

(1968) 02 GUJ CK 0009

In the Gujarat High Court

Case No : Criminal Revision Application No. 490 of 1965

Balamal Matlomal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-02-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 435, 439, 517, 517(1), 520
Limitation Act, 1963 — Article 131

Citation : AIR 1970 Guj 26 : (1970) CriLJ 46 : (1970) 11 GLR 130

Hon'ble Judges : N.G. Shelat, J

Bench : Single Bench

Advocate : J.M. Acharyya, for the Appellant; A.H. Thakar, Asst. Govt. Pleader, for the Respondent

Judgement

1. The charge against one Ibrahimkhan Fazalkhan in Criminal Case No. 1201 of 1964. In the Court of the Chief City Magistrate, Ahmedabad, was that he had committed theft of 5 catchpit jalis ordinarily known as covers of the gutters, of the Municipal Corporation of Ahmedabad, in the early morning of 1-10-1964, so as to be liable for an offence u/s 379 of the Indian Penal Code. The accused was found going in auto rickshaw bearing No. GTD 285 wherein he had put the said stolen property. He was stopped, and as he could not explain about the possession of those catch-pit jalis that property as also the auto rickshaw came to be attached under a panchnama made in respect thereof. During that trial one Gokaldas Kanjibhai was examined as a witness on behalf of the prosecution, as the owner of that auto rickshaw. According to his evidence he had given that rickshaw to one Babubhai Nurbhai on hire on 30-9-1964 with instructions to return the same to him at Amedpura before the next morning. Some time after he learnt that his rickshaw was lying at the Kalupur Police Chowki, Babubhai also informed hire about the rickshaw being attached by the police. In that case the learned Chief City Magistrate, Ahmedabad found the accused guilty for an offence u/s 379 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three months and to pay a fine of Rs. 200 or in default to suffer

rigorous imprisonment for one month. At the same time he passed another order whereby the Muddamal auto rickshaw before the Court was directed to be confiscated to the State. Aggrieved by that order passed on 21-4-1965 the accused had preferred an appeal, and it came to be dismissed.

2. During the pendency of that trial however, that Gokuldas Kanjibhai had preferred his claim in respect of this auto rickshaw and the same was rejected. That Gokuldas had also filed an application in revision No. 181 of 1965 against that order of confiscation passed by the learned Magistrate in this Court and on that application the following order was passed by Raju J., on 5-7-1965:-

"I see no reason to exercise my revisional jurisdiction in this case."

It further appears that the present petitioner Balamai had also filed Criminal Revision Application No. 242 of 1965 against the order of confiscation passed by the learned Magistrate. In respect of that the following order was passed by Mehta J., on 8-9-1965.:

"Mr. Acharya gives an application to withdraw his revision application on the ground that he had not approached the trial court.

This application is, therefore, rejected for want of prosecution."

Mr. Acharya has stated that since he was advised by the Court that he should approach first to the Court of facts he requested for being permitted to withdraw the application so as to enable him to file the same in the Court of the learned City Magistrate. Ahmedabad. After that order was passed on 8-9-1965 this petitioner Balamai presented an application on 17-9-1965 in the Court of the learned Magistrate who rejected the same. Feeling dissatisfied with that order passed on 30-9-1965 by Mr. D. C. Mehta, Chief City Magistrate, Ahmedabad, the applicant has come in revision before this Court.

3. The application discloses two prayers. The first is that the order passed on 21-4-1965 by the learned Magistrate regarding the disposal of the auto rickshaw, the muddamal property, before the Court in Criminal Case No. 1201 of 1964 was illegal and improper and that it should be set aside. By the second prayer he claimed to be entitled to have that rickshaw restored to him, he being its owner and if necessary, by holding an inquiry in respect thereof. However, before this Court, Mr. Acharya, the learned advocate appearing for him, has claimed to be entitled to its possession on the basis of hirepurchase agreement entered into between him and Gokuldas and as it was standing in his name before the registration authority before it came to be attached by the police. It came to be attached by the police. It was contended by Mr. Acharya that since he was not a party to the proceeding in which the order of confiscation of auto rickshaw came to be passed by the learned Magistrate u/s 517(1) of the Code he could not file any appeal against that order and as soon as he came to know about it he approached the High Court for setting aside the same so as to enable the trial Court to make suitable inquiry as to whom the auto rickshaw should be returned

