(2008) 03 MP CK 0029

Madhya Pradesh High Court (Indore Bench)

Case No: None

Chandanmal		APPELLANT
	Vs	
Suryakant		RESPONDENT

Date of Decision: March 24, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 227, 239, 244, 245
- Penal Code, 1860 (IPC) - Section 406, 468, 498A, 506

Citation: (2008) ILR (MP) 1554

Hon'ble Judges: S.C. Vyas, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.C. Vyas, J.
This is a petition filed u/s 482 of Cr.P.C., challenging the order passed by XV Additional Sessions Judge, Indore in Criminal Revision No. 700/2005 dated 3.6.2006, whereby he confirmed the order passed by Judicial Magistrate, First Class, Indore in Criminal Revision No. 1340/03 dated 2.9.2005. Learned Magistrate in the aforesaid criminal case framed charge u/s 406 of IPC against the present petitioner which has been confirmed by the Sessions Court.

2. Brief facts of the case are that a private complaint was preferred by complainant/Suryakant Johri against present petitioner, thereby alleging that on 18.7.1993 he handed over his ancestral jewellery to the present petitioner for safe custody and thereby entrusted that property with the present petitioner. Complainant said that the property was valuing Rs. 125 crores. The house of the complainant was under repairing on the relevant time and present petitioner asked him to give that property to him for safe custody with the promise to return the same as and when demanded. Thereafter when the jewellery was demanded by the

complainant/respondent, then present petitioner assured him that the property has been kept in safe custody and avoided its return. Many times demand was made by the complainant and ultimately when present petitioner denied return of those articles, then he lodged FIR against present petitioner and offence was registered by the police u/s 406 of the IPC as Crime No. 115/1998. It is alleged that the crime was not properly investigated by the police and in the meantime petitioner moved an application for grant of bail u/s 438 of Cr.P.C., which was allowed by the High Court on the condition that he will fully co-operate with the police in seizure of the disputed jewellery, thereafter on the request of respondent some jeweleries were seized by the police, but out of that jewellery one item Alexendride could not be seized, because the same was sold by the present petitioner to some foreigner for $ 3 Crore (Three Crore Dollars). It is also alleged that at the place of that precious stone some other stone was seized by the police and in this way present petitioner committed criminal breach of trust, punishable u/s 406 of IPC. Ultimately, police prepared Khatma report on 25.4.2000, then a private complaint was filed by the respondent, on the basis of which criminal case u/s 406 of IPC was registered against present petitioner and he was summoned. Thereafter, evidence before charge was taken and on the basis of that evidence order for framing charge u/s 406 of IPC was passed, which was challenged by the present petitioner before learned Session Court, unsuccessfully and thereafter, present petition has been filed.

3. The petitioner has come with a specific case. As per the defense of petitioner, the alleged property was handed over to him by the complainant/respondent, but the same was given by way of security of the amount of loan of Rs. 30 lacs. The amount was taken by the respondent in many installments from the petitioner and the jewellery was also pledged one by one with the petitioner as security of loan. It has also been specifically taken as defense that no big precious stone valuing crores of rupees was ever handed over by the present respondent to the petitioner and in fact an artificial stone was given which has already been recovered. This defense has also been specifically taken that complaint is hopelessly barred by time because as per the case of prosecution itself, the property was handed over to the petitioner on 18.7.1993 and on 5.1.1998 finally petitioner refused to return that property to the respondent and then he lodged report with the police station Tukoganj. Thereafter, present complaint was filed on 18.8.2001, which is about 7 1/2 months late than the prescribed period of limitation as per provisions of Section 468 of Cr.P.C., therefore, the complaint is required to be dismissed on this ground.

4. Learned Counsel for the petitioner Sr. Advocate, Shri S.K. Vyas has very vehemently argued that the complaint was barred by limitation, because as per the case of prosecution itself he went to the accused/petitioner many times for making demand for return of the jewellery, but he denied and ultimately on 4.1.1998 he totally refused to return the property to the complainant and said that no property belonging to the complainant/respondent is with him and the complainant is free to

take any action which he choses. Thereafter, FIR was lodged on 5.1.1998. He further submitted that as per the provisions of Section 468 of Cr.P.C., the prescribed limitation for filing a complaint of the offence punishable u/s 406 of IPC is only three years, because the offence is punishable with imprisonment for three years or fine or both. He submitted that Section 468 of Cr.P.C. specifically provides that period of limitation for taking cognizance shall be three years for the offence punishable with imprisonment for a term exceeding one year but not exceeding three years. He further placed reliance on the provisions of Section 469 of Cr.P.C. and submitted that the period of limitation starts from the date when the offence was committed, but in the present case, as per the story of prosecution, complaint was not lodged within prescribed period of limitation after refusal of the present petitioner from returning the entrusted property.

