

(1982) 11 BOM CK 0004
In the Bombay High Court
Case No : Criminal Appeal No. 1542 of 1979

State of Maharashtra

APPELLANT

Vs

Deepchand Khushalchand Jain and others

RESPONDENT

Date of Decision : 22-11-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378, 378(3), 378(4), 417, 417(1)
General Clauses Act, 1897 — Section 8
Limitation Act, 1963 — Article 114, 29, 29(2)
Penal Code, 1860 (IPC) — Section 20, 21, 378, 378(5)
Prevention of Food Adulteration Act, 1954 — Section 16, 17, 2, 7

Citation : (1982) 11 BOM CK 0004

Hon'ble Judges : R.R. Jahagirdar, J

Bench : Single Bench

Judgement

This Judgment has been overruled by : T.V. Usman Vs. Food Inspector, Tellicherry Municipality, Tellicherry, AIR 1994 SC 1818 : (1994) 1 JT 260 : (1994) 1 SCALE 179 : (1994) 1 SCC 754 : (1994) 1 UJ 365

1. The respondents in this appeal were prosecuted in Criminal Case No. 72 of 1974 in the Court of the Judicial Magistrate First Class, of Niphad for offences punishable under sections 16 and 17 read with Sections 7(i) and 2(i)(a) of the Prevention of Food Adulteration Act, hereinafter referred to as "the Act". The prosecution was launched on the allegation that the respondents had sold groundnut oil, which was found to be adulterated by the Public Analyst, to the Food Inspector attached to the office of the Assistant Commissioner, Nasik Circle, of the Food and Drugs Administration. In the complaint itself the complainant was described as follows :-

"State of Maharashtra, at the instance of Shri H. N. Ogale, Food Inspector, Nasik."

Section 20 of the Act provides as follows :-

"20(1). No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Central Government or the State Government

or a local authority or a person authorised in this behalf, by general or special order, by the Central government or the State Government or a local authority."

The above provision shows that the prosecution for an offence under the Act can be instituted by (1) the Central Government, (2) the State Government, (3) a local authority, (4) a person authorised in this behalf, by general or special order, by the Central Government or the State Government or the local authority, (5) or by a person with the written consent of any of the aforesaid authorities or persons. In the present case it has been mentioned in the complaint filed in the Court below as follows :-

"That as per the provisions of S. 20 of the Act consent has been obtained from the Asstt. Commissioner, Food & Drugs Administration. Nasik Circle, Nasik for the prosecution of the accused."

The Assistant Commissioner must obviously be the person who is authorised to give consent as provided for in Section 20. That is clear from the order passed by the Assistant Commissioner, Nasik Circle, of the Food and Drugs Administration, on 19th of January 1974. In this order the Assistant Commissioner has mentioned that in exercise of the powers vested in him u/s 20 of the Act read with Government Resolution, Urban Development, Public Health and Housing Department No. PFA/1872/56917-V dt. 24th July, 1973, he gives consent for the prosecution of the persons named therein who are the accused in the case.

2. The learned trial Magistrate by this judgment and order dated 28th of February, 1979 acquitted the accused of the offences with which they were charged. It may be mentioned that originally in the trial Court there were four accused, the first three being the partners of the fourth accused which is a firm. During the pendency of the trial, the third accused died. The application for certified copy of the judgment was made by the State on 5th of March, 1979. The certified copy was ready somewhat late on 29th September, 1979. The appeal has been filed on 7th of December, 1979. Taking into consideration the time requisite for obtaining the certified copy, the appeal has been filed within ninety days, though beyond sixty days, from the date of the order.

3. Mr. Ganatra, the learned Advocate appearing for the respondents, has taken a preliminary objection to the hearing of this appeal in the ground that the appeal when filed was barred by limitation. According to Mr. Ganatra, the period of limitation for this appeal is sixty days. He contends that the provisions of sub-sections (4) and (5) of S. 378 of the Code of Criminal Procedure, 1973, hereinafter referred to as "the Code of 1973", are applicable to this appeal. Even if the appeal is treated as a composite petition containing both the grounds of appeal and prayer for leave to appeal under sub-section (4) of S. 378 it should have been filed within sixty days as mentioned in sub-section (5) of S. 378.

