

frivolous that the complaint could possibly not result in the conviction of the petitioners. We do not agree with this submission made by the learned counsel. There is a definite allegation in the complaint that the ornaments given to the respondent at the time of her marriage were entrusted by her to the petitioners, some of which they refused to part with when she made the demand. Whether she will be able to prove this allegation or not is an entirely different matter and at this stage it is not possible for us to assume that she would not be able to lead any evidence in support of these allegations. It is no doubt true that in a criminal case the burden of proving the charge rests on the complainant and an accused person is entitled to have the benefit of doubt but these principles are quite well known and we have no doubt in our minds that the learned trial Magistrate will keep them in view while trying the complaint. In the circumstances, we find no force in the petition and dismiss the same.

(16) Before parting with the case, we might observe that in view of the status of the parties we tried our best to bring about a compromise between them but failed. Even then we do hope that on some future date this ugly litigation will come to an end and the two spouses would once again decide to live together. Impelled by that hope we direct that the learned trial Magistrate shall grant the petitioners exemption from appearing in person in Court as long as it is felt necessary.

**N.K.S.**

*Before D. B. Lal and Harbans Lal, JJ.*

*PUSHPA WANTI—Appellant.*

*versus*

*MAJESAR DASS—Respondent.*

*Criminal Appeal No. 56 of 1975*

*September 25, 1978.*

*Code of Criminal Procedure (V of 1898)—Sections 256 and 257—Witnesses named by the accused not summoned by the Court—Complainant absent on the date fixed for cross-examination of such witnesses—Such absence—Whether sufficient to acquit the accused.*

Pushpa Wanti v. Majesar Dass (D. B. Lal, J.)

*Held*, that it is clear from section 256 of the Code of Criminal Procedure, 1898 that after the charge is framed and the statement of the accused recorded, the only requirement is for the accused to tell as to which of the prosecution witnesses he wishes to cross-examine. If the accused tells this and the witnesses are named by him whom he wants to cross-examine under section 256 of the Code, then it is the duty of the Magistrate to summon those witnesses and if it is not done or if any attempt made does not fructify and such witnesses are not available on the subsequent dates, the presence or the absence of the complainant becomes meaningless in these circumstances. It is the duty of the Magistrate to summon the witnesses and if he does not do so, the complaint cannot be made to suffer on that account and the accused cannot be acquitted merely because the complainant was found absent on the date fixed for the cross-examination of witnesses under section 256 of the Code.

*Appeal from the Order of Shri P. P. Chhabra, Judicial Magistrate, 1st Class, Ballabgarh, dated the 11th March, 1974, acquitting the accused.*

K. D. Singh, Advocate, for the appellant.

R. N. Narula, Advocate, for the respondent.

D. B. Lal, J. (Oral) :

(1) This criminal appeal is directed against the judgment of the Judicial Magistrate, First Class, Ballabgarh, acquitting Majesar Dass for the offences under sections 323 and 504 of the Indian Penal Code, on the short ground that the complainant Smt. Pushpawanti was found absent on one of the dates fixed for the witnesses to be cross-examined under section 258 of the then Code of Criminal Procedure. The facts giving rise to the present appeal may now briefly be stated:

(2) A complaint was filed by Smt. Pushpawanti, alleging that her husband Sham Lal was tenant in the house of the accused and the latter wanted him to vacate that house. Accordingly on May 3, 1971, the accused Majesar Dass came and finding the lady alone in the house, hurled abuses upon her and also gave a beating to her with a stick. The incident was witnessed by Moti Singh, and a few others. In the complaint case, on the first date the complainant gave her statement and the Magistrate having found a *prima facie* case against the accused, summoned him for the two offences. Under section 252 of the then Code the complainant produced her witnesses

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in support of the prosecution. It appears that some cross-examination was also conducted on behalf of the accused. However, under section 254 of the Code a charge was framed and under section 255 of Cr. P.C. the plea of the accused was recorded. He pleaded not guilty of the charge. Thereafter, the Magistrate came to the stage of section 256 Cr. P.C. which runs as follows:—

- “256. (1) If the accused refuses to plead, or does not plead or claims to be tried, he shall be required to state (at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith), whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says, he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.
- (2) If the accused puts in any written statement, the Magistrate shall file it with the record.”

