

(2001) 04 BOM CK 0067

In the Bombay High Court

Case No : Criminal Application No. 412 of 2001

Gulab Gaibu Shaikh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-04-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 122, 397, 427, 427(1), 482
Penal Code, 1860 (IPC) — Section 248(2), 379

Citation : (2001) ALLMR(Cri) 1404

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : Ms. Geeta Nayyar, for the Appellant; Ms. Usha Kejriwal, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Pratibha Upasani, J.—This application is filed by the applicant/convict Gulab Gaibu Shaikh, who is at present lodged at Yerwada Central Prison, Pune. He was convicted on 30.11.1999, by the Judicial Magistrate. First Class, Indapur, in two separate cases being Regular Criminal Case Nos. 97 and 110 of 1994. In both these cases, which were tried vide separate C.R. numbers, the applicant/accused was convicted in each of these two cases for offence punishable u/s 379 of the Indian Penal Code and was sentenced to suffer R.I. for three years in each case.

2. By the present application, the applicant has prayed that this Court pass an order directing the applicant to suffer his both the imprisonment of three year's R.I., concurrently, and not in succession.

3. Now, few facts are required to be stated to appreciate the point and decide whether the prayer made by the applicant can be considered or not.

4. As far as Regular Criminal Case No. 97 of 1994 is concerned, it was registered vide C.R. No. 104 of 1994. The prosecution case was that the applicant/accused, on 6.6.1994, between 12 a.m. to 2 a.m., committed theft of the complainant's

white coloured cross-breed cow from the courtyard of the complainant Sarubai Mahadeo Zhagade by dishonestly removing the said cow out of the possession of the complainant, without her consent, and moved the same in order to taking the said cow and thus committed theft of the same. Since the cow was not to be found, the said complainant Sarubai lodged complaint on 15.7.1994 at Indapur Police Station. On the basis of the complaint, offence punishable u/s 379 of the Indian Penal Code came to be registered vide C.R. No. 104 of 1994. Routine investigation followed and it was revealed that the accused had stolen the said cow. He was already shown arrested in C.R. No. 100/ 94 and 39/94. While the accused was in police custody, he made statement in the presence of two panchas, which was recorded by the investigating Officer. There was a recovery of the said cow at the instance of the accused, who took the police to village Sakurde via Baramati Morgan and Jejuri. The accused led the police to the house of one Rangnath Saste, to whom the accused had sold the cow, belonging to the complainant Sarubai. The said cow was seized under a panchnama. After completing the investigation, charge-sheet came to be filed against the accused.

The learned Judicial Magistrate, First Class, Indapur, after examining the complainant and the other prosecution witnesses and after hearing both the sides, came to the conclusion that the prosecution had proved that the said cow was stolen by the accused Gulab Gaibu Shaikh on 6.6.1994, between 12 a.m. to 2 a.m. at village Wadapuri, Taluka Indapur, District Pune and committed offence of theft u/s 379 of the Indian Penal Code. Holding this, the Judicial Magistrate, First Class, Indapur, convicted the accused u/s 379 of the Indian Penal Code vide Section 248(2) of the Code of Criminal Procedure, 1973 and sentenced him to suffer R.I. for three years.

5. On the same day i.e., 30.11.1999, the learned Judicial Magistrate, First Class, Indapur, also convicted the applicant/accused in Regular Criminal Case No. 110 of 1994 for offence punishable u/s 379 of the Indian Penal Code for committing theft of the cross-breed cow. In this case the cow belonged to the complainant Rajaram Krishna Fadtare, who was residing at Shetpal Haveli, village & Taluka Indapur.

The prosecution case was that on 20.3.1994, between 1 a.m. to 5 a.m., the applicant/accused committed theft of complainant's cross-breed cow from his courtyard by dishonestly removing the same out of the complainant's possession, without his consent, and moved the same in order to taking away the said cow. On the basis of the complaint, offence came to be registered vide C.R. No. 39/94 on 21.3.1994. Routine investigation followed. The accused came to be arrested on 14.7.1994. He was thus arrested in C.R. Nos. 100/94, 104/94 and 39/94. On 14.7.1994 the accused made a statement to the Investigating Officer in the presence of two panchas, while he was in police custody, and accordingly the said cow was recovered at the instance of the accused from the very same person Rangnath Krishna Saste at village Sakurde. After completing routine investigation, charge-sheet came to be filed against the accused for

offence punishable u/s 379 of the Indian Penal Code.

6. The learned Judicial Magistrate, First Class, Indapur, after examining the complainant Rajaram and the other prosecution witnesses and after hearing both the sides, came to the conclusion that the prosecution had succeeded in establishing beyond reasonable doubt that the accused had committed theft of the said cross-breed cow belonging to the complainant Rajaram from village Shetpal Haveli, Taluka Indapur. Thus, the learned Judicial Magistrate, First Class, Indapur, convicted the accused Gulab Gaibu Shaikh for offence punishable u/s 379 of the Indian Penal Code vide Section 248(2) of the Code of Criminal Procedure, 1973. and sentenced him to suffer R.I. for three years on the same day i.e., 30.11.1999.

