

**Samadhan Vs. State of Maharashtra**

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**SooperKanoon Citation :** [sooperkanoon.com/1175362](http://sooperkanoon.com/1175362)

**Court :** Mumbai Aurangabad

**Decided On :** Jul-01-2014

**Judge :** V.M. Deshpande

**Appeal No. :** Criminal Revision Application No. 216 of 2013

**Appellant :** Samadhan

**Respondent :** State of Maharashtra

**Advocate for Pet/Ap. :** Shri. C.R.Deshpande

**Judgement :**

1. By the present Revision, the applicant is challenging the judgment and order, passed by the Sessions Judge, Dhule, dated 16.11.2013 in Criminal Appeal No.48 of 2010, whereby the learned lower Appellate Court, though partly allowed the appeal filed on behalf of the present applicant, the conviction of the applicant for the offences punishable under Sections 304 and 338 of the Indian Penal Code is maintained, however, the period of rigorous imprisonment of six months was reduced to three months, as directed by the learned 4th Joint Judicial Magistrate, First Class, Dhule in Summary Trial Criminal Case No.3088 of 2007. The learned lower Appellate Court was pleased to maintain the conviction and sentence of rigorous imprisonment for three months recorded against the applicant under Section 337 of the Indian Penal Code as awarded by the court below.

2. Brief facts can be narrated as under:-

The applicant was prosecuted for the offences punishable under Section 304A, 338, 337, 427 of the Indian Penal Code and under Sections 184, 66 r/w Section 192 of the Motor Vehicles Act.

According to the prosecution case, on 18.4.2007 at about 6.05 p.m., an information of accident was received by the Police Head Constable Arifali of Songir police station reflecting that an accident took place opposite Shetti petrol pump due to collision between one Indigo Car bearing registration No.MH-18/T-1750 and black yello Maruti Van bearing registration No.MH-18/N-5484. He immediately reached on the spot to found that number of persons travelling were injured in the accident. Injured were forwarded to the Civil Hospital for medical treatment and he gave the information of the accident to Songir police station culminating in registration of Crime vide Crime No.19 of 2007 against the driver of black yello Maruti van i.e. present applicant.

3. The learned Magistrate was pleased to convict the applicant under Section 304A of the Indian Penal Code and was directed to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for one month. The Magistrate was further pleased to record a finding of guilt against the present applicant for the offence punishable under Section 338 of the Indian Penal Code and on that count also he directed the applicant to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/-, in default he was directed to suffer simple imprisonment for one month. He was also convicted for the offence punishable under Section 337 of the Indian Penal Code and was directed to suffer rigorous imprisonment for three months and to pay fine of Rs.1,000/-, in default he was directed to suffer simple imprisonment for one month.

However, the learned Magistrate was pleased to acquit the applicant for the offence punishable under Section 66 r/w 192 of the Motor Vehicles Act.

4. Since the applicant was aggrieved, he carried an appeal before the appellate court. The said appeal was registered as Criminal Appeal No.48 of 2010 and the learned lower Appellate Court has passed the order as mentioned in the opening paragraph of this judgment.

5. I have heard Shri C.R.Deshpande, learned counsel for the applicant and Shri V.H.Dighe, learned Additional Public Prosecutor for the respondent/State.
6. The main submission on behalf of the applicant advanced before this court was that both the courts below have committed an error in law in convicting the present applicant. According to the learned counsel, Criminal Case was conducted by the learned Magistrate as a Summary Case. The part of evidence in the case was recorded by one Magistrate; whereas the remaining part of evidence was recorded by another Magistrate without ordering de-novo trial, and therefore, the judgment of conviction passed by the learned Magistrate cannot stand to the scrutiny of law. According to the learned counsel, the learned lower appellate court ought to have allowed the appeal and ought not to have reduced the sentence only in order to cure the defect of learned trial court in imposing the sentence for a period of more than three months. The learned counsel heavily relied on the decision of the Hon'ble Apex Court reported in the case of Nitinbhai Saevatilal Shah and Another vs Manubhai Manjibhai Panchal and Another [2011 ALL SCR 2130] and another reported case of this court in the case of Pratibha Pandurang Salvi and others vs State of Maharashtra and another [2010 Cri.L.J. 730] and submitted that the present Revision needs to be allowed.
7. Per contra, the learned Additional Public Prosecutor submitted that the judgment and order, passed by the learned lower Appellate court is perfectly legal and justified. Alternatively, he submitted that the matter can be sent to the learned Magistrate for de-novo trial. He submitted that the present Revision be dismissed.
8. Admittedly, the present case was tried by the learned Magistrate as Summary Case. On 25.9.2008 notes of evidence of Prosecution Witness No.1-Hemlata Mohan Jain were recorded by Shri Jaydeo Y. Ghule, the then learned Judicial Magistrate, First Class, Dhule. Similarly, on 16.2.2009 Shri Jaydeo Y.Ghule, learned Magistrate has taken the notes of evidence of Prosecution Witness No.2-Popat Gangaram Patil.
9. From the record, though it does not appear as to whether Shri Jaydeo Y.Ghule was transferred or the case was made over to the 4th Judicial Magistrate, First Class, Dhule, it appears that on 11.2.2009, 29.4.2010 and 30.4.2010 Shri

