
(2012) 03 GUJ CK 0132
In the Gujarat High Court
Case No : Criminal Appeal No. 314 of 2009

Mehulj Savla

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 15-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 326, 326(3), 326(3), 378
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 3 BC 1

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Zubin F. Bharda, for the Appellant; C.M. Shah, Assistant Public Prosecutor for the Opponent NO. 1, Mr. H.M. Parikh, Advocate for the Opponent NO. 2, for the Respondent

Final Decision : Allowed

Judgement

Bankim N. Mehta, J.—Appellant-original accused has preferred this appeal u/s 378 of the Code of Criminal Procedure, 1973 and challenged the Judgment and Order of acquittal passed by the learned JMFC and 2nd Additional Civil Court, Navsari, on 15.4.2008 in Criminal Case NO. 5441 of 2003. According to the complainant, Rs. 30,000/- were given to the accused on condition that he would return the amount at a specified time. On making demand of the amount, the accused gave cheque NO. 081457 dated 18.7.2003 for Rs. 30,000/- drawn on Indusind Bank. The cheque returned unpaid on account of insufficient funds when it was presented in the Bank, with the endorsement "Today's opening balance insufficient". Therefore, Notice was issued to the accused through Advocate, but it had returned with the endorsement "refused". The notice sent by certificate of posting was received by the accused, but the accused did not pay the amount of unpaid cheque. Therefore, complaint u/s 138 of the Act was filed.

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, further statement of the accused was recorded u/s 313 of the 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. Bharda for the appellant, learned Advocate Mr. Parikh for the accused and learned APP Miss Shah for the respondent State at length and in great detail. I have also perused the impugned judgment and record and proceedings of the trial Court.

4. Learned Advocate Mr. Bharda submitted that the case was tried as summary case, but the Magistrate, who recorded the evidence, did not deliver the judgment and his successor, relying upon the evidence so recorded, delivered the judgment. Therefore, the trial was vitiated and hence, the case is required to be remanded to the trial Court for retrial. He relied upon decision of *Nitinbhai Sevantilal Shah and Another v. Manubhai Manjibhai Panchal and Another*, IV (2011) CCR 8 (SC)=VII (2011) SLT 127=111 (2011) DLT 1017 (SC)=(2011) 9 SCC 638.

5. Learned Advocate Mr. Parikh could not dispute the fact that the evidence was recorded by one Magistrate and the judgment was delivered by his successor Magistrate relying upon the evidence recorded by his predecessor.

6. It appears from the Rojakam of the trial Court that the case was originally assigned to learned CJM, but thereafter, it was transferred to the Court of learned 3rd Additional Senior Civil Judge and JMFC, who recorded part of the evidence. Thereafter, the case was transferred to the Court of 7th Additional Senior Civil Judge, who recorded part of the evidence. Thereafter, the case was transferred to the Court of 3rd Additional Senior Civil Judge and thereafter, to the Court of 2nd Additional Civil Judge, who delivered the judgment. This clearly indicates that the learned Magistrate delivered the judgment relying upon the evidence recorded by his predecessor. In the decision of *Nitinbhai Sevantilal Shah* (supra), the Hon"ble Supreme Court has observed as under:

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 aforesaid decision, it is clear from the record of this case that the learned Magistrate, who recorded the evidence, did not deliver the judgment, but his successor, relying upon the evidence adduced by his predecessor, delivered the judgment. Therefore, the successor Magistrate, who delivered the judgment could not have appreciated the substance of evidence properly recorded by his predecessor and hence, serious prejudice is caused to the complainant, as the Court acquitted the accused. Hence, the learned Magistrate, who decided the matter, failed to decide the case effectively and to do substantial justice. Therefore, the impugned Judgment is required to be set aside and the case is required to be remanded to the trial Court for retrial in accordance with law.

8. In view of above, the appeal is allowed. The impugned Judgment and Order of acquittal passed by the learned JMFC & 2nd Additional Civil Court, Navsari on 15.4.2008 in Criminal Case NO. 5441 of 2003 is set aside and the case is remanded to the trial Court for retrial in accordance with law.

9. The parties are directed to appear before the trial Court on 16.4.2012. If the accused fail to appear before the trial Court as directed by this Court, learned Magistrate trying the case is at liberty to take appropriate action to secure their presence. R & P be sent back to the trial Court forthwith.