u/s 517 of the Criminal Procedure Code. Mr. Acharya's contention then was that since it was the view of the Court that before filing an application in revision against that order, he should have first approached the original Court which passed the order and on that basis or rather feeling that view to be correct he withdrew his application by obtaining permission from the Court so as to enable him to present an application in the trial Court. His first contention was that any order passed on his application is revisable by this Court having powers to revise the same. If found to be illegal or improper and unjust in the circumstances of the case. According to him, the order can hardly be justified in law inasmuch as the use of rickshaw cannot be called use thereof in commission of an offence of theft by the accused and that again when it belongs to some one else, who cannot be said to have known that he would so use. On the other hand it was pointed out by Mr. Thakar, the learned Assistant Government Pleader, for the State that this petitioner has no right to present any such application to the Court below for the simple reason that the Court had already passed an order directing confiscation of the muddamal property in the case, and since his remedy against that order was only before the Superior Court such as the Appellate Court or Revisional Court, and as he had already availed of that opportunity, and when his application had come to be rejected by the High Court on 8-9-1965, he cannot re-litigate the same question even if the order is found to be illegal or unjust, and more particularly after the period of limitation under Article 131 of the Limitation Act was over.

4. Before we consider the legality, propriety or otherwise of the order of confiscation passed by the learned Magistrate, in view of the contentions raised, it is essential to consider whether the petitioner has a right to come in revision in this Court in respect of an order passed by the learned Magistrate on an application presented by him on 17-9-1965, and if so whether this Revision Application is in time. The contention of Mr. Acharya is that this application can be treated both u/s 520 as also u/s 435 or 439 of the Criminal Procedure Code. As I said above there are two prayers in the application one for setting aside the order of confiscation of the auto rickshaw passed on 21-4-1965 at the conclusion of the trial and that obviously cannot be set at naught by the same Court, though no doubt it had authority to consider any such application wherein claim of any muddamal property if made during the pendency or at the conclusion of the trial, u/s 517 of Criminal Procedure Code. In the case of *Natwarlal Damodardas v. State*, Criminal Revn. Appln. No.156 of 1967, decided by me recently on 31-1-1968 (Guj) section 517(1) of the Code was considered, and having regard to the use of words "any person claiming to be entitled to possession thereof" therein, and in agreeing with the view taken by Raju J., in *Mohmed Yusuf v. Jivraj Premjibhai* ILR (1963) Guj 1002, while no difficulty arises in passing an order regarding disposal of the property at the end of the trial affecting the parties in the case, as it can consider their claims, but when no such claim or right to possession was made by a third party, the Court cannot be required to take any notice of any such supposed claim. But if the claim is made

by any third party before the court even during the pendency of the trial that claimant has a right to be heard about his claim at the end of the trial and before passing any orders u/s 517(1) of the Code. In the present case, however, the Court appears to have before it the claim of Gokaldas, and it had come to be rejected. Thus the learned Magistrate cannot be said to be in any way wrong in the order he passed in the case. This applicant was however, not a party to the proceeding. Nor was he a witness in regard to the muddamal property so as to infer knowledge to him with regard to the trial. He is a third party-claimant, and in my opinion, he should have, therefore, made a claim before that Court so as to enable that Court to deal with his claim while passing an order u/s 517(1) of the Code. Not having so made a claim, he cannot claim it in that Court as the order was already passed, and in that event, his remedy lay by preferring an appeal or revision against that part of the order, and it is only if that order is set aside that his claim can be considered by the original Court. The learned Magistrate was, therefore, right in rejecting his application as, he cannot reopen the matter and revise his own order of 21-4-1965.

5. The question then is whether this revision application lies against the order passed by the learned Magistrate. It was said that this may be treated as an application in revision u/s 520, or even u/s 435 or 439 of the Criminal Procedure Code and at any rate, the High Court exercising supervising Jurisdiction over subordinate Courts can set aside an order of confiscation, if found to be illegal and unjust and do justice to the party affected thereby. Now Section 520 of the Criminal Procedure Code provides:

"Any Court of appeal, confirmation, reference or revision may direct any order u/s 517, Section 518 or Section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just."

Since the order of confiscation of muddamal property was passed u/s 517 I would set out the relevant portion of that provision also:-

"517(1): When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise or any property or document produced before it or in its custody or regarding which any offence appears to have committed, or which has been used for the commission of any offence."