J.S.Bhatia, learned 4th Judicial Magistrate, First Class, Dhule was pleased to record the notes of evidence of remaining prosecution witnesses.

After appreciating the prosecution case Shri J.S.Bhatia, learned 4th Judicial Magistrate, First Class, Dhule was pleased to convict the applicant as observed above.

10. It is found by the learned lower Appellate Court in his judgment that the learned Magistrate has tried the case by way of Summary trial. According to the learned lower appellate court, Section 262(2) of the Code of Criminal Procedure provides that no sentence of imprisonment for a term exceeding three months shall be passed in any case of any conviction under Chapter XXI. Hence, according to the learned lower appellate court outer limit for imposing sentence by the trial court is only three months, however, the learned Magistrate imposed the punishment of rigorous imprisonment for six months for the offence punishable under Section 304A and 338 of the Indian Penal Code. In that view of the matter, the learned appellate Court partly allowed the appeal by reducing the sentence of the applicant in order to bring it within the ambit of Section 262(2) of the Code of Criminal Procedure.

11. Section 326 of the Code of Criminal Procedure reads as under :-

"326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another. -

(1) Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witness whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and

after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325. "

12. The Hon'ble Apex Court in the reported judgment in the case of Nitinbhai Saevatilal Shah's case (cited supra) has observed in paragraph 14 as under :-

"14] The mandatory language in which Section 326(3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-Section (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice."

As observed in the case of Nitinbhai and on the plain reading of Section 326 of the Code of Criminal Procedure, it is crystal clear that in Summary proceedings, the successor judge or the Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it.

On facts, it is clear that in the present case, the evidence of two witnesses was recorded by one judge and the remaining prosecution witnesses were examined before the successor.

The case was decided and tried as a summary case is an undisputed fact. The learned Additional Public Prosecutor has fairly conceded in that behalf. Apart from concession of the learned Additional Public Prosecutor, it is clear from the judgment and order, passed by the appellate court that the trial Magistrate has conducted the said case as summary case. In the present case, as observed, two different learned Judges have recorded the evidence of the prosecution witnesses.

In view of the mandate of law, the successor Magistrate was under obligation to order de-novo trial. He could have called the witnesses who were already examined by his predecessor and could have recorded their evidence afresh.

Thus, in the present case, part of the evidence is recorded by one learned Judge and remaining part of evidence and delivery of the judgment is done by another learned Judge.

In view of the Hon'ble Apex Court judgment it is impermissible, especially when admittedly the case was tried as a summary case.

13. In order to buttress the point that in the present case there is no curable irregularity but is an illegality, and therefore, the entire conviction of the applicant should be set aside, the learned counsel has relied upon the reported judgment of this court in the case of Pratibha Pandurang Salvi (cited supra).

Paragraph 11 of the said judgment reads as under:-

"11] Thus, recording of evidence by one Magistrate and passing order or deliver the judgment by the other is not curable irregularity but is an illegality. On this

count alone the order of conviction passed by the trial Court dated 24.2.1994 and also the order confirming the said conviction dated 7.8.1999 passed by the Additional Sessions Judge need to be set aside."

14. In the present case, though part of evidence was recorded by one Judge and remaining part of the Prosecution witnesses was recorded by another learned Judge, even that is not curable irregularity but is an illegality. It is thus clear that serious mistake at law has crept in, in the judgment of both the courts below. Hence, I pass the following order.

## **ORDER**

(i) The judgment and order passed by the Sessions Judge, Dhule, dated 16.11.2013 in Criminal Appeal No.48 of 2010, together with the judgment and order, dated 26.5.2010, passed by the learned 4th Joint Judicial Magistrate, First Class, Dhule in Summary Trial Criminal Case No.3088 of 2007 are hereby quashed and set aside.

(ii) The applicant is acquitted for the offences punishable under Sections 304A, 338 and 337 of the Indian Penal Code.

(iii) The applicant is on bail. His bail bond stands cancelled.

(iv) Revision allowed.

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