

(1970) 07 KAR CK 0014
In the Karnataka High Court
Case No : Criminal Appeal No. 198 of 1969

The State of Mysore

APPELLANT

Vs

Kalilulla Ahmed Shariff and Another

RESPONDENT

Date of Decision : 27-07-1970

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 207 A (2), 208 (3), 251 A (11), 251 A (7)

Penal Code, 1860 (IPC) — Section 323, 392

Citation : AIR 1971 Kar 60 : (1971) CriLJ 226 : (1970) 2 MysLJ 209

Hon'ble Judges : S.R. Rangegowda, J;M. Santhosh, J

Bench : Division Bench

Advocate : G. Dayananda, S.P.P, for the Appellant; K.A. Swamy, for the Respondent

Final Decision : Allowed

Judgement

Santhosh, J.—This appeal filed by the State is directed against the order of acquittal of the two respondents passed by the Judicial Magistrate, First Class, Second Court, Biiapur, in C. C. No. 1344 of 1968. Charges under Sections 392 and 323 of the Indian Penal Code were framed against the respondents by the learned Magistrate and the case was posted for evidence. On 27-5-1969 as there were no witnesses present in the court on behalf of the prosecution, the learned Magistrate acquitted the respondents u/s 251-A (11) of the Code of Criminal Procedure, and it is this order of acquittal that is challenged by the State in this appeal.

2. The learned State Public Prosecutor appearing on behalf of the appellant, has contended that the said order of acquittal passed by the learned Magistrate is illegal. On 27-5-1969 as the Assistant Public Prosecutor was not well, and adjournment was asked on behalf of the prosecution which was not unreasonable and that the learned Magistrate was not justified in acquitting the respondents merely on the ground that no prosecution witnesses were present in Court. The

learned Magistrate had no power to acquit the respondents u/s 251-A (11) of the Code of Criminal Procedure unless he records a finding that the respondents-accused who were charged with the serious offence of robbery, were not guilty of the charge. He therefore argues that the impugned order of acquittal is not in accordance with law and deserves to be set aside.

3. The order-sheet in the case shows that on 24-2-1969 charges were framed against the respondents-accused and the case was posted for evidence to 11-3-1969. On 11-3-69 as no witnesses were present, the case was again posted for evidence to 10-4-69. On 10-4-1969 as the Magistrate was on leave the case was posted to 23-4-1969; that on 23-4-1969 as the counsel for the accused were absent and no witnesses were present, the case was posted to 27-5-1969. On 27-5-1969 the Head Constable represented that the Assistant Public Prosecutor was not well and the witnesses were not present and the learned Magistrate passed the following order:

"In this case, I do not see any reason to adjourn the case any more as a punishment to the accused for the laches on the part of the prosecution. Hence, I take the prosecution has no evidence to adduce and close the case. The accused are acquitted u/s. 251-A (11), Cr. P. C. and their bail bonds are cancelled."

4. In *State of Mysore v. Nara-simhegowda* (1964) 2 Mys LJ 241 : AIR 1965 Mys 167 on which strong reliance is placed by the learned State Public Prosecutor in support of his contention that the learned Magistrate had no power to acquit the respondents without recording evidence u/s 251-A (11) of the Code of Criminal Procedure, Tukol and Chandrashehar, JJ. held that in a case where the magistrate had framed charges and the case was adjourned for production of the prosecution witnesses and the summons issued to the witnesses had not been returned, the Magistrate could not have passed an order of acquittal u/s 251-A (11), Cr. P. C. without recording evidence and finding the accused to be not guilty. Having issued summons to the witnesses the Magistrate should have taken steps by issuing warrants if necessary to secure the presence of witnesses. Their Lordships observed in para 4 at p. 243 (of Mys LJ) = (Para 4 at p. 169 of AIR) as follows:-

"Sub-section (11) lays down that "if, in any case under this section in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal." The word "finds" seems to have been used in the sense of "decides", "concludes" or "holds" implying that the finding to be arrived at shall be after consideration of all the evidence adduced by the prosecution, the plea of the accused and the evidence adduced on his behalf if any. This Section occurs in Chapter XXI of the Code which also provides for the procedure for trial of warrant cases "instituted otherwise than on a police report" and embodies in Section 258 (1) provisions identical with those of Sub-section (11). The Code does not provide for or contemplate an order of acquittal being recorded merely on the ground that the prosecution or the complainant had failed to produce evidence on the date fixed by the Magistrate. We do not desire to express any

opinion in the present case on the question whether the Magistrate cannot at all record an order of acquittal under any circumstance where the prosecution or the complainant persistently and unreasonably fails in his obligation to keep the witnesses present or secure their attendance."

In para 5 (of Mys LJ) = (In para 5 of AIR), their Lordships also observed as follows:

"In warrant cases where the law requires the State to undertake the burden of prosecuting the offenders in public interest to ensure law and order, the Court also has its responsibility to see that justice is done by a fair and speedy trial. Passing orders of discharge or acquittal without just and sufficient grounds would be contrary to law and against public interest."

Mr. Swamy the learned counsel appearing on behalf of the respondents-accused, has relied on a decision of a single Judge of this Court reported in *Basappa v. Kalappa* (1966) 2 Mys LJ 528 in which Honniah, J. held thus:

"Before the amendment Act of 1955 the Magistrate had a duty to ascertain the names of the prosecution witnesses and summon them, but there appears to be no analogous provision in Section 251A. Under Sub-section (7) of Section 251A the Magistrate is to take such evidence as is produced before him in support of the prosecution. If for one reason or the other, the prosecution fails to produce such evidence, the only alternative left to the Magistrate would be to act under Sub-section (11), to make an order holding that the accused are not guilty as the prosecution has failed to produce any evidence in support of the charge and then record an order of acquittal."

