
(1981) 03 BOM CK 0010

In the Bombay High Court

Case No : Criminal Application No. 1399 of 1980

Jethmal Himmatmal Jain and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-03-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(1), 469(1), 473

Citation : (1981) 83 BOMLR 603 : (1981) CriLJ 1813 : (1982) MhLj 19

Hon'ble Judges : Rele, J

Bench : Single Bench

Judgement

1. The petitioner No. 1, who is the employer, and petitioners Nos. 2 to 5, who are the employees in the first petitioner's chemist shop known as "Maharashtra Medical Stores" at Kalachowki, Bombay, have invoked the inherent jurisdiction of this court to quash proceedings Case No. 186/S of 1977 pending in the Court of the Metro-politan Magistrate, 28th Court, Esplanade, Bombay.

2. This Application raises an important question in regard to the jurisdiction of the Court to take cognizance of an offence without first condoning the delay. Petitioner No. 1 is the proprietor of Maharashtra Medical Stores. Petitioner No. 2 is the Manager of the said proprietary concern. Petitioner No. 3 is a qualified person employed in the said concern and petitioners Nos. 4 and 5 are the employees.

3. In the course of investigation in C.R. 64/74 of Criminal Branch Control (Drugs). C.I.D., Bombay, the police arrested one Rajanikant Laxmichand Mehta on 23rd July 1974 and seized from his residence at Sonawalla Building, C.P. Tank, Bombay, huge stock of drugs stocked for sale without licence. Some of the drugs were mis-branded drugs bearing markings of E.S.I.S., M.C.G.B., Medical Stores, K.E.M. Hospital, etc. The said Rajanikant revealed that he had purchased most of the stock from petitioner No. 1.

4. On 24th July 1974, the police accompanied by the Officers of the Food and

Drug Administration searched the premises of Maharashtra Medical Stores in the presence of panchas. At that time petitioner No. 1 was not present in the shop; but petitioners Nos. 2 to 5 were present in the shop. The police seized from the shop : (1) Garamyein Gemtamyein as Sulphate U.S.P. Batch No. IN-3AMKZ-19, labelled as manufactured by Messrs G. E. Fulford (India) Pvt. Ltd., Bombay; (2) Tetracycline Hydrochloride capsules I.P. Batch No. 108. Manufactured by Messrs Alkame Laboratories, 125/1, L.B. Shastri Road. Bhandup, Bombay; and (3) Tetracycline Hydrochloride Capsules I.P. Batch No. 506, manufactured by Messrs Ravi Pharmaceuticals, Daman, Petitioners Nos. 2 to 5 did not produce purchase invoices of records in respect of these drugs. Sample of the drugs was taken by the Drugs Inspector and intimation in form No. 17 was prepared and as accused No. 1 was not present, intimation in form No. 17 together with sealed samples were given to petitioners Nos. 2 and 3.

5. All the samples were sent to Government Analyst, Maharashtra State, for analysis. The Government Analyst submitted his report dated 2nd August 1974. The report showed that Garamyein Gentamycine, as sulphate, U.S.P. Batch No. IN-AMKZ-19 was not of standard quality and it contained only 9.1% of the labelled amount of Gentamycine base. By his report dated 10th October 1974, the Government Analyst reported that the samples of Tetracycline Hydrochloride capsules I.P. Batch No. 108 were not of standard quality and not containing any Tetracycline Hydrochloride at all. Inquiries further revealed that Messrs Alkame Laboratories, Bombay, was a fictitious firm. In regard to Tetracycline Hydrochloride Capsules I.P. Batch No. 506, the Government Analyst reported that the capsules were of standard quality.

6. Further inquiries revealed that the petitioners had sold to some doctors having dispensaries at Bombay various drugs and the petitioners had not mentioned Batch number, name of manufacturer, etc., in the invoices issued to those doctors as required by Rule 65(5)(1) of the Drugs and Cosmetics Rules 1945. Inquiries further revealed that some of the drugs supplied by the petitioners to the above doctors were in unlabelled containers.

