

(1999) 08 BOM CK 0014

In the Bombay High Court

Case No : Criminal Writ Petition No. 906 of 1992

Shri Atmaram Shivling Duple

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-08-1999

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66(1)

Criminal Procedure Code, 1973 (CrPC) — Section 468, 469, 470, 473

Citation : (2000) 5 BomCR 715

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : N.J. Patil, for the Appellant; R.Y. Mirza, Assistant Public Prosecutor, for the Respondent

Judgement

S.S. Parkar, J.—By this writ petition the order of conviction and sentence recorded by the Ld. J.M.F.C. Radhanagari on 31st December 1988 in Summary Case No. 175 of 1985 and confirmed by the Addl. Sessions Judge, Kolhapur in Criminal Appeal No. 22 of 1989 by judgment and order dated 5-8-1990 is under challenge.

2. The brief facts necessary for disposal of this petition are as follows : The petitioner, who was serving as Police Head Constable under Buckle No. 2/1400 was attached to Radhanagari Police Station in Kolhapur District on the date of incident which is 2nd April 1983. On that day he was suspected of having consumed alcohol, and therefore he was sent to the Medical Officer on the same day. He was examined by the doctor under Medical Case No. 138/83. His blood was taken. The C.A. report is at Exhibit 30 according to which the blood of the petitioner-accused contained 0.14% ethyl alcohol. His blood was collected under the panchanama and there is no procedural lacuna pointed out. The papers were submitted to the Sr. Prosecutor, Kolhapur in the month of April 1983 itself for obtaining the opinion for filing complaint. Thereafter the complaint (Exh. 20) came to be filed on 17-10-1984 at the Radhanagari Police Station and crime was

registered against the petitioner under C.R. No. 48/84. Thereafter the charge-sheet came to be filed on 13-5-85. The evidence was led on behalf of the prosecution of the P.S.I. complainant and other witnesses including the panchas in the trial Court and after appreciating the entire evidence on record the Trial Court found the petitioner guilty under the provisions of section 66(1)(b) of the Bombay Prohibition Act and was accordingly convicted and sentenced till rising of the Court and to pay a fine of Rs. 500/- in default to undergo R.I. for 15 days.

3. The petitioner-accused then challenged his conviction order by filing Criminal Appeal No. 22 of 1989 before the Sessions Court, Kolhapur. His appeal was heard by the Ld. Addl. Sessions Judge, Kolhapur who was pleased to dismiss his appeal by confirming the order of the trial Court on 5-8-91.

4. From the perusal of the facts of the case it appears that the complaint was barred by limitation u/s 468 of the Cr.P.C. The said point of limitation was raised before the Sessions Court which has been dealt with by the Ld. Sessions Judge in para 9 of the judgment. The Ld. Judge has tried to overcome the said plea of limitation by observing that satisfactory explanation was given by prosecution for delay in lodging the prosecution.

5. u/s 468(2)(b) the period of limitation in this case would be one year as the offence is punishable with imprisonment upto maximum of six months. u/s 469 the period of limitation commences from the date of the offence which is 2nd April 1983 in this case. Under Clause (b) of sub-section (1) of section 469 the period is to be calculated from the day of knowledge of the commission of the offence by the person who is aggrieved by the said offence or from the date of establishment of identity of the offender, if the offender was not known. This case would be governed by sections 468(2)(b) and section 469(1)(a) of the Cr.P.C. According to the Ld. Sessions Judge Clause (3) of section 470 would be applicable under which the period required for previous sanction is to be excluded. However, the Ld. Sessions Judge has not mentioned how much period was taken for obtaining the sanction which could be excluded u/s 470, sub-section (3) of the Code. In this case the cognizance cannot be said to have been taken by the Court at the time of lodging of the F.I.R. on 17-8-1984 but only when the charge-sheet was filed on 13-5-1985.

6. What is surprising here is that although the offence was committed on 2nd April 1983 and the blood was sent for analysis, even the complaint was not lodged for a period of more than one year as the same was lodged on 17-10-1984. I have perused the record and gone through the evidence of the complainant P.S.I. Dilip Shinde who is examined as P.W.1. He does not give any explanation for filing the complaint belatedly. He even does not say as to how much time was taken for obtaining the sanction. In the absence of adequate explanation how the lower courts could have been satisfied about the explanation and condoned the delay. In order to extend the prescribed period of limitation the Court must be satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it was necessary so to do in the

interest of justice. In my view the discretion given to the lower Court has not been properly exercised. In the absence of material giving explanation for lodging the complaint belatedly and thereafter filing the charge-sheet after considerable delay, there cannot be any question of arriving at any satisfaction for delay having been properly explained. Nor any reason has been given as to why it was necessary to condone the delay in the interest of justice. In the case of Jethmal Himmatmal Jain and others Vs. State of Maharashtra, this Court has quashed the complaint when the Magistrate had taken cognizance of the offence in respect of which complaint was filed beyond limitation without any explanation for delay or application for condonation of delay. Normally delay should be condoned at the earlier stage at the time of taking cognizance and this cannot be done without giving an opportunity to the accused. In this case also no proper explanation has been given for delay in filing the complaint and the charge-sheet.

7. The trial Court has gone on the footing that u/s 66(1)(b) the maximum punishment provided is two years imprisonment and fine and, therefore, the limitation was three years and not one year. It is true that there are different punishments prescribed in respect of first offender and subsequent offences. The petitioner has been convicted for offence u/s 66(1)(b)(i) under which the maximum sentence is six months and not two years. The trial Court in its discretion has chosen to award the nominal substantive sentence of simple imprisonment till rising of the Court. When the petitioner was acting as Police Head Constable, during the course of investigation the prosecuting agency must have tried to find out whether the petitioner was first offender or that he was prosecuted for similar offence previously. There is no dispute that he is the first offender and the prosecuting agency was knowing that the petitioner was liable to be punished only u/s 66(1)(b)(i) of the Bombay Prohibition Act, 1949 and, therefore, it cannot be said that the petitioner was being prosecuted for offence which was punishable with maximum punishment of two years imprisonment and fine. In the case of K. Hanumantha Rao Vs. K. Narasimha Rao and Others, the Division Bench of the Andhra Pradesh High Court had taken a view that though cognizance was taken of major offence but when the accused was found to be guilty of a minor offence it would be open for the accused to raise the plea of limitation in relation to minor offence and if the challan was found to have been filed beyond the period of limitation prescribed for the minor offence the cognizance could be challenged subject to exercise of discretion by the Court u/s 473 to condone the delay if it was satisfied about the explanation given by the prosecuting agency. In the facts and circumstances of this case I am of the view that in this case there was no doubt from the beginning when the charge-sheet was filed that the petitioner was sought to be prosecuted under sub-clause (i) of Clause (b) of sub-section (1) of section 66 of the Bombay Prohibition Act for which maximum period of imprisonment is six months and, therefore, the period of limitation which is applicable u/s 468 of the Cr.P.C. is one year. In the absence of satisfactory explanation in that behalf, the trial Court ought not to have taken cognizance of the offence.

8. In the result, this petition succeeds. The order of conviction recorded against the petitioner under the provisions of section 66(1)(b) of the Bombay Prohibition Act by the Ld. J.M.F.C., Radhanagari in Summary Case No. 175 of 1985 which was confirmed by the Ld. Addl. Sessions Judge, Kolhapur in Criminal Appeal No. 22 of 1989 is hereby quashed and set aside. Rule is made absolute in terms of prayer Clause (b) of the petition. The petitioner is acquitted. The fine if paid shall be refunded.

9. Petition succeed.