

In Re: Jamnabai Meghji

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Court : Mumbai

Decided On : Oct-17-1933

Reported in : AIR1934Bom130; (1934)36BOMLR105; 150Ind.Cas.858

Judge : Broomfield and ;Divatia, JJ.

Appeal No. : Criminal Application for Revision No. 235 of 1933

Appellant : In Re: Jamnabai Meghji

Judgement :

Broomfield, C.J.

1. We have to thank the learned Presidency Magistrate, Third Court, for a very full report. In para. 2 he describes the practice which he has been following in these terms:

It is a practice of my Court that on summons days, i. e., days on which preference is given to the summons cases, as soon as I take my seat in Court at 11-30 a.m., applications for adjournments, etc., are heard by me. After such applications, which usually take about an hour or so, an attempt is made to go through the day's board with a view to dispose of petty and uncontested cases, subject to a sufficient margin of time being reserved for part-heard cases on the day's board, which always receive preference. After all the petty cases are disposed of, the Court begins to hear part-heard cases. As regards the remaining cases in some of them parties or their lawyers usually take dates by consent from the Judicial Clerk with

my permission in the course of the day when it is felt that the Court has no time left to take up their cases. Those cases that are not disposed of, or postponed as stated above, are called out one by one at the end of the day, before the Court rises, if the number of such cases is not very large. But on days when there is a heavy board before the Court like the one in the present case and when the Court feels that it is not at all possible to take up any other case than the part-heard cases, all the remaining cases are called out one by one at about 2-15 or 2-20 p.m. and postponed in order that the parties and their witnesses may not have to wait unnecessarily and may be relieved.

2. He goes on to say that this practice is in accordance with the judgments of Mr. Justice Patkar and Mr. Justice Wild in *Jafferbhai v. Purshottam*, (1929) Crim. Rev. App. No. 153 of 1929 and with a decision of the Madras High Court in *Tonkya v. Jaganna*. I.L.R. (1926) Mad. 883 Then in paras. 8 and 9 of his report he says that any other system would mean dislocation of the work of the Court and additional clerical work and would throw an additional burden on the Court to see that the parties have been duly informed of the dates fixed in their absence. The answers to the specific questions which we put are as follows:

(1) There were fifty-three cases fixed for hearing on June 21, 1933.

(2) Case No. 39/S of 1933 was fifteenth on the day's board.

(3) The roll-call of cases was taken at about 2-20 p.m. under the circumstances stated in para. 5. From what is stated in paragraph 5 it appears that the roll-call was taken in the middle of a part-heard case.

(4) The roll-call was taken for postponing the cases in order to relieve the parties.

(5) The case would not have been taken, if the complainant had been present, but the applicant should not be allowed to put it as an excuse for her absence, as she is bound to be present in Court till the case is postponed in the usual course. If she chooses to absent herself without informing the Court, she takes the risk of the case being dismissed in her absence as any other litigant.

(6) The roll-call is generally taken at about 2-20 p.m., before the Court rises for tea, on days when there is a very heavy board. When the number of cases to be postponed is not very large, the roll-call is not taken till the evening, i.e., the time when the Court rises for the day.

3. Before referring to the authorities which the learned Magistrate has cited, let us look, first of all, at the relevant Sections 247 and 259. Section 247 is as follows:

If the summons has been issued on complaint, and upon 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 proper to adjourn the hearing of the case to some other day.