On a plain perusal of Section 520, it appears to be an enabling provision, and confers no right as such to any person for filing the appeal or an application in revision thereunder. By this provision the Court of Appeal or any Court of Revision..... has been empowered to modify, alter or annul any such order that may have been passed under Sections 517, 518, or 519 and make any further orders that may be just. It follows, therefore, that if any appeal or revision against the order in the case were before the Court of Appeal or Revision

it could have considered the legality or propriety of the order passed therein u/s 517 of the Criminal Procedure Code, even if no appeal or revision against that part of the order u/s 517 of the Code was before it. The question however is whether any such Court can entertain and decide any such question when no appeal or revision is filed against the main case. In other words, whether any appeal or revision lies against any such order affecting a third party who was not before the Court in the main case u/s 520 of the Criminal Procedure Code. Such a question arose before the Division Bench of the Nagpur High Court in *Nandu v. Dhasada* 1967 MPLJ 67 viz., as to whether an appeal lies u/s 520 of the Code against an order passed by a Criminal Court u/s 517 of the Code, and the answer to the same can well be found in the observations which run thus:-

"On the whole, we think that the concurrence of opinion on this point is that S. 520 of the Code of Criminal Procedure does not confer a right of appeal but is only an enabling section creating a supervisory power in Courts of appeal, confirmation, reference or revision. These Courts can pass the order in the main case, or if no appeal has been filed against the main case, can be moved to pass such order as they think fit in respect of the property involved in the criminal case. It may be pointed out that the subordination of the Courts according to the better view is to be taken into account in determining the forum for the exercise of such supervisory powers. It is not necessary that the Court of appeal must every time be the Court of appeal to which an appeal against the main decision can be taken."

The same observations can well apply to "revision" contemplated in that section and, therefore, it can be held that while the appeal or revision against that order of confiscation as such cannot lie, u/s 520 of the Code, such a Court of Appeal or Court of Revision can be moved to pass such an order as it thinks fit in respect of property involved in the criminal case. That power can thus be exercised by this Court which is both a Court of Appeal as also of Revision, in any such matter brought to the notice of the Court. But apart from that position, the revisional powers of the High Court are wide enough under Sections 435 and 439 of the Code, to consider the legality or propriety of any such order passed in any case by any subordinate Court, and they can be exercised by the Court even suo motu or on being moved by any party affected by any such order. In the case of *Lala Har Bhagwandas and Another Vs. Diwan Chand*, a similar question had arisen and it was held that even after the appeal or revision against the main order in the case is disposed of, an application u/s 520 would lie to the Court. Even if when the matter does not come up before High Court at all, the appellate Court can be moved by way of original application. Then the observations are that even a revision under Sections 435 and 439 of the code would lie for the purpose. Thus while this Revision application may not so strictly lie u/s 520, it can be treated as an application invoking exercise of powers by this Court u/s 520 of the Criminal Procedure Code. In any event, the Court can exercise powers under Sections 435 and 439 of the Criminal Procedure Code, and therefore the present application whether against the order passed by the learned Magistrate or not, it

can be heard, and the validity or propriety of the orders regarding the disposal of property etc., passed u/s 517 of the Code, can well be raised, set aside or modified by this Court. The decision of this court in Kanchanlal Somalal Chokshi Vs. The State and Another, also leads support to the same.

6. It was then pointed out by Mr. Thakar that he had preferred a revision application against the order of confiscation passed in the case, and since it was rejected, he cannot be allowed to reagitate the same. As already pointed out hereabove, the application was not decided on merits and it had come to be withdrawn with the Court's permission, with a view to file an application to the original Court. He had then filed an application in the lower Court, and it is against that order apparently that he has come before this Court. In these circumstances, there can therefore, be no bar on merits. It was on a probably doubtful position of law, that he withdrew the application and at any rate it was obviously a bona fide act on his part.

7. It was next urged by Mr. Thakar the learned Assistant Government Pleader for the State that the application should be filed within 90 days from the date of the order of confiscation of the property under Art. 131 of the Indian Limitation Act. The order was passed on 21-5-1964 and the application either to the trial Court or to this Court is obviously beyond 90 days provided therein, it being against an order passed under the provisions of the Criminal Procedure Code. On the other hand, it was pointed out by Mr. Acharya that in respect of any application u/s 520 of the Code before this Court, there would not arise any question of limitation within which he must come in revision. In support thereof he invited a reference to a case of Kanshi Ram v. Emperor AIR 1924 Lah 75 , where it was held that no period of limitation was prescribed for an application for restoration of property u/s 517 and it can be made within a reasonable time from the date on which the accused is acquitted of the crime with which he was charged. Then it is observed that the words "and make any further orders that may be just" in Section 520 obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of u/s 517. Now such a question would not arise, once it is found that this Revision Application can be treated as an application invoking the supervisory powers of a Court of Appeal or Revision in relation to any such order passed u/s 517, and that can be exercised by the Court at any time when it comes to its notice or is brought to its notice by any such party. This point would therefore, have only academic interest, and if any party were to come in revision or appeal against that order, the provisions of Limitation Act would no doubt govern. Since the matter was argued from this point of view, I would consider the same. Now under the old law of limitation no such provision as we have now Article 131 under the amended Act of Limitation, 1963, was there. The case relied upon by Mr. Acharya may not, therefore, apply. But now in the new amended Limitation Act, 1963, we have Article 131, namely added, whereby period of limitation of 90 days has been provided "from the date of the decree or order or sentence sought to be revised for the exercise of its powers of revision by any Court under the

