
(2012) 10 BOM CK 0148
In the Bombay High Court
Case No : Criminal Appeal No. 621 of 2012

Sitaram Dhanad

APPELLANT

Vs

Ashok Gavhane and Others

RESPONDENT

Date of Decision : 20-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 238, 239, 240, 241, 242
Penal Code, 1860 (IPC) — Section 323, 324, 34, 504, 506

Citation : (2013) 2 BomCR(Cri) 489

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : S.D. Kotkar, for the Appellant; P.P. Khandagale, advocate for respondent nos. 1 to 4 and Shri B.J. Sonawane, Assistant Public Prosecutor, for the Respondent

Judgement

Shrihari P. Davare, J.—Heard respective learned counsel for the parties. This is an appeal preferred by the appellant (original complainant) challenging the order, dated 17.8.2009, passed by the learned Judicial Magistrate, First Class, Gangapur, thereby dismissing the complaint filed by the complainant in default and discharging the accused, for the offences punishable under Sections 324, 323, 504, 506 r/w 34 of the Indian Penal Code, since the complainant has filed the private complaint against the accused and since the orders passed by the learned Trial Court dismissing the complaint in default and discharging the accused amounts to acquittal of the accused.

2. Admit. Shri P.P. Khandagale, learned counsel waives service of notice for respondent nos. 1 to 4 and Shri B.J. Sonawane, learned A.P.P. waives service of notice for respondent no. 5, after admission. With the consent of the learned counsel for the parties, present appeal is taken up for final hearing.

3. It is alleged by the appellant (original complainant) that on 1.8.2009 while he was working in the field of Anna Trimbak Dhotre, the accused persons assaulted him by a wooden handle of spade and sticks and thereby he sustained serious

injuries. Moreover, while assaulting to the complainant, the accused also abused him. Thereafter the complainant was required to be admitted in Public Health Centre, Gangapur and the Medical Officer, Public Health Centre, Gangapur gave medical treatment to him. Thereafter, the complainant/appellant moved the police station, Gangapur, but the police personnel refused to register the offence against the respondents. Hence, the complainant was required to file private complaint before the learned Judicial Magistrate, First Class, Gangapur, bearing R.C.C. No. 196 of 2009 and copy thereof is annexed to the appeal at Exh. "A".

4. Learned counsel for the appellant contended that the respondents were served with the summons of the said complaint. However, they sought time for execution of surety bond repeatedly and at lastly furnished the surety bond before the said court. However, thereafter the respondents remained absent before the learned Trial court, and hence, bailable warrants were issued against them and copy thereof is annexed at Exh. "B" with the appeal. Learned counsel for the appellant further submits that on 23.6.2012 the respondents were absent before the learned trial court, and hence, their advocate moved an application for exemption. However, the said application came to be rejected by the learned trial court. Therefore, the appellant preferred an application before the learned trial Court requesting to issue non-bailable warrants against the respondents, and accordingly, non-bailable warrants were issued against the respondents on 23.6.2011 which were made returnable on 17.8.2011.

5. However, it appears that in between, the respondents appeared before the court on 3.8.2011 and filed an application for cancellation of non-bailable warrants and the said non-bailable warrants appear to have been cancelled by the learned trial court and the matter was posted on 17.8.2011 for evidence before charge behind the back of the complainant i.e. appellant herein. Thereafter, it is the contention of the appellant that he was under the impression that date was 17.8.2011 for the receipt of report of non-bailable warrants issued against the respondents, and therefore, he did not remain present before the learned trial court on 17.8.2011. Moreover, appellant was also under the impression that so long the charge was not framed, the court would not proceed for recording evidence of the appellant. However, on 17.8.2011, the learned trial court dismissed the complaint filed by the appellant in his absence and discharged the respondents and closed the proceeding.

6. Learned counsel for the appellant further submits that bare perusal of the roznama discloses that the appellant was not absent on a single date before the learned trial court, except on 17.8.2011. It is further contended that he has given convincing explanation for his absence on 17.8.2011. The said complaint should not have been dismissed in default on 17.8.2011, since the appellant was not aware about the appearance of the respondents and cancellation of warrants on 3.8.2011 and he had no notice thereof. According to the learned counsel for the appellant, prejudice has been caused to him due to dismissal of his complaint in default. Hence, the learned counsel for the appellant urged that present

appeal be allowed and the appellant be given opportunity to prosecute his complaint on its own merits before the learned trial court.

