18 SCOB [2023] HCD 294

HIGH COURT DIVISION
Criminal Revision No. 1377 of 2018.

Md. Al Amin
Vs.
The State and others

None appears.
..... For the Complainant-Petitioner.

Mr. Bashir Ahmed, DAG with
Mr. Nirmal Kumar Das, AAG with
Mrs. Syeda Shobnum Mustary, AAG and
Mr. Md. Tariqul Islam (Hira), AAG
..... For the State.

Heard on: 03.06.2021.
Judgment on: 10.06.2021

Present:
Mr. Justice Shahidul Karim
And
Mr. Justice Md. Akhtaruzzaman

Editors' Note:
In the instant Criminal Revision question came up for consideration as to whether the Sessions Court had power or authority to acquit an accused under section 265H of the Code of Criminal Procedure without examining any witnesses or without exhausting the legal procedures for compelling the attendance of the witnesses. The High Court Division examining relevant laws, particularly, Rule 638 of the *Criminal Rules and Orders (Practice and Procedure of Subordinate Court), 2009* and case laws held that in exercising the power under section 265H of the Code, the Sessions Court must take necessary measures to secure the attendance of the witness and comply all the relevant procedures according to law before acquitting any accused. Consequently, the rule was made absolute.

Key Words:
Acquittal; Sections 265(H), 435, 439 of the Code of Criminal Procedure 1898; Rule No. 638 of the Criminal Rules and Orders, [Volume I]

Section 265H of the Code of Criminal Procedure, 1898:
From a plain reading of the provisions of section 265H it transpires vividly that after framing charge against the accused, the Sessions Judge is bound to examine witnesses and upon hearing the prosecution as well as defence if he considers that there is no evidence to proceed against the accused then the Court should pass an order of acquittal to acquit the accused. Recording the evidence before passing such an order is mandatory under section 265H of the Code. (Para 12)

Section 265H of the Code of Criminal Procedure, 1898:
Necessary measures should be taken to secure the attendance of the witness:
Our considered view is that in exercising his power under section 265H of the Code, the Sessions Judges, at first, shall take meaningful steps for securing the attendance of the

witnesses; and secondly: if any witness is available record the same; and thirdly: in case of non-availability of any other witnesses, take hearings from both the parties and thereafter shall pass an order of acquittal of the accused. (Para-20)

Section 265H of the Code of Criminal Procedure, 1898:
The Court must exhaust all the procedure for taking down evidence before passing the order of acquittal:
Under the provisions of section 265H of the Code the duty of a Sessions Judge is to look into the prosecution evidence and materials brought out in the examination of the accused and thereafter should hear the learned Advocates of both sides and considering the evidences and materials on record if he finds that all the procedures under the law have been exhausted and if he is of the opinion that he has taken all possible steps for taking down the evidences of the prosecution but the prosecution has miserably failed to comply with the order of the Court, in that case, the duty casts on the Court to pass an order of acquittal of the accused. But in the present case, it appears manifestly that the learned Joint Sessions Judge without complying with the relevant laws and procedures has illegally dismissed the petition filed by the prosecution with the observations that the prosecution is not willing to adduce evidences. (Para-23)

JUDGMENT

Md. Akhtaruzzaman, J.

1. This Rule, arising out of an application under section 435/ 439 of the Code of Criminal Procedure, has been issued calling upon the opposite parties to show cause as to why the impugned order dated 09.01.2018 passed by the learned Joint Sessions Judge, 2nd Court, Manikganj in Sessions Case No. 08 of 2016, arising out of C.R. Case No. 166(Satu)/2015, corresponding to Petition Case No. 230(Satu)/2015, under sections 312/313/34 of the Penal Code acquitting the accused-opposite party Nos. 2-4 from the case should not be set aside and/or such other order or further order or orders passed as to this Court may seem fit and proper.