CPC or Criminal Procedure Code. 1898." The order of confiscation passed by the learned Magistrate u/s 517 of the Criminal Procedure Code is obviously an order under the Criminal Procedure Code and is sought to be revised by the Court in exercise of its power of revision. In my view, therefore Article 131 would apply and the period contemplated therein ordinarily would run from the date of the order of the confiscation of the muddamal auto rickshaw, which was 21-4-1965. Now there is no doubt that this period of limitation would clearly govern the party to the proceeding who comes in revision of any such order. But the present petitioner was not a party to the proceeding and it would be, therefore, difficult to say that he knew of the order on the date it came to be passed by the learned Magistrate. If he can move the Court, it appears reasonable and fair that the period should run from the date of his knowledge of that order in the case. In this respect I would refer to case of Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, , where the question arose as to whether the expression "the date of the award" in proviso (b) to Section 18(2) of the Land Acquisition Act, 1894 must mean the date when the award is either communicated to the party or is known by him either actually or constructively. Their Lordships of the Supreme Court said that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order, the making of the award must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by the Collector u/s 12 of the Land Acquisition Act, 1894 either actual or constructive is an essential requirement for fair play and natural justice. Their Lordships then observed that it would be unreasonable to construe the words "from the date of Collector's award" used in the proviso to Section 18 in a literal or mechanical way. Those observations were followed by this Court. In Criminal Reference No. 75 of 1966, the judgment whereof was delivered on 23rd February 1967, where a similar question had arisen with regard to the provisions contained in Section 488(6) of the Criminal Procedure Code. In my opinion, therefore, the period of limitation would have to be counted not from the date of the order passed by the learned Magistrate in the case namely 21-4-1965 but from the date when this petitioner came to know about. He can be said to have come to know on 14-6-1965 when he presented the revision application. If we calculate the period of 90 days from that date the application should have been filed by the petitioner in the trial Court on or before 12-9-1965. There has been, therefore thus delay of 5 days. That deserves to be condoned the same having been obviously due to misunderstanding of the position of law or at any rate due to time spent in bona fide having his remedy in the High Court. In fact that was a correct remedy and at that stage he was already in time. This is a fit case where such delay can well be condoned. But as already stated above this Court can pass just orders u/s 520 or under S. 439 of the Criminal Procedure Code, now that the matter is brought to our notice for invoking revisional or supervisory jurisdiction of this Court. I may incidentally observe that the revision application No. 181 of 1965 preferred by Gokaldas against that order cannot come in his

way for the reason that this applicant was not a party to that proceeding.

8. The material question, however that arises to be considered is as to whether the order of confiscation passed by the learned Magistrate on 21-4-65 in the Criminal Case NO. 1201 of 1964, u/s 517(1) of the Code is illegal and improper requiring interference by this Court. I have already set out Section 517(1) of the Code under which the order has been passed by the learned Magistrate. On a plain reading of this section, it is clear that the Court has every authority and power to exercise discretion in making any order for the disposal of the muddamal property before him in any case. That can be done by passing an order "for disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession of any property or document produced before it or in its custody or regarding which any offence appears to have committed or which has been used for the commission of any offence." Now the learned Magistrate has observed in his judgment, while passing such order in the end, that he "agreed with the learned Police Prosecutor that use of such vehicle makes the commission of such offence easy and, therefore, in his opinion, since five gutter covers were found from the auto rickshaw it was liable to be confiscated to the State." In other words, he directed it to be confiscated to the State, as in his view it was used in commission of that offence of theft. Now the words "which has been used for commission of an offence" have to be read and interpreted in a reasonable manner. The accused was going away in that rickshaw and in that were put the stolen articles. The auto rickshaw, therefore, does not necessarily become an article which can be said to have been used in the commission of an offence of theft. It was not an instrument with which that theft was committed, that it could be destroyed or confiscated. The theft was already committed, and the mere fact that the stolen property was placed in a rickshaw whereby he was going away, cannot be called an instrument used in commission of offence. If that were so, any motor car driven by any person from which a stolen property is found can well be taken as used in the commission of the offence. In that event the case may have to be confiscated to the State. Such a view hardly sounds in any way so reasonable or proper. I was referred to some cases by Mr. Acharya, in this respect, and I will refer to them in brief. In *Phula Singh v. Emperor* AIR 1931 Lah 565, a motor driver was prosecuted for an offence of causing grievous hurt while driving the car rashly and negligently u/s 338 of the Indian Penal Code. On his conviction the car was confiscated to the State as one used for commission of the offence u/s 516-A of the Criminal Procedure Code. It was held that it would be straining the language to hold that the motor car was used for the commission of the offence within the meaning of Section 516-A, Criminal Procedure Code. In *Jarip Gazi v. Emperor* 8 CWN 887, the point arose as to whether the confiscation in respect of two boats passed by the Court should be set aside. The facts of that case were that some persons broke into the granary of the complainant at night time and were carrying away two sacks of paddy. Those culprits left the sacks of paddy behind and managed to get into boats and tried to escape. They were pursued and they were then