7. Learned counsel for the respondents opposed the present appeal vehemently and submitted that this appeal shall not be maintainable before this court in view of the amended proviso to Section 372 of the Code of Criminal Procedure and further submitted that proviso has been inserted to Section 372 of the Code of Criminal Procedure by way of amendment which has come into effect from 31.12.2009 and the appellant has been given right to file the appeal against acquittal before the learned Sessions Judge. He further submitted that the appellant has chosen wrong forum by filing present appeal before this court, and hence, submitted that present appeal deserves to be dismissed.

8. I have perused the present appeal, its annexures, the complaint filed by the appellant i.e. R.C.C. No. 196 of 2009 and the roznama, more particularly, the roznama pertaining to dates from 23.6.2011 to 17.8.2011 and the impugned order, dated 17.8.2011 passed on the said complaint as well as the orders passed on the said date in the roznama of the said case and heard the rival submissions advanced by the learned counsel for the parties.

9. In so far as factual aspects of the present matter are concerned, it is the matter of record that the appellant herein filed private complaint against the respondents on 13.8.2009 before the learned Judicial Magistrate, First Class, Gangapur under R.C.C. No. 196 of 2009 and the verification of the complaint was recorded on 5.9.2009. Accordingly, learned Judicial Magistrate, First Class, Gangapur after perusal of verification of the complainant and documents annexed with the complaint and also after hearing the complainant issued process against the respondents/accused for the offences punishable under Sections 324, 323, 504, 506 r/w 34 of the Indian Penal Code on 5.9.2009 and the same was made returnable on 6.8.2009.

10. Accordingly, the respondents/accused appeared through their advocate in the said case on 6.10.2009 and preferred the application for bail. However, it appears from the roznama that subsequently during the pendency of the said trial, the respondents/accused remained absent, and hence, non-bailable warrants were issued against them and same were also cancelled later on the application preferred by the respondents. Further roznama discloses that the said proceeding was adjourned from time to time for recording of the plea. The roznama dated 23.6.2011 reflects that the accused were absent, hence, exemption application was filed by the advocate for accused, but same was rejected. Hence, the complainant filed an application for issuance of non-bailable warrants against the accused. Accordingly, non-bailable warrants were issued against the accused on 23.6.2011 and same were made returnable on 17.8.2011, and case was adjourned to 17.8.2012 for appearance.

11. However, it appears from the roznama that in between, on 3.8.2011 the respondents/accused appeared before the learned trial court and preferred an

application for cancellation of non-bailable warrants against the accused and the said non-bailable warrants issued against the accused appear to have been cancelled. Moreover, the said roznama, more particularly, dated 3.8.2011 discloses that charge against the accused was recorded vide Exh. "C-25" and the statements of the accused were recorded at Exhs. "C-26 to C-29" and the case was adjourned for EBC i.e. evidence before charge on 17.8.2011. Further roznama, dated 17.8.2011 discloses that, "the complainant and his advocate are absent when called upon. The accused and their advocate are present. The order is passed on Exh. 1. Regular Criminal Case is dismissed and the accused are discharged. Proceeding is closed."

12. Thus, it is apparently clear that non-bailable warrants were issued against the accused on 23.6.2011 and same were made returnable on 17.8.2011 and the said case was adjourned to 17.8.2012 for appearance. However, in between the said two dates the accused/respondents appeared before the trial court on 3.8.2011 i.e. behind the back of the complainant and applied for cancellation of non-bailable warrants against the accused, which appear to have been granted by the trial court without notice to complainant and even as per roznama dated 3.8.2011 the charge against the accused was recorded at Exh. "C-25" and their statements were recorded at Exhs. "C-26 to C-29", but curiously enough, the said case was adjourned for EBC i.e. evidence before charge to 17.8.2011 i.e. behind the back of the complainant. Hence, there is substance in the contention raised by the learned counsel for the complainant that he was under impression that the case was fixed on 17.8.2011 for appearance after service of non-bailable warrants issued against the accused and he was not aware about the afore said developments took place behind his back and without notice to him on 3.8.2011, and therefore, he and his advocate remained absent on 17.8.2011. Accordingly, since they remained absent on the said date, the said Regular Criminal Case was dismissed due to their absence, and accused were discharged and the proceeding was closed.

