

APPELLATE CRIMINAL

Before Gopal Singh and A. D. Koshal, JJ.

AJIT SINGH,—Appellant.

versus

VED RAJ,—Respondent.

Criminal Appeal No. 494 of 1967

November 23, 1970.

Code of Criminal Procedure (V of 1898)—Section 259—Private complaint of a cognizable offence being tried as warrant case—Charge framed against the accused—Such complaint—Whether can be dismissed on default of the appearance of the complainant.

Held, that if a private complaint of a cognizable offence is being tried as warrant case, the Magistrate is bound to proceed with its trial after he has framed the charge against the accused and has to conclude the trial notwithstanding the fact that the complainant absents himself. After the charge has been framed, the complainant becomes a mere witness. The failure on the part of a witness to appear cannot result in the dismissal of the complaint and acquittal of an accused. (Para 5)

Appeal u/s 417(3) Cr. P. C. against the order of the Court of Shri Ramji Lal Aneja, Judicial Magistrate, 1st Class, Fatehabad, dated 17th December, 1966, dismissing the complaint for non-prosecution and acquitting the respondent.

M. K. MAHAJAN, ADVOCATE, for the appellant.

ACHHRA SINGH, ADVOCATE FOR D. D. JAIN, ADVOCATE, for the respondent.

JUDGMENT

Gopal Singh, J.—(1) According to the allegations made by the appellant in his complaint filed by him on March 1, 1965, he was given beating and tortured by the respondent at Police Station, Ratia, the respondent pulled one of his legs and a Constable pulled the other while he was made to sit astride on a cot and the surface of skin of his thighs was touched with heated iron rod as he was said to have been making complaints against the respondent to the higher authorities. The appellant was also wrongfully confined by the respondent at the Police Station. On the application of Bakhtawar Singh, brother of the appellant, the appellant was examined on February 8, 1965 by Dr. Sudershan Kumar Bhaskar, Medical Officer, District Jail, Hissar. There were found 11 injuries on his limbs and back. Nine injuries were described by the doctor as abrasions. There were noted two injuries in the form of burn

marks, one on the right thigh and the other on the left thigh. By order dated March 3, 1965, the trial Magistrate on examination of the complainant and the medico-legal report found that a *prima-facie* case had been made out. He summoned the respondent. After several attempts were made to effect service of the summonses upon the respondent, he was served. The evidence of the complainant and four other witnesses in support of the allegations made in the complaint against the respondent, namely of Dalel Singh, Chanan Singh, Sarwan Singh and Waryam Singh was recorded. Dr. Sudershan Kumar Bhaskar also appeared to prove the existence and nature of the eleven injuries found on the person of the appellant, when he was examined on February 8, 1965. The respondent was charged on December 2, 1966 for offences under Sections 323 and 324, Indian Penal Code for causing hurts to the appellant with blunt weapons and heated substance. After several adjournments, the case came up for hearing on December 17, 1966. On that date, neither the complainant nor his Counsel was present in Court. The respondent was present along with his Counsel. The trial Court dismissed the complaint for non-prosecution by the complainant and acquitted the respondent.

(2) The present appeal has arisen on grant of special leave to appeal under sub-section (3) of Section 417, Criminal Procedure Code. Shri M. K. Mahajan appearing on behalf of the appellant has contended that the trial Magistrate had no power to dismiss the complaint in default of non-prosecution consequent upon non-appearance of the complainant after the charge had been framed for the cognizable offence tried as a warrant case.

(3) The present case arose out of a complaint filed by the appellant. It was being tried by the trial Magistrate as a warrant case under Chapter XXI, Criminal Procedure Code headed as, "Of the trial of warrant cases by Magistrate". Power to dispose of a complaint, when complainant fails to appear, is provided in Section 259 occurring in that chapter. That Section runs as follows :—

"When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused."

(4) Thus, power to discharge an accused person is subject to the following conditions :—

(i) The proceedings must have been instituted upon a complaint.

(ii) The complainant has failed to appear.