4. His second contention is that even if the appeal has been admitted without the office raising any objection in respect of the bar of limitation, he is entitled to point to the Court at the time of the final hearing of the appeal that the appeal,

when it was originally filed, was barred by limitation. He then proceeded to contend that if it is found, accepting his contention in this regard, that there was a delay in the filing of the appeal, the appeal itself should be regarded as non est because the delay has not been condoned and no application for condoning the delay was made along with the filing of the appeal. Lastly he contended that at this stage the State is not entitled to file an application for condonation of delay. According to Mr. Ganatra, if limitation as been prescribed for any appeal and if there is delay in the filing of that appeal, an application for condoning the delay must be presented along with the appeal itself and it cannot be presented later. There are quite weighty submissions which I am proceeding to examine in the order in which they have been enumerated by me above.

5. The provisions of the relevant laws should now be considered. The Limitation Act of 1963, in its Art. 114, provides that an appeal from an order of acquittal under sub-section (1) or sub-section (2) of S. 417 of the Code of Criminal Procedure, 1898, hereinafter referred to as "the Code of 1898", should be filed within ninety days from the date of the order appealed from. However, an appeal under sub-section (3) of S. 417 of the Code of 1898, that is by the complainant, had to be filed within thirty days from the grant of special leave. That appeal could be admitted only if on an application made to the High Court by the complainant in that behalf the High Court granted special leave to appeal. The application for leave to appeal itself had to be filed under sub-section (4) of S. 417 of the Code of 1898 within sixty days from the date of the order of acquittal. After the leave was granted, the appeal had to be filed within thirty days. Though in practice both the application for leave to appeal and the appeal could be and were filed together within sixty days.

6. No period of limitation was prescribed in the Code of 1898 for appeals from orders of acquittal by the State. According to Mr. Ganatra, the new Code, namely the Code of 1973, does prescribe period of limitation for an appeal against an acquittal to be preferred by a State which also has to be done after obtaining leave from the High Court. Mr. Ganatra rightly mentions that S. 378 of the Code of 1973 is a special law within the meaning of Section 29 of the Limitation Act, 1963, sub-section (2) of which provides as follows :-

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule. The provisions of S. 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

7. The question whether the analogous provision in the Code of 1898 was a special law arose earlier before the Supreme Court in *Kaushalya Rani Vs. Gopal Singh*, It was held in that case that so far as appeal by the State Government

against acquittal was concerned, the law of limitation is the general law laid down in the Limitation Act. But in so far as an appeal by a private prosecutor was concerned, it was held that the legislature was astute to specifically lay down in S. 417 itself of the Code of 1898 that the foundation for such an appeal should be laid within sixty days from the date of the order of acquittal. In that sense it was held that the rule of sixty days' bar is a special law, that is to say, a rule of limitation which was specifically provided for in the Code itself. Though the Code of Criminal Procedure was a general law regulating the procedure in criminal trials in general, it was held that the Code contained provisions specifying a bar of time for particular class of cases which are of a special character. Such provisions would be special law as mentioned in S. 29(2) of the Limitation Act, 1963.

8. If Mr. Ganatra's contention that the period of limitation for appeals by the State against orders of acquittal is provided for in S. 378 of the Code of 1973 is accepted, then naturally the limitation provided for in the Limitation Act would not be applicable. The question is whether this contention is correct. Though Art. 114 of the Limitation Act, 1963 refers to S. 417 of the Code of 1898, by virtue of the provision contained in S. 8 of the General Clauses Act, the reference in Art. 114 will have to be read as one to the corresponding provisions in the Code of 1973, viz. Section 378.

9. One must now subject S. 378 of the Code of 1973 to a proper analysis. Sub-section (1) of the said section mentions : "Save as otherwise provided in sub-section (2) and subject to the provision of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court." No appeal under sub-section (1) or sub-section (2) can be entertained except with the leave of the High Court. It is so provided in sub-section (3) of S. 378. In other words, when the State decides to prefer an appeal through the Public Prosecutor against an order of acquittal, it has to first obtain the leave from the High Court and after such leave is granted the appeal would be entertained.

10. Sub-sections (4) and (5) may now be reproduced :-

"(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the high Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal."

11. From the above provisions it is easily seen that S. 378 itself prescribes a period of limitation for an application for special leave to appeal against an order of acquittal to be filed by the complainant. Where the complainant is a public

servant, the period is six months and in other cases it is sixty days. Sub-sections (4) and (5) obviously do not deal with an application for leave to appeal to be filed by the State if it desires to prefer an appeal against an order of acquittal. The difference in the terminology of sub-sections (3) and (4) should not be overlooked. In the case of an appeal under sub-section (1) or sub-section (2) of S. 378. Which is to be preferred by the State, what is to be obtained by the State is the leave of the High Court : in the case of appeals to be preferred by the complainant, the application has to be filed for obtaining special leave to appeal from the order of acquittal. Sub-section (5) of S. 378 will apply only to a situation covered by sub-section (4) of that section. It cannot, by the very terminology used in the said sub-section, apply to sub-section (3) of S. 378. In other words, application for grant of special leave to appeal from an order of acquittal mentioned in sub-section (5) of S. 378 necessarily refers only to an application which is to be filed under sub-section (4).