2. Briefly, the facts leading to the issuance of the Rule are that one Md. Al Amin as complainant filed a petition of complaint being Petition Case No. 230(Satu)/2015 before the Court of Senior Judicial Magistrate, Court No.2, Manikganj against 3(three) accused, namely, 1) Shirin Akter, 2) Md. Kader, and 3) Laily Begum under sections 312/313/34 of the Penal Code alleging, *inter alia,* that he got married with accused No.1 and started conjugal life following which in the month of June, 2015 the latter became pregnant. But, on 25.08.2015, accused Nos. 2 and 3 brought accused No. 1 from the house of the complainant-petitioner on the provocation that she would be given in marriage elsewhere. Thereafter, accused Nos. 2/3 along with accused No. 1 went to a clinic at Manikgonj and were able to cause miscarriage of the child of accused No.1. Being informed, the complainant-petitioner asked the accused persons about the occurrence at which they admitted their involvement in the crime and also asked the former to do whatever he could do. Alleging all the facts, the complainant-petitioner filed a petition of complainant before the Magistrate concerned who, upon receiving the same, directed the Officer-in-Charge of Saturia Police Station, Manikgonj to hold an inquiry. Accordingly, S.I. Md. Hasan Ali of that P.S. enquired about the matter who

having found *prima facie* case against accused Nos.1-3 submitted inquiry report on 19.09.2015 before the concerned Magistrate Court. Subsequently, the case was transferred to the Court of the learned Sessions Judge, Manikgonj wherein it was registered as Sessions Case No.08 of 2016. Thereafter, on 27.09.2016, the learned Sessions Judge, Manikgonj framed charge against the accused under sections 312/313/34 of the Penal Code fixing 23.10.2016 for trial. The case record was then transferred to the Court of the learned Joint Sessions Judge, 2nd Court, Manikgonj settling 09.01.2018 for trial on which date the prosecution sought adjournment of the case which was rejected by the Court acquitting all the accused under section 265H of the Code from the charge mounted against them vide its order No.17 dated 09.01.2018.

3. Being aggrieved by and dissatisfied with the aforesaid order of acquittal dated 09.01.2015 passed by the learned Joint Sessions Judge, 2nd Court, Manikgonj, the complainant-petitioner moved this Court under section 439 read with section 435 of the Code and obtained the instant Rule.

4. In the revisional application, the petitioner stated, among others, that without complying with the provisions of section 265H of the Code, the Court below most illegally passed the impugned order occasioning failure of justice.

5. None appears on behalf of the complainant-petitioner to press the Rule though the matter is posted in the list with the name of the learned Advocate for the complainant-petitioner. However, we have heard Mr. Bashir Ahmed, learned Deputy Attorney General, appearing for the State-opposite party who finds it difficult to oppose the Rule.

6. Considered the submission advanced by the learned Deputy Attorney General, perused the application filed under section 439 read with section 435 of the Code with grounds stated thereon along with the annexures attached thereto and also took into consideration the facts and circumstances of the case.

7. Annexure-A is the petition of complaint wherein it has been categorically disclosed that the complainant and accused No. 1 validly got married 1(one) year before the date of occurrence by a registered *Kabinnama*. The marriage was duly consummated and as a result accused No.1 became pregnant in the first week of June, 2015. It is further stated that the accused Nos.2 and 3 with their ill intention tried to convince accused No.1 to get married elsewhere and accordingly on 25.08.2015 they took away accused No.1 from the house of the complainant. Thereafter, without informing or taking prior permission from the complainant, the accused Nos. 2 and 3 were able to illegally caused miscarriage of accused No.1 occasioning irreparable loss and injury to the complainant which is a punishable offence under sections 312/313/34 of the Penal Code. It has further been stated that the petitioner subsequently came to know about the occurrence and asked accused No.1 regarding the incident to which accused No.1 admitted her guilt explaining that with the direct provocation as well as instigation of accused Nos.2 and 3 she did the same and further that he (complainant) can do whatever he could.

