

(2009) 10 GUJ CK 0110
In the Gujarat High Court
Case No : Criminal Appeal No. 1163 of 1994

Memon Mohmedrafik Rasulbhai	APPELLANT
Vs	
Desai Rameshlkumar Virsangbhai and Another	RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 4 BC 408 : (2010) CriLJ 2543 : (2010) 4 Crimes 336 : (2011) 6 RCR(Criminal) 2085

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : Jayshree C. Bhatt,s 1, for the Appellant; KV Pandya, Assistant Public Prosecutor for Opponents 2, for the Respondent

Judgement

Z.K. Saiyed, J.—Present appeal has been filed by the original complainant of Criminal Case No. 817 of 1992 which was disposed of by the learned JMFC, Idar on 1.12.1993. In this matter the complainant-present appellant has filed one complaint for the offence u/s 138 of the Negotiable Instruments Act before the learned JMFC at Idar Court, and on 30.6.1992 process was issued against the respondent. The respondent is served but does not turn up before this Court for hearing.

2. Heard Ms. Jayshree Bhatt, learned advocate for the appellant and Mr. K.V. Pandya, learned Additional Public Prosecutor for the respondent No. 2-State.

3. In this case the question of amount was involved and cheque was given to the present appellant-original complainant by respondent No. 1 and it was bounced and proper provisions of law was followed by present appellant-original complainant. Thereafter the statement of the original accused was recorded at Exh.5 and then on 17.12.1992 the oral evidence of the complainant-present appellant was recorded and documents at Exh.6 were also produced. But due to lack of time, examination-of-chief of the complainant was not over on 17.12.1992 so it was adjourned to 19.1.1993 at that day the learned advocate

for the parties, complainant and accused were also present before the Court but chief-examination of the complainant was not recorded and it was adjourned to 1.2.1993. On said day the present respondent No. 1 was present and Exh.11 application was given to the Court with a contention that the complainant and his advocate was not present. So in absence of the complainant and his advocate that application Exh.11 was allowed and present respondent No. 1 was acquitted for the offence u/s 138 of the Negotiable Instruments Act. The said order is challenged by the original complainant.

4. It is contended by learned advocate Ms. Jayshree Bhatt that the question of money of a poor person is involved in this case. It was the duty of the Court to issue bailable warrant or a non-bailable warrant to call the complainant and other witnesses before that Court, but the learned trial Judge has not offered any such type of facility to the complainant, and simply in the absence of the complainant and his advocate, that original complaint was dismissed for want of evidence.

5. It is true that on next day of hearing only for a day the complainant and the learned advocate was not present before the Court, this is not a ground to dispose of the complaint. It is the duty of the Court to use the provisions of Code of Criminal Procedure and he cannot blame the prosecution with a word that witnesses and learned advocate or a prosecutor is not present. When the question of money of a poor person is involved, it was the duty of the learned trial Judge to decide the case on merits depending upon the evidence produced before him. He was empowered to call the witnesses by adopting the provisions of Cr.P.C. I have found that non-application of the provisions of Cr.P.C., it is a gross judicial misconduct made by the learned JMFC. A poor person who had knocked the door of the Court for justice, his right cannot be removed or washed out by a learned trial Judge with a simple word that on next hearing witness and advocate is absent so his right cannot be shut down by way of simple one line order. It was the duty of the Court to issue bailable warrant to the complainant if he did not turn up the court then the learned trial Judge can issue non-bailable warrant also and he can simply call the witness before that Court.

5.1 To cite some such reported decisions, they are (1) State of Gujarat v. Lalit Mohan 1989(2) G.L.R. 952 ; (2) State of Gujarat Vs. Ramanbhai R. Pandya, (3) State of Gujarat Vs. C.K. Patel, (4) State of Gujarat Vs. Kirit Maganbhai Patel, (5) State of Gujarat Vs. Lohana Prakash Dayalji and Another, (6) State of Gujarat Vs. Shambhubhai Jivrambhai Patel, (7) B.J. Pandya, Octroi Inspector, Godhra Municipality Vs. Arvindkumar Kanubhai Hadial and Others, and (8) State of Gujarat v. Bhupatbhai Muljhibhai and Anr. 1995(1) GCD 786 (Guj). In this last mentioned case, in para 6, it is held as under:

Now having heard the learned advocates for the respective sides quite at length, it clearly appears to this Court that the impugned order is per-se perverse and illegal. The learned Magistrate was not conducting a "mock trial"!! The case he was trying was a serious case under the Prohibition Act wherein 400 tins of molasis valuing at Rs. 1,90,002/were seized. This is a serious offence against the