7. On these fact, the Inspector appointed u/s 21 of the Drugs and Cosmetics Act, 1940, filled his complaint on 12th August 1977 in Court of the Metropolitan Magistrate 28th Court, Esplanade, Bombay, charging the petitioners with having sold mis-branded drugs in contravention of Section 18(a)(ii) read with Section 27 of the Drugs and Cosmetics Act, 1940. They were further charged u/s 18 read with Section 27 of the said Act for having sold the drugs to the said doctors without mentioning the batch number, the name of the manufacturer, etc., as required by Rule 65(5)(1) of the Rules framed under the said Act. The learned Magistrate took cognizance of the offence and passed an order on the same day i.e., on 12th August, 1977 for issue of summons upon the Petitioners. In the said case witnesses Ramakant Gudal, P.W. 1, Inspector of Food and Drugs Administration, as also Shyamrao Shinde and Dr. Suryakant Lakamshi Shah. Medical Practitioners, were examined before framing of charge and they were

cross-examined by the learned Advocate on behalf of the Petitioners. Thereafter the learned Magistrate framed charge against the accused on 30th September, 1980 u/s 18(a)(ii) read with Section 27 of the Drugs and Cosmetics Act, as also u/s 18 read with Section 27 of the said Act read with Rule 65(5)(1) of the said Drugs and Cosmetics Rules. Being aggrieved by the complaint and the framing of the charge by the learned Magistrate, the Petitioners have filed this application invoking the inherent jurisdiction of the Court u/s 482 of the Code of Criminal Procedure, 1973, for quashing the proceedings.

8. Shri Gosalia, learned Advocate on behalf of the Petitioners, has argued that the complaint having been filed more than three years after the raid had taken place, viz., more than three years after 24th July 1977, the Court was barred from taking cognizance of the offence u/s 468(1) of the Cr.P.C., 1973, after the period of limitation. He has submitted that there was no application u/s 473 of the Cr.P.C. not did the Court apply its mind at the date the Court took cognizance of the offence not delay was condoned on that day and as such the Court has taken cognizance of the offence without jurisdiction. He has further submitted that the delay could not have been condoned without giving to the Petitioners-accused an opportunity of being heard and that no such opportunity was given to the Petitioners before the Court took cognizance of the offence and on this ground also the very valuable right given to the Petitioners by the statute has been affected. He has further submitted that on the mere fact that the Court has framed a charge, it cannot be said that the Court took cognizance of the offence by condoning the delay. His contention is that it cannot be read in the charge that has been framed against the Petitioners that condonation of delay was in the interest of justice. Shri Gosalia has further submitted that condonation of delay is a condition precedent to the taking of cognizance and the Court cannot take cognizance, issue process, record evidence and thereafter determine the question of limitation. He has submitted that this is exactly what has been done by the learned Magistrate and just at the time of the framing of the charge when the Petitioners were required to make their submissions as to why the charge should not be framed that in the course of arguments an argument was advanced on behalf of the Petitioners-accused that the Court could not have taken cognizance and, therefore, it cannot be said that the Court has condoned the delay in the interest of justice. Shri Gosalia has relied upon several decisions in support of this contention. He has relied upon the decision of the Rajasthan High Court in the case of Panney Singh and Others Vs. State of Rajasthan, upon two decisions of the Karnataka High Court in State of Karnataka Vs. Vedavati, and Channabasappa Vs. The State of Karnataka, upon the decision of the Allahabad High Court in Prakash Chandra Sharma v. Kaushal Kishore and upon a decision of the Delhi High Court in the Case of Jagmohan Vs. The State, . He has also relied upon the decision of the Madhya Pradesh High Court in the case of Krishna Sanghi and Others Vs. The State of Madhya Pradesh,

9. Shri Gosalia has further submitted that the Petitioners were entitled to the benefit of sub-section (1) of Section 468 and that the belated and dormant claim

of the complainant was shut out in order to save the accused from unnecessary harassment. He has relied upon the decision of the Supreme Court in the case of Surinder Mohan Vikal Vs. Ascharaj Lal Chopra, in support of this proposition and he has contended that the Petitioners are entitled to the bar prescribed u/s 468 of the Cr.P.C. on the facts and circumstances of the case.

