

(1983) 08 BOM CK 0030

In the Bombay High Court

Case No : Criminal Revision Application No. 554 of 1982

Rustom Shahabuddin

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 31-08-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 300
Limitation Act, 1963 — Section 5
Railway Property (Unlawful Possession) Act, 1966 — Section 3

Citation : (1983) 2 BomCR 787

Hon'ble Judges : M.P. Kanade, J

Bench : Single Bench

Advocate : H.H. Keswani, for the Appellant; M.D. Gangakhedkar, Public Prosecutor, for the Respondent

Judgement

M.P. Kanade, J.—The petitioner-original accused was prosecuted u/s 3(a) of the Railway Property (Unlawful Possession) Act, 1966, having been found in possession of battery connections belonging to the railways, on August 14, 1974 at Matunga Workshop. The said case was numbered as 255/S of 1974. The prosecution, led the evidence of one Nasaruddin Rakshak attached to Railway Protection Force, Post Matunga. In his evidence the said witness stated that the property seized from the accused had no specific marks indicating that the property belonged to the railways. No further evidence was led by the prosecution and the learned Magistrate on the basis of the said evidence discharged the accused on June 25, 1976.

2. It is thereafter criminal case bearing Case No. 115/S of 1977 was filed on the same facts. No leave was obtained by the prosecution to file a fresh complaint. It further appears that no objection was taken regarding the maintainability of the second complaint. However at the final hearing a point was raised before the learned Magistrate that the second complaint was not maintainable in view of the provisions of section 300 of the Code of Criminal Procedure. That contention was negatived by the learned Magistrate and on appreciation of evidence the learned

Magistrate by his judgment and order dated September 30, 1978 was pleased to convict the petitioner accused u/s 3(a) of the Railway Property (Unlawful Possession) Act, 1966 and sentenced him to pay a fine of Rs. 500/-. In default of payment of fine the accused was ordered to suffer R.I. for two months.

3. Feeling aggrieved by the said order of conviction and sentence, the petitioner preferred an appeal being Criminal Appeal No. 705 of 1 978 to the Court of Sessions for Greater Bombay. The appeal was barred by limitation. The learned Additional Sessions Judge by his judgment and order dated October 19, 1982 dismissed the appeal holding that the appeal was time barred. However, on the merits, it is held that the second complaint filed by the prosecution was not maintainable.

4. It is that judgment and order that is challenged in this revision application.

5. Shri H.H. Keshwani, the learned Counsel appearing in support of this revision application contended that though the appeal was filed beyond a period of limitation and inspite of the note by the office that the appeal was barred being beyond the period of limitation, the appeal was admitted by the learned Sessions Judge and the Said order of admission should be treated as an order condoning the delay in filing the appeal. There is no force in this contention. A substantial right is accrued to the respondent in that the appeal was time barred. At the final hearing of the appeal the contending respondent will have a right to contend that the appeal was time barred and, therefore, liable to be dismissed. Even assuming that at the time of admission the learned Judge had condoned the delay ex parte, an application should have been filed explaining the delay in filing the appeal. But such an application was not filed by the petitioner in the Appeal Court. The learned Sessions Judge observed that by virtue of section 5 of the Limitation Act, the delay had to be condoned at the time of admission and, therefore, it is beyond his jurisdiction to condone the delay at In the stage of hearing of the appeal. It is further observed that in ,where the delay was not condoned when the appeal was I am not able to condone the delay at the stage of hearing. This observation made by the learned Judge is seriously challenged by the learned Counsel of the petitioner.

6. Section 5 of the Limitation Act enables an appellant to make an application for condonation of delay if the appeal is presented after the prescribed period of Limitation. If at the time of instituting an appeal an application is not made leader section 5 of the Imitation Act, it would not debar the appellant to such an application during the hearing of the appeal. There is no bar to make an application u/s 5 during the pendency of the appeal. When a respondent is entered to challenge the admission on the ground of limitation at the final hearing it means that the plea of limitation is available even at the final hearing of the appeal. The learned Judge ought to have asked the appellant to make an application giving sufficient cause for condonation of delay. The lower Court committed an error of law in holding that it had no jurisdiction to entertain an application for condonation of delay. The appellant had not filed an application in

the appeal Court for condonation of delay, however an oral application was made for condonation of delay, The learned Judge rightly observed that there was no application for condonation of delay and no sufficient cause was shown. In this revision application the petitioner has filed an affidavit explaining the delay of 21 days in filing the appeal against the order of conviction and sentence. In para 3 of the affidavit he has stated that he bona fide believed that the period required for filing the appeal is 60 days and, therefore, it resulted in delay of 21 days in filing the appeal accept this affidavit and the statement made therein to be correct. From the record it appears that the appellant and his Advocate both were under the impression that the period for tiling the appeal was 60 days and not 30 days as provided by the Limitation Act and, it is, therefore, no separate application for condonation of delay was made. The note of the office remained unnoticed till the final hearing of the appeal. At the stage of the proceedings probably the Advocate of tie petitioner was not in a position to make a written application. I, therefore, feel that there is sufficient reason shown by the petitioner to condone the delay. The statement in para 3 of the affidavit appears to be correct and truthful because no separate application was filed during the hearing of the appeal before the learned Sessions Judge. In the result, the delay in filing the appeal before the learned Additional Sessions Judge deserves to be condoned.

7. On merits the learned Additional Sessions Judge held that it is very clear that the second complaint in Case No. 115/S of 1977 was not tenable in law and it was barred u/s 300 of the Code of Criminal Procedure. The learned Additional Sessions Judge found that the facts which led to the prosecution in Criminal Case No. 255/S of 1 974 are the same which are subject matter of Case No. 11,3/S of 1 977. The order in Criminal Case No. 255/S of 1 974 makes it clear that on June 23, 1 976 Evidence of Nasaruddin Rakshak recorded by the learned Metropolitan Magistrate. On June 25, 1976 the learned Metropolitan Magistrate delivered the judgment and observed that the witness Nasaruddin himself admitted that there was no evidence to show that the properties are of railways. Therefore, in the absence of evidence the learned Metropolitan Magistrate came to the conclusion that there was no ground to frame the charge against the accused and accordingly discharged the accused. From the facts of these two cases it is clear that the prosecution led the evidence of Rakshak Nasaruddin and no adjournment was sought for producing more witnesses. The order of discharge was passed on June 25, 1976 and the second complaint was filed somewhere in 1977. The offence is alleged to have been committed by the petitioner on August 15, 1974. It is beyond my comprehension how the property could have been identified by the witness nearly after three years to be the property belonging to the railways. In any case, the learned Additional Sessions Judge found that the second complaint was not tenable. I concur with his view and hold that the second complaint itself was not maintainable in view of the provisions of section 300 of the Code of Criminal Procedure and it is, therefore, the order of conviction and sentence passed by the learned Metropolitan Magistrate and confirmed by

the learned Additional Sessions Judge deserves to be quashed.

8. In the result, the rule is made absolute. The order of conviction and sentence passed by the learned Metropolitan Magistrate, 35th Court, V.T. Bombay dated September 30, 1978 and confirmed in appeal by the learned Additional Sessions Judge for Greater Bombay dated October 19, 1982 is quashed and set aside. The petitioner-accused is accordingly acquitted. Fine, if paid, be refunded to the petitioner-accused.