5. Whereas, Learned Counsel for the respondent Shri S. M. Dagaonkar submitted that after refusal of present petitioner for returning the property, immediately FIR was lodged by the complainant/respondent with the police station Tukoganj and he was waiting for the outcome of the investigation. When finally police failed to file charge sheet against the petitioner and preferred to file Khatma report, then he was having no other choice, but to file private complaint and in these circumstances complaint was filed. He submitted that the private complaint is very well within the limitation from the date of filing of Khatma report by the concerning police. He submitted that the date on which the FIR was lodged and the period during which the investigation was going on is required to be excluded from the period of prescribed limitation.

6. This question was also raised before learned Judicial Magistrate as well as before learned Sessions Judge. Both of them have not agreed with the present petitioner on the question that the complaint is barred by limitation. Learned Magistrate in his order has held that the period during which the investigation was going on is required to be excluded from the period of limitation, because that period has passed during investigation and complainant was bona fidely waiting during that period. It has also been held that apart from offence punishable u/s 406 of IPC, complaint was also filed for the offence punishable u/s 468 and 506 Sub Clause 2 of IPC and, therefore, in the facts of the present case provisions of Section 468(3) will be application and not that of Section 468(2)(c) of Cr.P.C. Learned Sessions Judge was also of the view that the delay has properly been explained by the complainant and under the provisions of Section 473 of Cr.P.C., trial Court was having discretion to take cognizance of the offence, even after the period of limitation, if it is satisfied that the delay has properly been explained and it is necessary to do so, in the interest of justice.

7. Provisions of Section 473 of Cr.P.C. Reads as under:

Section 473 - Not-withstanding anything contained in the foregoing provisions of this chapter, any Court may take cognizance of an offence after the expiry of the

period of limitation, 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 do in the interest of justice.

8. This provision of Section 473, Cr.P.C. empowers any Court which takes cognizance of an offence to take such cognizance even after expiry of the period of limitation, if it is satisfied that in the facts and the circumstances of the case that the delay has been properly explained or that it is necessary to take cognizance even after expiry of period of limitation, then the period of limitation will be extended by that Court. In the case of Madan Mohan Sharma and Another Vs. State of M.P. and Another, it has been held that power of contonation of delay can be exercised even suo moto.

9. In the case of Zandu Pharmaceuticals Works Ltd. and Ors. v. Mohd. Saharafull Haq and Ors., which has been referred by learned Sessions Judge in his order, the delay in filing the complaint was not explained by the prosecution and the Magistrate had not even referred Sections 468 and 473 of the Cr.P.C. In his order. The delay was not found fully explained and, therefore, that complaint was found barred by limitation. Whereas in the facts of the present case not only the delay in filing of complaint has fully been explained, but learned Magistrate also in his speaking order found that delay has been explained properly and choses to condone it. The reasons which have been given by learned Magistrate appears appropriate in the facts of the present case and not only this, but the defence would have further opportunity to raise the same question at the time of final arguments. When full facts will be cleared, then both parties will be in better position to address on this question. So far as present stage is concerned, I find that FIR of the offence was lodged by the complaint at the police station and then the matter was under investigation. So naturally he was required to wait for the outcome of the investigation and then only he could file a private complaint. In these circumstances, the period which has passed in investigation of the matter has been excluded from the period of limitation and thereby if the period of limitation has been extended by learned Magistrate, then there appears no illegality in it and learned Magistrate was having full discretion to do the same. There is nothing to show that the discretion which was available with the Magistrate has been exercised by him improperly. In this regard judgment of Hon''ble Supreme Court in the case of State of Himachal Pradesh Vs. Tara Dutt and Another, can be fruitfully referred, wherein, in Paragraph No. 7 it has been held as under:

Para 7 - Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in Section 468 the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court

taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for : superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence. But the provisions are of no application to the case in hand since for the offences charged, no period of limitation has been provided in view of the imposable punishment thereunder. In this view of the matter we have no hesitation to come to the conclusion that the High Court committed serious error in holding that the conviction of the two respondents u/s 417 would be barred as on the date of taking cognizance the Court could not have taken cognizance for the said offence. Needless to mention, it is well settled by a catena of decisions of this Court that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of a minor offence if the facts established indicate that such minor offence has been committed.

10. Learned Counsel for the petitioner has drawn attention of this Court towards reported judgment of the Hon''ble Supreme Court. He referred the case of Arun Vyas and Another Vs. Anita Vyas, , State of Maharashtra Vs. Sharadchandra Vinayak Dongre and Others, , State of Punjab Vs. Sarwan Singh, and Ramesh Chanra Sinha v. State of Bihar (2003) 11 ILD 427 (SC), but these cases are distinguishable from the facts of present case. In the case of Arun Vyas (supra) charge u/s 498A of IPC was levelled and it was found as continuing offence, though in that case complaint was also filed for the offence punishable u/s 406 of IPC regarding which it was held that complaint was barred by limitation in respect of that offence. But as there is charge of Section 498A of IPC also, therefore, the whole complaint was not barred by limitation. Therefore, the facts are distinguishable. In the case of Sharadchandra Vinayak Dongare (supra) cognizance was taken after period of limitation even without notice to the accused and, therefore, it was ordered that notices be issued to the accused. In the case of Sarwan Singh (supra), as a matter of principle it was held that offence punishable u/s 406 of IPC is not a continuing offence and on this question there cannot be any quarrel. But in the facts of the present case the delay has been properly explained and has been properly condoned. In the case of Ramesh Chanra Sinha (supra) the only ground for condonation of delay was given by the Magistrate that the proceedings were stayed, whereas as a question of fact it was found that the stay order was earlier vacated. Therefore, all these cases are distinguishable on facts and are not of any help to the petitioner.