10. Shri Barday, learned Public Prosecutor, on the other hand, has submitted that the very fact that the Court took cognizance of the offence shows that the court has condoned delay in the interest of justice and that the only thing that remained to be stated was the reasons for condonation of delay. This is more so because the court having taken cognizance of the offence and directed issue of summons itself shows that the Court had condoned the delay. He has further submitted that the right of the Petitioner-accused to be heard is not taken away by the mere fact that the Court had taken cognizance of the offence. The Petitioners-accused would be still entitled to submit that the prosecution is barred by limitation and the Petitioners-accused could be heard at any time on this question. It is difficult to accept the submissions of Shri Barday. There is considerable force in the arguments advanced by Shri Gosalia.

11. In order to appreciate the contentions advanced before me by the learned Advocates, it would be necessary for me to consider the provisions of S. 468 and Section 473 of the Code of Criminal Procedure, 1973. Section 468 bars a Court from taking cognizance after the lapse of the period of limitation. Section 473 empowers the Court to take cognizance of the offence after the period of limitation if it is satisfied on the facts and circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interest of justice. Section 468 states -

"468. (1) Except as otherwise provided elsewhere in this 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.

(2) The period of limitation shall be -

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years."

Section 473 states - "473. 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 interest of justice."

If the conditions mentioned in Section 473 are fulfilled, the Court is empowered

to take cognizance by reason of non obstante clause. Section 468(1) debars a Court from taking cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation. Section 473 is an enabling provision which enables the Court to take cognizance of the offence in case the conditions mentioned in that section are satisfied. Considering the provisions of Sections 468 and 473 together, it appears to me that it is incumbent upon the Court taking cognizance of the offence to first consider the question of limitation and if the Court finds that the complaint has been filed after the period of limitation, it would have no jurisdiction to take cognizance and any order passed by the Court would be without jurisdiction unless the Court condones the delay.

12. When a complaint filed is *ex facie* barred by limitation, it is necessary for the prosecution to state in the complaint itself giving explanation why delay should be condoned. If the complaint is silent in this regard, it is necessary for the prosecution to file a separate application for condonation of delay giving explanation for delay and in the absence of any statement in the complaint explaining the delay or in the absence of a separate application for condonation of the delay, it cannot be said that the Magistrate has condoned the delay by the mere fact of the Magistrate having taken cognizance of the offence. It is incumbent upon the Magistrate to show on record that he applied his mind to the question of limitation and that he was satisfied that on the facts and circumstances of the case that the delay has been properly explained. It was also incumbent upon the Magistrate to indicate on record that it is necessary for him to take cognizance in the interest of justice. In the absence of any such record made by the Magistrate, it cannot be presumed on a look at the order of the issue of summons that the Magistrate has taken cognizance on the ground that it was necessary for him to do so in the interest of justice. In *Surinder Mohan Vikal Vs. Ascharaj Lal Chopra*, the accused was prosecuted u/s 500 of the Indian Penal Code and summons was issued more than three years after the earlier complaint was disposed of. In considering the provisions of Section 468 of the Cr.P.C. their Lordships observed -

"It would thus appear that the appellant was entitled to the benefit of sub-section (1) of Section 468 which prohibits every Court from taking cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation. It is hardly necessary to say that statutes of limitation have legislative policy behind them. For instance they shut out belated and dormant claims in order to save the accused from unnecessary harassment. They also save the accused from the risk of having to face trial at a time when his evidence might have been lost because of the delay on the part of the prosecutor. As has been stated, a bar to the taking of cognizance has been prescribed u/s 468 of the Cr.P.C. and there is no reason why the appellant should not be entitled to it in the facts and circumstances of this case."

