

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 2.11.2016

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

Crl.R.C.No.1045 of 2011

S.Balasubramaniam

... Petitioner/Accused

Vs.

State rep. by
The Assistant Commissioner of Police,
West (Crime),
Coimbatore.

... Respondent/Complainant

This Criminal revision is filed under Section 397 & 401 of Cr.P.C., against the order passed by the VIII Judicial Magistrate, Coimbatore in C.M.P.No.272 of 2011 in C.C.No.21 of 2011 dated 09.02.2011.

For Petitioner : Mr.S.Saravanan

For Respondent : Mr.R.Sekar,
Government Advocate (Crl.side)

O R D E R

This revision has been directed at the instance of the sole accused in C.C.No.21 of 2011 on the file of the learned VIII Judicial Magistrate, Coimbatore as against grant of extension of time to prosecution in C.M.P.No.272 of 2011.

2. On 25.8.2006, a road accident has been reported to the respondent police alleging that it is a case of rash and negligent driving of the accused and he has also caused injuries to the victim. Police registered a case in Cr.No.250 of 2006 under Sections 279 and 338 I.P.C.

3. As per Sec.468 Cr.P.C., charge sheet has to be filed on or before 24.8.2009. However, it was not filed. Later, on 31.1.2011, final report was filed by the police along with C.M.P.No. 272 of 2011 under Section 473 of Cr.P.C. seeking condonation of said delay in the interest of justice.

4. The learned Magistrate, passed the following impugned order:

'Records perused. Satisfied with the documents. Further statement of MVI Sivakumar and MVI report also enclosed. Hence delay condoned may be ordered.'

5. The learned counsel for the revision petitioner/accused contended that in passing the impugned order the learned Magistrate has not followed principles of natural justice. Before passing the impugned order no notice was given to the accused. No proper reason has been given in the affidavit filed by the investigation officer. Without assigning proper reason, the delay has been condoned. The impugned order is a non speaking order. It suffers from legality and propriety.

6. In this respect, the learned counsel for the revision petitioner cited M.S.Jothimani vs. Inspector of Police, N.1 Royapuram Police station and another (Crl.O.P.No.1730 of 2009 dated 12.02.2009).

7. On the other hand, the learned Govt. Advocate (Crl.side) would submit that considering the factual aspects of the case, the trial Court has rightly condoned the delay in the interest of justice.

8. I have anxiously considered the rival submissions, perused the impugned order, the entire materials on record and the decision cited.

9. Chapter XXXVI, Code of Criminal Procedure, 1973 contains period of limitation for taking cognizance of offences alleged to have been committed. Different period of limitation has been prescribed for different type of offences. It is based on the gravity of the offences. The limitation commences from the date of offence (See Section 469 Cr.P.C.). The Code also contains exclusion of certain period in computing the period of limitation under certain circumstances (See Section 470 Cr.P.C.).

10. Provisions to condone the delay has been made in Sec.473 Cr.P.C. It is to extend the time prescribed in Sec.468 Cr.P.C.

11. The said Section 473 Cr.P.C. as under:

"Extension of period of limitation in certain cases:

Notwithstanding any thing contained in the foregoing provisions of this Chapter, any court may make cognizance of an offence

after the expiry of the period of limitations, 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.''

12. The exercise of judicial discretion vested under section 473 Cr.P.C. is regulated by two considerations viz., when the delay is satisfactorily explained or it is necessary to do so in the interest of justice. Under these two parameters, the Court can extend the time/limitation period and take cognizance on the final report filed by the investigation officer.

13. The discretion to be exercised by the Court under Sec.473 Cr.P.C. is a judicial discretion. Reasons are live wire in judicial decision making. An order without reason is faceless. It is like an Egyptian phoenix bird. The discretion has to be exercised on sound judicial principles. It cannot be exercised on whimsical or fanciful reasons. There is wide difference between judicial power and the administrative power. Any order passed by a Court tending to have an adverse effect on a person or it will ultimately cause prejudice to the interest of a person shall not be passed behind his back. An order extending the time limit to file final report, will have an adverse effect on the accused.