8. On going through the inquiry report (Annexure-B) submitted by S.I. Md. Hasan Chowdhury of Manikgonj Police Station before the Senior Judicial Magistrate, Manikgonj it appears vividly that during the inquiry, he found *prima facie* case against the accused wherein it is stated, among others, that during the marriage between the complainant and accused No.1, accused No. 2 received Taka 1,15,000/- as loan from the complainant. Both

accused Nos.2 and 3 are greedy persons, as a result, they insisted accused No.1 to get married elsewhere and to that effect these 2(two) accused on the date and time of occurrence brought accused No.1 at Manikgonj Super Diagnostic Center to cause miscarriage of her pregnancy and subsequently were able to do the same and in course of investigation accused No. 1 admitted her guilt. During the inquiry, the inquiry officer examined as many as 6(six) witnesses including the accused and thereafter, found *prima facie* incriminating materials against the accused of committing offence under sections 312/313/34 of the Penal Code.

9. After receiving the inquiry report, the concerned Magistrate took cognizance of the offence and transmitted the case to the Court of Sessions Judge, Manikgonj for trial who by his Order No.8 dated 27.09.2016 framed charge against the accused under the above sections of law and sent the same to the Joint Sessions Judge, 2nd Court, Manikgonj for disposal. It further appears from the impugned Order No.17 dated 09.01.2018 that on this particular date all the 3(three) accused were present but the prosecution filed an application seeking adjournment of the case for bringing witnesses but it was rejected by the learned Joint Sessions Judge and by exercising her power under section 265H of the Code, the learned Joint Sessions Judge passed an order of acquittal of the accused with the observations that the Court on several occasions issued processes to the witnesses including the complainant but they did not turn up. The learned trial Court also observed that the complainant is not interested to examine himself before the Court. Thereafter, considering the principles enunciated in the case of *Kamar Ali* v. *Abdul Manaf*, reported in 39 DLR 319, the Court below disposed of the case in the manner as stated above.

10. Now, the paramount question before us is whether in a sessions case the concerned Court has any power and/or authority to acquit an accused under section 265H of the Code without examining any witnesses or without exhausting the legal procedures for making sure of the attendance of the witnesses?

11. In a normal course of law, neither the Sessions Judge nor the Additional Sessions Judge or the Joint Sessions Judge has any power to acquit any accused without examining any witnesses or without exhausting the formalities laid down in the Code. However, to address the same, the relevant laws and rules are need to be addressed here to arrive at a correct decision on the matter mentioned above. Section 265H of the Code is reproduced below in verbatim:-

> "If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defense on the point, the Court considers that there is no evidence that the accused committed the offence, the Court shall record an order of acquittal."

12. From a plain reading of the provisions of section 265H it transpires vividly that after framing charge against the accused, the Sessions Judge is bound to examine witnesses and upon hearing the prosecution as well as defence if he considers that there is no evidence to proceed against the accused then the Court should pass an order of acquittal to acquit the accused. Recording the evidence before passing such an order is mandatory under section 265H of the Code.

13. In the case of ***State of Kerala*** v. ***Mundan*** reported in 1981 CriLJ 1795 it was held by Kerala High Court:

> "8. After duly considering the arguments advanced on either side and carefully perusing all the relevant sections in Chapter XVII, we are of the view that

the words "no evidence" in Section 232 Cr.P.C. cannot be construed or interpreted to mean absence of sufficient evidence for conviction or absence of satisfactory or trustworthy, or conclusive evidence in support of the charge. The Judge has to see whether any evidence has been let in on behalf of the prosecution in support of their case that the accused committed the offence alleged, and whether that evidence is legal and relevant. It is not the quality or the quantity of the evidence that has to be considered at this stage. If there is any evidence to show that the accused has committed the offence, then the Judge has to pass on to the next stage. It is not open to him to evaluate or consider the reliability of the evidence at this stage.

