
(1990) 07 MP CK 0027

In the Madhya Pradesh High Court

Case No : Criminal Rev. No. 254 of 1989

Bombay Pharma Products and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 23-07-1990

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(2), 470, 471, 472
Drugs and Cosmetics Act, 1940 — Section 25(2), 27
Drugs and Cosmetics Rules, 1945 — Rule 78, 96

Citation : (1993) 38 MPLJ 404 : (1993) MPLJ 404

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Advocate : A.J. Bhojwani, for the Appellant; S.S. Swami, for the Respondent

Final Decision : Allowed

Judgement

K.L. Shrivastava, J.

This revision petition is directed against the order dated 1-8-1989 passed by the Chief Judicial Magistrate, Indore in Criminal Case No. 1328 of 1986 extending the period of limitation as provided u/s 473 of the Criminal Procedure Code, 1973 (for short "the Code").

Facts giving rise to this revision petition are these : On 26-7-1980 Shri B.K. Dube, Drug Inspector took the sample of Dexamethasone tablets (Batch No. B. L. 8080) from M/s. Bombay Pharma Products, Indore the petitioner No. 1 The other petitioners are the partners in the said firm.

One part of the sample was sent to the Government Analyst, Bhopal who in his report dated 7-10-1980 opined that the sample was not of the standard quality. A show cause notice along with the copy of the report of the Government Analyst, as required by Sub-section (2) of Section 25 of the Drugs and Cosmetics Act, 1940 (for short "the Act") was issued to the firm on 15-10-1980. On its part

the firm sent a written reply dated 18-10-1980 controverting the correctness of the report. It was prayed therein that the test be repeated as it seems that there was some error in the analysis.

After about 5 years, the Drugs Controller directed that the petitioners be prosecuted and thereafter the Drug Inspector on 28-3-1988 filed a complaint against the petitioners in respect of the offence punishable u/s 27(b) of the Act, with the maximum punishment for 3 years.

On 3-8-1988 the petitioners moved an application contending that the prosecution was time barred in view of the provision embodied in Section 468 of the Code.

By the impugned order the learned Chief Judicial Magistrate has extended the period of limitation and has upheld the cognizance taken 2 1/2 years back after the expiry of the period of limitation. In passing the impugned order with recourse to Section 473 of the Code, the learned lower Court has placed reliance on this Court's decision in Bhanwarlal's case. Cri. Rev. No. 223/86 decided on 13th March 1987.

The contention of the learned counsel for the petitioners is that the learned lower Court failed to appreciate that the aforesaid decision was distinguishable on facts. It is submitted that in the instant case the prosecution was launched after the date of expiry of the medicine and the petitioners have been deprived of their valuable right to get the sample analysed by the Central Drugs Laboratory as provided u/s 25(4) of the Act and they were thus prejudiced and such was not the position in Bhanwarlal's case.

The point for consideration is whether the impugned order extending the period of limitation deserves to be set aside.

Section 4(1) of the Code relates to the trial of offences under the Indian Penal Code and Sub-section (2) thereof relates to other offences which subject to any other enactment for the time being in force are also to be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Code. There being no other enactment, Section 468 of the Code providing bar to taking cognizance after the lapse of the period of limitation applies to the case in hand. According to the provision except as otherwise provided elsewhere in the Code no Court shall take cognizance of an offence of the category specified in Sub-section (2) after the expiry of the period of limitation. It may be noted that in the provision the word used is "shall". According to the provision in Section 468(2) (c) in respect of an offence punishable with imprisonment for a term exceeding one year but not exceeding three years the period of limitation provided is of three years.

It may be pointed out that Section 27 of the Act has been substituted w.e.f. 1-2-1983 by Act No. 68 of 1983. In view of Article 20(1) of the Constitution of India which occurs in part III (Articles 12 to 30) pertaining to fundamental rights,

the Legislature cannot retrospectively make an innocent act an offence when at the time of its commission it was not. Neither can it provide for imposition of a penalty greater than that which was provided for the offence under the existing law. Reference in this connection may usefully be made to the decision in *G.P. Nayyar Vs. State (Delhi Administration)*, It is true that Section 36 of the Act authorises the Magistrate concerned, to impose enhanced penalties in excess of his powers under the Code but the question of limitation has to be determined only with reference to the statutory maximum provided for the offence. It may be remembered that limitation for criminal prosecution has, for the first time been introduced by the Code and the provision in Section 468 thereof is one of repose.