12. As far as the State is concerned, S. 378 only provides that an appeal under sub-section (1) or sub-section (2) shall not be entertained except with the leave of the High Court. That leave may be obtained by preferring an appeal itself and making a prayer in that appeal for leave to appeal as mentioned in sub-section (3) of S. 378. A proper reading of all the provisions contained in S. 378 must necessarily lead to the conclusion that as far as the State is concerned, no period of limitation is mentioned in the said section. Though S. 378 is a special law, since the period of limitation is not mentioned in the said section, one has necessarily to refer to the Limitation Act for finding out what the period of limitation is for a State appeal against an order of acquittal.

13. Mr. Ganatra, however, as insisted that in all case arising under the Act, the State itself is the complainant and, therefore, the present appeal, as any other appeal from an order of acquittal, must be regarded as an appeal preferred by the complainant and the provisions of sub-sections (4) and (5) of S. 378 must necessarily apply. In support of his contention that the State is the complainant and the present appeal is necessarily by the State, Mr. Ganatra has referred to and relied upon *Municipal Corporation of Delhi Vs. Jagdish Lal and Another*, The facts of that case disclose that the Municipal Prosecutor authorised by the resolution of the Municipal Corporation of Delhi in that regard had filed a complaint against the respondent before the Supreme Court for an offence punishable under S. 16 read with S. 7 of the Act. It had been specifically mentioned in the said complaint that the Municipal Prosecutor, one Sri Mathur, was competent to file the complaint under S. 20 of the Act by virtue of a resolution passed by the Corporation. The Magistrate having acquitted the respondent, the Delhi Municipal Corporation made an application to the High Court asking for special leave to appeal under S. 417 of the code of 1898. The application was granted and the appeal was admitted. However when the appeal came up for final hearing an objection was raised on behalf of the respondent that the Municipal Prosecutor alone and not the Deli Municipality could file an appeal because the Prosecutor was the complainant.

14. Analysing the provisions of Section 20 of the Act and also the relevant provisions of the Delhi Municipal Corporation Act, the Supreme Court held that it was the Delhi Municipal Corporation which was the complainant and the Municipal Prosecutor was acting only in a representative capacity in filing the complaint. The maxim "Qui per alium facit per seipsum facere videtur" (he who does an act through another is deemed in law to do it himself) was relied upon. Reference also may be made to the judgment of the Supreme Court in *Dhian Singh Vs. Municipal Board, Saharanpur*, wherein it has been held that if the complaint for an offence under the Act is purported to have been filed by the Municipal Board but signed by the Food Inspector, the Board was competent to file an appeal against acquittal.

15. The judgment of the Supreme Court in *Municipal Corporation of Delhi Vs. Jagdish Lal and Another*, has been followed, and naturally, by the Delhi High Court in *Municipal Corporation of Delhi Vs. Amrit Lal*. In this case, the question whether the Municipal Corporation was a public servant was involved. The accused was acquitted in a case instituted on a complaint filed by the Municipal prosecutor on behalf of the Municipal Corporation. The application for special leave to appeal was filed by the Municipal Corporation beyond the period of sixty days but within the period of six months, it was contended on behalf of the Municipal Corporation that the Corporation itself was a public servant and, therefore, it was entitled to get the benefit of the extended period of six months in filing an application for special leave to appeal u/s 378(5) of the Code of 1973. This contention was negatived and it was held by the Delhi High Court that the Municipal Corporation being a public body could not be said to be a public servant within the meaning of S. 21 of the Indian Penal Code. Mr. Ganatra's reliance upon this judgment is for the purpose of showing that the present appeal cannot be held to be an appeal by a public servant and the benefit of the extended period of six months cannot be made available to the State. That the State itself cannot be a public servant just as the Municipal Corporation cannot be a public servant, is in my opinion, an unexceptional proposition.

