

**Kunhuman Vs. Kotha and ors.**

**Kunhuman Vs. Kotha and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/723303](http://sooperkanoon.com/723303)

**Court :** Kerala

**Decided On :** Aug-31-1962

**Reported in :** 1963CriLJ667

**Judge :** Anna Chandy, J.

**Appellant :** Kunhuman

**Respondent :** Kotha and ors.

**Judgement :**

**Anna Chandy, J.**

1. The only question to be decided in this Criminal Appeal is whether the trial Magistrate was right in acquitting the accused under Section 247 of the criminal Procedure Code for the absence of the complainant, when the complainant was but 15 minutes late in reaching the Court.

2. The appellant, the Panchayat Officer and the Executive Authority of the Arthat Panchayat was the complainant in the lower Court. The four respondents were charged for the offence punishable under Section 66 (a) and (b) of the Travancore-Cochin Panchayat, Act (Act II of 1950) for having unlawfully and without the knowledge or consent of the Panchayat removed a considerable quantity of earth from a public road thereby causing an obstruction in the road as well as loss to the Hancnayat to the extent of about Rs. 100/-. The complaint was

filed before the Second Class Magistrate, Talapilly On 4-7-1961. In pursuance of the summons from the court accused 1 and 2 appeared in Court on 30-9-1961 and 14-10-1961 respectively. For the appearance of accused 3 and 4 the case was adjourned to 8-11-1961.

On that day A 2 the husband of the 3rd accused and the 1st accused's surety applied for time on behalf of accused 1 and 3 on the ground that they were unable to attend the Court due to illness. The 4th accused was absent. The applications were allowed. However at 11-15 A.M. the case was called and as the complainant was not present at that moment, the Court passed an order acquitting the accused under Section 247 of the criminal Procedure Code. The complainant who reached the court by about 11-30 coming to realise that the accused had already been acquitted, moved a petition to have the case restored to the file. As the Magistrate had no jurisdiction to grant such relief the petition was returned. That petition with the order thereon is filed before this Court for reference. It is stated in the petition that the complainant lives 16 miles away from the Court house and that he could reach the Court only by 11-30 being unable to catch the bus at the proper time. The truth of the statement in the petition is not disputed.

3. It is argued on behalf of the appellant that the appearance of the complainant during any portion of the day is sufficient compliance with Section 247 Criminal Procedure Code and as the complainant had appeared 'on the day' on which the case was posted, the acquittal of the accused on the ground of non-appearance of the complainant, is erroneous and without jurisdiction. It is further contended that in any view of the matter the Magistrate has failed to exercise the discretion vested in him judicially in disposing of the case so early in the day when there was other work for the Court, and especially on a day when the complainant's presence was not necessary to proceed with the case.

4. The question that arises for determination. Therefore is whether the action of the Magistrate in acquitting the accused under Section 247 Cr.P.C. at 11-15 A.M. soon after the Court started working is justified by the provisions of Section 247. Section 247 reads 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 herein before contained, acquit the accused, unless" for some reason he thinks proper to adjourn the hearing of the case to some other day: Provided that, where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

There are two views as to the scope and meaning of the words 'on the day appointed'. One view is that 'day' means the moment when the case is called and the other view is that 'day' means any time before the closing of the working day.

In *Nagarambilli Tonkya v. Matta Jagannatha* AIR 1926 Mad 1009 a Division Bench of the Madras High Court interpreting Section 247 Cr.P.C. held that:

there is nothing in the section which would justify the construction that the words 'upon any day appointed for the appearance of the accused' mean any time before the close of the working day. The absence of the complainant at the time when the case is taken up for hearing is sufficient to justify the Magistrate in dealing with the case under Section 247, and acquit the accused and the Court is not bound to wait till the close of the day to see, before proceeding under Section 247 whether the complainant appears.

In *In re Jamnabai Meghji* AIR 1934 Bom 130 the Court gave its opinion that

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.

In *Natesa Naicker v. Man Gramani* AIR 1948 Mad 4b also the Court took the same view. Following the earlier decision it was held that the Magistrate was not bound to wait if the complainant was not present at the moment the case was called and could straightway acquit the accused. Other decisions of the Madras High Court

also adopt the same view.