Society as from such molasis (rotten Gur) only the country liquor is prepared, which in the past has resulted into several hooch tragedies taking heavy toll of human lives and making many more surviving blind for life. To view such an offence lightly and too technically and in follow through mechanically acquit the accused is something quite unbecoming of any learned Magistrate, which cannot be countenanced for a while even. Once the court takes cognizance of any case, it is its first and foremost duty to do justice and while doing the same, it can take assistance of the prosecution. Accordingly, if the prosecution renders desired assistance, well and good, but in case if for whatever reasons it fails to render the same, it is for the court to exert and assert its judicial powers to compel the witnesses to remain present before the court at any cost and see that the cause of justice do not suffer and fail on account of the negligent prosecution. Turning to the facts of the present case it is apparent that the complainant was a Police Officer. Under the circumstances, it was the duty of the court to see that in the first instance by issuing summons and thereafter, warrant and even if that was not heeded to, by issuing even non-bailable warrant, he was kept present before the Court and examined in the overall interest of public. Not to discharge this duty in the manner suggested above, at the cost of repetition, it may once again be emphatically reiterated, stated that it is serious dereliction of duty, which neither can be countenanced lightly by the Administration of Justice nor can the learned Magistrate expect Society to pardon him. It further appears that the learned APP has also not taken the desired care in conducting the trial and it was for this reason only that he was summoned by this Court to remain present. On appearing before this Court Mr. Vasant Rana from the file pointed out that the trial Court had once prepared summons against the complainant Police Officer but for whatever reasons that remained on the file and was never taken out to be served upon the complainant. Now this circumstance on the contrary is an indicator to show that the learned APP Mr. Vasant Rana had not taken any further interest in the matter, though his explanation was that because he was overburdened with the work, he could not discharge his duty to the desired extent. As stated above, merely because the learned APP for whatever reasons failed to evince the desired interest in keeping the complainant present before the Court, this was certainly no ground for the learned Magistrate to throw to winds his sense of duty, interest and initiative in the matter of examining the complainant as has been done in the instant case. If the learned Magistrate was of the opinion that despite the fact that the to panch witnesses were present in the court and the learned APP was not present to examine them either he should have waited for the learned APP to come or should have adjourned the case to some future date and in case if the learned Magistrate was of the opinion that the learned APP was in habit in not regularly attending the court, then he should have drawn the attention of the concerned DSP and the learned District Magistrate of the area. Be the case as it may, but the fact remains that such short-circuit premature acquittal in a serious case like the present one ought not to have been gifted away on the flimsy excuse of prosecution not examining the complainant where it was also plainly the duty of the learned Magistrate to take necessary steps to

examine him in order to subserve the ends of justice. These glaring infirmities in the conduct of trial positively make out the case of remanding the case to the trial court for denovo trial. It is not possible for this Court to agree with the submission made by Mr. Dave that since all the panchas have already failed to support the prosecution, therefore, the solitary interested evidence of Police Officer standing by itself would not be of any consequential assistance to the prosecution and that the remanding of the case would be an idle formality and waste of public time. There are cases and cases where depending upon the overall credibility of the evidence of the concerned Police Officer that the same can as well be relied upon despite the fact that the panchas had chosen not to support the prosecution. It is indeed too premature at this stage to say that the evidence of concerned Police Officer would inspire the confidence of the trial court or not. That all depends upon the honesty, integrity, performance and capacity of the concerned Police Officer to withstand the cross-examination at trial.

5.2 Similarly, in the case of State of Gujarat v. Yogendrakumar Bhaskerrao Setalvad and Ors. in para 8.1 of the judgment in Criminal Appeals No. 66 to 71 of 1985, rendered on 13.4.1993, this Court held as under:

