
(1991) 08 GUJ CK 0021
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Patel Hardas Gordhan and Others

RESPONDENT

Date of Decision : 13-08-1991

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 248(1)
Penal Code, 1860 (IPC) — Section 147, 147, 148, 148, 324

Citation : (1992) 1 GLR 306

Hon'ble Judges : J.U. Mehta, J

Bench : Single Bench

Judgement

J.U. Mehta, J.—The State has approached this Court against the judgment and order dated 19-9-1990 passed by the learned Judicial

Magistrate, First Class, Junagadh in Criminal Case No. 4899 of 1988 acquitting the accused-respondents.

2. In the present case, the respondents were charged for offences punishable under Sections 147, 148, 324, 326, 337, 427, 506(2) of I.P.C. and

Section 135 of the Bombay Police Act. The charge was framed on 26-2-1990 and the accused pleaded not guilty to the charge. Thereafter, the

matter was adjourned to 17-3-1990 for taking evidence. On 17-3-1990, further the matter was adjourned to 24-4-1990. Then on 24-4-1990

again the matter was adjourned to 19-6-1990. On 19-6-1990, it is stated in the Rojnama that a Resolution was passed by the Bar Association to

go on strike and, therefore, the matter is adjourned for taking evidence to 30-6-1990. On 30-6-1990 accused Nos. 2, 3, 4, 6, 13, 14, 16 and 17

were absent and on behalf of the said accused, exemption application was filed at Ex. 35 and the same was granted. On that day, the matter was

adjourned for taking evidence to 4-8-1990. In the Rojnama it is shown that on 4-8-1990 because there was a Resolution of the Bar Association

to go on strike, the matter was adjourned to 12-9-1990. On 12-9-1990 accused No. 4 was absent and an application was made on his behalf to

exempt him from, appearing and the same was granted. The Rojnama shows that the prosecution witnesses were not present and the matter was

adjourned for taking evidence to 19-9-1990. On 19-9-1990, according to the Rojnama, the accused were present. It is mentioned in the Rojnama

that though summonses were issued to the prosecution witnesses, they have not remained present and on that day, on behalf of the prosecution the

learned A.P.P. had given an application at Ex. 31 that even though the summonses were served, the witnesses are not present and, therefore,

bailable warrants be issued. The Court passed an order rejecting that application stating that many adjournments were given and, therefore, this

application is rejected and then proceeded further and acquitted the accused u/s 248(1) of the Criminal Procedure Code.

3. Mr. D.K. Trivedi, learned Addl. Public Prosecutor appearing for the State submitted that it is not that at all times the matter was adjourned

because the prosecution witnesses were not present, but on two occasions the Court adjourned the matter because there was a Resolution of

strike on behalf of the Bar Association. He also submitted that in spite of the application, Ex. 38 requesting the Court to issue bailable warrants

against the witnesses, the Court rejected the application made on behalf of the prosecution. Mr. D.K. Trivedi submitted that the trial Court ought

to have issued bailable warrants against the prosecution witnesses instead of taking the easy course by acquitting the accused. He has also relied

upon the judgment of this High Court in the case of State of Gujarat Vs. Nagin Amara Vasava and Others, . I find much force in the submission

made by the learned Addl. Public Prosecutor Mr. Trivedi.

4. On the other hand, Mr. S.M. Shah, learned Advocate appearing for the accused submitted that even though many adjournments were given, the

prosecution did not choose to make a request at any point of time to issue bailable warrants against the witnesses and even in its Memo the State

has not made any grievance that in spite of Ex. 38 requesting the learned Magistrate to issue bailable warrants, the learned Magistrate has failed to

issue the warrants and acquitted the accused and the only grievance made is that the prosecution has not been given proper opportunity to lead

evidence by examining the prosecution witnesses. He submitted that when the judicial discretion is exercised by the Court below in not granting

further adjournment and acquitting the accused, this Court will not interfere as the incident occurred, according to the prosecution, on 11-6-1988.

Mr. Shah vehemently supported the judgment of the trial Court. I do not see any substance in the argument advanced by Mr. Shah.

5. It is pertinent to note that while submitting the chargesheet by the Police, a request is made in the chargesheet itself by the prosecuting agency

that all the 31 witnesses cited by the prosecution be called by issuing summonses. Under these circumstances, it was the duty of the Court below

to issue summonses to all the prosecution witnesses and if the persons to whom such summonses are served do not comply with it, then the trial

Court ought to have seen that by coercive process the witnesses are brought before the Court. In the present case, initially even at the time of

submitting the chargesheet the prosecuting agency had requested the Court to issue summonses to all the witnesses and also at Ex. 38 the learned

A.P.P. made a request to the Court to issue bailable warrants to the witnesses as they did not remain present. However, the learned Magistrate

rejected the said application stating that many adjournments were given and proceeded further by acquitting the accused. The State has made a

grievance in the Memo that the learned Magistrate rejected the application filed by the A.P.P., which resulted in the miscarriage of justice. It is also

stated that the learned Magistrate ought to have given an opportunity to the prosecution to lead evidence and, therefore, the order of acquittal is

required to be set aside. It is also stated in the Memo that the learned Magistrate ought to have issued bailable warrants on the witnesses to

procure their presence, looking to the seriousness of the offence and that the learned Magistrate committed an error in acquitting the accused. In

my view, the State has made a grievance against acquitting the accused on the ground that the Court did not procure the presence of the witnesses

by issuing warrants. Thus, it cannot be said, as contended by Mr. Shah, that no grievance is made by the State in the Memo regarding the rejection

of the application of the prosecution by the learned Magistrate and non-procuring the presence of the witnesses by issuing such warrants. In my

opinion, the trial Court committed an error in acquitting the accused without giving opportunity to the prosecution to lead evidence by examining the witnesses.