16. The meaning of the word "complainant" to be found in S. 378 has to be necessarily gathered from the definition of the word "complaint" contained in S. 2(d) of the Code itself. That provision describes the "complaint" to mean "any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report". In other words, the police report cannot be a complaint. The explanation to Cl. (d) of S. 2 provides that "a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant". The offences under the Act are not cognizable offences. Besides, cognizance of the offences under the Act cannot be taken by any Court except on the complaint of a competent person or authority mentioned in S. 20 of the Act. The question of the police or the State coming into the picture for

approaching the Court trying an offence under the Act as a cognizable offence thus does not arise. Whoever, therefore, files a complaint in compliance with the provisions contained in S. 20 of the Act must be regarded as the complainant within the meaning of S. 378 of the Code of 1973. If this is so and if the State has filed the complaint in the trial Court, the State must be held to be the complainant. Then if the State prefers an appeal in its capacity as the complainant, sub-sections (4) and (5) of S. 378 must necessarily come into play. The question, however, is whether an appeal by the State under sub-section (1) is in its capacity as the complainant.

17. Mr. Barday, the learned Public Prosecutor, has pointed out that sub-section (1) of S. 378 recognises the eminent role the State as to play in all criminal proceedings. The State has been given a right to prefer an appeal against an order of acquittal irrespective of who is the complainant in the trial Court. Even if an individual files a criminal complaint in the trial Court and if the proceedings end in an order of acquittal, the State as the upholder of law and order in the society has a right to bring into question that order of acquittal. This right as been statutorily recognised, says Mr. Barday, by the provisions contained in S. 378(1). In support of this contention Mr. Barday has relied upon *State of U.P. v. B. S. Birdhi* 1966 All LJ 159, wherein M. H. Beg J., as he then was, held that the right of appeal under S. 417(1) of the old Code given to the State is against any order of acquittal in any case. There was no restriction on that right of appeal except those mentioned in sub-section (5) of Section 417 of the old Code.

18. I have no hesitation in upholding this contention. Once this position is accepted, as I am inclined to accept, then irrespective of the fact that the State had in its capacity as the complainant conducted the proceedings in the trial Court, it has an independent right as the State to prefer an appeal under sub-section (1) of S. 378. This right of the State cannot be trammelled by the provisions contained in sub-sections (4) and (5) of S. 378. This is a right which is independent if the right given to the complainant, whether the complainant in the trial Court was the State or a public servant or any other private individual. The wide amplitude of phraseology used in sub-section (1) of Section 378, namely "..... the State Government may, in any case, direct the Public Prosecutor to present" clearly shows that the State has a right to approach the High Court to challenge an order of acquittal passed in any case in the lower Court. One restriction that is placed upon this right of appeal is that leave of the High Court under sub-section (3) has to be obtained. The other restriction, with which we are not concerned here, is in sub-section (6).

19. The independent right of the State to prefer an appeal against acquittal where the investigation has been carried out under the Delhi Special Police Establishment Act has been recognised by the Supreme Court in *Khemraj Vs. State of Madhya Pradesh*, of the Code of 1898 was held to be no bar to the jurisdiction of the State Government to present appeals against acquittals when it was moved by the said Police Establishment."It is purely a matter of

procedure. The word "also" in S. 417(2) seems not to bar the jurisdiction of the State Government to direct the Public Prosecutor to present an appeal even in cases investigated by the Establishment. Sub-section (1) is in general terms and takes in its purview all types of cases since the expression used therein is "in any case". Sub-section (2) advisedly uses the word "also" when power is given to appeal."

20. Mr. Ganatra, however contends that this interpretation will render certain words in sub-section (1) of S. 378 superfluous. For example, he mentions that the right of appeal under sub-section (1) is "subject to the provisions of sub-sections (3) and (5)". According to him, in such a case the provisions of sub-section (3) and (5) must necessarily apply. He insists that if the State has to prefer an appeal even in exercise of its right under sub-section (1), that right is subject to the provisions of sub-sections (3) and (5). Sub-section (3) provides for leave of the High Court to be obtained. It is further argued that subsection (5) must be split up into two parts. The first part refers to applications to be made under sub-section (4) for the grant of special leave to appeal from an order of acquittal where the complainant is a public servant. In such a case the application must be filed within a period of six months. The second part deals with all other cases, namely, all those cases where the original complainant is not a public servant. We have already seen that the State and the Municipal Corporations cannot be called public servants. If this is so it suggested, then the latter part of sub-section (5) must necessarily apply and the period of limitation is sixty days.

