

(1997) 06 CAL CK 0006
In the Calcutta High Court
Case No : Criminal Revisional No. 985 of 1990

Tapan Kumar Ghosh and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 29-06-1997

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(3), 2, 251, 401

Penal Code, 1860 (IPC) — Section 323, 325, 328, 34

Citation : (1997) 06 CAL CK 0006

Hon'ble Judges : Dibyendu Bhusan Dutta, J

Bench : Single Bench

Advocate : Biswanath Sanyal and Anil K. Das, for the Appellant; Krishna Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Dibyendu Bhusan Dutta. J.

1. The instant application u/s 401 read with Section 482 of Criminal Procedure Code is for quashing the proceeding in G.R. Case No. 3913 of 1987 u/s 323/34 I.P.C. pending in the Fourth court of Metropolitan Magistrate Calcutta. In December 1985, a complaint was filed before the court of Additional Chief Metropolitan Magistrate, Calcutta against the petitioners on the allegations that they had committed offences u/s 325 of I.P.C. The Id. Magistrate directed the police to investigate into that complaint u/s 156(3) Cr. P.C. According to that direction, police registered a case being Section AC/No. 4331 dated 21.12.85 u/s 325 I.P.C. and started investigation. After investigation, police submitted a report before the Id. Additional Chief Metropolitan Magistrate on 19.2.87 with a prayer for discharge of the accused petitioners and also for permission u/s 155(2) Cr. P.C. for submission of challan u/s 323/34 I.P.C. Acting on that report, the Id. Magistrate discharged the accused petitioners and also accorded the permission sought for. On 24.2.87, police submitted the challan u/s 323/34 I.P.C. against the

petitioners and the Id. Magistrate took cognizance on the basis of that challan and issued process against the petitioners. The case was thereafter transferred to the fourth Court of Metropolitan Magistrate for disposal. The petitioner filed an application before the transferee court on 21.8.89 praying for their discharge on the ground that the cognizance was barred by limits of time and was accordingly void abinitio. The said prayer for discharge was register by the delacto complainant as well as the State on the ground that the Id. Magistrate took cognizance after considering the question of limitation and as such, the transferee court had no jurisdiction to go into that question again. The Id. Magistrate was of the view that the Id. Additional Chief Metropolitan, Magistrate considered the question of limitation u/s 473 Cr. P.C and thereafter took cognizance and as such the cognizance was not bad in law. In such view of the matter, the Id. Magistrate rejected the objection of the accused petitioners. And hence the instant revision.

2. The fact remains that the offence of which the cognizance has been taken is punishable u/s 323 IPC with imprisonment for a term not exceeding one year, with the result that the period of limitation for taking of cognizance prescribed under Clause (b) of Sub section (2) of Section 468 of Cr. P.C. would be one year. Evidently, the period of limitation, in this case, commenced on the date of the offence. The offence was committed on 21.12.85 while the cognizance was taken on 24.2.87, that is to say after the expiry of the period of limitation. As such, the cognizance is apparently hit by the mischief of the bar under Sub section (sic) of Section 468 Cr. P.C. Now, Section 473 lays down two exceptions to the bar imposed by Section 468 for taking cognizance of an offence. Section 473 permits a court to take cognizance of an offence even after the expiry of the period of limitation if it is satisfied, on the facts and in the circumstances of the case, they the delay is properly explained or that it is necessary so to do in the interest of justice.

3. Mrs. Krishna Ghosh, the Id. counsel appearing for the state contends that the present case is covered by the exceptions laid down by Section 473. Mrs. Ghosh draws my attention to the fact that the case was registered on the basis of an FIR complaining of an offence punishable u/s 325 I.P.C. which is an offence punishable with a term of imprisonment exceeding three years with the result that there was no time limit prescribed u/s 468 Cr. P.C. for taking cognizance of the offence which was initially complained of against the petitioners and that it was only after the completion of the police investigation that it was discovered that a prima facie case was made out for a non-cognizable offence u/s 323 IPC and not for a cognizable offence u/s 325. When such a situation arose, the police submitted a final report on 19.2.87 before the Id. Magistrate with the prayer for discharge of the accused petitioners on the ground of wan(sic) of evidence u/s 325 I.P.C. as well as a separate prayer for permission u/s 155(2) Cr. P.C. for submission of a challan u/s 323/34. The fact remains that the Id. Magistrate, by his order dated 19.2.87 discharged the accused petitioners as prayed for and did also accord the permission, by the self-same order, u/s 155(2) Cr. P.C. on due

