

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

NAGARAMBILLE TONKYA (COMPLAINANT), PETITIONER,

1926,
March 9

v.

MATTA JAGANNA AND TWO OTHERS (ACCUSED),
RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 247—Case posted to a certain date—Called up at 11 a.m.—Complainant absent—accused acquitted—if valid.

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.

Rangaswami v. Narasimhulu, (1884) I.L.R., 7 Mad., 213, *Kuttiyah v. Pari Makri*, (1884) I.L.R., 7 Mad., 356, followed.

Criminal Revision Case No. 229 of 1925 dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Second-class Magistrate of Sompeta in Calendar Case No. 200 of 1925.

The order of the Second-class Magistrate of Sompeta was in these terms:—

“The case was called on for hearing to-day to which it had been posted. The complainant not being present either in person or by pleader, the accused are acquitted under section 247, Criminal Procedure Code.”

The facts necessary for this report appear from the judgments on revision.

K. Bhashyam Ayyangar for the petitioner.

* Criminal Revision Case No. 772 of 1925.

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K. N. Ganapati for the *Public Prosecutor*, for the
Crown.

The respondents were not represented.

JUDGMENT.

DEVADOSS, J.—This is a petition to revise the order of acquittal passed by the Second-class Magistrate of Sompeta under section 247 of the Code of Criminal Procedure. It is contended by Mr. Bhashyam Ayyangar for the petitioner that the complainant and his witnesses appeared at 11–30 a.m. on the date fixed for the trial of the case and the Magistrate acted illegally in acquitting the accused on the ground that the complainant was absent and that the appearance of the complainant on the date is a sufficient compliance with section 247.

The question is whether the absence of the complainant at the time when the case was taken up for hearing was sufficient to justify the Magistrate in dealing with the case under section 247. That section is in these terms:

“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.”

The section makes it obligatory upon the Magistrate to acquit the accused if the complainant does not appear, unless he thinks proper to adjourn the hearing of the case to some other day. The contention is that it is sufficient if the complainant appears at any time during the day, and that “the day” means the ordinary working hours of the Court, i.e., from 11 a.m. to 5 p.m. If the contention is to hold good it would mean that the Magistrate has to wait till 5 p.m. before dealing with a

case under section 247. There is nothing in the section which would justify the construction that the words "upon the day appointed for the appearance of the accused," etc., mean any time before the close of the working day. In Order IX, rule 8 of the Civil Procedure Code, the wording is, "where . . . the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed," etc. From this it is clear that the plaintiff should be present when the case is called on for hearing. In the case of a complainant, the complainant should appear when the case is called on for hearing. The object of section 247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case. It may, no doubt, appear to be a hardship that a complainant who was present from 11 a.m. to 4-30 p.m. should have his case dismissed if he happens to be away for a few minutes when the case is taken up; but the question is not whether there is hardship or not but what is the meaning of the section. The complainant is bound to be present on the day to which the case is posted, and if he wants to be absent during any portion of the day he should take the Court's permission for doing so. But, if he does not do so, he does so at his risk. It is suggested that such a construction would entitle the Magistrate to dismiss a complaint under section 247 even after the prosecution case is closed and before he delivers judgment. No doubt, it would be so; but that is not a ground for giving a construction to a section different from what the clear words would justify.

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The presence of the complainant's vakil alone is not sufficient compliance with the requirements of section 247. In civil cases the presence of a party's vakil is considered as the appearance of the party. But in criminal cases, except where the Court dispenses with the personal attendance of the accused and allows him to appear by a pleader or agent, his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of the Magistrate to proceed under section 247. Where a vakil appears for the complainant, it is not likely that the Magistrate would dismiss the complaint under section 247, for the vakil would represent to the Court that his client was unavoidably absent or that he had just gone out of the Court house for a very proper purpose.

This case has been referred to a Bench by WALLACE, J., by reason of the view taken by JACKSON, J., in Criminal Revision Case No. 229 of 1925. In that case JACKSON, J., held that section 247 must be strictly interpreted and the appearance of the complainant during any portion of the day was sufficient compliance with section 247. With great respect, I am unable to agree with that view. We should not consider the hardship that may be caused to the complainant in construing the section. Instructions may be given to Magistrates not to dismiss cases under section 247 unless they are satisfied that the complainant is keeping out of the way and to wait for a reasonable time to enable the complainant to appear; but the absence of such instructions would not be a ground for giving a forced construction to the very clear words of the section.

The view of JACKSON, J., is opposed to the view taken by HUTCHINS, J., in *Kuttiyali v. Pari Makri* (1). There the

learned Judge overruled the contention that the Magistrate should wait till the close of the day before he could act under section 247.

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It is next contended that on the merits the petitioner is entitled to have the order of the Magistrate set aside. The petitioner appeared with his witnesses at 11-30 a.m. and it is alleged that the case was taken up and dismissed five minutes before the appearance of the complainant. Though the Magistrate could very well have waited for a short time, it cannot be said that the order of the Magistrate is illegal. He acted within his powers and when the order is not illegal it would not be right for this Court to interfere with it. Though the conduct of the accused was not all that could be desired, yet I do not think it would be right to set aside the order of the Magistrate in a case of this kind. The petition is dismissed.

WALLER, J.—This petition raises a question as to the construction of section 247, Criminal Procedure Code. A summons case was called on for hearing. The complainant not appearing, the Magistrate acquitted the accused under section 247. Later in the day the complainant put in an appearance. It is now argued on his behalf that as he appeared on the day to which the case had been adjourned, the Magistrate had no jurisdiction to acquit the accused—in other words, that a Magistrate cannot act under the section before the Court day has closed.

WALLER, J.

There is direct authority to the contrary—vide *Ranga-swami v. Narasimhulu* (1) and *Kuttiyali v. Pari Makri* (2). The earlier of these two rulings, which dates back over 40 years, follows a still older decision of the year 1874. So far as I am aware the view that has prevailed for

(1) (1884) I.L.R., 7 Mad., 213.

(2) (1884) I.L.R., 7 Mad., 356.

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over 50 years was not questioned till it was dissented from by JACKSON, J., last year in Criminal Revision Case No. 229 of 1925. With great respect, I am unable to follow his line of reasoning. He appears to think that there is something in the section that prevents a Magistrate from taking up a particular case twice on the same day, that, in fact, a Magistrate cannot if a complainant does not appear in the morning, adjourn the case till the afternoon. I can myself see nothing in the section that prevents a Magistrate from so doing. Indeed, I think that, as a rule, he would be well advised to give a complainant whose case is called on early in the day, some latitude before he decides to apply section 247. If, however, he decides to act at once, when a complainant fails to appear on his case being called on, I am clearly of opinion that he has jurisdiction to do so and that he is not obliged to wait till the close of the Court day before doing so. I agree therefore in dismissing the petition.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

1925,
March 30.

RAMACHANDRAN SERVAI (PETITIONER),

v.

PRESIDENT, UNION BOARD, KARAIKUDI
(RESPONDENT).*

Madras Local Boards Act (XIV of 1920), ss. 164 and 221—Proceedings taken by a Local Board under sec. 221 to recover penalty for encroachment—If defaulting party can raise a contention regarding the factum of encroachment.

Where a Local Board has instituted proceedings before a Magistrate under section 221 of the Madras Local Boards Act

* Criminal Revision Case No. 614 of 1924.