21. The argument is attractively attired, but it is based upon a misreading of the provisions contained in sub-section (5). Sub-section (5) applies, in my opinion, to an application made for the grant of special leave to appeal and it does not apply to an application to be made for the grant of leave of the High Court. The provisions of sub-section (5) are to be read as a rider to the provisions of sub-section (4) and they do not at all apply to what is contained in sub-section (3). The opening words of sub-section (5) "No application under sub-section (4) for the grant of special leave to appeal" necessarily show that the entire sub-section (5) is concerned with a providing for limitation for an application to be made under sub-section (4) for obtaining special leave. Sub-section (4) admittedly deals with applications to be made only by the complainant and not by the State. If once this basic position is appreciated, then there is no scope for misunderstanding the second part of sub-section (5). In my opinion, therefore, there is no period of limitation prescribed in S. 378 of the Code of 1973, which is a special law, for appeals to be preferred by the State against orders of acquittal in exercise of its right given by sub-section (1) of S. 378. This is so despite the mention of the words "subject to the provisions of sub-sections (3) and (5)" in sub-section (1) of S. 378. If, however, the State prefers an appeal in its capacity as the complainant, then may be the provisions of sub-section (5) will come into play. In the present case, however, as Mr. Barday has pointed out, the appeal is an appeal preferred by the state in exercise of its right given under sub-section

(1) and not as the original complainant. In the prayer clause leave under sub-section (3) has been requested. It is, however, advisable for the Public Prosecutor to specify in what capacity the State has preferred the appeal to the High Court. The period of limitation prescribed for State appeals against orders of acquittal under Art. 114 of the Limitation Act, 1963 is ninety days. This appeal is therefore, within time.

22. It will not be out of place to briefly refer to a judgment of the Supreme Court in State of Rajasthan Vs. Ramdeen and Others, The question that was being decided by the Supreme Court was slightly different from the one which I have examined. There the question was whether an appeal by the State against an order of acquittal can be filed only after obtaining leave under sub-section (3) of S. 378. It was held that under the law it would be perfectly in order if a composite application was made giving the necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer for leave to entertain the appeal. It was not necessary as a matter of law that an application for leave to entertain the appeal should be lodged first and that only after the grant of leave by the High Court an appeal should be preferred against an order of acquittal. Thereafter the Supreme Court noticed that the period of limitation provided by Limitation Act. 1963 in its Article 114 for an appeal by the State against an order of acquittal was ninety days from the date of the order appealed from. In paragraph 9 of the judgment the position of the State appeal and the appeal by the private complainant has been discussed. I cannot thus overlook the fact that the Supreme Court has in one case taken the view that under Art. 114 of the Limitation Act an appeal from an order of acquittal by the State can be filed within ninety days from the order appealed from.

23. I may also made a brief reference to the Law Commission Report which preceded the passing of the Criminal Procedure Code of 1973. In paragraph 31.20 of the Forty-First Report, the Law Commission of India mentioned as follows :-

"The time allowed for an acquittal appeal by the State is now ninety days. Some time ago, it was six months. It has been suggested that the period should be extended, but we are unable to find any justification for it."

The draft Code annexed to the aforesaid Report of the Law Commission incorporated the provisions relating to appeals as follows :-

"S. 388(1). Subject to the provisions of sub-section (5), the State Government may in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court."

Sub-section (5) mentioned above corresponds to sub-section (6) of the Code of 1973.

24. From the above recommended provision it would be seen that the Law

Commission did not recommend that the State has to make an application for leave to appeal. That is why the right of the State to prefer an appeal under sub-section (1) of S. 388 was not made subject to obtaining of leave as was ultimately provided in the Code that was passed by the Parliament. The Joint Select Committee considered the question of the period of limitation under sub-section (4) of S. 417 of the Code of 1898 and stated as follows :-

"Sub-clause (4) of S. 417 old Code prescribes a period of limitation of 60 days for an appeal against an order of acquittal at the instance of a complainant. In quite a few cases prosecutions are launched by means of complaints by public servants, such as prosecution for offences under some special laws such as the law relating to Foreign Exchange, smuggling, etc. In such cases, the administrative procedure for taking a decision in the matter takes quite a long time and in some cases such procedure is not completed before the prescribed period of limitation of 60 days. In consequence. There might be miscarriage of justice."

The provision requiring the State also to obtain leave before filing of appeal was inserted as a new provision on the view expressed by the Joint Select Committee that the executive had in some cases used the power to file appeal against acquittal somewhat arbitrarily. It was thus felt necessary to provide a check against this by making a provision for prior leave. The period of limitation, however, for the State appeal was not altered when the new Code was passed by the Parliament.

