
(2010) 06 BOM CK 0154

In the Bombay High Court

Case No : Criminal Application No. 1665 of 2009

Khalid Akhtar Abdul Latif Ahemi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(1), 468(2), 469(1), 470(3)
Penal Code, 1860 (IPC) — Section 500
Unlawful Activities (Prevention) Act, 1967 — Section 10, 17

Citation : (2010) 06 BOM CK 0154

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : Yakub Shaikh, instructed by and Amin Solkar, for the Appellant; A.T. Javeri, APP, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J

1. Rule. Rule made returnable forthwith. Heard the learned Counsel for the parties.

2. The applicant by this Application seeks to quash and dismiss the Regular Criminal Case No. 325/2007 pending on the file of J.M.F.C., Court No. 3, Malegaon.

3. To state in brief, the applicant was arrested by Ahesh Nagar Police Station, Malegaon, in Crime No. 3053 of 2001 u/s 10 of the Unlawful Activities (Prevention) Act, 1967 (for short, "the Act") on the allegation that inspite of the ban imposed on Students Islamic Movement of India (SIMI), the applicant was found addressing gatherings of Muslim community to instigate the workers and members of SIMI to teach a lesson to the Government of India for doing injustice to the Muslim community by imposing ban on SIMI. The offence was registered on 30.11.2001 and on the same day, the applicant was arrested. On 25.

10.2002, the Government of Maharashtra accorded sanction for prosecution of the applicant u/s 10 of the said Act. However, the charge-sheet was actually filed on 24.4.2007 in the Court of J.M.F.C. It is the contention of the applicant that the offence u/s 10 of the Act is punishable with imprisonment for a term which may extend to two years and also with fine and in view of the provisions of Section 468 Cr.P.C., the Court could not take cognizance of the offence beyond the period of three years, being the period of limitation prescribed u/s 468(2) Cr.P.C. It is also contended that the prosecution had never sought extension of period of limitation either by giving reasons in the charge-sheet itself or by filing a separate application for condonation of delay and for extension of time as required u/s 473 Cr.P.C. The applicant filed an application Ex.7 before the J.M.F.C., Malegaon for dismissal of the case on the ground that it is barred by limitation. However, that application was rejected by the order dated 3.10.2008. The applicant has moved this application u/s 482 Cr.P.C. challenging the order taking cognizance of the matter and rejection of complaint Ex.7.

4. There is no dispute that offence was registered on 30.11.2001 and charge-sheet was filed on 24.4.2007, though sanction to prosecute the accused u/s 10 of the Act was accorded on 25.10.2002 by the Additional Chief Secretary (Home), Government of Maharashtra. The learned APP also concedes, after taking instructions, that in the charge-sheet, no reasons were given for the delay nor any separate application was moved by the police for extension of period of limitation by condoning the delay beyond the period of 3 years.

5. The offence u/s 10 of the Act is punishable with imprisonment for a term which may extend to two years and with fine. Section 468(1) Cr.P.C. provides that except as otherwise provided elsewhere in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation. Clause (c) of Section 468(2) provides that period of limitation shall be 3 years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. As the offence u/s 10 of the Act is punishable with imprisonment upto two years, the period of limitation would be three years. Section 469(1)(a) provides that period of limitation shall commence on the date of the offence. In the present case, the offence was allegedly committed on 30.11.2001 and on the same day, the offence was registered and accused was also arrested. Therefore, the period of limitation would begin to run from 30.11.2001 itself. Section 470(3) provides that where under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then in computing the period of limitation, the time required for obtaining such consent or sanction shall be excluded. Section 17 of the Act provides that no Court shall take cognizance of an offence punishable under the said Act except with the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf. Therefore, the cognizance of the case could not be taken by the Court without the prior sanction by the Central Government or the competent officer. Presuming that the police machinery moved the central Government or the

Additional Chief Secretary (Home), Government of Maharashtra, who is said to be an officer authorised by the Central Government in this behalf, for sanction to prosecute the accused, the period till, the date sanction was accorded, will be excluded. As the sanction was accorded on 25. 10.2002, the period from 30.11.2001 to 25. 10.2002 will have to be excluded for the purpose of limitation in view of the provisions of Section 470(3) Cr.P.C. Therefore, if the period of limitation begins to run from the date when sanction was accorded, in view of the prescribed period of limitation being three years, the charge-sheet could be filed on or before 25.10.2005. Still, in the present case, the charge-sheet was filed on 24.4.2007 i.e. about 18 months after the period of limitation had expired.