9. Sections 225 appearing in Chapter XVIII of the Code, deal with procedures relating to trial of cases before the Court of Session. The object of Section 232, no doubt, is to have a speedier conclusion of the trial and to avoid unnecessary harassment to the accused by calling upon him to enter on his defence and adduce evidence. This section substantially corresponds to sub sections (2) and (3) of Section 289 of the previous Code and there is no material change. In a trial, before a Court of Session, an accused has a right to claim for a discharge under Section 227 of the Code. This is a new provision introduced in the present Code. Under this section if upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in that behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused after recording his reasons for so doing. Under Section 228 which is also a new section, if, after consideration of the record and documents referred to in Section 227 of the Code, and hearing both parties, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which is exclusively triable by that court, he shall frame in writing a charge against the accused, and if the offence is not exclusively triable by that court, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate. Under the above sections, the Judge is not considering any evidence in the strict or legal sense, but it is only the recorded the case and the documents submitted therewith which have to be considered by him. It is not necessary that at this stage these documents must have been proved. Under Section 232, what the Judge has to look into and consider is whether there is legal evidence adduced on behalf of the prosecution connecting the accused with the commission of the crime and not its quality and quantity. He is not to consider at this stage the sufficiency, reliability or trustworthiness of that evidence. In other words, what the Judge has to see is whether there is any evidence on record which, if true, would amount to legal proof of the offence charged against the accused and not whether that evidence is satisfactory, trustworthy or reliable. Although direct decisions under Sec. 232 on the point are very few, there are a number of decisions under Section 289 of the Previous Code, where various High Courts have considered what is meant by the expression "no evidence" in that section. It is a salutary principle in a sessions trial that no final opinion as to the reliability or acceptability of the evidence should be arrived at for the Judge until the whole evidence before him and has been duly considered. (See Queen Empress v. Ramalingam (ILR 1897 Mad 445). It is only after the accused is called upon to enter his defence under Section 233 and after the evidence, if any, adduced on behalf of the accused and hearing the counsel appearing for both sides, the Judge hearing the case after a due consideration of the evidence decides whether the evidence adduced on behalf of the prosecution is

reliable and trustworthy. In cases solely depending upon the ocular account of the witnesses, it might sometimes happen that all those witnesses, one by one, might turn hostile to the prosecution without giving any evidence in support of the prosecution. There may be a case where the only legal evidence on record in support of the prosecution case is the confession of a co-accused or the evidence of witnesses examined on behalf of an accused. In cases where there are a number of accused, it might happen there may not be any evidence connecting one or more of them with the commission of the offence. These may also be cases where evidence connecting the accused with the crime is only rank hearsay. All these are cases where it can be said that there is no evidence that the accused committed the offence and Section 232 can be invoked. But in a case where there is some evidence connecting the accused with the commission of the crime, it is the duty of the Judge to pass on to Section 233 and not to appreciate that evidence and find out whether it was reliable or not to pass an order under Section 232 Cr.P.C. The expression "there is no evidence" under Section 289 does not mean absence of reliable or conclusive evidence but means absence of evidence which, if believed to be true, would warrant a conviction. (See Emperor v. Nawal Kishore 30 Cri LJ 519 at p. 521 (Pat)). It was held in Rahamali Howladar v. Emperor AIR 1925 Cal 1555: 26 Cri LJ 1151 that if there is any evidence, although worthless. Judge should not direct jury to return verdict of not guilty; that no evidence worth the name is under the law very different from no evidence: that if a Judge directs the jury to return a verdict of not guilty, because he holds that there was no evidence worth the name against the accused, he commits an error of law. The question what is meant by "no evidence" under Section 232 came up for consideration before the Karnataka High Court in Kumar v. State of Karnataka MANU/KA/0137/1975 and before the Bombay High Court in MANU/MH/0318/1977. In both these cases, it was held that under Section 232 the Sessions Judge has to look into the prosecution evidence and the materials brought out in the examination of the accused and after hearing the counsel for both sides decide whether there is any evidence or not, to show that the accused had committed the offence and that at that stage the Judge is not entitled to evaluate the evidence and find out whether the evidence is reliable and trustworthy. In Pari Ram v. State of U. P. : (1970) 3 SCC 703 while considering a similar question arising under Section 289 of the Previous Code, it was held by the Supreme Court that what Section 289 requires is that if the Sessions Judge comes to the conclusion that there is evidence to show that the accused had committed the offence, then the accused should be called upon to enter on his defence and that the value to be attached to that evidence was not to be considered at that stage. A Division Bench of this Court also, as pointed out earlier took the same view in State of Kerala v. Mohamedkutty 1977 Ker LN Case No. 34 p. 62. We are in respectful agreement with this decision which, according to us, does not require any reconsideration. On looking into the materials on record in the light of the principles stated above, it cannot be said that this is a case where there is no evidence as contemplated under Section 232 Cr.P.C.