The Bench decision of this Court (1964) 2 Mys LJ 241 : AIR 1965 Mys 167 referred to earlier, was not brought to His Lordship's notice. Further in the said case the prosecutor had undertaken to produce the witnesses on the adjourned hearing. The acquittal was also not challenged by the State but by the complainant only.

It is contended by Mr. Swamy that in the instant case, no summons to the witnesses had been taken by the prosecution and the prosecution undertook to produce the witnesses. As the prosecution have not produced any witness in support of their case, the learned Magistrate, it is argued, was perfectly justified in acquitting the respondents-accused under Sub-section (11) of Section 251A.

5. There is no force in the said contention of Mr. Swamy. In the charge-sheet filed by the Police, there was a specific prayer for issue of summons to the witnesses cited in the charge-sheet. In the order sheet of the case, it is nowhere stated that the prosecution undertook to produce the witnesses. In a case like this where the prosecution has not undertaken to produce the witnesses "and where they have made a specific prayer in the charge-sheet to issue summons to the witnesses mentioned therein, it is the duty of the Court to issue summons to those witnesses and insist on their attendance. If the witnesses do not come to

court in spite of the summons, it is open to the Court to issue a warrant and see that the witnesses appear before the Court.

We may also point out that under Sub-clause (2) of Section 207A of the Code of Criminal Procedure it is the duty of the officer conducting the prosecution to apply to the Magistrate to issue process to compel the attendance of any witness. Section 208 (3) of the said Code also lays down that in proceedings instituted otherwise than on police reports, it is the duty of the complainant or the officer conducting the prosecution or the accused to apply to the Magistrate to issue process to compel the attendance of any witness. There is no such obligation cast, u/s 251-A (7) of the Cr. P. C. on the prosecution to apply for process to the witnesses. There is, therefore, no force in the contention advanced by Mr. Swamy that it is the duty of the prosecution to apply for summons to the witnesses they proposed to examine in the case.

6. It is also clear from the wordings of Sub-clause (11) of Section 251-A that if in any case under this Section in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. As has been pointed by Their Lordships in (1964) 2 Mys LJ 241 : AIR 1965 SC 167 to which we have already referred, the word "finds" in Sub-clause (11) of this Section is used in the sense "decides" implying that the finding to be arrived at shall be after consideration of the evidence adduced by the prosecution, the plea of the accused and the evidence adduced on his behalf if any, and the Code does not provide for or contemplate an order of acquittal being recorded merely on the ground that the prosecution failed to produce the witnesses on the date fixed by the Magistrate.

The words used in Sub-clause (11) are "finds the accused not guilty" and "record an order of acquittal". If the legislature wanted merely that the accused should be acquitted, it could have simply used the words "pass an order of acquittal". There was no need for the legislature to use the specific words "finds the accused not guilty". Finding, the accused not guilty implies that the Court has applied its mind to the merits of the case after recording evidence and then only found him not guilty. We may also point out that the policy of law seems to be that in serious cases the accused should not be acquitted merely because of laches on the part of the prosecution. In summons cases instituted on complaint u/s 247 of the Cr. P. C. the Court is competent to acquit the accused merely because of the non-appearance of the complainant. u/s 249 of the Cr. P. C. in any case instituted otherwise than upon a complaint, the Magistrate may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon release the accused. Power is given to Court to stop proceedings for good reasons even in a case instituted otherwise than on a complaint.

Some Courts have taken the view that Section 249 applies only to summons cases as it is found in Chapter XX dealing with trial of summons cases. But the words used in the said Section are very wide and it says "in any case" instituted

otherwise than upon a complaint the Court for reasons to be recorded by it may stop the proceedings. It may also be mentioned that the very next Section 250, though it appears in Chapter XX dealing with trial of summons cases, refers to compensation to be awarded for frivolous accusations both in summons and warrant cases.

Referring to this Section 439 Cr. P. C. the learned author Sohoni in his Code of Criminal Procedure, 1966 Edition observes that "The Section though occurring in Chapter XX seems to be applicable to warrant cases also." All that we are interested in pointing out here is, that so far as Police charge-, sheets are concerned, there is no provision in Chapter XXI dealing with trial of warrant cases, for the acquittal of the accused merely on the ground of absence of the prosecutor or non-appearance of his witnesses. Section 259 is the only Section in the said Chapter which states that when the proceedings have been instituted upon complaint and on the day fixed for hearing the complainant is absent and the offence may be lawfully compounded or is not a recognizable offence, the Magistrate may, in his discretion at any time before the charge is framed, discharge the accused. It is needless to point out that Section 259 does not apply to cases instituted on police charge-sheets.

7. Apart from the question of law, we are of the opinion even on merits, the learned Magistrate was not justified in passing the impugned order. The order sheet shows that it was represented to him that the Assistant Public Prosecutor was ill on 27-5-69 the day on which he acquitted the accused. The order sheet further discloses that later in the day the Head Constable filed an application for issue of attendance certificates to five witnesses who are stated to have been present. The charge against the respondents was of a serious one viz. robbery. We have already pointed out that the order sheet does not disclose that the prosecution at any time undertook to produce any witnesses. We are, therefore, clearly of opinion that the learned Magistrate was not justified in passing the impugned order in the instant case. Disposal of cases in this fashion is not desirable.

8. For the reasons mentioned above, we allow this appeal and set aside the order of acquittal of the respondents passed by the learned Magistrate and we remand the case for a fresh disposal in accordance with law. We direct that the case should be disposed of expeditiously.