

Vasanthi Vs. Ramaswami and Others

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Court : Chennai

Decided On : Mar-29-1990

Reported in : 1992CriLJ2442

Judge : Padmini Jesuddurai, J.

Appeal No. : Cri. Appeal No. 460 of 1985

Appellant : Vasanthi

Respondent : Ramaswami and Others

Advocate for Def. : Mr. V. Srinivasan, Adv.

Advocate for Pet/Ap. : Mr. C.S. Dhanasekaran, Adv.

Judgement :

1. This appeal has been preferred by the complainant in a case instituted on her complaint against the respondents for offences under Sections 494 and 495 read with 109, I.P.C. and is directed against the acquittal of the respondents under section 248(1), Cr.P.C. by the trial Court on the ground that the complainant has failed to produce the witness for further cross-examination under Section Section 246(4), Cr.P.C. and also on the ground that the complainant herself was absent on the day fixed for such further cross-examination.

2. The appellant filed the case against the respondents and under Section 244, Cr.P.C. she had examined herself and another witness. On the basis of the evidence of these two witnesses, the trial Court had framed charges under section 246(1), Cr.P.C. against the respondents for offences under sections 494 and 495 read with 109, I.P.C., P.Ws. 1 and 2 had not been cross-examined when they were examined under section 244, Cr.P.C. The respondents decided to cross-examine P.Ws. 1 and 2 under section 246(4), Cr.P.C. The case had been posted to 13-3-1984 for cross-examination. On that date, the appellant was absent and the other witness P.W. 2 was also absent. The learned Magistrate examined the Court Peon Perumal as C.W. 1 to show that the appellant was absent and thereafter observing that the appellant had not proved her case against the respondents, acquitted them under section 248(1), Cr.P.C. Challenging the acquittal, this appeal has been filed by the aggrieved complainant.

3. Thiru C. S. Dhanasekaran, the learned Counsel for the appellant would contend that the procedure adopted by the trial Court in acquitting the respondents under section 248(1), Cr.P.C. was contrary to the provisions of the Code as well as to the decided cases. The learned Counsel would submit that the trial Court having found the material sufficient to frame charges, had no further material after the framing of charges to record an acquittal on the ground that the complainant had not proved the case against the respondents. If the complainant or her witness was absent, it was the duty of the trial Court to get them, if need be, by coercive process provided under the Criminal Procedure Code. An acquittal under section 248(1), Cr.P.C. on that ground could not be rendered.

4. Per contra, the learned Counsel for the respondents Thiru V. Srinivasan would contend that only if the appellant had prayed for summons to her witnesses, the Court was bound to get the witness and that in the instant case, there was nothing to indicate that the appellant had asked for summons for witnesses.

5. The only question for determination is whether, once the trial Court has framed charges under section 246(1), Cr.P.C., it could acquit the accused under section 248(1) merely on the ground that the complainant and her witness examined prior to the framing of the charges were not available for cross-examination under

section 246(1), Cr.P.C.

6. Chapter XIX-B of the Criminal Procedure Code formulates the procedure that has to be followed in warrant cases instituted otherwise than on a police report. Initially the complainant offers evidence under section 244, Cr.P.C. and if the Magistrate finds that there is no evidence, which if unrebutted, would warrant the conviction of the accused, the Magistrate should discharge the accused under section 245(1), Cr.P.C. If on the other hand, the Magistrate is of the opinion that there is ground for presuming that the accused has committed the offence triable by him, he should frame charges under section 246(1), Cr.P.C. The charges are to be read over and explained to the accused and the plea of the accused to be recorded. If thereafter, the accused desires to cross-examine any of the witnesses already examined by the complainant, it shall be the duty of the learned Magistrate to recall such of those witnesses, whom the accused desire to cross-examine and make them available for cross-examination. After such cross-examination and re-examination under Section 246(5), Cr.P.C., the Magistrate shall discharge those witnesses. Thereafter, witnesses not examined under section 244, Cr.P.C. could be called and examined. The accused is then called upon to enter upon his defence and to adduce evidence if he so desires and after that, the Magistrate has to consider the evidence available against the accused and if he finds that the accused are not guilty, he shall record an order of acquittal under section 245(1), Cr.P.C.

7. The above provisions would clearly indicate that once the Magistrate had chosen to frame charges against the accused on the ground that there are grounds for presuming that the accused has committed an offence, if there is to be an acquittal, it can only be under section 248(1), Cr.P.C. To render a finding that the accused are not guilty, it is necessary for the Magistrate to appreciate the evidence already on record, give reasons for rejecting that evidence and then hold that the accused are not guilty and record an acquittal. Merely because the complainant or her witnesses are not available for cross-examination under section 246(4), Cr.P.C., the Magistrate cannot record an acquittal under section 248(1), Cr.P.C. that the complainant had not proved her case. The learned Counsel for the appellant rightly relies upon a decision of this Court in

Kanagasabai Ammal v. P. Subramanian, 1989 MLW 462 wherein a learned Judge of this Court while dealing with Section 244, Cr.P.C. has held that the Magistrate cannot discharge the accused without ascertaining whether summons have been served or not and without taking all possible steps for securing those witnesses. These observations made with reference to Section 244, Cr.P.C. would apply with greater force to witnesses to be recalled under section 246(5), Cr.P.C. A reading of Section 246(5), Cr.P.C. would show that if the accused expresses the wish to cross-examine any of the prosecution witnesses whose evidence had already been taken, the witness so named by him, shall be recalled and could be discharged only after cross-examination and re-examination, if any. The subsection casts an express duty upon the Court to see that those witnesses are recalled, detailed till the cross-examination and re-examination are over and only thereafter the Court is to discharge those witnesses.

8. In the instant case, when the Magistrate found that the appellant as well as P.W. 2 were absent, it was the duty of the learned Magistrate to have procured the complainant as well as P.W. 2, if need be, by coercive process, make them available to the respondents for cross-examination and thereafter proceed according to law. It was not open to him to acquit the accused merely on the ground that the witness already examined by the prosecution were not made available for cross-examination. The order of acquittal, being illegal, has to be set aside and retrial has to be ordered.

9. In the result, the appeal is allowed, the order of acquittal is set aside and there shall be a retrial of the case.

10. Appeal allowed.