consideration, for submission of a challan u/s 323/34. It is only in pursuance of the said permission granted by the Id. Magistrate that the police submitted the challan u/s 323/34 I.P.C. against the petitioners on 24.2.87 and it is on the basis of that challan which is to be deemed to be a complaint within the meaning of Explanation to clause (d) of Section 2 of Cr. P.C., that cognizance was taken by the Id. Additional Chief Metropolitan Magistrate, on 24.2.87. In the circumstances. Mrs. Ghosh submits that it can be safely said that the Id. Magistrate must be deemed to have been satisfied on the facts and in the circumstances of the case that the delay had been properly explained or that it was necessary to take cognizance in the interest of justice, notwithstanding the bar u/s 468 Cr. P.C. and as such, the cognizance that has been taken in this case cannot be held to be bad in law, as suggested on behalf of the petitioners.

4. Mr. Biswanath Sanyal, the Id. counsel appearing for the petitioners, submitted that there is nothing in the order whereby the cognizance was taken by the Id. Magistrate to indicate that the challan that was received by the Magistrate u/s 323/34 contained a specific prayer for condonation of the delay or to indicate that the Id. Magistrate did at all apply his mind to the question of limitation before he took the cognizance that the delay was actually condoned or for that matter, cognizance was taken in the interest of justice. Accordingly, Mr. Sanyal contends that the cognizance was illegal and on this ground the proceeding is liable to be quashed.

5. From the certified copy of a police report dated 19.2.87 which has been annexed with the revisional application, it would appear that after the investigation of the case that was initially registered u/s 325 I.P.C. was complete, the police submitted that report before the Id. Magistrate stating that the investigation was already complete and that the accused petitioners, who were on bail till that date, should be discharged from that case in view of want of any evidence. The want of evidence spoken of in this report, is obviously referable to the offence punishable u/s 325 because in the self-same sentence where the, police prayed for discharge of the accused persons for want of evidence, it was categorically stated that a separate prayer u/s 323 I.P.C. was separately submitted. It can therefore, be safely presumed that a separate prayer u/s 328, I.P.C. was, in fact, submitted along with this report praying for discharge of the accused. The petitioner has annexed the certified copy of the order that was passed by the Id. Magistrate on 19.2.87 which goes to reveal that of the two petitioners, who were on court bail on that day one was absent by petition thereby implying that the other one was then present before the court. In this order dated 19.2.87, the id. Magistrate recorded the fact that he had perused the police report dated 19.2.87 which has been referred to above and not only discharged the accused persons as prayed for in the report but also accorded the permission u/s 155(2) Cr. P.C. for submission of challan u/s 323/34 after due consideration. The Id. Magistrate also directed the I.O. to be informed accordingly and subsequently, by his order dated 24.2.87, the Id. Magistrate took the cognizance on receipt of the challan u/s 323/34 IPC against the

petitioners who had already been discharged, and issued process. The facts and circumstances of this particular case appear to be quite sufficient for satisfying the court that the delay was properly explained. On 19.2.87 the date on which the Id. Magistrate accorded the permission u/s 155(2) for submission of the challan u/s 323/34, the period of limitation prescribed in Section 468(2) (b) for the offence punishable u/s 323 I.P.C. had already run out but when the Magistrate records the fact that he accords the permission for submission of challan u/s 323 after due consideration, it can be safely inferred that he at least thought it necessary to extend the period of limitation in the peculiar facts and circumstances of the case. Viewed from this angle, it can be safely presumed that while taking cognizance on 24.2.87 the Id. Magistrate thought it necessary to take the cognizance in the interest of justice, notwithstanding the bar u/s 468 Cr. P.C. In the peculiar facts and circumstances of this case, the mere absence of any (sic) that the cognizance was being taken to (sic) contemplated u/s 473 Cr. P.C. (sic) sufficient to (sic) the contention of behalf of the State that the (sic) the interest of justice as contemplated u/s (sic) separate prayer u/s 323 I.P.C. was submitted by the I.O. at the time he submitted the final report praying for discharge of the accused petitioners and the Id. Magistrate accorded the permission u/s 155(2) for submission of a challan u/s 323 after due consideration. Accordingly, I feel inclined to accept the contention of Mrs. Ghosh that the cognizance was taken in the instant case in the interest of justice and as such, the taking of cognizance cannot be held to be illegal.