13. In fact, as per earlier roznama of 23.6.2011, the said Regular Criminal Case was posted on 17.8.2011 for appearance and not for hearing, but again due to development on 3.8.2011 behind the back of the complainant and without notice to him, the said Regular Criminal Case was posted on 17.8.2011 for evidence before charge. Hence, naturally the complainant/appellant was not aware about fixation of said Regular Criminal Case No. 196 of 2009 for evidence before charge on 17.8.2011, since the development before the learned trial court took place on 3.8.2011 behind his back and without issuance of notice to him, which resulted into dismissal of the complainant's complaint due to default and discharging the accused on 17.8.2011, without giving any opportunity to the complainant to lead evidence and to prosecute the said complaint on its own merits.

14. Besides, the question arises when on 3.8.2011 charge against accused was recorded as per Exh. C-25 and statements (plea) of the accused were recorded as per Exhs. "C-26 to C-29", then how the case was posted on 17.8.2011 for

EBC i.e. evidence before charge reversing the wheels. Moreover, when case was posted on 17.8.2011 for appearance after service of N.B.W. against the accused and not for hearing as per very roznama, dated 23.6.2011, then how the case was dismissed on 17.8.2011 on the ground of failure of the complainant to lead evidence, when the case was not at all fixed on 17.8.2011 for evidence as per earlier roznama, dated 23.6.2011. Thus, there are anomalies regarding the factual aspects and present case appears to have been handled in loose and casual manner.

15. As regards the legal aspect and the objection raised by the learned counsel for the respondents raising the law point, admittedly, the appellant herein filed a private complaint against the respondents i.e. Regular Criminal Case No. 196 of 2009 on 13.8.2009 and the learned trial court issued process thereon on 5.9.2011 for the offences punishable under Sections 323, 323, 504, 506 r/w 34 of the Indian Penal Code, and hence, it is crystal clear that the said Regular Criminal Case was instituted by the complainant by filing private complaint i.e. it is the case instituted other wise than on the police report, which comes under the Chapter XIX-B of the Code of Criminal Procedure as a Trial of warrant case by the Magistrates and is governed by the provisions of Sections 244 to 247 of the Code of Criminal Procedure. However, the cases instituted on police report come under Chapter XIX-A of the Code of Criminal Procedure which are warrant cases triable by the Magistrates and Sections 238 to 243 of the Code of Criminal Procedure are applicable thereto and since those cases are instituted on police report, right has been conferred upon the victim to prefer an appeal against any order passed by the court acquitting the accused or convicting him for lesser offence or imposing inadequate compensation, under the amended proviso to Section 372 of the Code of Criminal Procedure, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

16. However, so is not the position in the instant case, since present case comes under Chapter XIX-B of the Code of Criminal Procedure which has been instituted other wise than on police report and same is governed by Sections 244 to 247 of the Code of Criminal Procedure, and hence, the appeal against acquittal/discharge preferred in the cases governed by the said Sections under Chapter XIX-B of the Code of Criminal Procedure shall come under the purview of Section 378(4) of the Code of Criminal Procedure. Hence, it is amply clear that Section 372, more particularly, amended proviso thereto of the Code of Criminal Procedure and Section 378(4) of the Code of Criminal Procedure, operate in different areas.

17. Apart from that the scheme of Chapter XIX of the Code of Criminal Procedure is such that the said Chapter is divided into three parts i.e. "XIXA, XIXB and XIXC" and Chapter XIXA deals with the "cases instituted on a police report", which are governed by Sections 238 to 243 of the Code of Criminal Procedure; whereas Chapter XIXB is related to "cases instituted otherwise than on police

report" which are governed by Sections 244 to 247 of the Code of Criminal Procedure; and Chapter XIXC pertains to the "conclusion of trial" comprising of Sections 248 to 250 of the Code of Criminal Procedure, and the said Chapter XIXC, which pertains to conclusion of trial, consisting of Sections 248 to 250 of the Code of Criminal Procedure is common to both the said parts i.e. applicable to the cases which come under the ambit of both the categories i.e. under Chapters XIXA and XIXB. Thus, Section 248(1) under Chapter XIXC of the Code of Criminal Procedure in respect of conclusion of trial prescribes that, "If, in any case, under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal." In the case on hand, we are not concerned with Section 248 Sub-sections (2) and (3) of the Code of Criminal Procedure, which deal with the conviction/previous conviction, but we are concerned with Section 248(1) of the Code of Criminal Procedure.