6. Section 473 Cr.P.C. reads as follows:

473. Extension of period of limitation in certain cases - 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.

In view of this, the Court may take cognizance of an offence after expiry of period of limitation if it is satisfied on the facts and in the circumstances of the case that delay has been properly explained or that it is necessary so to do in the interest of justice. Naturally, when the Court is required to extend the period of limitation and to take cognizance of an offence after the expiry of period of limitation, the prosecuting agency has to give reasons for the delay and only if the Court is satisfied about the delay, or if it finds that it is necessary in the interest of justice, it may condone the delay and take cognizance of the case beyond period of limitation. The reasons could be given by the prosecution either by putting a note in the charge-sheet itself or by making a separate application with a request to condone the delay, to extend period of limitation and to take cognizance of the matter beyond period of limitation. When such a request is made either by giving reasons for delay in the charge-sheet itself or by separate application, the concerned Magistrate is expected to hear the prosecution and consider reasons and if it is satisfied, it has to indicate on record that he was satisfied about the reasons for the delay and therefore the cognizance of the case was being taken beyond period of limitation. If no such indication is given, it cannot be said that the concerned Magistrate had applied his mind to the facts of the case and had condoned the delay before taking cognizance of the offence. I am supported by an authority of this Court in *Jethmal Himmatmal Jain and others Vs. State of Maharashtra*, wherein the learned Single Judge of this Court was called upon to consider the provisions of Sections 468 and 473 Cr.P.C. The learned Judge observed as follows in para 12:

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 as 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 in para 8 -

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.

7. In the present case, the accused was arrested on 30.11.2001 and was released on bail on 1.12.2001. The charge-sheet was submitted on 25.4.2007, though it was prepared and signed by the concerned police officer on 19.4.2007. No reason was given in the charge-sheet about delay nor there was any request for extension of period of limitation. On 26.4.2007, the learned JMFC endorsed on the charge sheet - "Accused is absent when called out. Issue B/W of Rs. 5000/-". The learned JMFC passed another order by writing on the charge-sheet thus:

Issue Notice to surety

From the order dated 26.4.2007 to issue bailable warrant, it appears that the learned Magistrate had taken cognizance of the case, but that order nowhere indicates that the learned Magistrate had considered the reasons for the delay and was satisfied about the delay or that he was satisfied that it was in the interest of justice to take cognizance even beyond the period of limitation.

8. The accused filed the application Exhibit 7 for dismissal of the complaint on

the ground that it was barred by limitation. While rejecting the application, the learned JMFC observed thus:

...However, it appears from the record that this Court has received the charge sheet and registered it on 25/4/2007 and my learned predecessor has issued the bailable warrant against the accused on 26.4.2007. It means that this Court has taken the cognizance of alleged offence against the accused and therefore, the bailable warrant was issued against the accused. Thus, it appears that delay, if any, in filing the charge sheet appears deemed to be condoned. The alleged offence is serious one, being it is alleged to be against the Nation and Public Peace, inspite of having a ban on SIMI organization. I do not find any legal substance in the instant application. In result, the application vide Exh.7 is liable to be rejected

It shows that though the Magistrate taking cognizance of the case had nowhere indicated that he was satisfied about the reasons for the delay or that it was in the interest of justice to take cognizance of the case beyond period of limitation, the learned JMFC, while passing the impugned order presumed that the delay if any in filing the charge-sheet was deemed to have been condoned. In fact, he could not presume that the delay was condoned by the earlier Magistrate while taking cognizance of the case. These observations of the learned Magistrate run contrary to the observations of this Court in *Jethmal H. Jain (supra)*.