4. Section 259 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.

5. In my opinion there are two points which it is necessary to note in connection with these sections. In the first place the day referred to in each of these sections is the day for hearing the case. No doubt if the language were to be taken quite literally it might perhaps be said to be permissible to fix for hearing two or three times the number of cases which the Court will actually be in a position to take up and then to have a roll-call of all the cases so fixed at any time in the course of the day and pass orders of acquittal or discharge, as the case may be, if the complainant is absent, although there never was any reasonable chance of some of the cases being heard. But such a practice, even if it is not contrary to the letter, must surely be regarded as contrary to the spirit of these provisions. When a date is fixed for the hearing of the case, it is the duty of the parties to be present at any time in the course of the day when the Court may call on the case for hearing, i. e.,

for the purpose of proceeding with it. It will be no excuse for a party to say that he expected his case would not be reached. If he is absent on the date fixed for hearing and the Court is ready to hear the case, he cannot grumble at the result, for he has failed in an obvious duty. But the position seems to me to be quite different if a case is only nominally fixed for hearing, when it cannot reasonably be expected to be reached and is not in fact reached during the day. I can see no good reason why it should be considered to be incumbent on a complainant in such a case to be present on one date after another over a period lasting, it may be, for many months and to remain in Court all day long in order that he may hear with his own ears the date to which his case is postponed. Of course if he wants to be consulted about the new date, that is a different matter. In that case he must subordinate his own convenience to that of the Court, and if he is not present to say what he wants to say about the date, he must just accept the date fixed ex parte. But in my opinion it is not reasonable, and I do not consider that the legislature ever intended, that the penalty for not being present to hear the new date of hearing fixed should be the same as the penalty for absence when the case is actually called on for hearing.

6. The other point to be noted is that Section 247 allows a discretion and Section 259 requires that a discretion should be exercised. It is not contemplated that the order of acquittal or discharge should be a mere matter of routine and follow automatically upon the absence of the complainant. The learned Magistrate says in para. 6 of his report:

If the complainant is absent when the case is called out, and when no reason is shown to the Court for the absence of the complainant, naturally the Court would presume that the complainant is absent because he does not wish to go on with the case, and accordingly an order of discharge or acquittal is made as the nature of the case may be.

7. I think it must often be very unsafe to make such a presumption. It surely must very largely depend on the position of the case on the board and the likelihood of its being reached, and sometimes it would be proper to consider what has happened previously in the case. In this case the learned Magistrate might not

unreasonably have considered an application which the complainant had made to the Court at the preceding hearing, i. e., June 9, 1933, in these terms:

The complainant abovenamed begs to petition your Worship as follows:

I am an aged lady.

I filed the complaint on January 16, 1932. Since the said February 20, 1932, there have been eleven adjournments of the case, most of them for want of time owing to congestion of work, and I have to pay fees to my attorneys for all this.

I pray that my case may be taken up to-day, but in any case my evidence may be taken up to-day so that I may not have to attend Court any further, if the case is adjourned any further.

8. This application indicated dissatisfaction at the manner in which the hearing had been delayed and a desire that the case should be speedily disposed of, but certainly not a disinclination to go on with it.

9. What the learned Magistrate says about the dislocation of the work of the Court and about additional clerical work and so on does not impress me, because I see no need for anything of the kind. In the High Court we see a good deal of the work of the Presidency Magistrates and we are fully alive to the fact that there is great congestion in their Courts and that they have so many cases to deal with that all legitimate methods of time saving must be resorted to. But I take it that it is the duty of every Court to transact its business so as to cause no more inconvenience to litigants than is really necessary, and the more heavily worked the Court is the greater need for care in this respect, since more persons are affected. It cannot be really necessary to require parties in cases which cannot be taken up to be present all day or even half a day to hear the new dates, and anything in the nature of a snap roll-call which has the effect of prematurely cutting short contested cases is, I think, not a legitimate device, or at any rate it is a very unsatisfactory one. Despatch is a good thing but justice is a better. It is quite true, as the learned Magistrate says, that the complainant in this case could and did file a fresh complaint. But that only means probably that the whole weary process

begins again. What was an old case becomes a new one which has to take its turn.