5. A few decisions taking a different view may now be referred to. In *State of Mysore v. Mahadevappa* AIR 1953 Mys 146 where the case was disposed of at 11-30 a.m. and it was not denied that the Court had other work for the day, it was held that the application of Section 247 Criminal Procedure Code to effect a hasty disposal at the early stage when the day's work begins, was not proper. It was also observed that it would amount to a misuse of the discretion vested in the Court if the circumstances indicate that the Magistrate had attempted to clutch at the jurisdiction for merely disposing of the case.

In *United Industrial Corporation v. S.M. Hussain* : AIR 1955 AP192 where an order of acquittal was passed under Section 247 by 11-20 A.M. it was held by a bench that

Though Section 247 gives a discretion to the Magistrate to dismiss a complaint for the non-appearance of the complainant, but such a discretion must be used in a judicial manner.

In that case the delay in the appearance of the complainant and his advocate was on account of some trouble to the car of the advocate. It was observed that as there was adequate reason for the complainant being late, dismissing the complaint at the early hours of the Court when there was other work before the Court was not justified, and the order of acquittal was set aside.

6. In *Ram Narain v. Mool Chand* : AIR1960 All296 after a detailed consideration of all the available decisions on the subject Mulla, J. held that the word 'day' in the phrase 'upon the day appointed for the appearance' occurring in Section 247 meant the whole of the working hours of the day and not the moment when the case is called and that an order of acquittal for default of appearance of the complainant should be passed at the end of the day. It was further observed that the punishment for default could not be awarded unless the default was committed and this question could not be determined in the early hours of the day but only at the end of the day. In the course of an elaborate discussion, the learned judge has also compared the terminology in Order 9, Rule a Civil Procedure Code where the

words used are 'when the suit is called on for hearing' as distinct from 'upon the day appointed' occurring in Section 247 Cr.P.C. The learned Judge observes that there is good reason behind the difference in the terminology viz., if the plaintiff's suit is dismissed for default no final order is passed against him and he can apply for restoration and also reinstitute his plaint whereas the exercise of the power vested in Court under Section 247 Cr.P.C. practically seals the fate of the case leaving only the restricted chance of getting an order of retrial by the appellate Court which ordinarily will refuse to interfere with the discretion exercised by the Magistrate.

7. Though I am not inclined to hold that the Magistrate should wait to the end of the working day to pass an order of acquittal under Section 247, it seems to me that acquittal should not follow as a matter of mere routine if at the moment the case is called the complainant is not present in Court. The intention of the Legislature in enacting Section 247 is clearly to discourage dilatory tactics on the part of the complainants which might lead to the harassment of accused persons and the waste of public time. It is equally clear that the power given by the Section should not be so used as to deny justice to complainants who in good faith approach the Court for redress of their grievances. It is neither possible nor desirable to specify any particular length of time as the period the Magistrate should wait before acquitting the accused. The discretion has to be used in a judicial manner. In other words the Magistrate should take into consideration all the relevant circumstances before deciding 'whether to acquit the accused or to adjourn the case to another day. For example in this case, the learned Magistrate should have taken into consideration the circumstances that the complainant was a Panchayat Officer acting in his official capacity, and that the case was called soon after the court began its sitting for the day, as also the circumstance that since the Court had allowed the application for time filed on behalf of the accused the presence of the complainant would have served no useful purpose. The acquittal of the accused in spite of these circumstances indicates that the learned Magistrate disposed of the case merely for the sake of disposal - something which amounts to misuse of the discretion vested in him by Section 247.

8. I must say in this connection that instances are not rare where Magistrates have exhibited a tendency to clutch at the jurisdiction vested in them under Section 247 Cr.P.C. as a short cut to obtain quick and easy disposals. The temptation offered by the Section is so much that in one case that was brought to my notice an order of acquittal under Section 247 was passed in the very face of the complainant at 11-15 A.M. on the ground that he was not present earlier when the case was first called. Vide *Govindan Nambiar v. Chidambareswara Iyer* 1961 Ker LT 797 : 1962 (2) Cri LJ 547 Magistrates will do well to bear in mind that 'despatch is a good thing but to do justice is better'.

9. In the result the order of acquittal passed by the learned Magistrate is set aside and the case is remitted to the lower Court for fresh disposal according to law after recording the evidence.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**