainant was absent, but his Advocate was present before the Magistrate. *The accused was absent.* The Magistrate adjourned the matter to 02/05/2013 'for steps'.

16. On 02/05/2013 the board was discharged and the matter was adjourned to 15/06/2013. On 15/06/2013 again the board was discharged and the matter was adjourned to 26/07/2013.

17. On 26/07/2013, the complainant was absent, but his advocate was present. The warrant issued against the accused was not executed. The Magistrate adjourned the matter to 30/08/2013 for “steps/dismissal”.

18. On 30/08/2013, both the parties were absent and the matter was adjourned to 16/11/2013 'for steps/dismissal'.

19. Apparently, the matter did not appear on board on 16/11/2013 and it was taken on board on 10/01/2014. Both the parties were absent on that date. Observing that the parties were absent “since long”, the Magistrate adjourned the matter to 31/01/2014 'for dismissal'.

20. It is on this date that the impugned order came to be passed, as the complainant as well as accused were absent.

21. It is clear that a warrant of arrest had been issued for securing the presence of the accused. This warrant had been handed over by the complainant to the police on 12/08/2013 itself. This is not in dispute and has not been disputed before this Court.

22. Since the Magistrate has emphasized on “no steps having been taken by the complainant” as a ground justifying the exercise of the discretion vested in him by Section 256, in favour of the accused and ordering his acquittal, some observations in that regard would be necessary.

23. The Magistrate had been vague in that regard and preferred not to disclose what were the precise 'steps' which the complainant was required or expected to take. The 'steps' would obviously be such as would be necessary for proceeding further with the trial; and in the circumstances, the biggest obstacle in proceeding with the trial was the non-availability of the accused before the Magistrate. The question as to ‘what was the complainant expected to do to compel the accused to appear before the Court’ arose in the course of arguments, when the learned counsel for the accused vehemently contended that it was for the complainant to secure the presence of the accused. When it was pointed out that the complainant would not be expected to physically apprehend the accused and produce him before the

Magistrate, the learned counsel submitted that 'it was the duty of the complainant to see that the warrant was executed and 'the steps' referred to by the Magistrate, were 'steps to ensure that'. That an accused who, in law, is required to be present before the Magistrate in obedience to the process issued by the Magistrate should fail to do so and instead contend that 'the complainant did not take steps to get him arrested and produced before the Magistrate' is indeed paradoxical, but, this may be left at that.

24. When the Magistrate had issued a warrant of arrest for compelling the presence of the accused, the 'steps' that the complainant is expected to take, *if at all*, can only be for ensuring that the warrant is received by the police. It would be the duty of the police, thereafter, to have the same executed. It would be the duty of the Magistrate to see that it is executed. In case of non-execution of the warrant, the Magistrate would not only be entitled to and fully justified, but rather *bound* to make an inquiry with the police as to 'what had happened in the matter of execution of warrant and *why* it has not been executed.' In the instant case, nothing was done by the Magistrate.

25. When the question of propriety of focusing on the absence of the complainant – when the accused had not been remaining present before the Magistrate, and when, in spite of the coercive steps taken by the Magistrate the presence of accused was

not being procured – arose in the course of arguments, the learned counsel for the accused contended that the provisions of Section 256 of the Code speak only of the absence of the complainant and that they do not refer to the presence or absence of accused. What he canvassed by making this submission is that the aspect of the presence or absence of accused, would be quite immaterial in deciding whether an order of acquittal under Section 256 of the Code should be passed.

26. It is not possible to agree with the learned counsel for the accused.

27. Section 256 gives a discretion to the Magistrate and an order of acquittal cannot be mechanically passed on the absence of the complainant. The Magistrate is expected to exercise the discretionary power conferred on him judicially and judiciously.

28. The provisions under Section 256 of the Code are meant to ensure that the complainant does not drag on the proceedings without taking any real interest in prosecuting the matter. The provisions of Section 256 of the Code come in picture after a summons has been issued and after a trial is expected to commence. The absence of the complainant would result in the Court being unable to proceed with the trial and that is why to prevent the harassment of the accused, who would be required to

be present before the Magistrate without there being any prospects of the case proceeding further, that the said Section has been , apparently, enacted. When in a given case the accused is served with a summons, but does not remain present before the Court and a warrant is issued, but still not executed, it would not be just and proper to focus on the absence of the complainant and order the acquittal of the accused, who has defied the process of the Court. When the process to compel the appearance of the accused was undertaken by the Magistrate and was incomplete, the Magistrate ought to have been more concerned with the non-execution of the warrant of arrest by the police and ought to have questioned the police in that regard instead of getting rid of the case by focusing on the absence of the complainant.

29. Even otherwise, the proceedings before the Magistrate were affected by the Court being vacant for a period of more than one year. A number of dates were given, but on all these dates the matter was adjourned to some further dates, because the Court was vacant. When the matter was revived after the previous order of acquittal passed by the Magistrate was set aside, the parties were directed to remain present before the Court on 15/06/2011, but on that date itself, the Court was vacant.

30. Then there came an order of transfer of the case from one Court to another apparently without notices to the parties and, therefore, the transferee Court directed notices to be issued to both the parties. The *roznama* does not show that the notices were duly served upon any of the parties. The board was also discharged on at least two occasions.

31. When the proceedings were progressing in this manner, suddenly to treat the absence of the complainant harshly and pass an order of acquittal was not proper. The discretion available to the Magistrate was not exercised properly by him in the instant case. This was a case where the fact, that the accused had not remained present before the Court even on a single date after the case was revived, ought to have been taken into consideration by the Magistrate. The emphasis on 'not taking steps' was totally misplaced as the warrant had already been delivered to the police. Though an order to issue the warrant was passed earlier, it appears from the record that it was signed by the Magistrate only on 07/08/2013. The complainant, therefore, cannot be faulted for not handing over the warrant to the police before that date. All these aspects were entirely overlooked by the Magistrate.

32 The impugned order is not proper. It needs to be interfered with.

33. The appeal is allowed.
34. The impugned order is set aside.
35. The Magistrate shall proceed further with the trial expeditiously and in accordance with law.
36. The parties shall appear before the Magistrate on 29th April 2016.

(ABHAY M. THIPSAY J.)