In the decision in *Srinivas Gopal Vs. Union Territory of Arunachal Pradesh (Now State)*, with reference to its two earlier decisions, the Apex Court has pointed out that the provisions pertaining to limitation have legislative policy behind them and the object of the Code in putting a bar of limitation on prosecution was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and delayed prosecutions long after the date of occurrence and that this object is clearly in consonance with the concept of fair trial as enshrined in Article 21 of the Constitution providing that no person shall be deprived of his life or liberty except according to the procedure established by law. It may be stated here that Article 21 of the Constitution has a wide sweep and in addition to a reasonable and fair procedure it has been interpreted as guaranteeing fundamental rights of speedy trial and free legal aid. Reference in this connection may usefully be made to the decisions in *Rajendra Kumar's case* 1989 MPLJ 106, *Chandu's case* 1989 MPLJ 429, *Sekadiva's case* 1989 MPLJ 435 and *State of Maharashtra v. Arun Sewalram's* 1989 Cri.L.J. 1918.

It may be pointed out that the bar of limitation goes to the root of the Court's jurisdiction. Therefore, when a complaint is filed against an accused and it prima facie appears that it is barred by time the proper course to be followed is to determine the question at the very inception by notice to the accused. Reference in this connection may usefully be made to the decision in *Ladder Sidda Basappa's case* 1988 Cri.L.J. 213 which holds that otherwise the proceedings stand vitiated. Therein reliance has been placed on the decision in *Krishna Sanghi and Others Vs. The State of Madhya Pradesh*,

Sections 470 and 471 of the Code provide for exclusion of time in computing the period of limitation. Section 472 *ibid* relates to continuing offences and feeling the need regarding extension of period of limitation in deserving cases, the Legislature has provided thus in Section 473 of the Code giving it under ambit than that u/s 5 of the Limitation Act 1963:

"Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that

the delay has been properly explained or that it is necessary so to do in the interests of justice."

On the provision quoted above the decision in Madan Mohan's case 1990 MPLJ 165 makes an illuminating reading. Therein the Apex Court's decision in Bhagirath Kanoria and Others Vs. State of M. P., has been adverted to and it has been pointed out that as is clear from the words employed in Section 473 of the Code, it has overriding effect on all earlier Sections of Chapter XXXVI. According to the decision the jurisdiction under the provision may be exercised by any Court, at any stage and even suo motu.

In the instant case the period of limitation has been extended on the ground that it is necessary to do so in the interests of justice. Where the question is of extension of period of limitation on the ground of explained delay, the decision in Ajit Singh Thakur Singh and Another Vs. State of Gujarat, and State of M. P. v. Bingopal. 1972 (2) MPWN 206 may usefully be perused. The decision in Ajit Singh's case points out that the explanation for delay must be referable to the period prior to the expiry of the period of limitation. In the decision in Bingopal's case it has been pointed out that routine and leisurely departmental consultations do not constitute sufficient cause for delay. The decision in State of Punjab Vs. Sarwan Singh, relates to permission to prosecute and limitation.

It may be noted that the provision in Section 473 of the Code does not enjoin that whenever the interests of the citizens or the society are involved the period of limitation must invariably be extended. The Legislature has very wisely left the question of extension of the period of limitation in the domain of the Court's discretion which it has to exercise in a judicial manner on a balanced consideration of the facts and circumstances of a given case.

From what has been discussed above it is clear that by lapse of the period of limitation a valuable right accrues to the accused and he is not to be deprived of it unless the Court comes to the conclusion that the delay has been properly explained as required by law or that interests of justice necessitate the extension of the period of limitation. Where the Court, in accordance with the provision in Section 473 of the Code rightly extends the period of limitation there can be no question of infraction of Article 21 of the Constitution.

The crucial question for consideration is whether the, present case is a fit one where it may be said that extension of period of limitation is necessitated in the interests of justice.

