

**(1983) 03 CAL CK 0002****Calcutta High Court****Case No:** None

Anar Bibi

APPELLANT

Vs

Habibur Rahaman and Others

RESPONDENT

**Date of Decision:** March 24, 1983**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 251, 256
- Penal Code, 1860 (IPC) - Section 427

**Citation:** (1983) CriLJ 1538 : 87 CWN 550**Hon'ble Judges:** S.N. Sanyal, J**Bench:** Single Bench**Judgement**

S.N. Sanyal, J.

This is an appeal by the complainant against an order dated April 15, 1976 passed by the learned Judicial Magistrate, 7th Court, Alipore acquitting the accused persons u/s 256 of Criminal P.C. (hereinafter referred to as the Code) of the offence u/s 427 of the Penal Code.

2. The complainant appellant filed a petition of complaint against the respondents on Nov. 7, 1974 in the Court of the Sub-Divisional Judicial Magistrate, Alipore. After examination of the complainant the learned Magistrate took cognisance and issued summons against the accused persons u/s 427 of the Penal Code. Three of the accused persons namely, respondents Nos. 1, 2 and 4 appeared on July 8, 1975 and thereafter on Sept. 13, 1975 accused Ibrahim (respondent No. 3) also appeared. The accused persons were released on bail. The case was fixed on April 15, 1976 for examination of the accused persons u/s 251 of the Code. On that date the complainant was found absent on repeated calls and no petition was filed on her behalf. The learned Magistrate accordingly acquitted the accused persons u/s 256 of the Code holding that the complainant appeared not to be interested.

3. Being aggrieved, by the said order the appellant has preferred the present appeal. Mr. Dhar learned Advocate for the appellant has contended that the record would show that the appellant was attending the Court regularly. Her absence on the relevant date, namely on April 15, 1976, was due to circumstances mentioned in the petition of Appeal. Mr. Dhar submits further that on April 15, 1976 the appellant duly attended Court but she was told, by her lawyer and his clerk not to enter the Court room but remain outside and as such she was sitting in a tea shop. Subsequently she was told by her lawyer to go home and she went home. She came to learn on or about April 20, 1976 that the case had been dismissed by the learned Judicial Magistrate. Appellant thereupon applied for certified copy of the order and has preferred this appeal. Mr. Dhar argues that mere absence of the appellant on April 15, 1976 does not justify the acquittal of the accused persons u/s 256 of the Code when it is seen that she was attending the court regularly. Next contention of Mr. Dhar is that on April 15, 1976 the accused persons were to be examined u/s 251 of the Code and as such the appellant had nothing to do on that day. The learned Magistrate, according to Mr. Dhar, was not justified, in the circumstances of the present case, in acquitting the accused persons u/s 256 of the Code.

4. The complainant filed the petition of complaint on Nov. 7, 1974. After examination of the complainant the learned Magistrate took cognisance and issued summons upon the accused persons u/s 427 of the Penal Code. The complainant appeared on the dates namely, Jan. 17, 1975, April 7, 1975, June 28, 1975. Three of the accused persons appeared on July 8, 1975 and they were granted bail. Thereafter on the next date namely on Sept. 13, 1975 another accused appeared and he was also granted bail and the case was transferred to the Court of Shri H. K. Chakraborty, Judicial Magistrate, First Class. On Oct. 3, 1975 the complainant was absent by petition and the case was adjourned, to Dec. 22, 1975 for appearance as one of the accused was absent by petition. On Dec. 22, 1975 the complainant was present and three of the accused persons were also present but one accused was absent by petition, and the case was adjourned to Jan. 16, 1976 for appearance. On Jan. 16, 1976 the complainant and the accused persons were present but the learned Magistrate was busy and he fixed Feb. 2, 1976 for examination of the accused persons u/s 251 of the Code. On Feb. 2, 1976 the complainant was absent. The accused persons were present. The learned Magistrate directed the complainant to appear on Mar. 9, 1976. Record shows that on the said date the complainant subsequently appeared. On March 9, 1976 the parties were present but the learned Magistrate was on leave. The case was adjourned to April 15, 1976 for examination of the accused persons u/s 251 of the Code. On April 15, 1976 the learned Magistrate recorded the following order:

Complainant is found absent on repeated call. No petition. All the accused persons on C. B. are present. Complainant appears not to be interested. The accused persons are acquitted u/s 256 Cr. P.C.

5. This is a summons case instituted on complaint. According to Section 256(1) of the Code "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". The provisions of Section 256(1) of the Code correspond to Section 247 of Criminal P.C. 1898 with the changes by way of addition in the proviso underlined hereinbefore.

6. Learned Advocate for the appellant has referred to the case of *Bhageerathi Ramamani v. Radhamma (Ker)*. This decision dealt with Section 247 of the Code of 1898. It has been held in this decision that the object of the provision u/s 247 was to prevent dilatory tactics of the complainant and there was no warrant for the view that in all cases where the complainant was found to be absent on the date of hearing, the case had to be dismissed. In the instant case, on April 15, 1976 the accused persons were to be examined u/s 251 of the Code. In view of Section 256 of the Code, if the complainant in such a case does not appear, the Court may acquit the accused or may adjourn the case recording reasons or proceed under the proviso to Sub-section (1). The record shows that the complainant was attending the Court diligently. She was absent by petition on Oct. 3, 1975. On 2nd Feb. 1976 the complainant also appeared though she was a bit late in attending. The complainant did not appear on April 15, 1976. In the instant case the learned Magistrate should have considered whether he was unable to proceed with the case without the presence of the complainant and if he was of the opinion that he could not, then whether in view of the fact that the complainant was attending regularly he could not have adjourned the case. Section 256(1) of the Code gives discretion to the Magistrate to adjourn the hearing of the case to some other date or to proceed with the case even if the complainant is not present.

In the case of [The State Vs. Gurdial Singh Gill and Others](#), it has been held that the dismissal of the complainant on account of the complainant's absence is not to follow as a matter of course but before passing such an order the, Magistrate is to apply his mind to the facts of the case before him and to consider whether it would not be proper to adjourn the hearing instead of dismissing the complaint.

7. It appears that the learned Magistrate, did not dispose of the case in the proper manner. "On the date fixed" the learned, Magistrate was to proceed u/s 251 of the Code and there is nothing to show how the presence of the complainant on the said date was necessary. Having regard to the materials on records and the

circumstance of the case the observation of the learned Magistrate that the complainant appears not to be interested cannot be upheld. The order of acquittal should thus be set aside as the learned Magistrate did not apply his mind properly to the provisions of law. It cannot be said that according to Section 256(1) of the Code the learned Magistrate, without taking into consideration the relevant materials, shall acquit the accused as a matter of course. Before the accused is acquitted u/s 256(1) of the Code all the relevant, factors mentioned hereinbefore should, be taken into account.

8. The order of acquittal thus cannot be sustained. The appeal is allowed and the impugned order of the learned Magistrate acquitting the accused persons u/s 256 of the Code is set aside. The learned Magistrate is directed to proceed in accordance with law.

9. Let the records be sent down forthwith.