8.1 The above chart submitted by the learned APP speaks volume as to how, why and under what circumstances, the trial got protracted for five long years, and from that it cannot be said that respondents also have not contributed in delaying the cases, and accordingly were in way less guilty for the said delay ! It is quite true that the prosecution has failed to examine the witnesses, but then incidentally it may also be stated that this is not a new phenomenon altogether as it has come to the notice of this Court since quite sometime that number of such cases are just thrown-off mid-stream by the courts without any effective trial, on the stock ground of either (i) the cases have become old, or (ii) the complainant was absent when the cases were called out, or (iii) despite sufficient time given, the prosecution failed to examine the witnesses, etc. etc. Now none of the aforesaid grounds more particularly when the charges are framed can be said to be legal grounds for acquitting the accused as the court has equally, rather more serious and important duty of doing the justice. These days, by and large, we do find number of criminal cases go on failing due to the non-prosecution which is clearly attributable either to the inefficient or corrupt practices adopted by the process serving agency or the Investigating Officer or the learned PP incharge of the cases, and therefore, to that extent the said three can be said to be guilty for the said non-prosecution. This undoubtedly is the matter of very serious concern for anyone, which the State Government will have to consider in all seriousness to control and regulate the same by taking some effective, stringent departmental actions against the erring agencies. But under no circumstances, the non-prosecution of the cases on the part of prosecuting agency can be permitted to write-off on the one hand the serious charge against the accused and on the other hand to deny the aggrieved citizens their fundamental right under the Constitution to have justice from the Court. After

framing of the charge, if for whatsoever reasons, the prosecution is found to be either accused or guilty of non-prosecution then in that case, the situation is such wherein before the trial court, there are two groups of accused - one the original accused who is charged under the relevant Section of the particular Act, and the second one is the prosecuting agency for misconducting itself in not discharging duty and letting off the accused by non-prosecution ! Thus merely because the prosecution stands accused or guilty of non-prosecution, the trial court is not justified in acquitting the accused. As a matter of fact, if the prosecution is found to be prima-facie guilty of non-prosecution, then it is an unquestionable duty of every Court to report the remissness on the part of the said agency at once to the concerned higher-ups, and thereafter, should also further issue warrants or even non-bailable warrants to the concerned witnesses to secure their presence for examination purposes. Now instead of discharging this positive duty towards the cause of justice, if the trial court opts for easier and negative way of acquitting the accused then that is nothing but a serious dereliction of duty on its part which is by no means less serious than the dereliction of duty on the part of prosecution in not prosecuting the accused. In short, once the charge is framed, the accused cannot be acquitted on the sole ground either of non-prosecution by the prosecution or non-trial by the Court. It may further be stated that the trial court cannot be permitted to be oblivious to the important fact that the prosecuting agency is merely an agency to voice and ventilate the grievances of aggrieved citizen before the court and thereafter to do everything needful to assist the Court in rendering the justice. Under the circumstances, if for whatever reasons the prosecuting agency commits some default and does not examine the witnesses and as a result if the accused are to be acquitted that would be in substance denying justice to the aggrieved citizen who on the one hand has no locus standi to directly approach the Court to conduct the trial and on the other hand, the prosecution fails him to get the justice ! Under such embarrassing and quite paradoxical circumstances where the aggrieved citizen has to go? Is he to break his head against the wall for not getting justice anywhere ? This aspect is required to be clearly understood by all concerned, i.e. prosecuting agencies as well as trial courts. One can understand the mistake committed by the Court either in appreciating the evidence or interpreting some provisions of the law, but there is no defence left open to any Court or for that purpose to any prosecuting agency even to commit any error on the simple, elementary, first principles of the procedure as to how to conduct the trial ! It is hoped that what is observed here percolates deep down, both - on the trial court as well as prosecuting agency and henceforth will stop themselves from foisting injustice on the aggrieved citizen.

6. In Criminal Appeal No. 954 of 1995 it was observed by Division Bench of this Court and copy of that order was also produced by learned APP. He has contended that this Court has already observed and the judgment of said appeal was already circulated to the learned Judicial Officers of the State also. I have also gone through the observations made by Division Bench of this Court in

Criminal Appeal No. 954 of 1995 and I have also perused the contents of the complaint as well as oral evidence of the complainant and the order passed by the learned Magistrate at Exh.11. I have found that the learned Judge had chosen short way to dispose of the matter and just to show the disposal.

7. Any way in present appeal is concerned, the original criminal case is not decided on merits but only dispose of mainly because the witness was not present and not examined by the prosecution. On this ground appeal is required to be straightway allowed and remanded to the trial court for further trial according to law.

8. In the result, the appeal is partly allowed. The impugned judgment and order passed by the learned JMFC, Idar in Criminal Case No. 817 of 1992 dated 1.12.1993 is hereby quashed and set aside. The case is remanded to the trial court with a direction to dispose of the same on merits according to law in light of the observations made above. The learned Principal District Judge, Sabarkantha District is directed to notify this matter before the learned JMFC, Idar with a direction to dispose of this matter within four months from the receipt of writ of this order. Appeal is disposed of accordingly. R&P, if any, be sent back to the trial court immediately.