
(2012) 04 GUJ CK 0002
In the Gujarat High Court
Case No : Criminal Appeal No. 1477 of 2009

Chetankumar Amrutlal Shah

APPELLANT

Vs

Hiteshkumar Kirtibhai Shah and Another

RESPONDENT

Date of Decision : 25-04-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 262, 263, 264, 265, 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2013) 3 BC 254

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Prabhav A. Mehta, No. 1, for the Appellant; Yash Joshi, Advocate for the Opponent No. 1 and Miss C.M. Shah, Assistant Public Prosecutor for the Opponent No. 2, for the Respondent

Final Decision : Allowed

Judgement

Bankim N. Mehta, J.—The appellant -- original complainant has preferred this appeal u/s 378 of the Criminal Procedure Code, 1973 and challenged the judgment and order of acquittal dated 20.5.2005 passed by the learned Additional Senior Civil Judge and JMFC, Patan in Criminal Case No. 754 of 2005 acquitting the respondent accused for the offence punishable u/s 138 of the Negotiable instruments Act (for short "the Act"). According to the complainant, the accused demanded Rs. 2 lacs as hand loan and assured that he would pay the same within 15 days. Therefore, after borrowing the amount from relatives, the said amount was given to the accused as hand loan. On making demand of the amount, the accused came to Patan on 12.11.2004 and gave cheque dated 24.1.2005 bearing No. 669812 for Rs. 2 lacs drawn on Vijaya Bank, Manekchok Branch, Ahmedabad. The cheque returned unpaid with endorsement "Account closed". Therefore, notice through Advocate was served on the accused. Despite service of notice, the accused did not pay the amount but gave evasive reply. Therefore, complaint u/s 138 of the Act was filed in the Court of learned CJM at Patan and it was registered as Criminal Case No. 754 of 2005.

2. The Trial Court issued summons. Pursuant to the summons, the accused appeared and denied having committed the offence. Therefore, the prosecution adduced evidence. At the end of recording of evidence, trial Court explained to the accused the incriminating circumstances, appearing in the evidence against him. The accused explained the incriminating circumstances in his further statement recorded u/s 313 of the Criminal Procedure Code. After hearing the learned Advocates for the parties, the Trial Court by impugned judgment acquitted the accused. Being aggrieved by the said decision, the complainant has preferred this appeal.

3. I have heard learned Advocate Mr. Mehta for the appellant and learned Advocate Mr. Yash Joshi for learned Advocate Mr. NC Thakkar for the respondent accused. I have also perused the impugned judgment and Record and Proceedings of the trial Court.

4. Learned Advocate Mr. Mehta submitted that the case was tried as summary case and successor Magistrate recorded part of the evidence and delivered the judgment. Therefore, the trial is vitiated and hence, the impugned judgment is required to be set aside and the case is required to be remanded to the trial Court. He relied upon the decision in the case of Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, .

5. Learned Advocate Mr. Joshi for learned Advocate Mr. Thakkar did not dispute the fact that the successor Magistrate relied upon part of the evidence recorded by his predecessor and delivered the judgment.

6. It appears from the impugned judgment that successor Magistrate recorded part of the evidence and relying upon the part of the evidence recorded by his predecessor, delivered the judgment. In the decision of Nitinbhai Saevatilal Shah (supra), the Hon''ble Supreme Court has ruled that in summary trial only substance of evidence instead of entire evidence is recorded which a successor Magistrate is not in a position to appreciate properly. Therefore, decision rendered by successor Magistrate relying upon the evidence recorded by his predecessor was bad in law. The Hon''ble Supreme Court observed thus:

17. The mandatory language in which Section 326(3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of Sub-sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on

the basis of evidence recorded by his predecessor. Section 326(3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

7. In view of the law laid down by the Hon"ble Supreme Court in the present case, as successor Magistrate decided the case in summary trial on the basis of part of the substance of evidence recorded by his predecessor, he was not in a position to appreciate the evidence properly and decide the case effectively. This caused serious prejudice to the complainant as order of acquittal is passed. Section 143 of the Act was inserted w.e.f. 6.2.2003. It also provides that Sections 262 to 265 of Code of Criminal Procedure, 1973 shall, as far as may be, apply to the trial under the Act. Section 326(3) of the Code does not permit the Magistrate to act upon the substance of evidence recorded by his predecessor. In order to do substantial justice, the successor Magistrate was required to record the evidence afresh. Therefore, the impugned judgment is required to be set aside and the case is required to be remanded to the trial Court for de novo trial.

8. In view of the above, the present appeal is allowed. The impugned judgment and order of acquittal dated 20.5.2005 passed by the learned Additional Senior Civil Judge and JMFC, Patan in Criminal Case No. 754 of 2005 is set aside. The case is remanded to the Trial Court for retrial in accordance with law. The parties are directed to appear before the Trial Court on 14th May, 2012. If the accused fail to appear on the date fixed before the Trial Court, the learned Magistrate trying the case is at liberty to take appropriate action to secure presence of the accused. Registry is directed to send back the Record and Proceedings to the trial Court, immediately.