9. The learned APP fairly conceded and pointed out that the Supreme Court has held that whenever the discretion of taking cognizance after extending the period of limitation is to be exercised. The Court should pass a speaking order giving the reasons for the same. In *State of Himachal Pradesh Vs. Tara Dutt and Another*, as follows:

7. Section 473 confers power on the Court taking cognizance 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 and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in S. 468, the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence....

10. In Sharadchandra Vinayak Dongre and others etc. Vs. V. State of Maharashtra, , this Court after taking note of observations of Supreme Court in Surinder Mohan (supra) in observed thus in paras 30, 31 and 33:

30. Thus, the Court is duty bound on the presentation of the charge-sheet to consider the question of limitation and to see as to whether it is competent to take cognizance and whether the limitation has expired or not. In case the limitation has expired, it has no jurisdiction to take cognizance and if in disregard to the provisions the Court takes cognizance, the order of the Court would be without jurisdiction.

31. It is contended by the State that the accused persons are not entitled to a hearing or a notice as there was no express provision in that behalf in the Code. It is needless to say that even if the Statute is silent, a very valuable right arises in favour of the accused persons on account of the expiry of the prescribed period of limitation and they are entitled to an opportunity of being heard and principles of natural justice inevitably require that they should be heard on the question of extension of period of limitation by the Court. In my view, before taking cognizance of the offence, in case the charge-sheet is presented after the expiry of the period of limitation, an opportunity of being heard should be given to the accused persons before extending the period of limitation....".

33. Incidentally, there is another infirmity in respect of this order condoning the delay by the trial Court. The Magistrate has no power or jurisdiction to take cognizance of an offence which is time barred u/s 468 of the Code. That being the position, there is no scope for condonation of delay after taking cognizance of the offence. Such delay has to be condoned in accordance with the provisions of the Criminal Procedure Code, 1973, prior to the taking of the cognizance of the offence. In the present case, the process has just been reversed The Magistrate takes the cognizance of the offence, directs process to be issued and later on proceeds to grant the application for condonation of delay. That has been done in the present case and as such I feel no hesitation in holding that on this additional ground the trial Court acted illegally and without jurisdiction in taking cognizance of the offence alleged in the present case.

11. Taking into consideration all the facts and circumstances and the legal position, it is clear that as the prosecution never made a request for condonation of delay by giving any valid reason either in the charge-sheet or by separate application nor the learned Magistrate has indicated anywhere that was satisfied about the reasons for the delay or that it was in the interest of justice to take cognizance beyond the period of limitation, it cannot be said that the power u/s 473 to extend the period of limitation was actually exercised by the concerned Magistrate. If that power was not exercised and the period of limitation was not extended, the charge-sheet could not have been filed beyond the period of limitation of 3 years which had expired on 25. 10.2005. Therefore, the Court could not take cognizance of the case beyond period of limitation in view of the specific provisions of Section 468(1) Cr.P.C. This aspect has not been considered

by the learned Magistrate while rejecting the application Exhibit 7.

12. It is true that the offence against the accused appears to be serious as activities and is a banned organisation and present accused was allegedly associated with said banned association and was instigating the people of Muslim community against the Government of India. However, the concerned police officers, were sitting over the matter for a period of about four and half years even after the sanction for prosecution was accorded by the Additional Chief Secretary (Home). No justification was given as to why the charge-sheet could not be filed within the period of 3 years after the sanction was accorded. In fact, it would be a fit case where the Government should consider the appropriate action against the officers, who may be guilty for unreasonable delay and for dismissal of this case on the ground of limitation.

13. For the aforesaid reasons, the Application is allowed. The impugned order is hereby set aside and the Criminal Case No. 325/2007 on the file of JMFC, Malegaon, stands dismissed.

14. The learned APP shall bring to the notice of the Government the above observations for taking appropriate action against the concerned police officers.