



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 1300 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MRS. JUSTICE M. K. THAKKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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KHWAJA NIJAMUDIN S. CHISTEE
Versus
WASIM ALARKHA BHARUCHA & ANR.

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Appearance:

MR.KUMAR TRIVEDI for MR RAJENDRA R CHAVDA(10209) for the Appellant(s) No. 1

for the Opponent(s)/Respondent(s) No. 1

MR.HARDEEP MAHIDA for MR.A R ROCKEY(7592) for the Opponent(s)/Respondent(s) No. 1

MR.JAY MEHTA, APP for the Opponent(s)/Respondent(s) No. 2

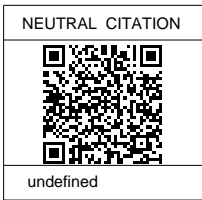
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CORAM:HONOURABLE MRS. JUSTICE M. K. THAKKER

Date : 20/06/2024

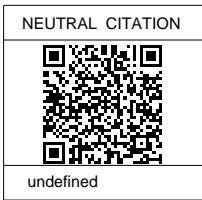
ORAL JUDGMENT

1. With the consent of the respective learned advocates,



this matter was heard finally.

2. This appeal is filed against the judgment and order passed by the learned Chief Judicial Magistrate, Gir Somnath at Veraval exercising the power under section 256 of the Code of Criminal Procedure, 1973 acquitting the respondent-accused from the charges punishable under section 138 of the N.I.Act.
3. It is the case of the complainant that complainant and the accused are distant relative and on the demand of the accused the complainant lent the amount of Rs.4,50,000/- and for repayment of the aforesaid amount cheque bearing no.074180 dated 29.12.2016 was issued. On depositing the same, it was dishonoured with an endorsement of "funds insufficient". Therefore, complaint came to be filed before the learned competent court.
 - 3.1. On issuing the process, the respondent-accused appeared vide order dated 07.04.2017. Thereafter, case came to be adjourned from time to time and plea was recorded of the accused on 14.12.2018 below Exh.18 and thereafter, case was adjourned for the cross-examination of the complainant. On the day when the



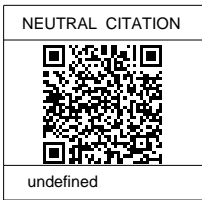
impugned order was passed, learned trial court observed that though the case was adjourned after recording the plea for the evidence of the complainant, neither the complainant remained present since 2019 nor his advocate remained present. Therefore, court has dismissed the case for non-prosecution which is the subject matter of challenge before this Court.

4. Heard learned advocate Mr.Kumar Trivedi for learned advocate Mr.Rajendra Chavda and learned advocate Mr.Hardeep Mehta for the respondent-accused.

4.1. Learned advocate Mr.Kumar Trivedi for the appellant has submitted that the complainant and his advocate could not appear before the learned trial court as the advocate of the complainant had passed away in 2017 and therefore, the complainant was also not aware about the stage of the trial.

4.2. Learned advocate Mr.Kumar Trivedi submits that due to the death of learned advocate for the complainant, the impugned order is passed and therefore, the criminal case requires to be restored to its original filed in the interest of justice.

4.3. In view of the above statement, the learned advocate

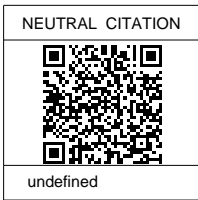


Mr.Kumar Trivedi prays to quash the impugned order of acquittal and prayed to remand the matter for deciding it on merits before the learned trial court.

5. On the other hand, learned advocate for the respondent Mr.Hardeep Mehta submits that it is not in dispute that appellant's pleader passed away in the year 2017. however, it is the duty of the complainant that after setting the criminal law in motion to get the follow up of the case.

5.1. Learned advocate Mr.Hardeep Mehta submits that as the complainant is not vigilant therefore, the learned trial court is justified in passing the impugned judgment and order of acquittal. In view of the same, learned advocate Mr.Hardeep Mehta prays to confirm the order passed by the learned trial court and to dismiss the appeal.

