

**Premkumar Vs. the State**

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**Court :** Rajasthan

**Decided On :** Dec-19-1961

**Reported in :** AIR1963Raj77; 1963CriLJ321

**Judge :** C.B. Bhargava, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 247 and 439

**Appeal No. :** Criminal Revn. No. 389 of 1960

**Appellant :** Premkumar

**Respondent :** The State

**Advocate for Def. :** R.A. Gupta, Adv.

**Advocate for Pet/Ap. :** S.K. Jindal, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

ORDER

**C.B. Bhargava, J.**

1. This is an application in revision by Prem Kumar who has been convicted under Section 26 of the Rajasthan Forest Act read with Rule 2 of the Rajasthan Forest (Produce Transit) Rules and has been sentenced to pay a fine of Rs. 100/ by the

learned Sub-Divisional Magistrate, Bundi. His appeal before the learned Additional Sessions Judge, Bundi also failed.

2. The two courts have concurrently found on the evidence of Motilal (P. W. 1), Insafali (P. W. 2), Mathura (P. W. 3) and Gafurali (P. W. 4) that on the night of 1st November, 1958, some Bhils were cutting trees from the reserved forest of Shikarganj and were loading them in truck No. RJR 175 while the petitioner was present there armed with a gun. After loading the truck the forest produce was being taken away when they were stopped by the employees of the forest department who had placed stones on the way in order to block the further movement of the truck. The petitioner on seeing the employees of the forest department, jumped out of the truck and ran away leaving behind his gun in the truck. This is a finding of fact and there is sufficient evidence in support of it. The petitioner has challenged the correctness of this finding but it is not open to him to do so in this revision.

3. The only contentions which deserve consideration are :

1. that the prosecution has failed to prove that the place from where the trees are said to have been cut, was within the area of the reserved forest.

2. that the trial in the case was vitiated for the reason that on 7th and 28th October, 1958, Surajprakash Range Officer who was the complainant in the case was not present in the court and the learned Magistrate instead of acquitting the accused and without adjourning the case or dispensing with the presence of the complainant recorded the evidence of the prosecution and defence witnesses. It is urged that the procedure followed by the learned Magistrate was contrary to the provisions of Section 247 of the Code of Criminal Procedure. In support of this contention learned counsel relied upon *Arjandas Tulsidas v. G. K. Bhagat*, AIR 1954 Ajmer 31 (2) *Daulat Ram Bala Ram v. Ram Kishan* AIR 1958 Punj 317 L S. *Patil v. Dundappa Malkajappa*, AIR 1960 Mys 39 and *State v. Reva Chand*, AIR 1961 All 352.

4. As for the first contention it may be pointed out that it is only in this court that this objection has been raised. Neither before the trial court nor before the learned

Additional Sessions Judge this objection was taken. However, it appears from the statements of the prosecution witnesses that the trees were cut from a place which was within the demarcation line of the reserved forest. Specific question was also put to the petitioner in this behalf but he did not deny that it was a reserved forest.

5. Learned Deputy Government Advocate has also produced notification published in the Gazette dated 18th December, 1954 to show that the place in question was a part of the reserved forest, but this notification was Issued under section 4 of the Forest Act and the final notification, which is issued under Section 20 was not shown, to me. But on the evidence of the prosecution witnesses which were not challenged by the accused it can safely be said that the trees were cut and were removed from the reserved forest.

6. As for the second contention it is not disputed that the case was instituted on the complaint of Surajprakash Range Officer and was a summons case. Section 247 of the Code of Criminal Procedure provides that :

'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 :

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'.

In a summons case therefore, it is incumbent on the Magistrate to acquit the accused if the complainant is not present on the date of hearing unless he thinks proper to adjourn the hearing of the case to some other date, or dispenses with the complainant's attendance and proceeds with the case.

It appears that on 23rd September statements of some of the prosecution witnesses were recorded and the case was adjourned to 7th October, 1958. On

this date the complainant was not present but his counsel Shri Raghbardayal was present. The learned Magistrate did not adjourn the case and proceeded to record the statement of Insafali and closed the prosecution evidence. It does not appear from the order sheet that the learned Magistrate was of opinion that the personal attendance of the-complainant was not necessary and should be dispensed with. Similarly, on 28th October, 1958, Suraiprakash was not present and only his counsel Shri Raghbardayal was present. The case was neither adjourned nor was any order dispensing with the personal attendance of the complainant recorded and the case was proceeded with and the statements of the accused and of the defence witnesses were recorded. The case remained pending in the court of the learned Magistrate for further proceedings and ultimately on 26th February, 1960, resulted in the conviction of the accused.

Neither on 7th nor on 28th October nor on any subsequent date objection was taken fay the accused regarding the legality of proceedings taken in the absence of the complainant. It is for the first time in revision that the question has been raised. The question therefore, is whether the conviction of the accused is bad and the trial was vitiated. In Arjandas's case, AIR 1954 Ajmer 31 (2) the facts were that a complaint under Section 182, I. P. C. was filed against the accused. oN 25th March, 1953, charge was explained to him. The case was next taken up on 9th April, 1953 and on that date statements of the complainant and one witness were recorded. The case was adjourned to 25th April, 1953. On this date the complainant was not present in court but the Assistant Public Prosecutor moved two applications; one for summoning certain additional evidence and the other for trying the case as a warrant case as the facts alleged constituted an offence under Section 193 of the Indian Penal Code. The court did not pass any orders on these applications. On 30th April, the accused submitted an application that as the complainant was absent on 25th March, 25th April and 30th April, he was entitled to acquittal under the provisions of section 247 of the Code of Criminal Procedure. This application was rejected.