The order sheet written by the Magistrate dated December 14, 1973, does indicate that the case was adjourned to March 1, 1974 for cross-examination of the witnesses. The names of such witnesses were obviously pointed out by the accused for further cross-examination under section 256 on March 1, 1974. The record of the Court of Magistrate indicates that the complainant Smt. Pushpawanti had appeared before the Chief Judicial Magistrate, Gurgaon and filed an application, on the back of which the learned Chief Judicial Magistrate, Gurgaon, indicated that the case was transferred to J.M., I.C., Ballabgarh and that she had to appear before that Court on March 16, 1974. It so happened that on March 1, 1974, the case was called in the Court of J.M., I.C., Ballabgarh and the complainant was obviously found absent on that date. The accused and his counsel were present and since no witnesses were available, the complainant's evidence was closed. Thereafter a date was fixed for the statement of the accused

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and on March 11, 1974, while the complainant was absent the statement of the accused was recorded and he was called upon to enter upon his defence. Since he did not produce any defence witness the defence was also closed. Thereafter, a date was fixed for arguments and the learned Magistrate observed in his judgment that the complainant having remained absent failed to produce the witnesses for cross-examination and as such the accused had no opportunity to cross-examine the witnesses. He referred to section 257 of the Cr. P.C. and held that the statements of the witnesses recorded on behalf of the complainant could not be read in evidence. It was found that no case was made out and the accused was acquitted. This order of the learned Magistrate is the subject-matter of the present appeal.

(3) Mr. K. D. Singh, the learned counsel for the complainant-appellant, referred to sections 256 and 257 of the then Cr. P.C. It is abundantly clear from section 256 Cr. P.C., that after the charge was framed and the statement of the accused was recorded, the only requirement was for the accused to tell as to which of the prosecution witnesses he wished to cross-examine. It is admitted on all hands that the accused did tell that and the witnesses were named by him whom he wanted to cross-examine under section 256 Cr. P.C. It was then the duty of the Magistrate to have summoned those witnesses, which however, was not done or if any attempt was made to summon the witnesses it did not fructify and the fact of the matter was that the witnesses were not available on the subsequent dates. Mr Singh, therefore, contends, and rightly so in our opinion, that the presence or the absence of the complainant was meaningless, in these circumstances. It was the duty of the Magistrate to have summoned the witnesses and if he did not do so, the complainant could not be made to suffer on that account.

(4) In this connection, the learned Magistrate referred to section 257 Cr. P.C. but we wish to make it clear at this stage that the said section was only applicable after the defence was entered upon by the accused. That stage had not yet arrived and the only relevant section was 256 Cr. P.C. and under that section obviously it was the duty cast upon the Magistrate to have summoned the witnesses which he never did. The complainant cannot be made to suffer on that account.

(5) It is also manifest that on March 1, 1974, the date fixed for the presence of the complainant, she did appear before the Gurgaon

Court and moved an application. She was directed to appear before the Ballabgarh Court and the date given was March 16, 1974. Long before that date the Ballabgarh Court had already taken cognizance and having found the absence of the complainant on March 1, 1974, closed her case. It is thus evident that the complainant was not to be blamed in any manner. That is the additional ground in support of the complainant.

(6) The Learned Magistrate could discharge the accused under section 259 Cr. P.C., but that he could do only before the charge was framed. In the instant case, the stage was after the framing of the charge and as such section 259 Cr. P.C. had no application. It is, therefore, evident that the order of the learned Magistrate cannot be sustained in the eye of law. It has got to be set aside.

(7) The appeal is, therefore, allowed and the order passed by the learned Magistrate is set aside. The case is remitted to the learned Magistrate to proceed in accordance with law.

N.K.S.

Before Surinder Singh, J.

BHUPINDER SINGH SANDHU—*Petitioner*.

*versus*

STATE OF PUNJAB and others—*Respondents*

*Civil Writ Petition No. 4228 of 1976*

*and*

*C. M. No. 2023 of 1977*

October 19, 1978.

*Constitution of India 1950—Article 226 (3)—Punjab Civil Service (Punishment and Appeal) Rules 1970—Rules 5, 14, 15 and 21—Order passed against a civil servant governed by the Rules—Power of review conferred by Rule 21—Whether a statutory alternative remedy under Article 226 (3)—Writ Petition against such order without exhausting the remedy—Whether barred.*

*Held*, that rule 21 of the Punjab Civil Services (Punishment and Appeal) Rules 1970 does not deal only with a case where a penalty is