6. Mr. Sanyal then submits that the order taking cognizance was passed without notice to the petitioners to whom a right had already vested by reason of expiry of the period of limitation and that the said ex-parte order extending the period of limitation and condoning the delay was violative of the interest of justice and principles of natural justice and, on that ground alone, the cognizance should be quashed and the Magistrate should be directed to decide the question of limitation only after hearing the accused petitioners on that score. In support of this contention, Mr. Sanyal relies on a Division Bench decision of our High Court in the case of P. Sengupta v. Register of Companies and State reported in 1991 C Cr LR (Cal) 178.

7. Mrs. Ghosh sought to distinguish the case cited on behalf of the petitioners from the present case on the ground that in the present case it cannot be said that the interest of justice had suffered or the principles of natural justice had been denied in view of the fact that by the order according permission u/s 155(2) Cr. P.C. for submission of challan u/s 323 I.P.C. in presence of the accused petitioners on 19.2.87 when the time for taking cognizance of an offence u/s 323 I.P.C. had already expired the Id. Magistrate must be deemed to have condoned the delay and by the consequential order dated 24.2.87 taking cognizance the Id. Magistrate must be deemed to have thought it fit to take cognizance in the interest of justice within the meaning of Section 473 Cr. P.C.

8. There is much force in the aforesaid contention of Mrs. Ghosh because I have

already observed that the order dated 19.2.87 whereby the accused persons were discharged and the permission u/s 155(2) was accorded appears to have been passed when one of the accused was present and another was absent by petition. The subsequent order dated 24.2.87 whereby the cognizance was taken was an aftermath of the earlier order dated 19.2.87. In the circumstances, the present case is distinguishable from the case of P. Sengupta (*supra*) and accordingly. I do not feel inclined to adopt the procedure that was adopted in the aforesaid case.

9. Mr. Sanyal now submits that the proceeding should be quashed on another ground namely the ground of violation of Article 21 of the Constitution inasmuch as the offence was committed in December, 1985 and continuation of the proceeding at this stage would mean violation of the principles of quick justice as envisaged under Article 21 of the Constitution. Reliance has been placed on Srinivas Gopal Vs. Union Territory of Arunachal Pradesh (Now State), In that case, the alleged offence took place in November, 1976 and until the High Courts order in August 1987, no investigation had taken place. The offence was of rash and negligent driving. The Supreme Court held that quick justice is a *sine qua non* of Article 21 of the Constitution. Keeping a person in suspended animation for nine and a half years without any cause at all cannot be with the spirit of the procedure established by law and in such view of the matter, the Hon'ble Court considered it just and fair in accordance with equity to quash the proceeding. In the instant case, the accused petitioners moved the Id. Magistrate and filed a petition on 21.8.89 praying for their discharge on the ground that the cognizance was time barred and the Id. Magistrate rejected that petition and fixed a date for taking the plea of the accused persons u/s 251 Cr. P.C. before the date fixed for plea, the accused petitioners came forward to this Court challenging the legality of the said order in the instant revision on 13.2.90 and obtained a stay of the proceeding till the disposal of the revisional application. So, unlike the Supreme Court case referred to above, the delay here is not without any cause. Having regard to the peculiar facts and circumstances of this case, the present case does not appear to be on all fours with the facts and circumstances of the Supreme Court case cited by Mr. Sanyal. Having regard to the peculiar facts and circumstances involved in the present case, I am of the view that the delay in the disposal of the criminal proceeding before the court below cannot ensure to the benefit of the accused petitioners so as to prove fatal to its continuance. In the result, the criminal revision fails and is hereby dismissed. The stay is hereby vacated. The Id. Magistrate is directed to dispose of the case as early as possible and preferably within a month from the date of the communication of the order. Let the order be communicated to the Court concerned at once.