prosecuted for an offence u/s 457 of the Indian Penal Code. The accused were convicted in respect thereof and the two boats in which the accused had run away were directed to be confiscated by the Magistrate on ground that they were used for commission of the offence u/s 517 of the Criminal Procedure Code. The matter was taken in revision in the High Court. The High Court while stating aside the order observed as under:-

"We hardly think that such could have been the intention of the Legislature. A man may use a lathi or other instrument for committing an offence. No doubt such a weapon can be dealt with under the section in question, but if the interpretation put by the Magistrate upon the Section were sound, one might conceive a case in which the house used by thieves or counterfeiters of coin for carrying on their unlawful trade would be liable to confiscation. Such an interpretation has never been given to this section. Apart from the question of law we think that the confiscation of the boats which apparently were hired by the petitioners would be very unjust to the owners."

Another case to which my attention was invited by Mr. Acharya was on of in re, Abdul Azeez, AIR 1944 Mad 59. In that case the accused was charged u/s 65, City Police Act, in connection with some hides which he was found carrying in a cart. He was charged only in respect of the hides and not in respect of the cart, but all the same the Magistrate directed the confiscation of the cart as well. It was then held in that case that the offence being only in respect of the hides there was no justification for passing an order, in respect of the cart confiscating it. The only order that ought to have been passed was an order directing the return of the same to the accused from whose possession it was seized, Apart from this some observations made in Suleman Issa Vs. The State of Bombay, may well be quoted here: "The powers of the Court, u/s 517 of the Criminal Procedure Code no doubt extend to confiscation of property in the custody of the Court, but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case. It is possible to conceive of cases where the subject matter of the offence may be property which under the law relating to the offence is liable to be confiscated as a punishment on conviction. The section contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the Section. Confiscation is not the only mode of disposal of property and is singularly inappropriate in a case where the accused is prosecuted, for an offence punishable with the maximum sentence of 3 months and a fine of Rs. 100/- u/s 61-E of the Bombay District Police Act. By reference to all these authorities, my attempt was to show that much though the learned Magistrate has powers to confiscate any such property u/s 517 of the Criminal Procedure Code, he has to exercise his powers in a reasonable and judicial manner. In the present case it is too much to say that the auto rickshaw was used in commission of an offence of theft in respect of the catch-pit covers from the Municipal gutters. All that he did was that he placed the stolen property in it and went away in that rickshaw and for that reason it cannot be said that rickshaw was used in commission of that

offence. The order is not only, therefore, illegal, improper but also very unjust to the real owner of the auto rickshaw. It is, therefore, liable to be set aside.

9. Once that order is set aside the trial Court would have to consider the claim made by this applicant as also by any person who can be used to have any interest therein. During the course of the trial it transpired that Gokaldas had made a claim in respect of that auto rickshaw. He would be a person interested and that way it would be necessary to give him an intimation by the Court while determining the claim sought to be made by the present petitioner in this case. It may well be necessary to issue notice to one Balamal Matlomal in whose possession that auto rickshaw was and from whom the accused is said to have taken. The learned Magistrate is, therefore, directed to issue suitable notices to those persons interested in the auto rickshaw and then after holding the proper inquiry with regard to the same pass orders u/s 517(1) of the Criminal Procedure Code.

10. The result, therefore, is that the order passed by the learned Magistrate on 21-4-1965 in the original Criminal Case No. 1201 of 1964 in so far as it directs confiscation of the auto rickshaw, muddamal property before the Court is set aside. This matter shall be sent back to the Court of the learned Magistrate. On receipt of the papers he shall issue notices not only to this applicant but also to two other persons such as Gokaldas Kanjibhai and Babubhai Noorbhai as also the accused in that case and then after making suitable inquiry with regard to their being entitled to claim for possession thereof pass suitable orders u/s 517 of the Criminal Procedure Code.

11. Order accordingly.