10. It is clear from the above discussion and finding that the learned Sessions Judge has committed a clear illegality by appreciating and finding out whether the evidence was reliable and trustworthy and acquitting the accused under Section 232 Cr. P.C. This being a serious illegality the order of acquittal under this section has to be set aside and the case has to be sent back to the court below, for fresh disposal.

> We therefore allow this appeal, set aside the order of acquittal, without going into the merits or demerits of the evidence on record, send back the case to the trial court for disposal afresh according to law, from the stage where the illegality was committed by that Court."

14. In ***Queen Empress*** v. ***Vajiram*** [(1892) ILR 16 Bom 414] it was held that the words "no evidence" in the 2nd and 3rd clauses of Section 289 of the Code of Criminal Procedure (Act X of 1882) must not be read as meaning "no satisfactory, trustworthy or conclusive evidence". If there is evidence, the trial must go on to its close, when in trials by jury, the jury, and in other trials, the Judge after considering the opinion of the assessors have to find on the facts. It is only in the absence of any evidence as to the commission of the offence by the accused that the Court can record an acquittal without allowing the trial to go on, or obtaining the opinion of the assessors, or that the Court can direct the jury, without going into the defence, to return a verdict of not guilty.

It was thus in substance held that if there is evidence, the trial must go on to its close; the words "no evidence" must not be read as meaning "no satisfactory, trustworthy or conclusive evidence."

15. In respect of object of enacting section 232 of the Code (section 265H in our jurisdiction) in the case of ***Hanif Banomiya Shikalkar*** v. ***The State of Maharashtra*** reported 1981 CriLJ 1622 Bombay High Court observed:

> "27. In Queen Empress v. Imam Ali Khan, ILR (1896) Cal 252, it was ruled that the formality of calling upon an accused person to enter on his defence under the provisions of Section 289 of the Criminal Procedure Code, 1898 is not a mere formality, but is an essential part of a criminal trial. Omission to do so occasions a failure of justice, and is not cured by Section 537 of the Code.
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> ... ...
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> 30. Now the object of Section 232 of the Criminal Procedure Code (new) is to expedite the conclusion of the Sessions trial and, at the same time, to avoid unnecessary harassment to the accused by calling upon him to adduce evidence or to avoid the waste of public time when there is no evidence at all. The accused will have to be acquitted under Section 232 of the Code if there is no evidence at all. If there is some evidence, no order of acquittal can be recorded. The court is not to embark upon the question at that stage whether the evidence is sufficient or is reliable. If, however, the Court finds that there is no evidence at all, the order of acquittal had to follow. Such an order would be subject to appeal. The learned Judge passing such an order may have to give some reasons as to why he came to the conclusion that there was no evidence at all as his order of acquittal would be ordinarily subject to appeal. However, if there is no acquittal, ordinarily a small order on the order sheet or somewhere in the proceedings indicating that that was not a case of 'no evidence at all' and that the accused has not been acquitted and that he is called upon to enter on his defence would be sufficient. An unnecessarily long order, as happened to be made in Arun's case MANU/MH/0318/1977 (supra) would cause an apprehension in the mind of the accused that the learned Judge has already made up his mind as to the guilt of the accused. It is clear from the wording of Section 232 that the question whether the accused wants to lead evidence in defence would not arise when the trial is at the stage of Section 232 of the Criminal Procedure Code. It would be necessary to put that question to the accused when the trial enters the stage of Section 233."

16. In the case of ***Md. Taheruddin*** v. ***Abul Kashem*** reported in 37 DLR (1985) 107 a Division Bench of this Court observed:-

"8. If prosecution witnesses are absent on the date fixed for the examination of witnesses, the Sessions Court has to see whether an adjournment is necessary or advisable. Section 344 Cr.P.C. enables the Sessions Court to postpone or adjourn the proceedings and it is worthwhile to quote Section 344 Cr.P.C. in this regard:

"344 (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such term as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

... ...