(iii) The offence, to which the proceedings pertain, can be lawfully compounded or is not cognizable by the police.

(iv) Stage of passing of order of discharge must arise prior to a charge having been framed against the accused.

(5) In order that that Section may apply, all the four conditions must be fulfilled. In the present case, only conditions Nos. (i) and (ii) have been fulfilled inasmuch as the proceedings, in which the order appealed from has been made, arose out of a complaint filed by the appellant and the complainant failed to put in appearance on the date when the said order was made. The other two conditions precedent for the passing of the order by the trial Magistrate are, however, wanting in the present case. There is no doubt that the two offences under Sections 323 and 324, Indian Penal Code are compoundable, the former at the instance of the parties concerned and the latter at the instance of the parties with the consent of the Court. Offence under Section 324, Indian Penal Code, with which the respondent had been charged, is cognizable by the police. Admittedly, the case was being tried as a warrant case. The third condition in the alternative as to the offence with which the respondent was proceeded against being cognizable offence, has not been satisfied. The complainant having failed to appear after the charge had been framed, the fourth condition as to the Magistrate being empowered to discharge the accused respondent prior to the charge having been framed does not at all stand satisfied. The learned Magistrate while passing the order of dismissal of the complaint and acquitting the respondent has ignored to take into consideration the said two ingredients of the Section, which forbade him from making the order, which he made. The case being a case of cognizable offence and a warrant case, the Magistrate was bound to proceed with its trial after he had framed the charge against the accused and had to conclude the trial notwithstanding the fact that

the complainant had absented himself. After the charge had been framed, the complainant became a mere witness. The trial Magistrate should have in the interest of justice attempted to summon him or if he would have been found avoiding or evading to accept service, he should have issued a coercive process to secure his attendance in Court as a witness. After charge has been framed and complainant fails to appear, the case should be treated as if a witness has failed to appear. Such a failure on the part of a witness to appear cannot result in the dismissal of a complaint and acquittal of an accused. The trial Magistrate has committed illegality in acquitting the respondent on the ground of failure of the appellant to appear in Court. Such a procedure is not contemplated by Section 259 of the Code.

(6) Scope and effect of Section 259, Criminal Procedure Code was considered by a Division Bench of this Court consisting of Gurdev Singh and Koshal JJ. in *Jai Narain vs. Bhagwana and others* (1). That case was also a case of a private complaint. The question of applicability of section 259, Criminal Procedure Code arose in course of trial of the case as a warrant case after the charge had been framed. It was observed as under :—

“Section 259 of the Code of Criminal Procedure makes it clear that in the case of a complaint relating to a warrant case, the absence of the complainant cannot end, all by itself, in the acquittal of the accused after a charge has been framed and that even before that stage is reached the accused can be discharged only when the offence complained of may be lawfully compounded or is not a cognizable offence. The Section makes a significant departure from what is provided for a similar situation arising in a summons case which is dealt with by Section 247 of the Code providing that the Magistrate must in that event dismiss the complaint, unless he thinks proper to adjourn it to some other date or dispenses with the personal attendance of the complainant. The Code thus gives much greater importance to the trial of warrant cases, especially when they cover cognizable and non-compoundable cases, and this for good reasons. Offences covered by warrant cases are of a far more serious type than those which may be tried in summons cases and society, as such, is considered to be vitally interested in the trial of the former, while the

(1) Cr. A. No. 680 of 1966 decided on 20th Nov. 1969.

Ajit Singh v. Ved Raj (Gopal Singh, J.)

latter are regarded as disputes being, more or less, of a personal nature. That is why after the accused person has been charged in a warrant case, Section 259 does not provide for his acquittal on the ground of the absence of the complainant whose status, as contended by the learned counsel for the appellant, is reduced after the charge to that of a mere witness."

(7) For the foregoing reasons, the appeal is allowed, the acquittal of the respondent is set aside and the case is remanded for trial according to law.

A. D. KOSHAL, J.—I agree.

B. S. G.