In *Jagmohan Vs. The State*, Luthra J. quoted the observation of the Division Bench of the Delhi High Court in *State v. Anil Puri*. Criminal Appeal No. 389 of

1977. The observations are as follows :

"Limitation Acts are based on public policy that one must not be faced with stale claims. Indeed one should be allowed to have his peace of mind if no action is taken against him for an alleged infraction of law within a particular period. It is for that reason that a statute for limitation has been termed as a "statute of repose". The reports of the Joint Select Committee recommending the incorporation of provisions of limitations in criminal law mentions, amongst others, the grounds that (i) "people will have no peace of mind if there is no period of limitation even for petty offences", (ii) "the deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of persons concerned." Further.

"Once a cognizance is barred in favour of a person he acquires a valuable right, this right cannot be taken away except under the law."

In the present case, in the complaint there is no statement anywhere explaining the delay and praying for condonation of the delay. The offence in the present case was brought to light on 24th July, 1974. It must have been committed before 24th July 1974. However, for the purposes of this application the offence is taken to have been committed on 24th July 1974, viz. when the police raided the shop of Maharashtra Medical Stores. The offences in this case is u/s 18 read with Section 27 of the Drugs and Cosmetics Act, 1940. Section 27 prescribed the penalty for the offences committed under the Act and for an offence u/s 18 the penalty prescribed is three years. The period of limitation, therefore, would be three years from the date of the offence as provided in Section 468(2)(c) read with Section 469(1)(a) of the Cr.P.C. 1973. Section 469(1)(a) provides that the period of limitation, in relation to an offender shall commence on the date of the offence. The complaint should have been filed before 24th July 1977. The complaint has been filed in this case on 12th August, 1977, i.e. about 19 days after the period of limitation had expired. The complaint having been filed more than three years after the period of limitation, it was incumbent upon the prosecution to have explained the delay either in the complaint itself or by a separate application. It was also necessary that the learned Magistrate, before taking cognizance of the offence, should have applied his mind to the question of limitation and should have indicated that he condoned the delay or has taken cognizance of the offence in the interest of justice. There is neither any mention anywhere in the record of the case that the prosecution has explained the delay nor is there any statement anywhere that the learned Magistrate took cognizance of the offence in the interest of justice. In the absence of any such statement it is difficult to conclude that the Magistrate took cognizance by condoning the delay. There must be some record to show that the Magistrate has in fact condoned the delay or that on the facts and circumstances of the case it was necessary for him to take cognizance in the interest of justice. It cannot be implied in the order directing issue of process that the Magistrate has condoned the delay. It must,

therefore, be held that the Magistrate has taken cognizance of the offence with which the Petitioners are charged without the Magistrate having power to take cognizance of the offence without condoning the delay or without stating that he has taken cognizance of the offence beyond the period of limitation in the interest of justice.

13. Section 473 of the Cr.P.C. requires the Magistrate to be satisfied that the delay has been properly explained on the facts and circumstances of the case or he should be satisfied on the facts and circumstances of the case that it is necessary to take cognizance in the interest of justice. Since the Magistrate is required to be satisfied, it was necessary for the Magistrate to have passed a speaking order giving reasons as to why he was satisfied or as to why he was not satisfied. In the absence of any reason being stated by the learned Magistrate, it cannot be said that the Magistrate was satisfied. In this context a reference may usefully be made to the Full Bench decision of the Gujarat High Court in *Testeels Ltd. Vs. N.M. Desai and Another*, . Though the decision has been given in a different context, the observation of their Lordships would, in my opinion, apply in this case also. Their Lordships have stated :

"The necessity of giving reasons flows as a necessary corollary from the rule of law which constitutes one of the basic principles of the Indian Constitutional set up. The administrative authorities having a duty to act judicially cannot therefore decide on consideration of policy or expediency. They must decide the matter solely on the facts of the particular case, solely on the material before them and apart from any extraneous consideration by applying existing legal norms to factual situation. Now the necessity of giving reasons is an important safeguard to ensure observance of the duty to act judicially. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and excludes or, at any rate, minimises arbitrariness in the decision making process."