7. Thus, the learned Magistrate convicted the applicant/accused for offence punishable u/s 379 of the Indian Penal Code in two separate criminal cases, registered vide two separate C.Rs. The applicant/ accused has now approached this Court, praying that since the offence is of the same nature, he be permitted to suffer the sentences of imprisonment of three years awarded to him, concurrently, and not separately.

8. The Advocate for the applicant (appointed). Ms. Geeta Nayyar, is not present. She was not present on the last occasion also when the matter appeared on board on 26.4.2000. The learned A.P.P., Ms. Usha Kejriwal is present. I have heard the learned A.P.P., and also gone through the proceedings, so also both the judgments dated 30.11.1999, passed in Regular Criminal Case Nos. 97 of 1994 and 110 of 1994. It also appears that instead of approaching the superior Court by way of an appeal or revision, within the prescribed period, the applicant, through jail, submitted to the Additional District & Sessions Judge, Baramati, a reference. This reference, made through the Jailor by the applicant/convict, was rejected by the Additional District & Sessions Judge, Baramati, by his order dated 30.9.2000, by observing, firstly, that the reference/report was obviously time-barred and also observing that the reference/report was not tenable since in none of the cases the accused was sentenced to suffer imprisonment for life. The learned Judge, by referring to section 427 of the Code of Criminal Procedure. 1973, observed that for taking recourse to section 427 of the Code of Criminal Procedure. 1973, the accused must be sentenced to imprisonment for life and then only the subsequent sentence passed, which is lesser than life imprisonment, could be directed to run concurrently. He also observed that in both the instant cases, the accused was convicted and sentenced to suffer imprisonment for three years each only. He also observed that the application of the convict was not tenable. While giving this finding, the learned Judge relied upon a Full Bench decision of the Delhi High Court in the case of Gopal Das v. State. Thus, the said reference/report came to be rejected by the learned Additional District & Sessions Judge, Baramati. Now the applicant/convict has approached this Court, praying that since he comes from a poor family and since the offence is committed by him for the first time and since he has no criminal

record and since the modus operandi and the type of crime committed in both the cases are same, he may be granted the relief prayed for and he be permitted to suffer both the sentences concurrently.

9. Though there is no assistance from the applicant's Advocate, with the assistance of Ms. Kejriwal, the A.P.P., I have gone through the grounds taken by the applicant in his application. I have also perused the order dated 30.9.2000, passed by the Additional District & Sessions Judge, Baramati, on the reference/report made by the convict, through the Jailor, I have also gone through the Full Bench decision (*supra*) of the Delhi High Court and in my opinion, the prayer made by the applicant in his application cannot be granted.

10. For deciding the application made by the applicant/convict, the relevant provisions that may be looked into are the provisions contained in Section 427 of the Code of Criminal Procedure, 1973. The said section, namely, Section 427 of the Code of Criminal Procedure, 1973 is reproduced below for the sake of convenience.

"427. Sentence on offender already sentenced for another offence.-

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :

Provided that where a person who has been sentenced to imprisonment by an order u/s 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term of imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

11. Thus, Section 427 of the Code of Criminal Procedure, 1973 visualises the situation as to what has to be done when a person already undergoing a sentence of imprisonment, is once again convicted and is awarded sentence of imprisonment or imprisonment for life for a subsequent offence and under what circumstances the subsequent sentence of imprisonment or imprisonment for life shall run concurrently with such previous sentence. Sub-clause (2) of section 427 logically states that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for life, then the subsequent sentence shall run concurrently with such previous sentence of imprisonment for life. This indeed is logical. Sub-clause (1) of section 427 is also logical inasmuch as it states that when a person is already

undergoing a sentence of imprisonment and if he is again sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. This means that sub-clause (1) of section 427 does give discretion to the Court to pass an order where the person who is already undergoing sentence, on his subsequent conviction, can be allowed to suffer his sentence concurrently. It goes without saying that this discretion has to be exercised judiciously.

12. In the case of *Gopal Das v. State* (supra), the Full Bench of the Delhi High Court had an occasion to discuss the provisions of section 427 of the Code of Criminal Procedure, 1973 and the inherent powers of the High Court and scope of Section 397 of the Code of Criminal Procedure Code, 1973 and this is what the Delhi High Court stated :

"The High Court in the exercise of the inherent powers at the instance of a party who has a right of appeal or revision but has not availed himself of that right, cannot pass an order directing that a sentence of imprisonment awarded to such a person on a subsequent conviction to imprisonment when he is already undergoing a sentence of imprisonment on an earlier conviction shall run concurrently with such previous sentence."