The contention of the learned counsel for the petitioners is that in the instant case the Court's discretion u/s 473 of the Code must not be exercised in favour of the prosecution because the inordinate delay on the part of the prosecution has deprived the petitioners of their valuable right to take recourse to the provision embodied in Section 25(4) of the Act and the prejudice caused to them is quite clear. Reliance was placed on the decision in Vilco Laboratories Vs. The state of Gujarat and Another,

In the instant case it is not in dispute that the maximum life of the drug in question under Rule 96 of the Drugs and Cosmetics Rules, 1945 (for short "the Rules") was five years. Rule 78(c)(ii) of the Rules lays down that records and registers showing the particulars in respect of specified tests shall be maintained for the period therein laid down and the maximum period is of five years from the date of manufacture.

The contention of the learned counsel for the State is that the petitioners by their reply did not notify in writing that they intended to adduce evidence in controversion of the report of the Government Analyst and, therefore, the report of the Government Analyst is conclusive as provided u/s 25(3) of the Act and the petitioners cannot complain of any prejudice. Reliance was placed on the decision in *Vilco Laboratories v. State of Gujarat* (supra).

At this stage it is pertinent to reproduce the provisions in sub-sections (3) and (4) of Section 25 of the Act. They run as under :--

"(3). Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein such evidence shall be conclusive unless the person from whom the sample was taken or the person whose name, address and other particulars have been disclosed u/s 18A has, within twenty days of the receipt of a copy of the report, notified in writing to the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4). Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has, under Sub-section (3), notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may of its own motion or in its discretion at the request either of the complainant or the accused, cause the sample of the drug or cosmetic produced before the Magistrate under Sub-section (4) of Section 23 to be sent for test or analysis to the said laboratory, which shall make a test or analysis and report in writing signed by, or under the authority of the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein."

The ends of justice are higher than the ends of law and must reign supreme. Justice has to be done to all the contending parties and its dispensation by the Courts must be based on a consideration of the entirety of the facts and circumstances of the case and has to be even handed. Negligence of public servants, unless it has caused prejudice to the accused, must not be allowed to defeat the object of the Statute. Where the accused is prejudiced; it is certainly not proper to permit his prosecution. The decision in *Dalchand Vs. Municipal Corporation, Bhopal and Another*, is pertinent on this point.

On a perusal of the written reply by the petitioners it is quite clear that they did not accept the report of the Government Analyst as correct and requested that

the medicine be tested again. Thus their intention to challenge the report was quite clear. It may be remembered that the question here is not of the legal right of the prosecution but is one of Court's discretion and even if for the sake of arguments it is conceded that in the absence of the express words indicating intention to adduce evidence in controversion of the Government Analyst's report, the said report attained finality. I am clear in my mind that a cumulative consideration of the totality of facts and circumstances of the case leads to the one irresistible conclusion that this is not a fit case where the Court's discretion should be exercised in favour of the prosecution. That discretion must always subserve the cause of justice and technicalities must never be permitted to block the course of justice.

Before parting with the case I consider it apposite to refer to what the Full Bench observed in the decision in *Food Inspector, Mandsaur v. Devilal* 1985 MPLJ 14 : 1985 LLJ 195. Therein holding that the provision in Section 13(2) of the Prevention of Food Adulteration Act and Rule 9-A of the Rules framed thereunder are directory and non-compliance thereof is not per se fatal to the prosecution case, it has been stated as under in paragraph 27 :-

"We may like to add that the view which we have taken should not be construed to mean that those who are entrusted with the duty of implementing the provisions of the Act and the rules may not do their duties as laid down by the provisions of the Act and the rules and any lapse on their part must be dealt with at administrative level. They must bear in mind that the procedural provisions made in the Act and the rules are meant to be complied with and their omission to follow the dictates of those provisions may cause prejudice to the accused and in such a case even if the accused has indulged in the act of adulterating articles of food he may have to be acquitted of the offence charged with and thus the salutary object of the Act may be defeated."

In the ultimate analysis I find that the revision petition deserves to be allowed. It is, therefore, allowed. The impugned order is set aside and the complaint is dismissed as time-barred.