25. The second contention of Mr. Ganatra that even if an appeal which is barred by time has been admitted the question of limitation can be considered at the stage of final hearing on an objection raised by the respondent is well-founded and has got to be accepted. There is enough authority in support of this contention. As early as in *Krishnasami Panikondar Vs. S.R.M.A.R. Ramasami Chettiar*, , in *Krishnaswami Panikondar v. Ramasami Chettiar*, the Privy Council held that the High Court had at the time of hearing an appeal, jurisdiction to set aside an ex parte order made earlier admitting an appeal out of time. In a more recent decision, namely in *State Vs. Yeshwant Parashram Sawant*, , a Division Bench of this Court has held that when a delay in filing the appeal is condoned ex parte the order is liable to be reviewed at the instance of the respondent who can appear at the hearing and contend, notwithstanding the order, that the appeal was barred by time.

26. Since I have taken the view that this appeal is not barred by time, it will not be normally necessary for me to decide the other questions raised by Mr. Ganatra. However, I may briefly refer to them and express my opinions. Mr. Ganatra has relied upon a judgment of a single Judge of this Court in *R. C. Trivedi v. A. H. Paranjpe* 1982 Cri LJ 869. In this case the provisions contained in S. 473 of the Code fell for interpretation. In the trial Court complaint had been filed in March 1978 beyond the period of limitation prescribed under S. 468 and no application for condoning the delay had been made. Objections were taken on

the ground of limitation in September, 1978. After this the parties were heard and the learned trial Magistrate passed orders holding that the filing of the complaint was obviously barred by time, but found further that the delay was liable to be condoned in the interests of justice. The learned single Judge held that the right which had accrued in favour of an accused under S. 468 of the Code by virtue of a belated complaint can be denied to him only on an order for extension of period of limitation passed by the Court concerned acting judicially under S. 473 of the Code at the time of the issuance of the process itself and not when an objection is taken at the time of hearing. I am not sure whether this is the correct position. It is not inconceivable that when the complaint is filed it may allege that it is within the period of limitation prescribed by law. When, however, the respondent or the accused appears he may point out how the complaint is barred by time. At this stage, there is no reason why the right to file an application for condoning the delay which is shown to have occurred should be denied to the complainant.

27. In any case, I do not think that the reasoning contained in that judgment can be made applicable to an appeal. The procedure followed is that an appeal is filed and if the appellant himself is aware that the appeal is filed beyond the period of limitation he would naturally make an application for condoning the delay along with the filing of the appeal itself or immediately thereafter. The appellant, however, may make an averment in the appeal that the appeal has been filed within the time prescribed by law by mentioning among other things the time taken for obtaining the certified copy and in the light of other relevant provisions of the Limitation Act. In such a case it is open to the respondent to point out that the averments made are not true and the benefit of the other provisions of the Limitation Act which would make the appeal as having been filed within the limitation is not available. If it is thus discovered that there is a delay in the filing of the appeal, it is always permissible to the appellant to make an application for condonation of delay by setting out the necessary facts. In a given case the Court may refuse permission to file such an application as being belated without a justifiable cause. The question as to whether the delay should be condoned or not will naturally depend upon the facts and circumstances of each case. But it cannot be said as a proposition of law that an application for condonation of delay cannot be made at all after the appeal has been filed or that such an application must necessarily be made along with the filing of the appeal.

28. Mr. Ganatra also relied upon another judgment of a single Judge of this Court in Jethmal Himmatmal Jain and others Vs. State of Maharashtra, I do not think that this judgment is relevant to the facts of the case before me. What has been held in Jethmal's case is that condonation of delay should not be made except by giving notice to the other side. This is a well-established principle, but if condonation of delay is made without notice to the other side then naturally the law laid down by this Court in State of Maharashtra Vs. Yeshwant Parasharam Sawant, (referred to above) will be applicable.

29. It is true, as pointed out by the Supreme Court in State of Punjab Vs. Sarwan Singh, , that if the prosecution proceeds with a time-barred case till its conclusion and if an order of conviction is passed that order would be non est. But where, before the proceedings have ended, an objection to the period of limitation is taken and when there is provision for the condonation of delay on sufficient cause being shown, I do not think that the institution of proceedings themselves should be regarded as non est because of the absence of an application for condoning the delay.

The appeal before me is within time and it should now be placed for orders for fixing a date for hearing it on merits.

30. Ordered accordingly.