(2003) 06 KL CK 0051

High Court Of Kerala

Case No: Criminal R.P. No. 825 of 2003

Valsan		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: June 25, 2003

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 468, 468(2), 473

Citation: (2003) 2 KLT 1050

Hon'ble Judges: R. Basant, J

Bench: Single Bench

Advocate: Renjith Thampan, for the Appellant; P.M. Habeeb, Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R. Basant, J.
The petitioner/accused faces indictment u/s 12(1)(b) of the Indian Passport Act. To cut a long story short, the gist of the allegations against him is that he applied for a fresh passport in the name of his uncle K.K. Gopalan affixing his photograph. This was allegedly done by him with dishonest and questionable intentions. The First Information Report was registered on 13.1.1998. The charge sheet was filed on 18.1.2002. The offence u/s 12(1)(b) of the Indian Passport Act carries the maximum punishment of imprisonment of two years and fine.

2. After investigation, the charge sheet was filed on 18.1.2002 and the learned Magistrate took cognizance of the offence. The accused, after entering appearance, claimed that the proceedings against him may be discontinued. He filed Crl.M.P. No. 15840/03 requesting the Court to consider his plea to discontinue proceedings on the ground that cognizance was taken against him ignoring, overlooking and in violation of Section 468(2)(c) of the Crl.P.C. Notice was given. The rival contestants were heard. It is thereafter that the impugned order was passed. The learned

Magistrate took the view that at the time of taking cognizance, his predecessor had impliedly condoned the delay u/s 473 of the Crl.P.C, though there is nothing to show actual application of mind to the question u/s 473 of the Cr.P.C. whether the delay has been properly explained or that taking cognizance notwithstanding the bar u/s 468(2)(c) of the Cr.P.C. was necessary in the interests of justice.

3. The learned counsel for the revision petitioner and the learned Public Prosecutor have advanced their arguments before me. Various precedents have been cited at the Bar. I am of the opinion that the law is too well settled to require any specific reference to precedents.

4. That Section 468(2)(c) of the Cr.P.C. applies to the prosecution in the instant case is not disputed. That cognizance was taken beyond the period prescribed u/s 468(2)(c) of the Cr.P.C. is also evident and is not disputed. That the investigating officer had not filed any application explaining the circumstances under which there happened to be a delay in filing the charge sheet is also conceded. That the learned Magistrate had not passed any order specifically adverting to and answering the question whether extension of the period of limitation u/s 473 is at all necessary is also concerned. It is in this facts scenario that the contention raised before to be considered.

5. There can be no dispute that most ideally notice must be given to the accused in every case where the powers of the criminal court u/s 473 of the Crl. P.C. is invoked and cognizance is taken notwithstanding the interdiction against belated cognizance u/s 468 of the Crl.P.C. But in many cases it is seen that cognizance is taken invoking the powers u/s 473 of the Cr.P.C. even when the Court has entertained such satisfaction, ex parte - without giving notice to and without hearing the accused. In such cases, it would be unreasonable and improper to conclude that the accused does not thereafter have any right to raise objections against the belated cognizance in violation of Section 468 of the Crl.P.C. In all such cases it would be open to the accused, after appearing before the Court, to raise the objection that powers u/s 473 of the Cr.P.C. cannot and should not be invoked against him. In such cases, the ex parte satisfaction entertained by the criminal court to invoke its powers u/s 473 of the Crl.P.C. must certainly be held to be ad hoc, subject to further consideration and confirmation/revocation at a later stage after giving an opportunity to the most affected party - the accused, to make his submissions on the relevant aspects.

6. In this view of the matter, even assuming that the learned Magistrate at the stage of taking cognizance had entertained the impression that cognizance can be taken notwithstanding Section 468 of the Cr.P.C. (by invoking the powers u/s 473 of the Cr.P.C.) such ad hoc satisfaction can be challenged by an accused after he enters appearance. In these circumstances, the learned Magistrate was certainly obliged to consider the obligation raised by the accused after his appearance that powers u/s 473 of the Cr.P.C. should not have been invoked to take cognizance against him and

to proceed with, the case after such cognizance. When such an objection is raised, it certainly is the duty of the learned Magistrate to consider the crucial question u/s 473 of the Cr.P.C. - Whether the delay has been properly explained or that it is necessary to take cognizance notwithstanding the bar u/s 468 of the Cr.P.C. in the interests of justice. The learned Magistrate was certainly wrong in passing the impugned order by simply assuming that the learned Magistrate who took cognizance had by necessary implication chosen to invoke his powers u/s 473 of the Cr.P.C. The learned Magistrate was obliged to consider the crucial question u/s 473 of the Crl.P.C. when the accused raised an objection after entering appearance.

7. Less said about the theory of implied condonation, the better. There is nothing admittedly in the order passed by the learned Magistrate taking cognizance or in the final reports submitted by the police, which would indicate that the power u/s 473 of the Crl.P.C, was actually invoked or deserved to be invoked. From the mere fact that cognizance has been taken, it cannot lightly be assumed that the learned Magistrate had applied his mind to the relevant facts and had chosen to invoke the powers u/s 473 of the Cr.P.C. That theory cannot certainly be accepted. If the learned Magistrate had applied his mind to the relevant facts and had chosen to invoke the powers u/s 473 of the Cr.P.C., such application of mind must certainly be reflected in the order. The mandate of the rule of natural justice that there must be a speaking order must certainly be complied with by a court while choosing to invoke its powers u/s 473 of the Cr.P.C. Admittedly no such speaking order has been passed. There is nothing to indicate application of mind to the relevant facts u/s 473 of the Crl.P.C.

8. I am inclined to agree that the learned Magistrate was, at the later stage when the objection was raised against cognizance, entitled to consider whether the circumstances do exist to satisfy himself that the delay has been properly explained or that it is necessary to take belated cognizance in the interests of justice. The learned Public Prosecutor was requested to explain the circumstances, if any, which can induce the requisite satisfaction. Except that, there is a good and convincing prima facie case against the accused and that inevitable delay had crept in on account of exigencies of work of the police force, no other reasons are advanced. Cognizance has been taken well beyond the period of limitation as can be ascertained from the dates already referred above and I am in these circumstances satisfied that there is no material available even now before the Court to satisfy itself that the delay has been properly explained or that it is necessary in the facts and circumstances of this case to take cognizance, notwithstanding the bar u/s 468 of the Cr.P.C., in the interests of justice.

9. I am in these circumstances satisfied that the impugned order does, at any rate, warrant interference. The challenge succeeds.

10. In the result:

(a) This revision petition is allowed.

(b) The impugned order is set aside.

11. It is held that cognizance taken by the learned Magistrate, in violation of the specific bar u/s 468 of the Cr.P.C., is not justified and that there are no circumstances to justify the taking of cognizance u/s 473 of the Cr.P.C. ignoring/overlooking the interdiction u/s 468 of the Cr.P.C.

12. Consequently, further proceedings against the accused are stopped u/s 258 of the Crl.P.C. and the accused is set at liberty.