

(1989) 07 GUJ CK 0016

In the Gujarat High Court

Case No : Criminal Appeal No"s. 238 to 333 of 1988

State of Gujarat

APPELLANT

Vs

Dhirajlal Pranshankar Bhatt and etc. etc.

RESPONDENT

Date of Decision : 25-07-1989

Acts Referred:

Constitution of India, 1950 — Article 20(3)

Criminal Procedure Code, 1973 (CrPC) — Section 250, 256, 256(1), 300, 386

Citation : (1990) CriLJ 2122 : (1990) 1 GLR 201

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Advocate : M.D. Pandya, P.P, for the Appellant; S.I. Nanavati and K.S. Nanavati, for the Respondent

Final Decision : Allowed

Judgement

R.A. Mehta, J.—The State being aggrieved by mass disposal by acquittal in 96 criminal cases has preferred these appeals and contended that the learned Chief Judicial Magistrate has gravely erred in doing so merely because the complaint-factory Inspector was not present on that day especially when on all previous occasions, he was present and witnesses were also present on several dates. It is also submitted that the complainant, a public servant was transferred and therefore he had sent a telegram and another person Mr. Parekh was present in the Court on that day.

On behalf of the respondents, learned Counsels have submitted that u/s 256 of the Code of Criminal Procedure, the learned Magistrate has the jurisdiction and discretion to pass such an order and the learned Magistrate has given reasons for dismissing the complaint.

Section 256 of the Code of Criminal Procedure reads as under:--

"256(1). If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to

which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of Sub-section (1) shall, so far as may be, apply also to cases where the non appearance of the complainant is due to his death."

2. The learned counsels for the respondents have submitted that the language of Section 256(1) makes it clear that if the complainant does not appear, the Magistrate shall, notwithstanding anything before contained, shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. The record of this case shows that there were merely 42 dates almost on all occasions, the complainant was present. Rarely the complainant was absent or adjournment was sought. It is seen from the rojnama that on many occasions, the witnesses summons were served and the witnesses were present and yet the matters have been adjourned because of:

- i) strike of lawyers;
- ii) adjournment sought by the accused and
- iii) Court being busy with other cases.

About four times, because of the absence of the accused, warrants had to be issued. On the day previous to the dismissal of the complaint, the complainant was present and the advocate for the accused had prayed for adjournment and therefore the Court had directed payment of Rs. 250/- towards the costs of the witnesses. Having regard to this state of record, it appears that the learned Magistrate was unaware of his duty to see that the cases are not disposed of just for the sake of disposal and for the sake of statistics. This is not a case where the complainant has repeatedly sought adjournments for delaying the proceedings. It is true that the criminal cases were filed in the year 1985 and this order of dismissal was passed in the year 1987, but the delay was not at all due to the complainant. In fact the complainant and his witnesses have remained present on so many occasions and due to various reasons as stated above, the matter could not be taken up. In these circumstances, if on one occasion, the complainant who is a public servant was not present, the court ought to have in exercise of sound judicial discretion, adjourned the hearing. If this power is not exercised in such cases, then this power can rarely be exercised in other cases.

3. In the grounds of appeal, it is mentioned that another officer Mr. Parekh was present on that day. But there is nothing on record to show that he was present. But there is no dispute that the complainant was not present on that day as he

was transferred. It was a good ground and sufficient cause for the complainant to remain absent on that day and the interest of justice required, having regard to the facts of the case as narrated earlier, that the learned Magistrate ought to have adjourned the hearing to some other day.

4. In spite of 42 dates in the case, no evidence was recorded at any stage. The complainant had shown his sufficient interest to proceed with the matter by remaining present on almost all days and getting the witnesses summons issued and keeping the witnesses present. Merely because the Court could not record the evidence because of the reasons not attributable to the complainant, it is not a case where the Magistrate should have proceeded to dispose of such large number of cases in this fashion. The learned Magistrate was totally unjustified in doing so.

5. The learned Magistrate has also issued a direction u/s 250 of the Code of Criminal Procedure for issuing a notice for compensation to the accused and the reason given is that the complainant has without giving any evidence for a long time has prolonged the case for a long time by remaining absent and caused physical, mental and economic loss to the accused. In view of the state of record, it cannot be said that the complainant had prolonged or delayed the case or that he had not led the evidence. As seen earlier, the complainant was present almost on all occasions. He had not sought adjournment. He had kept the witnesses present. In view of this, the reason given by the learned Magistrate for issuing the notice is also incorrect. That part of the order issuing notice u/s 250 of the Code of Criminal Procedure is set aside.

5A. The learned counsel for the accused has submitted that since the accused have been acquitted, they cannot be prosecuted again in view of the provisions of Section 300 of the Code of Criminal Procedure and Article 20(3) of the Constitution of India because that would amount to double jeopardy. There is no merit in this contention because there is not going to be a fresh complaint for the same offence. It will be the same complaint to be tried. If the contention of the learned counsel were to be accepted, once there is an acquittal, there cannot be appeal against acquittal and in, such appeals against acquittal, High Court cannot pass any order for remand or retrial. The powers of the appellate court are mentioned in Section 386 of the Code of Criminal Procedure under which appellate court in an appeal from an order of acquittal, can reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial or find him guilty and pass sentence on him according to law. In view of this express provisions, there is no difficulty whatsoever and there is no bar in setting aside the order of acquittal and sending the matter for trial in accordance with law.

6. In the result, all these appeals are allowed and the impugned judgment and orders of acquittal and dismissal of complaint are set aside and the cases are remanded back to the learned Chief Judicial Magistrate, Bhavnagar. The direction for issuance of notice u/s 250 of the Code of Criminal Procedure is also hereby

set aside.