A revision was filed against this order before the learned Judicial Commissioner, Ajmer and it was held that when the attendance of the complainant was not actually dispensed with the Magistrate could either adjourn the case for proper

reasons or acquit the accused. In Daulat Ram's case, AIR 1958 Punj 317 it was held that

'even though the enquiry on a complaint may start as in a warrant case but if the charge framed is under a section which is tried as summons case provisions of Section 247 would become applicable'.

L. S. Patil's case AIR 1960 Mys 39 has no application in the present case. In AIR 1961 All 352 the accused was acquitted because the District Magistrate who happened to be complainant in that case was not present on the date of hearing. The State went in appeal to the High Court and it was held that :

'Section 247 is mandatory. It makes the personal attendance of the complainant in court on the day of hearing compulsory. The section makes no distinction between a public servant complainant and an ordinary complainant in respect of his personal attendance.

If on the day of hearing the complainant is absent while the accused is present, the Court is bound to acquit the accused unless it thinks proper to adjourn or the personal attendance of the complainant is dispensed with'.

7. None of these cases lays down that proceedings taken in the absence of the complainant without dispensing with his personal attendance are illegal and the conviction is liable to be quashed. However, in Sudhir Kumar v. Emperor AIR 1942 Pat 46 which was not cited at the Bar it was held that :

'When the complainant is absent the only course open to the Magistrate is to ordinarily acquit the accused or for proper reason adjourn the case. He cannot proceed with the case and convict the accused. Such a conviction is illegal and should be quashed'.

This case was decided on the terms of Section 247 as it stood before the amendment of 1955. Under that law, the discretion to dispense with the personal attendance of the complainant was given only in the case of public servants and did not extend to other persons. After the amendment of 1955 the personal attendance of the complainant whether he is a public servant or otherwise can be

dispensed with and the Magistrate can proceed with the case in his absence.

In Sudhir Kumar Neogi's case AIR 1942 Pat 46 the complainant was not a public servant and therefore, in his absence the case could not be proceeded with and the Magistrate was bound to acquit the accused unless for reasons he thought proper to adjourn it. But in the present case proceedings could be taken in the absence of the complainant provided the court dispensed with his personal attendance. It, therefore, follows that proceedings can be taken in the absence of the complainant, provided the court has dispensed with the personal attendance of the complainant. In the present case no objection was taken by the accused on the dates the complainant was absent. Proceedings were taken in the presence of the accused and statements of prosecution and defence witnesses were recorded before him. It is not alleged that the accused has been prejudiced in anyway. The only irregularity which appears in the proceedings is that the learned Magistrate failed to note about exempting the complainant from personal attendance on the dates he was not present in the court. In the absence of any prejudice to the accused this irregularity. is not such which might render the conviction of the accused as illegal.

In Amir Mia v. Sarafdi Hazi, AIR 1920 Cal 68 it was held that :

'Section 247 gives power to a Magistrate to adjourn a summons case for sufficient reason when the complainant does not appear and the fact that some witnesses are examined in the absence of the complainant would not vitiate the trial unless it is shown that the accused was in some way prejudiced. The fact that he cross-examined the prosecution witnesses and examined witnesses in his defence would show that he was not prejudiced in any way'.

Reference may also be made to an unreported Bench Decision of this Court in The State v. Shivdayal Rajawat (Criminal Appeal No. 138B of 1957 decided on 5-9-1958 Raj) where the Inspector of Factories who was a complainant did not appear in the court on some dates. On the last date i. e., 16th July, 1957 an objection was raised that the accused should be acquitted. The learned Magistrate fixed 1st August, 1957 for considering the objection and also summoned the Factories Inspector, On 1st August 1957, the complainant appeared but the

learned Magistrate acquitted the accused. It was observed that the proper stage for the Magistrate to have dismissed the complaint and acquit the accused, if at all, was when the case came before him on 16th July, 1957 when the Factories Inspector who was the complainant in the case was not present and not on the 1st of August, 1957 when he was actually present in court.

It, therefore, follows that unless an order of acquittal is passed on the day the complainant is absent, it can neither be passed on the adjourned date nor can it be deemed to have been passed without any express order in that behalf.

8. In a summons case merely because some proceedings were taken by the Magistrate in the absence of the complainant without dispensing with his personal attendance the proceedings would not be vitiated unless some prejudice was shown to have been caused to the accused. No objection was taken by the accused when the complainant was absent nor did the court pass an order of acquittal and it is now too late in the day to challenge the conviction on the ground that on some date the complainant was absent and the Magistrate should have passed an order of acquittal. An order of acquittal cannot be considered to have been automatically passed on the dates the complainant was absent. Since no order of acquittal was recorded it cannot be held that further proceedings taken in the case suffer from any illegality. There is no force in this contention either.

9. The revision application is therefore, rejected.

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