In the present case, there seems to be no application of mind on the part of the learned Magistrate to the question whether the complaint that was filed before him was within the period of limitation.

14. Since the Magistrate was required to be satisfied it was also necessary for the Magistrate to be satisfied after giving an opportunity to the accused of being heard. In deciding the question of limitation an important right given to the accused was being affected and the accused could not have been put in jeopardy by condonation of delay in their absence and without giving them an opportunity of being heard. In condoning delay without hearing the accused there would be a breach of the basic principle of natural justice since a valuable right to the accused by the statute was being affected. In the present case, no opportunity was given to the accused of being heard as to why the delay should not be condoned or as to why cognizance should be taken in the interest of justice. It was necessary for the learned Magistrate in the interest of justice to hear the accused first on the question of condonation of delay or to show cause why he did not do so in the interest of justice before he took cognizance of the offence

beyond the period of limitation. The Petitioners-accused not having been given any opportunity to show cause why the delay should not be condoned or why cognizance should not be taken in the interest of justice there is a travesty of justice and the cognizance taken by the learned Magistrate is illegal. The charge that has been framed by the Magistrate against the Petitioners is, therefore, illegal and is liable to quashed. I am fortified in the view that I have taken by the decisions which have been cited by Shri Gosalia. The Rajasthan High Court in considering the provisions of Sections 468 and 473 of the Cr.P.C. 1973, has taken the view (at p. 341 of Panney Singh and Others Vs. State of Rajasthan,

"There is legislative interdiction u/s 468 for taking cognizance of an offence after the expiry of the period of limitation for presentation of the charge-sheet. If the Court finds that the period of limitation has expired, the Court shall see as to whether there are sufficient grounds for condonation of delay or for extension of the period of limitation. It is not necessary that there should be separate application moved by the prosecution u/s 473. The delay may be explained in the chargesheet itself or the grounds for extension of the period of limitation may be stated in the charge-sheet itself. Extension of limitation may also be sought by a separate application accompanied with an affidavit or papers in support of the same."

The Rajasthan High Court relied upon the two decisions of Karnataka High Court in this regard in the case of State of Karnataka Vs. Vedavati, and Channabassappa v. State of Karnataka, 1978 Cri LJ 185 . It has been further held by the Rajasthan High Court that (at p. 342 of Panney Singh and Others Vs. State of Rajasthan,

"The Court could not subsequent to the passing of the order taking cognizance, condone the delay and extend the period of limitation."

It has also been held that :

"Before taking cognizance of an offence after expiry of the period of limitation, the accused is entitled to be given a notice and he shall be heard on the question of extension of the period of limitation u/s 473 Cr.P.C." Similar view has been taken by the Allahabad High Court in Prakash Chandra Sharma v. Kaushal Kishore where the Court relied upon the decision of the Madhya Pradesh High Court in Krishna Sanghi and Others Vs. The State of Madhya Pradesh, The Delhi High Court has taken a similar view.

15. The learned Magistrate, in the present case could not subsequent to the passing of the order taking cognizance condone the delay and extend the period of limitation. The learned Magistrate has without condoning the delay proceeded to examine witnesses and to frame a charge. This has been done by the learned Magistrate after the period of limitation and therefore illegal. The complaint is, therefore, liable to be quashed.

16. I, therefore, pass the following order.

Rule absolute, complaint against the Petitioners is quashed.

17. Application allowed.