
(1979) 03 KAR CK 0007

Karnataka High Court

Case No: Crl.A. 247/79

State of Karnataka

APPELLANT

Vs

Subramanya Setty

RESPONDENT

Date of Decision: March 28, 1979

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 255

Citation: (1980) 1 KarLJ 13

Hon'ble Judges: Desai, J; Nesargi, J

Judgement

Desai, J.-This is an appeal by the State against the order of acquittal passed by the Judicial Magistrate, First Class Tarikere, on 15-3-1978 in Criminal Case No. 460/77 on his file.

2. The facts relevant for the determination of the points at issue may be briefly stated as follows:

A charge-sheet was filed against the respondent for offences punishable under Ss. 341 and 324 I.P.C. on 29-4-1977. When the accused appeared after the service of summons, the learned Magistrate satisfied himself that the documents referred to in sub-sec. (5) of 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "New Code") had been furnished to him and by his order dated 25-8-1977, held that the material on record indicated the offences punishable under S. 341 and 323 I.P.C. only and decided to follow the procedure for trial of summons cases and adjourned the case for recording the plea of the accused to 12-9-1977. On 12-9-1977 the accusation for offences punishable under Ss. 341 and 323 I.P.C. was put to the accused and the accused pleaded not guilty and claimed to be tried. Then, the case was posted on 19-10-1977 for hearing. The prosecution had not kept its witnesses present on that day and the case was adjourned to 12-12-1977 at the request of Assistant Public Prosecutor. On 12-12-1977, the Magistrate was on leave and the case was adjourned to 18-1-1978. On that day also, it appears, the prosecution had not kept any witnesses present. On

18-1-1978 also, the prosecution had not kept any witnesses present and the case was adjourned to 27-2-1978 at the request of the Assistant Public Prosecutor. On 27-2-1978 also, the witnesses were not kept present, and the case was adjourned to 15-3-1978 with a direction to the prosecution to keep all the witnesses present on that day without fail as it was an old case. On 15-3-1978, none of the prosecution witnesses were present. The Assistant Public Prosecutor filed an application for the issue of summons to the witnesses stating that he had issued a memo to the PSI to keep the witnesses present and that the witnesses were not present as they were out of station. The learned Magistrate rejected that application and acquitted the accused, obviously, in exercise of his powers under S. 255 of the new Code.

3. The learned State Public Prosecutor argued that as the prosecution witnesses could not be present being out of station, the request of the Assistant Public Prosecutor for issue of summons to the witnesses was just and reasonable and the learned Magistrate ought to have granted it. Secondly, he urged that even if the reasoning of the learned Magistrate is taken to be correct, he ought to have applied the provisions of S. 258 of the New Code and released the accused instead of acquitting him under section 255 of the new Code since no evidence has been recorded.

4. The prosecution has cited 8 witnesses in the chargesheet. Out of them Dr. Dodda Veeregowda (witness No. 6) is the Doctor and Thirumale Gowda (witness No. 8) is the PSI who investigated the case. The prosecution ought to have taken steps to get the summons issued to charge-sheet witness No. 6 as he was a Medical Officer and as he was not expected to attend the Court as and when requested by the Police without summons. Such a step has not been taken by the prosecution until 15-3-1978. Even the Sub-Inspector of police who investigated the case to whom a memo had been issued by the Assistant Public Prosecutor to keep the witnesses present on 15-3-1978 failed to be present in the Court. All these facts in regard to the witnesses not being present and the summons having not been sought earlier to charge-sheet witness No. 6 Doctor, leave no doubt in our mind that the prosecution has been indifferent and the remissness on the part of the prosecution is writ large on the face of the records.

5. The learned State Public Prosecutor placed strong reliance on the decision in *State of Mysore v. Narasimhagowda N.G.*, (1964)2 MyLJ.241 while, Smt. Pramila, learned counsel for the respondent, placed reliance on the decision in *State of Mysore v. Abdul Hameed Khan*, (1969)1 MyLJ. 4. In the first case their Lordships were considering the provisions of section 251-A(2) of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Old Code"). In the second decision, their Lordships were considering the scope of the provisions of sections 252, 258 and 344 of the old Code. The ratio laid down in the first decision may be summed up as follows:

"Having once issued summons to secure attendance of witnesses, it was the duty of the Magistrate to have enquired into the cause of non-service or non-return of summons and to have taken further steps as were necessary in the circumstances of the case to secure

the attendance of witnesses, particularly when there was no material before him to show that there had been any remissness on the part of the prosecuting agency. (underlining (Italics) is ours).

In the second decision, Their Lordships found on facts that the prosecution was not at all diligent as the non-bailable warrants issued to the witnesses had neither been served nor returned to the Court by the concerned police. On recording these findings of fact, their Lordships concluded that where the prosecution is not diligent in producing its witnesses and had failed to serve the bailable warrants on the witnesses and return the same, the Magistrate would be justified in refusing to grant an adjournment and to proceed to acquit the accused on the material on record.

6. The real distinction between the two decisions, is as to whether there was remissness and want of diligence on the part of the prosecuting agency in producing the witnesses before the Court. We have already held on facts that there was remissness and want of diligence on the part of the prosecuting agency in this case in producing the witnesses before the Court. Therefore, we hold that the principle laid down in 1969 (1) My LJ. page 4, applies to this case.

7. Coming to the question whether the learned Magistrate ought to have acted under section 258 of the New Code, it is sufficient to observe that the provision applies only in special circumstances as observed in *Marotrao Ganpatrao Jadhav v. State*, AIR. 1960 Bom. 481, followed in *The State of Gujarat v. Sanghar Ibrahim Ladha*, AIR. 1971 Guj. 148, while dealing with Section 249 of the old Code which is analogous to Section 258 of the New Code. It is laid down in AIR. 1971 Gujarat 148, that the discretion to stop the proceedings without first hearing the accused and the complainant can be exercised only in exceptional circumstances and such exceptional circumstances may arise in a case in which not even a prima facie case is made out against the accused or the accusation may not actually constitute any offence or the prosecution may become invalid for not following a particular formality or on account of technical defect in the prosecution. We respectfully agree with the said view. No such exceptional circumstance is made out in this case. Therefore, we see no force in the said argument of the learned State Public Prosecutor.

8. In view of the foregoing reasons, the appeal fails and the same is hereby dismissed.