6. It will be necessary to examine the position regarding the trial of warrant cases instituted on a police report. u/s 240, if upon consideration of the police report and the documents sent with it u/s 173, and examination of the accused, if any as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX which such Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused. u/s 242 Cri. Pro. Code, if the accused refuses to plead or does not plead, or claims to be tried or the Magistrate does not convict the accused u/s 241, on his plea of guilt, the Magistrate should fix a date for examination of the witnesses and the Magistrate may on the application of the prosecution issue summons to any of its witnesses directing him to attend or to produce any document or other thing and on the date so fixed the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. Section 243 states that the accused shall then be called upon to enter upon his defence and produce his evidence, and if the accused puts in any written statement, the Magistrate shall file it with the record, and if the accused after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of the documents or other things, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such grounds shall be recorded by him in writing. In Section 242(3), the words "as may be produced in support of the prosecution have been used. It is necessary for me to examine the connotation of the words "as may be produced". In my opinion, the word "produced" in Section 242(3) cannot be given any restricted meaning as to saddle the prosecution with the entire responsibility of producing the evidence. In my opinion, a duty also is cast upon the Courts for enforcing

attendance of witnesses by the process provided in the Criminal Procedure Code. The Full Bench of the Madras High Court in the case of the The

State (Tamil Nadu) Vs. Veerappan and Others, at para 22 has observed as under:

In almost all the decisions in which it has been held that an acquittal of the accused on the ground that the prosecution did not produce the

witnesses was improper, the Courts have pointed out that the duty to summon the witnesses in the course of the trial is that of the Magistrate or the

Court concerned, and that the entire responsibility of production of witnesses cannot be saddled on the prosecution and a duty is also imposed

upon the Court for enforcing the attendance of witnesses by the processes provided in the Code and it is the duty of the Court to issue coercive

processes if in spite of summons served on the witnesses they do not appear before the Court and the prosecution fails to produce the witnesses as

directed. We are in respectful agreement with that view insofar as it emphasises the duty of the Magistrate or the Court.

7. No doubt, there is no specific provision in either the relevant Sections of Chapter XIX which deal with the trial of warrant cases instituted on the

police reports by Magistrate or Chapter XX relating to the trial of summons cases instituted on police report, for acquitting the accused on the

ground that the prosecution had not produced its evidence. Thus, there is a duty cast on the Court on an application by the prosecution to issue

summons to the witnesses and secure the presence of witnesses by exercising all the powers conferred on it by the Code for that purpose and duty

is also cast on the prosecution to produce all its evidence and to seek the assistance of the Court for so doing by applying to the Court for the issue

of summons to the witnesses. Therefore, in my view, an acquittal of the accused merely on the ground that the prosecution had not produced the

witnesses would not be proper if the Court had not on an application by the prosecution discharged its duty of summoning and enforcing the

attendance of witnesses, by coercive process. I am supported by the judgment of this High Court in the case of State of Gujarat Vs. Nagin Amara

Vasava and Others, , wherein it is laid down that if the prosecution fails to produce the witness or if inspite of service of the summons the witnesses

do not appear to give evidence, it becomes the duty of the Magistrate to use all coercive methods to secure their attendance in the Court. The

imparting of justice is always a matter of conscience and mere termination of a matter by itself means nothing. A trial Magistrate must indeed feel

hurt by such a recalcitrant complainant and such witness, if they do not come forth to help the cause of justice and he must make every permissible

endeavour to see that a case is not frustrated or miscarried merely because those who have set the criminal law in motion later on change their

minds and seek by their absence to get away from it.

8. In the present case, the Court even after the application filed by the A.P.P. at Ex. 38 did not procure the presence of the prosecution witnesses

by coercive process as provided u/s 350 Cri. Pro. Code and rejected the prayer of the prosecution and by adopting easy course, acquitted the

accused and under the circumstances, the matter is required to be remanded to the trial Court for proceeding further in accordance with law and in

light of the observations made above.

9. In the result, the appeal filed by the State is allowed. The judgment and order of acquittal, dated 19-9-1990 passed by the trial Court in

Criminal Case No. 4899 of 1988 is quashed and set aside and the matter is remanded to the trial Court to proceed further in accordance with law

and in light of the observations made in the judgment.

10. As the case is old one, the trial Court will give top priority in disposing of the case.