Recent substantive changes in the Code of Criminal Procedure in Bangladesh have not made any difference in the legal position in so far as the trial of a case before a Sessions Court is concerned. After a charge is framed in a Sessions Court the complainant is turned into an informant. It is the State which becomes the prosecutor and it no longer remains the duty of the informant to secure the attendance of his witnesses in the Court. It becomes the Court study and unless the Court exhausts all available modes of securing the attendance of witnesses, any order of acquittal for non-attendance of witnesses will clearly order, be an illegal order. Whatever the Sessions Court is required to do to ensure the presence of the informant and his witnesses by legal process, the Court must do and then proceed with the trial according to law. Law authorises the Sessions Court to pass an order of acquittal U/S 265H Cr.P.C. only after taking the evidence for the prosecution, examining the accused, hearing the prosecution and the defence and giving a finding that there is no evidence that the accused committed the offence. It postulates that the Sessions Court has to take all possible steps for taking the evidence for the prosecution. It cannot simply acquit the accused persons for default of the prosecution witnesses to attend the Court on the date of trial. The Public Prosecutor has no business to inform Court that the informant had lost interest in the prosecution of the case and the Sessions Court is also not obliged to honour that information without exhausting itself all the processes for compelling the attendance of prosecution witnesses. It is only when the Sessions Court exhausts all the processes then it acquires the right of recording an order of acquittal in substantial compliance with the provisions of section 265H Cr.P.C."

17. In the case of ***Amena Hoque*** v. ***Rajab*** reported in 38 DLR (AD) (1986) 303 it has further been observed by our Apex Court that:-

"Chapter 23 provided for trial before a Court of Session. Section 265A provides that in every trial before a Court of Sessions, the prosecution shall be conducted by a Public Prosecutor who opens the case on behalf of the prosecution.

Section 265C enables the Court to discharge the accused by recording the reasons for so doing if the Court considers "there is no sufficient ground for proceeding against the accused." Even at this stage no evidence is produced. Then the Court frames charge if it is of opinion "that there is ground for presuming that the accused has committed an offence."

Section 265D(2) provides that the charge shall be read and explained to the accused and the accused shall be asked to plead. If the accused pleads guilty, the Court shall record the plea and may, in discretion, convict him thereon (Section 265E). If the accused, however, claims to be tried, the Court shall fix a date for the examination of witnesses and may, on the application of the prosecution issue any

process for compelling the attendance of any witness or the production of any document or other thing. Then Section 265G provides for recording of evidence.

Now comes Section 265H which reads as under:

"If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defense on the point, the Court considers that there is no evidence that the accused committed the offence, the Court shall record an Order of acquittal."

It is only at this stage the Court can pass an Order of acquittal. Section 339C provides for time for disposal of cases for different categories of Courts. Sub-Section (3) reads as under:

"If for any reason to be recorded in writing a Magistrate or a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge is unable to conclude the trial of a case within the specified time, he shall conclude such trial within thirty days after the expiry of the specified time."

Sub-Section (4) reads as under

"If a trial cannot be concluded within the specified time or the extended time as mentioned in sub-Section (3) further proceedings in respect of the trial shall stand stopped and the accused person released."

Reading these two sections together there is no hesitation in saying that the learned Sessions Judge erred in law in passing the order of acquittal. The High Court Division further fell into error when dealing with the contention of the learned Advocate for the prosecution that the learned Sessions Judge ought to have exhausted all process including issuing warrant of arrest to secure attendance of the witnesses and the learned Judges observed that "it does not appear the prosecution made any such prayer nor it seems to be aggrieved by the Order of acquittal". The observation is unfortunate because Section 265F provides "the Court may on the application of prosecution, issue process for compelling the attendance of any witness." In a criminal trial the State is the prosecutor and it was the duty of the State to secure the attendance of the witnesses and if for any reason it needed the process of the Court the same should be issued on the application of the prosecution. Without complying with this provision the learned Sessions Judge passed the order of acquittal which is not sanctioned by Law and therefore, this Order must be set aside."

