



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	29.04.2019
Date of Judgment	08.07.2019

CORAM

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THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

Crl.A. (MD)No.378 of 2009

Sadaisamy : Appellant/Complainant

Vs.

1.Sundari

2.Mani

3.Eswaran

4.Rani

: Respondents/A1 to A4

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code against the order, dated 15.10.2009 passed in Cr.M.P.No.4456 of 2004 by the Judicial Magistrate, Uthamapalayam and set aside the same.

For Appellant : Mr.M.Tamilchelvan

For Respondents : No representation

J U D G M E N T

This Criminal Appeal is directed the order, dated 15.10.2009 passed in Cr.M.P.No.4456 of 2004 by the Judicial Magistrate, Uthamapalayam.

2.The petitioner as complainant had preferred a private complaint under Section 190 r/w 200 of Cr.P.C for the offence under Sections 452, 506, 352(2), r/w 34, 120(b) of IPC against the respondents/accused alleging that the accused on criminal conspiracy with common intention trespassed into the workshop of the appellant/complainant with deadly weapons during the night at about 11.30 hours on 18.02.2004.

3.The learned Judicial Magistrate, Uthamapalayam issued summons and on 15.10.2009, when the matter is taken up, a petition has been filed in Cr.M.P.No.4456 of 2006 under Section 256 of Cr.P.C for condoning the absence of the petitioner. The learned Magistrate dismissed the said petition on 15.10.2004. Aggrieved by the said order, the petitioner is before this court with this appeal.

4.Heard the learned counsel appearing for the appellant. No representation for the respondents.



5.The contention raised on the side of the appellant/complainant is that the complaint filed by the complainant was fully based on evidence to be recorded and there is a *prima facie* to believe that the accused were involved in the crime and there was a strong motive behind the occurrence and the reasonable opportunity is to be given to the appellant/complainant for prosecuting the case, when a petition to condone the absence was filed by the appellant's counsel on the particular day, but the complaint was dismissed by the trial court and allowed the petition for condone the absence filed by the accused and the presence of the complainant was not mandated by law and hence, the complaint filed by the complainant was ought not to have been dismissed by the trial court and prays that the criminal revision may be allowed.

6.Further, the learned counsel appearing for the appellant/complainant argued that when the complainant has not appeared on a particular day, the Magistrate has not justified in acquitting the accused, when the presence of the complainant on that day found necessary and it is the discretion of the court to acquit the accused or proceeded with the trial and it must be exercised judicially and fairly and the Magistrate was not justified in acquitting the accused particularly when the complainant and other witnesses had only been examined and prayed that the accused are not entitled to acquittal and the revision has to be allowed. For that, learned counsel for the appellant/complainant submitted a ruling reported in **1998-SCC (Cr1) 475 (Associated Cement Co. Ltd. Vs. Keshvanand)**. In that case, it has been held as follows:-

"16.What was the purpose of including a provision like Section 247 in the old code (or section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.

17.Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not

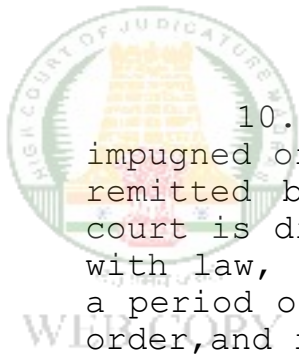


acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice."

7.This court has carefully perused the complaint filed by the petitioner/complainant under Section 200 of Cr.P.C. But on perusal of the prayer, it is stated that the petition is to be directed to send to the Rayappan Patti Police Station for taking necessary action. Hence, it is not clear that whether the petition filed under Section 200 of Cr.P.C or 156(3) Cr.P.C.

8.On perusal of the case records it reveals that the sworn statement of the complaint was only recorded. In this case, the complainant to prove his complaint cited two witnesses. But the above two witnesses were not examined. There are discrepancies between the allegations and prayer. Further no reasonable opportunity was given to examine further witnesses on the side of the complainant. When there is any evidence for cognizable offence, then it is the bounden duty of the court to send the complaint to the police for taking necessary action.

9.Further, the case was posted for the examination of the further witnesses on the side of the complainant. For the examination of the witnesses, the presence of the complainant is not necessary. Hence, without giving reasonable opportunity to the complainant t for examining the further witnesses on his side, the trial court dismissed the complaint filed by the complainant. The discretion by the Magistrate was to be exercised judicially and fairly. In this case, discretion by the Magistrate was not exercised judicially and fairly. Under these circumstances, it is necessary to interfere with the findings given by the trial court. Hence, the order passed by the learned Judicial Magistrate is liable to be set aside. Accordingly, it is set aside.



10. In the result, the Criminal Appeal is allowed. The impugned order passed by the trial court is set aside. The matter is remitted back to the trial court for fresh disposal. The trial court is directed to dispose of the case on merits and in accordance with law, after giving opportunity to the parties concerned, within a period of three months from the date of receipt of a copy of this order, and report the same to the Registry without fail.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar (CS)

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To

The Judicial Magistrate,
Uthamapalayam.

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