The Delhi High Court further stated :

"..... In not making the sentence awarded to an accused on a subsequent conviction to run concurrent with the sentence which the accused was already undergoing at the time of his subsequent conviction no order is required to be passed by the High Court in the exercise of its inherent powers to give effect to the order passed by a Court as the said order of the Court is enforceable on its own strength."

"..... In suitable cases, however, the Court is not precluded from treating a petition filed u/s 482 as a petition filed u/s 397 and grant necessary relief if so warranted by the exigencies and the facts of the case....."

"..... The discretionary power u/s 427(1) to direct that the sentence of imprisonment awarded on the subsequent conviction shall run concurrently with the sentence the accused was already undergoing is to be exercised on the merits of the case at the time of awarding the subsequent sentence. But this power can be exercised on either the accused or the prosecution bringing to the notice of the Court recording a subsequent conviction that the accused is already undergoing sentence of imprisonment. On pronouncement of the judgment, recording a conviction and sentencing an accused to appropriate imprisonment warranted by the facts of the case the Court becomes *functus officio* and cannot by resort to the provisions of section 427 on an application by an accused person pass an order directing that the imprisonment awarded by it shall run

concurrently with the imprisonment the accused was already undergoing at the time the Court sentenced him to imprisonment subsequently. Sentence imposed on the accused on his subsequent conviction according to the provisions of Section 427(1) shall commence at the expiration of the imprisonment, to which he had been previously convicted unless made concurrent with the previous sentence...."

13. In the present case at hand, admittedly, the applicant/convict did not prefer any appeal or revision against the conviction and sentence, recorded by the Judicial Magistrate. First Class, Indapur, in both the above referred regular criminal cases. Having failed to file any such appeal or revision against the aforesaid orders of conviction and sentence, passed in two separate cases, what the applicant/convict did was to file a reference to the Additional District & Sessions Judge, through the Jailor, belatedly, which came to be rejected on 30.9.2000. Thereafter the convict has approached this Court, praying that he be permitted to suffer the sentences awarded, concurrently. In my opinion, having considered all the aspects, granting such a request will not be possible.

14. The applicant was tried for offence punishable u/s 379 of the Indian Penal Code by two separate trials, one being Regular Criminal Case No. 97 of 1994 and the other being Regular Criminal Case No. 110 of 1994. Criminal Case No. 97 of 1994 was in pursuance to C.R. No. 104/94 and Criminal Case No. 110 of 1994 was in pursuance to C.R. No. 39/94. In both these cases, the complainants (owners of the respective cows) were different. The property which was stolen, namely the cows, were different. Two separate charge-sheets were filed against him, which he had to answer. There were two separate and distinct trials which the applicant had to face and in fact faced. The applicant came to be convicted in both the cases and was sentenced separately to suffer rigorous imprisonment for three years, in each case, and it is not that the Judicial Magistrate, First Class, Indapur, who tried the applicant, was oblivious to this fact. In fact, the learned Magistrate has mentioned the said fact in paragraph 15 of the judgment delivered in Regular Criminal Case No. 110 of 1994 and thereafter he proceeded to pass the sentence after hearing both the sides. Thus, in no way the order of the learned Magistrate awarding the sentence of imprisonment for three years separately, was erroneous. The sentences may be ordered to run concurrently when the same set of facts or circumstances give rise to various related offences arising during the course of same transaction but not otherwise. In the present case at hand, the accused is the same and the modus operandi adopted by the accused every time is also same. The modus operandi is to steal the cow from the courtyard of unsuspecting owners at the dead of night or in the wee hours of the morning and sell the said cow to some other unsuspecting buyer and earn money dishonestly by such transaction. The similarity ends here. The C.Rs. which are registered against the applicant are separate and distinct C.Rs. The property is different in each case, the owners/complainants are different and separate and distinct charges are framed against the applicant in each case. Separate trials are conducted by the learned Magistrate and the applicant is convicted in each

case by awarding a separate sentence. The observation of the learned Additional District & Sessions Judge made in his order dated 30.9.2000 on the reference/report that the provisions of section 427 of the Code of Criminal Procedure, 1973 are attracted only when the convict is undergoing life imprisonment, is wrong. Recourse to section 427 can be had even when the convict is not undergoing life imprisonment and it is also true that the Court is empowered to order that a subsequent sentence shall run concurrently with the previous sentence which the convict is already undergoing. A petition u/s 482 can be converted into a revision petition u/s 397 of the Code of Criminal Procedure, 1973, in a proper case, by the High Court by invoking its inherent powers.

15. Considering the antecedents of the applicant/convict and also taking into consideration the number of C.Rs. registered against him for stealing cows from the courtyard of unsuspecting owners, it cannot be said that this is a fit case where such a discretion can be exercised by the Court. In fact to exercise such a discretion will be travesty of justice. Hence following order :

ORDER

Criminal Application No. 412 of 2001 is rejected. The applicant to undergo the sentences awarded to him, in Regular Criminal Case No. 97 of 1994 and Regular Criminal Case No. 110 of 1994, in succession.