18. It is also observed by another Bench of this Court that when all process to compel attendance of prosecution witness is completed, order of acquittal under section 265H is correct. Explaining the scope of Section 265H of the Code the Court states that:-

"In the instant case, summons were issued on 14.3.84 and thereafter, warrants were issued on 22.4.84 for compelling the attendance of the prosecution witnesses. In the circumstances, we are of the opinion that the observation made by the learned Additional Sessions Judge that sufficient opportunity was given to the prosecution and all processes were exhausted for compelling the attendance of the prosecution witnesses appears to be correct. In the circumstances of the case, after the failure of the prosecution to adduce any evidence, we are of the opinion that the learned Additional Sessions Judge was competent to pass the impugned order of acquittal under section 265H. Apart from this, for our satisfaction, whether there has been a miscarriage of justice, we have gone through the (original) First Information Report, statements made by the 6 charge sheeted witnesses under section 161 (certified copy) and the postmortem report (certified copy). The allegations made in the First Information Report disclose that an offence under section 364 of the Penal Code had been committed at 02-00 hours on 2.7.81. The F.I.R. was lodged at 09-00 hours on 6.7.81. There is a delay of more than 4 days in lodging the F.I.R. It

has also been stated in the F.I.R. that one Aftar Ali who came to rescue victim Chand Ali, was severely beaten and he was admitted in the Sunamgonj Hospital for treatment. Aftar Ali is not a charge sheeted witness. The place of occurrence is only 20 miles away from Sunamgonj police station. Taking all these facts into consideration and the attending circumstances of the case, we are of the opinion that no useful purpose would be served in setting aside the impugned order of acquittal. We are further of the opinion that there has been no miscarriage of justice caused by the impugned order of acquittal. [***Kamar Ali*** v. ***Abdul Manaf***, 39 DLR (1987) 319]

19. Criminal Rules and Orders (Practice and Procedure of Subordinate Court), 2009 was issued by the authority of the Supreme Court (High Court Division) where in Rule 638 the procedures that to be followed by the Court concerned under Section 265H of the Code is reproduced as under:-

"Rule 638. (1) Before passing an order of acquittal under section 247 of the Code, the Magistrate should ascertain that summons was issued at the time of taking cognizance on complaint. If warrant of arrest is issued on complaint, or if it is a police case, section 247 of the Code has no application at all. Attention is also drawn to the fact that on the date fixed for hearing of such complaint case, if the complainant does not appear and the Magistrate does not adjourn the hearing of the case, an order of acquittal shall be passed under section 247 of the Code. The date on which appearance of the complainant is not necessary, the Magistrate should not generally apply this provision in passing an order of acquittal in an unreasonable manner.

Proviso to section 247 of the Code should be kept in view while passing orders thereunder.

(2) An order stopping a proceeding and releasing the accused at any stage without pronouncing judgment under section 249 of the Code should be passed in a police case only. This power should be used sparingly and it cannot be invoked in a complaint case. When the Magistrate is fully satisfied that the prosecution witnesses are not available on so many consecutive dates even after his best endeavour by exhausting all processes of the Court issued and served properly in time and there exists exceptional and unusual circumstances preventing the court from proceeding with the case, this power can be exercised.

Once the Magistrate has stopped the proceeding and released the accused, there is no scope for revival of the case by him as decided in the case of Niamat Ali Sk & others Vs. Begum Enayetur Noor & others reported in 42 DLR (AD) 250. So the Magistrates are to be very careful in exercising the power under section 249 of the Code.

(3) For the Sessions Judges, when all processes to compel attendance of the prosecution witnesses are exhausted and prosecution witnesses have failed to appear, an order of acquittal may be recorded under section 265H of the Code to get rid of unnecessary dragging of the sessions cases for years together.

The principles enunciated in the case of Kamar Ali Vs. Abdul Mnnaf reported in 39 DLR (HCD) 320 and in the case of Md. Taheruddin Vs. Abdul Kashem & others reported in 37 DLR (HCD) 107 may be followed in dealing with sessions cases in this regard."