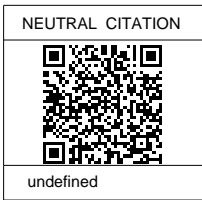
6. Considering the submissions made by the learned advocate for the respective parties and examining the record and proceedings thoroughly, it transpires that the private complaint came to be filed with aforesaid allegations before the learned trial court on 22.02.2017. the process was issued by the learned trial court on



07.04.2017 and on the same day it was noted in the Rojkam that learned advocate for the accused and the accused both remained present. Therefore, case was adjourned for recording the plea of the accused. The Rojkam further reflects that on 15.09.2017, 01.11.2017, 12.01.2018, 01.02.2018, 21.03.2018, 13.04.2018, 05.05.2018, 06.06.2018, 15.06.2018, 31.08.2018, 05.10.2018 and 25.10.2018 the accused remained absent and therefore,ailable as well as non-bailable warrants were issued against him. Ultimately, plea came to be recorded on appearance of the accused on 14.12.2018.

6.1. Thereafter, record reveals that complainant remained present on 15.02.2019, 08.04.2019, 01.07.2019 however, accused were absent therefore, case was adjourned. Thereafter, record reveals that on some of the dates neither presence or absence of the complainant was noted however, the accused absence is noted on 07.04.2019, 13.12.2019, 21.01.2020, 12.03.2020, 09.12.2020, 30.01.2021, 17.03.2021, 19.04.2021, 24.05.2021.

6.2. the learned trial court has observed on some dates

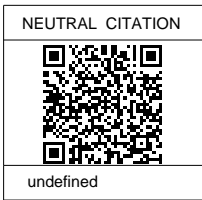


that complainant and his advocate is absent but overall consideration of the Rojkam reveals that both the parties has remained absent on many dates fixed by the learned trial court.

6.3. In addition to the above facts, the averments made by the learned advocate Mr.Trivedi in the appeal regarding the death of the learned advocate for the complainant, is reproduced herein below:

“D.It is submitted that appellant thereafter approached to the other advocate on dated 15.03.2023 for knowing the case status whereas upon the advice by advocate appellant made an application for the certified copy for the order at concern court dated 24.03.2023 whereas after receiving the certified order dated 31.03.2023, whereby came to the knowledge of appellant that the complaint filed by the him under Section 138 of NI Act has been dismissed and the respondent has been acquitted by Ld. Court.

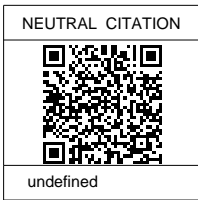
E. It is submitted that the from the perusal of the impugned order (At Annexure-A) it is evident that no reasons are assigned by the Ld. Magistrate except that appellant and his pleader are not remaining present, or not have made any other accommodation for the same but on the contrary, it is pertinent to note that appellant has engaged pleader on behalf of him and now he is wholly dependent upon the pleader wherein his presence would not be mandatory before the court, further it is unfortunate that appellant's pleader has passed away in the year 2017 for which appellant was



unaware, hence this Hon'ble court may kindly consider this crucial aspect and Criminal Case No. 134 of 2017 may kindly be restored in its original state.

F. It is submitted that Ld. Magistrate ought to have consider liberal approach before passing the order by issuing summons upon the appellant or the pleader for their appearance and conducting prosecution so that there may be probable chance that appellant would have been enlighten of the fact of non-appearance/ non-prosecution and his pleader's death, Hence Criminal Case No. 134 of 2017 may kindly be restored in its original state and the impugned order passed by the Ld. Magistrate is illogical and required to be quashed and set aside.”

7. That two constraints are imposed on the Court for exercising the powers under Section 256 of the Code of Criminal Procedure. First is if the Court thinks that in a situation it is proper to adjourn the hearing, then the Magistrate shall not acquit the respondent - accused. Second is when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has power to dispense with the attendance and proceed with the case. If the situation does not justify the case being adjourned, the Court is free to dismiss the complaint and acquit the accused. But, if the presence of the complainant on that day was



quite unnecessary, then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the Section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

8. In view of the above, this Court deems it fit to allow this application and directing the learned trial court to decide the same after giving due opportunity to the parties to adduce their evidence.
9. As this trial is pending since 2017, learned trial court is directed to decide the same within a period of 8 months preferably. Both the parties are directed to co-operate with the trial.
10. In view of the above directions, this appeal is allowed.

ARCHANA S. PILLAI

(M. K. THAKKER,J)