11. The next contention raised by Learned Counsel for the petitioner is that on facts also there is no ground to presume that the petitioner has committed offence

punishable u/s 406 of IPC. He submitted that petitioner is a creditor and has a right to continue his possession on the pledged property till his dues are clear. He submitted that the basic ingredients of dishonesty is not available in the facts of the present case, because the property was pledged with the petitioner and the complainant was required to clear his dues. In this regard Learned Counsel for the petitioner has taken this Court through the entire statement of the complainant as well as his witnesses and submitted that, looking to the major contradictions which have come in their statements and the documents which have been filed by the petitioner during the course of trial, including the written document containing signatures of the respondent/complainant and the declaration made by the present petitioner to Income Tax Department, it is clear that it is a case of pledging of property and not a case of entrustment and misappropriation.

12. I have carefully gone through the statements of the prosecution witnesses and the documents which have been filed by the present petitioner during trial. The complainant/respondent has denied his signatures on the documents which have been referred by the petitioner. It is also clear that initially no case of pledging of any property was made by the petitioner before Income Tax Officer. Later on, a declaration was made under voluntarily discloser scheme and some amount of tax was paid. It is also averred by the petitioner/accused that some mediators were appointed to settle the dispute between the parties and in their presence documents were signed by the respondent/complainant, but the complainant in his examination before charge has denied these facts. At this stage, the evidence is incomplete and complete evidence is yet to be recorded.

13. It is now well settled that what ever the allegations made in the complaint should be taken into consideration without any critical examination of the same by this Court while considering the petition filed u/s 482 Cr.P.C. and if the offence is ex facie appears on the basis complaint and the statement of the witnesses then the truth of falsity of the allegations would not be gone into by the Court, at this earlier stage. Whether the allegations made in the complaint are true or not is to be decided on the basis of the evidence led at the later stage. At this stage the Court is required to see whether it can be said that allegations in the complaint do not make out any case against accused or do they disclose all the ingredients of any offence alleged against accused, or the allegations are patently absurd or inherently improbable so that no prudent person could have reached to just a conclusion that there is sufficient ground for proceeding against accused. When the facts are incomplete and hazy and there are allegations and counter allegations of both the parties, then it is not desirable for this Court at this stage to go for minute documentation of the evidence available on record to give any finding on the question of fact which is yet to be finally determined by the trial Court. Whether it be a case of private complaint or of a police report, but at the stage of framing of charge trial Court is only required to apply the test of prima facie case and to come to the conclusion, as to whether in his opinion there are grounds for presuming that

the accused has committed an offence triable under Chapter XIX of the Cr.P.C., which the Magistrate is competent to try and which in his opinion could be adequately punishable by him, then he shall frame charge in writing against the accused. This question was considered by the Superme Court in the case of R.S. Nayak Vs. A.R. Antulay and Another, and in para 44 it is observed that:

Para 44 -The Code contemplates discharge of the accused by the Court of Session u/s 227 in case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. u/s 227, the trial Judge is required to discharge the accused it he ''considers that there is not sufficient ground for proceeding against the accused''. Obligation to discharge the accused u/s 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable u/s 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction...." It is a fact that Ss. 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge u/s 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge u/s 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed.

14. In police report case because the material is available in the form of police report which contains FIR, other documents and statements of the witnesses recorded u/s 161 of Cr.P.C. and on the other hand in a private complaint case the material is available in the form of statements recorded before framing of charge and defense can have the opportunity of cross examination also. Entire examination is required to be considered by the trial Court. In the facts of the present case also complainants as well as his witnesses have been examined before charge and there is no dispute that immovable properties belonging to the complainant were in possession of present petitioner. As per the case of prosecution that property was entrusted, whereas as per the case of defense it was pledged against some amount which was advanced. Which of the story is true is to be seen by the trial Court keeping in mind the general principles of criminal trial that prosecution is required to prove its case beyond all reasonable doubts, without depending on any weakness of the defense case. At this stage it is not necessary for this Court to express any

opinion on the quality of the evidence or on the credibility of the prosecution witnesses. If defense likes, then witnesses can be produced by it also to prove the material which has been placed during cross examination of the complainant and which has been denied.

15. Considering the matter from all angles and keeping in mind the limited scope of of interference available u/s 482 of Cr.P.C. to this Court, I do not find it a fit case for quashing the prosecution. It is always to be remembered that inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge and on similar grounds only as held by Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, and in the case of State of Haryana v. Bhajan Lal 1992 SCC 426 and later on in many other cases.

16. Applying these principles in the facts of the present case, I do not find any ground for quashing the complaint. Therefore, this petition has no merits and is dismissed.