

**(2012) 02 BOM CK 0179**

**Bombay High Court (Aurangabad Bench)**

**Case No:** Criminal Application No. 1153 of 2011 with Criminal Appeal No. ... of 2012

Sau Sudha Kashinath Bari

APPELLANT

Vs

Nirmala Magan Chavan and  
others

RESPONDENT

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**Date of Decision:** Feb. 9, 2012

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 2, 249, 256
- Penal Code, 1860 (IPC) - Section 323, 324, 325, 34, 448

**Citation:** (2012) BomCR(Cri) 726

**Hon'ble Judges:** A.M. Thipsay, J

**Bench:** Single Bench

**Advocate:** K.C. Sant, for the Appellant; Mukul Kulkarni, advocate for respondent Nos. 1 to 4 and Mr. N.R. Shaikh, APP for respondent No. 5-State, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

A.M. Thipsay, J.

Heard the learned advocates for the respective parties.

2. Leave granted.

3. By consent, the appeal is admitted and taken up for hearing forthwith. Mr. Kulkarni, the learned advocate for respondent Nos. 1 to 4 and Mr. Shaikh, the learned APP for respondent No. 5-State, waive service of notice.

4. The appellant (hereinafter referred to as the "complainant" for the sake of convenience and clarity), is the original complainant. She had filed a complaint against the respondent Nos. 1 to 4 (hereinafter referred to as the "accused" for the sake of convenience and clarity), alleging commission of offences punishable under Sections 325, 323, 448, 504, 506 of the I.P.C. r.w. Section 34 of the I.P.C. by them, in the Court of the learned Chief Judicial Magistrate, Dhule. The learned Chief Judicial

Magistrate, after examining the complainant on oath, issued process against the accused persons requiring them to appear and answer to the charge of offences punishable u/s 324, 323, 448, 504 and 506 of the I.P.C. r.w. Section 34 of the I.P.C. It is seen from the record that the complaint was pending for a number of years but no evidence was adduced. On 9.12.2010, which was a date of hearing of the case before the Magistrate, the complainant was absent. The learned Magistrate, therefore, passed an order terminating the proceedings and acquitting the accused persons, purportedly u/s 256 of the Code of Criminal procedure. It would be appropriate to reproduce here the operative order passed by the learned Magistrate :-

1. The complaint is dismissed for default for want of Prosecution.
2. The accused persons are Acquitted vide section 256 of the Code of Criminal Procedure for the offence 325, 323, 448, 504, 506 r/w 34 of the Indian Penal Code.
3. The Bail Bonds of the accused are cancelled.
5. The impugned order is patently illegal.
6. It is clear that the case was a warrant case, as defined in clause (x) of Section 2 of the Code of Criminal Procedure, (hereinafter referred to as "the Code" for brevity). The procedure for trial of warrant cases is found in Chapter XIX of the Code. This Chapter covers warrant cases instituted on police report as well as the cases instituted otherwise than on police report. The case before the Magistrate fell in the second category.
7. A perusal of the provisions of Chapter XIX of the Code, makes it clear that there is no provision permitting acquittal of the accused persons, on account of absence of the complainant. Moreover, the provisions also make it clear that before the stage of framing of charge, any termination of proceedings can never amount to an acquittal; and the proceedings before the stage of framing of charge can be terminated only by way of discharge of the accused. The legal concept, consequences and effect of "discharge" are quite different from that of the "acquittal".
8. The Magistrate has, referred to the provisions of Section 256 of the Code, which applies only to summons cases. Therefore, the Magistrate was not right in resorting to those provisions in the present case.
9. Though the Section referred to by the Magistrate, would not be the decisive factor in deciding this appeal, the fact remains, that in warrant cases, the termination of the proceedings on account of the absence of the complainant, is contemplated only u/s 249 of the Code. Now, this consequence of the absence of complainant might follow only in cases where the case relates to the offences which can be lawfully compounded, or which are not cognizable offences. Even in that case, the termination of the proceedings would be by way of "discharge" of the accused and

not by way of an "acquittal".

10. Since the Magistrate has passed an order of acquittal in the instant case, the order is not in accordance with the provisions of law. The same therefore, needs to be interfered with.

11. Mr. Mukul Kulkarni pointed out that the learned Magistrate has passed the impugned order on the assumption that the case before him was a summons case. Indeed, in the very first sentence of the impugned order, the observations of the Magistrate are as follows:-

This is a summons case for the offence punishable under sections 325, 323, 448, 504, 506 r/w 34 of the Indian Penal Code...

12. This was factually wrong for two reasons. Firstly, the process had been issued with respect to the offence punishable u/s 324 of the I.P.C. and not u/s 325 of the I.P.C. Thus, this observation is factually incorrect. Further, whether the offence would be punishable u/s 325 of the I.P.C. or 324 of the I.P.C., in either case, it would be a warrant case requiring the procedure in Chapter XIX of the Code, to be followed.

13. As a result of the aforesaid discussion, it follows that the appeal should be allowed.

14. The appeal is accordingly allowed.

15. The impugned order is set aside.

16. The proceedings before the Magistrate are revived. The learned Magistrate shall proceed further with the case in accordance with law.

17. The learned Magistrate shall endeavour to dispose of the case as early as possible, and in any event, within a period of six months from the date of this order.

18. The Record and Proceedings be sent back forthwith.

19. The appeal stands disposed of accordingly.