20. So, from the above discussion, it is clear that before passing an order of acquittal, the Sessions Court must take necessary measures to secure attendance of the witnesses and in appropriate cases, the same should also be issued at the instance of the Public Prosecutor and further that in a criminal trial the State is the Prosecutor and in the present case at our hand, the Public Prosecutor filed an application seeking adjournment of the case on the ground of bringing witness to prove the case. But, as we have observed, the learned Joint Sessions

Judge, without showing any valid reasons has rejected the said petition. Before exhausting all available modes of securing the attendance of witnesses, passing order of acquittal by the Sessions Judge is nothing but a clear violation of law which tentamounts to miscarriage of justice. In this situation, our considered view is that in exercising his power under section 265H of the Code, the Sessions Judges, **at first**, shall take meaningful steps for securing the attendance of the witnesses; and **secondly**: if any witness is available record the same; and **thirdly**: in case of non-availability of any other witnesses, take hearings from both the parties and thereafter shall pass an order of acquittal of the accused.

21. Now, let us see the impugned order dated 09.01.2018 passed by the learned Joint Sessions Judge, 2nd Court, Manikganj which reads as under:

> "অদ্য সাক্ষীর জন্য দিন ধার্য্য আছে। অত্র মামলার জামিনমুক্ত ০৩ জন আসামী (১) শিরিন আক্তার (২) কাদের (৩) লাইলী বেগম হাজির আছেন। রাষ্ট্রপক্ষ সাক্ষীর জন্য সময়ের আবেদন করিয়াছেন।
>
> শুনলাম। নথি পর্যালোচনা করলাম। নথি পর্যালোচনায় দেখা যায় একাধিকবার অভিযোগকারী সহ অন্যান্য সাক্ষীর প্রতি প্রসেস ইস্যু করা হয়েছে এবং সাক্ষীদের মামলার তারিখ জ্ঞাত করানো হয়েছে মর্মে সংশ্লিষ্ট A.S.I এর প্রতিবেদন সহ সাক্ষীর সমন ফেরত এসেছে, যা নথিতে সংযুক্ত আছে। ফলে এ থেকে প্রতীয়মান হয় যে, মামলার অভিযোগকারী সাক্ষ্য প্রদানে আগ্রহী নন। কাজেই রাষ্ট্রপক্ষের সময়ের আবেদন নামঞ্জুর করা হলো। এমতাবস্থায়, Kamar Ali Vs. Abdul Manaf, 39 DLR P-319 এর সিদ্ধান্ত অনুযায়ী আসামীর The Code of Criminal Procedure এর 265(H) ধারা অনুযায়ী খালাস পাওয়ার যোগ্য।
>
> অতএব,
>
> আদেশ হয় যে,
>
> আসামী শিরীন আক্তার, মোঃ কাদের ও লাইলী বেগমকে The Code of Criminal Procedure এর 265(H) ধারা অনুযায়ী খালাস প্রদান করা হলো।"

22. From the above it appears that the learned Joint Sessions Judge without going through the relevant provisions of section 265H of the Code as well as the relevant Rules [Rule No. 638] of the **Criminal Rules and Orders,** [Volume I] has illegally passed the impugned order occasioning failure of justice.

23. Under the provisions of section 265H of the Code the duty of a Sessions Judge is to look into the prosecution evidence and materials brought out in the examination of the accused and thereafter should hear the learned Advocates of both sides and considering the evidences and materials on record if he finds that all the procedures under the law have been exhausted and if he is of the opinion that he has taken all possible steps for taking down the evidences of the prosecution but the prosecution has miserably failed to comply with the order of the Court, in that case, the duty casts on the Court to pass an order of acquittal of the accused. But in the present case, it appears manifestly that the learned Joint Sessions Judge without complying with the relevant laws and procedures has illegally dismissed the petition filed by the prosecution with the observations that the prosecution is not willing to adduce evidences.

24. Having gone through the entire materials on record, our compassionate view is that the learned Joint Sessions Judge, 2nd Court, Manikganj has illegally passed the order of acquittal of the accused on 09.11.2018 which is not in accordance with law and, as such, is liable to be set-aside.

25. In the result, the Rule is made absolute.

26. The impugned order dated 09.01.2018 passed by the learned Joint Sessions Judge, 2nd Court, Manikganj in Session Case No. 08 of 2016 is set-aside.

27. The learned Joint Sessions Judge, 2nd Court, Manikgonj is directed to dispose of the case afresh according to law, as early as possible.

28. Communicate the judgment and order to the Court concerned forthwith.