18. Admittedly, in the instant case, as per roznama, dated 3.8.2011, charge against the accused was recorded at Exh. "C-25" and their statements were recorded under Exhs. "C-26 to C-29", and therefore, as per Section 248(1) of the Code of Criminal Procedure, the Magistrate was required to record an order of acquittal, if he finds the accused not guilty. However, in the present case, since the complainant and his advocate were absent when called out and failed to lead the evidence, the case was dismissed and the accused stood discharged as per the order passed by the learned Trial Court on Exh. 1 and also in the roznama, and hence, it appears that the learned Judicial Magistrate, First Class proceeded on the footing of Section 249 of the Code of Criminal Procedure i.e. in the situation of absence of the complainant, which reads as follows:-

249. Absence of complainant:-When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

19. The very essence of Section 249 of the Code of Criminal Procedure is that when the proceeding has been instituted upon the complaint, and on any date fixed for the hearing thereof, and when the complainant is absent and if the offence is lawfully compounded or is not a cognizable offence, at any time before the charge has been framed, the Magistrate may, in his discretion, notwithstanding anything herein before contained, discharge the accused. However, so is not the position in the instant case, since although the proceeding has been instituted upon the complaint, as per roznama, dated 23.6.2011, the case was fixed on 17.8.2011 for appearance and not for hearing, and although the complainant was absent on the said date and although the offence was lawfully compoundable, the charge was already framed against the accused on 3.8.2011 as per Exh. "C-25", and the stage of the case on 17.8.2011 as per roznama, dated 3.8.2011, was the stage of evidence before charge, and

therefore, learned Magistrate should not have discharged the accused as per Section 249 of the Code of Criminal Procedure and it was incumbent upon the learned Magistrate to acquit the accused, since charge has been already framed against the accused as per Exh. "C-25" and even their statements were recorded as per Exhs. "C-26 to C-29" as per roznama, dated 3.8.2011. In this scenario, the discharge recorded against the accused by the learned Judicial Magistrate, First Class, Gangapur, District Aurangabad by order, dated 17.8.2011 is required to be construed as acquittal of the accused, and hence, provision of Section 378, more particularly, Sub-section (4) thereof, shall be applicable for the appeals against such acquittals.

20. Thus, since present Regular Criminal Case has been instituted upon the complaint of the complainant which is the case instituted other wise than on the police report, comes under the purview of Chapter XIX-B of the Code of Criminal Procedure, and the appeals against acquittal arising out of the said cases shall be governed u/s 378 of the Code of Criminal Procedure, and therefore, application seeking leave to file appeal u/s 378(4) of the Code of Criminal Procedure shall lie before this court only. Accordingly, there is no substance in the argument canvassed by the learned counsel for the respondents.

21. In the circumstances, present appeal deserves to be allowed and the impugned order, dated 17.8.2011, passed by the learned Judicial Magistrate, First Class, Gangapur, District Aurangabad, deserves to be quashed and set aside and the matter is required to be restored and remanded back to the learned trial court to decide it on its own merits afresh, in accordance with law, after giving due opportunity to the parties to adduce the evidence and by directing the parties to remain present before the court on a specific date. In the result, present appeal is allowed and the impugned order, dated 17.8.2011, passed by the learned Judicial Magistrate, First Class, Gangapur, District Aurangabad, in Regular Criminal Case No. 196 of 2009 stands quashed and set aside and the matter is remitted back to the said court with directions to give opportunity to the parties to adduce/produce evidence and to decide it on it's own merits afresh, in accordance with law, and the parties are directed to remain present before the said court at 11.00 a.m. on 3.12.2012, and present appeal is disposed of accordingly.