14. In this connection, it is apposite to extract hereunder the following observations of the Hon'ble Supreme Court made in State of Maharashtra vs. Sharadchandra Vinayak Dongre and others (AIR 1995 SC 231)

''468. Bar to taking cognizance after lapse of the period of limitation;

(1) Except as otherwise provided elsewhere in this Code, no court shall take cognizance of an offence of the category specified in Sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purpose of this section, the

period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or as the case may be, the most severe punishment)

7. A reading of the above said provision makes it crystal clear that as per Section 468(2)(c) the period of limitation is three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. Therefore, there is no doubt that the charge sheet ought to have been filed before the expiry of the period of three years from the date of preferring the complaint. In this instant case, the complaint was preferred on 11.8.2005 and admittedly even as per the order of condoning the delay passed by the learned Magistrate, final report was filed only on 31.10.2008. Now it is seen that in view of such delay, the respondent police filed a petition to condone the delay in filing the charge sheet as contemplated under Section 473 Cr.P.C. It is very unfortunate to note on perusal of the condone delay petition filed by the respondent herein that the petition was not filed properly and even the provisions of Cr.P.C. also not stated or mentioned in the petition. The learned Magistrate has not sent any notice to the respondent/accused and straight away passed an order dated 13.10.2008. Therefore, this Court is constrained to state that the learned Magistrate thought it fit to pass a creptic order without assigning any reasons. At this juncture it is pertinent to be noted that the Honourable Apex Court in AIR 1995 Supreme Court 231, State of Maharashtra V. Sharadchandra Vinayak Dongre and others has held as follows:

"In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would

have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court however, did not adopt that course and proceeded further to hold that the trial court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a "supplementary charge-sheet" on the basis of an 'incomplete charge sheet' and quashed the order of the CJM dated 21.11.1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous."

8. In view of the above settled principle of law laid down by the Honourable Apex Court in the decision cited supra which is squarely applicable to the facts of this case as in this case also admittedly no notice was served to the accused before condoning the delay, this Court is constrained to set aside the order passed by the learned XVI Metropolitan Magistrate, George Town, Chennai dated 13.10.2008 condoning the delay and the learned Magistrate is hereby directed to consider the condone delay petition filed by the respondent police after affording opportunity to the accused by ordering notice to the accused and after hearing both sides and pass orders on merits and in accordance with law.''

15. Under analogous situation as before us, in Jothimani case (supra) my esteemed brother Hon'ble Justice K.N.Basha referring to the said Apex Court decision held that the power under section 473 Cr.P.C. before being exercised, opportunity by way of a notice shall be given to the accused. Further, it should be exercised by passing a reasoned order, proper reason must be given.

16. The accused was on bail. However, in the instant case, admittedly, no notice was given to him before passing the impugned order. The impugned order has been passed behind his back. The accused will have a say before passing the impugned order.

17. The Apex Court ruling and the decision of this Court squarely applies to the facts of this case.

18. In view of the foregoings, the impugned order suffers from legality, propriety and it requires revision.

19. In the circumstances, it is ordered as under:

(1) This revision is allowed.

(2) The impugned order passed by the learned VIII Judicial Magistrate, Coimbatore in C.M.P.No.272 of 2011 in C.C.No.21 of 2011 dated 09.02.2011 is set aside.

(3) The learned Magistrate will restore the C.M.P.No.272 of 2011 in C.C.No.21 of 2011 to his file.

(4) The learned Magistrate will fix a hearing date and send notice to the accused and the prosecution.

(5) The learned Magistrate will give an opportunity to both side and pass orders according to law.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Chief Judicial Magistrate,
Coimbatore.
2. The VIII Judicial Magistrate,
Coimbatore.
3. The Assistant Commissioner of Police,
West (Crime), Coimbatore.

+1cc to Mr.S.Saravanan, Advocate, S.R.No.62975

Cr1.R.C.No.1045 of 2011

CP(CO)
CA(08/12/2016)