10. It is obviously futile to put cases down for hearing on a particular day when there is no possibility of their being heard on that day, and I assume that the learned Magistrate's board is framed with some reference to practical considerations of that kind. Exactly how many cases can be disposed of it is impossible to foresee and there must always be a certain number of cases on the board to allow for accidents. As I said before, parties are bound to be present when their cases are reached for hearing, assuming that the cases are taken up, as in fairness they ought to be, in their order on the list. Subject to that, I can see no reason why there should not be a fixed time for the purpose of appointing new dates in cases which cannot be reached. It will not matter what time it is, at the beginning, middle or at the end of the day, as long as parties know at what time they must attend. To institute a practice of that kind can surely impose no burden on the Court. But whether this is feasible or not, the mere unexplained absence of a complainant, when a case is called on for the purpose of fixing a new date, is not, on my reading of Sections 247 and 259, apart from authority, a good ground for taking action under those sections. Whether parties are present or not, a new date should be fixed and published on the notice board. It will be the duty of the absent party to ascertain the new date. As long as the date is announced in Court at a time when the party might have heard it, if he had been present, and as long as it is published on the notice board and can be ascertained on inquiry, it cannot be said that the Court is bound to do anything more. The difficulties pointed out in the latter part of para. 8 of the report are, therefore, non-existent.

11. So much for the construction of the sections. The case to which the learned Magistrate refers, *Tonkya v. Jaganna*, I.L.R. (1926) Mad. 883 is not really on this point at all and affords no assistance. It was held there that a Magistrate is entitled to call up a summons case at any time of the day to which it is posted and to acquit the accused under Section 247 of the Criminal Procedure Code if the complainant is not then present. He is not bound to wait for the complainant to appear at any time before the closing of the day in order to take up and dispose of a case. With respect I entirely agree and I have already said the same thing in the

course of my judgment. But there the case had been called on and taken up for disposal. The consequence prescribed by Section 247 in the event of the complainant's absence, therefore, naturally followed. There is no reason to suppose that the decision of the Court would have been the same if the case had merely been called on, as here, for the purpose of fixing a new date.

12. In *Jafferbhai v. Purshottam* the Court was considering a practice similar to that which we have to consider in this case. But it was a case under Section 247. There had been an order of acquittal and it appears from the judgments both of Mr. Justice Patkar and Mr. Justice Wild that that was really the consideration which weighed with the Court there. Apparently it was suggested in the course of the argument that the Court had no power at all in revision to set aside an order of acquittal. That contention the learned Judges negatived and they expressed the view that in very rare cases the Court has the power to interfere in revision even with an order of acquittal. It does not appear that the practice followed in the Magistrate's Court was at all fully examined or that there was any discussion of the requirements of Sections 247 and 259. We think, therefore, that the fact that the Court refused to interfere in that case cannot be regarded as a precedent which debars us from considering the propriety of the practice in question or from interfering in a case where we consider that justice requires it. We, therefore, set aside the order of the learned Magistrate discharging the accused in this case and direct that the case be proceeded with from the stage at which that order was made.

Divatia, J.

13. I entirely concur with the conclusions as well as the reasons given by my learned brother. There would be nothing objectionable, under the Criminal Procedure Code, to the practice of taking a roll-call of all the cases on the board at any particular hour of the day when the board is heavy for the purpose of postponing such cases as are not likely to be taken up on that day so that the parties may be relieved, and the learned Magistrate does state in his report that a roll-call is taken for that purpose, and he further states that this particular case would not have been taken up on that day even if the complainant was present in

Court. But when the Magistrate states further that the applicant should not be allowed to put that as an excuse for her absence as she was bound to be present in Court till the case was postponed in the Usual course, then, in my opinion, it would be an abuse of the practice, and would operate as a trap for the unwary, because if the roll-call is to be made only for the purpose of postponing the cases, then an order made in the case of an accused for the issue of a warrant or in the case of a complainant for the discharge or acquittal of the accused, if by some chance the party is absent at the time of the roll-call, would be against the principles of natural justice. I think, therefore, that, in view of the reasons the learned Magistrate himself has given about the object of the roll-call, the step that he has taken in discharging the accused is unjustified. I, therefore, agree that the rule in this case should be made absolute.