

State of Kerala Vs. Sreekumar

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Court : Kerala

Decided On : Apr-06-2001

Reported in : 2001CriLJ4146

Judge : Mr. J.B. Koshy and; Mr. R. Rajendra Babu, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 378(1), (3), (4) and (5) and 417(4); [Limitation Act, 1963](#) - Sections 5 and 29(2) - Schedule - Article 144

Appeal No. : Crl. M.P. No. 3339 of 2000 in Crl. M.C. of 2000

Appellant : State of Kerala

Respondent : Sreekumar

Advocate for Def. : T.V. Prabhakaran and; S. Sudhesh Kumar, Advs.

Advocate for Pet/Ap. : Public Prosecutor

Judgement :

ORDER

J.B. Koshy, J.

1. This application is filed for condoning the delay of 177 days in filing the Crl. Appeal along with the application for leave to file appeal against an order of acquittal. The Sessions Court acquitted the accused and State has filed the above

appeal with an application for leave to file an appeal under S. 378(3) of the Code of Criminal Procedure(hereinafter referred to as Code). The preliminary objection raised by the respondents is that S. 5 of the Limitation Act is not applicable in this case and hence petition is liable to be dismissed. In support of the above, a Division Bench decision of this Court in CrI.M.P. No. 3375/1993 in CrI.A.....93 was cited before us. In the above case it was held that provisions of the Limitation Act including S. 5 will not apply in view of specific stipulations regarding time in S. 378(5) of the Code. The Division Bench in the above unreported case held as follows:

'The application if filed under S. 378(4) of the Code of Criminal Procedure. S. 378(5) of the Code specifically says thus:

'No application under sub-s.(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 public servant, and sixty days in every other case, computed from the date of that order of acquittal.'

3. In the instant case, de facto complainant is not a public servant and, therefore, the period of limitation for filing the application under S. 378(4) is 60 days. Petitioner seeks to extend this time under S. 5 of the Limitation Act. When there is a specific provision in the Code that no application for the grant of special leave to appeal shall be entertained after a prescribed period, we do not think that S. 5 of the Limitation Act can be availed of to extend this prescribed period.'Normally we should follow the above decision or refer the matter to a large bench. But we note, while disposing of the case, judgement of the Supreme Court in *Mangu Ram v. Delhi Municipality*(AIR 1976 SC 105) was not brought to the notice of court by the Public Prosecutor. It was also not pointed out by the Public Prosecutor that appeal filed by the State against the order of acquittal is filed under S. 378(4) nor S. 378(5) will apply.

2. This appeal is filed by the public Prosecutor as directed by the State under S. 378(1) of the Code. For filing an appeal by the State specific period of limitation is provided under Art. 114 of the Limitation Act which provides period of limitation of ninety days. For filing an appeal by the State to leave to file an appeal has to be

obtained by the State under S. 378(3) of the Code of Criminal Procedure. The Division Bench decision (*supra*) relied on by the respondents deals the matter as if the Court was dealing with delay condonation petition in filing the special leave to appeal under S. 378(4). The above section is applicable only when appeal is filed by a private party or a public servant and not in appeal on police charge. But for filing an appeal by the State only leave is necessary under S. 378(3) and not special leave to appeal under S. 378(4). It was not pointed out before the earlier Division Bench that the above appeal if filed by the State on a police charge and only leave is necessary under S. 378(3) of the Code of Criminal Procedure and not special leave under S. 378(4). In this connection we also refer to the Supreme Court decision in *State of Rajasthan v. Ramdeen & Ors.* (1977 SCC (CrI) 393). We quote paragraph 9 of the above judgment.

'9. Besides, under Art. 114 of the Limitation Act, in an appeal from an order of acquittal by the State, the period of limitation is ninety days from the date of the order appealed from; whereas in an appeal from an order of acquittal, in any case instituted upon complaint, the period is thirty days from the date of the grant of special leave. Thus there is a clear distinction between the two types of appeals with regard to terminus a quo under Art. 114. It is, therefore, not necessary to wait until the grant of leave by the High Court to present a memorandum of appeal against acquittal at the instance of the State. Thus, appeal can be filed by the State within ninety days from the date of the order of the acquittal and a prayer may be included in that appeal for entertaining the appeal under sub-s.(3) of S. 378, Cr.P.C. If the leave sought for is not granted by High Court, the appeal is not entertained and stands dismissed.'

The above shows that for filing an appeal by the State against an order of acquittal only application for leave is necessary under sub-s. (3) of S. 378(1) Cr.P.C. and the provisions of Art.114 of the Limitation Act will apply and no specific period of limitation is provided under S. 378 or 378(3). The Supreme Court in *Mangu Ram's* case (*supra*) already held that S. 5 of the Limitation Act will apply in such case if appeal is filed beyond the period prescribed under Art. 114 of the Limitation Act. Limitation prescribed under S. 378(5) is applicable only when an appeal is filed with special leave application under S. 378(4) and the above period is not

applicable to appeal and leave petition under S. 378(1) and 378(3). Supreme Court in Mangu Ram's case in AIR 1976 SC 105 (supra) held that even in cases where special leave is necessary under S. 417(4) of Cr.P.C., 1898 (corresponding to S. 378 of the present Code), S. 5 of the Limitation Act is applicable. Apex Court held as follows:

'S.5 is specifically made applicable by S. 29, sub-s.(2), it can be availed of for the purpose of extending the period of limitation by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of S. 5, that it would stand displaced. Hence, as pointed out by this Court in Kaushalyas Rani's case (AIR 1964 SC 260=(1964(1)Crl.L.J.152)the time limit of sixty days laid down in sub-s.(4)of S. 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of S. 5. It is true that the language of sub-s.(4)of S. 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant or special leave to appeal from an order of acquittal shall be entertained by the high Court after the expiry of fifty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of S. 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of S. 5. The conclusion is , therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal it filed after the coming into force of the [Limitation Act, 1963](#), S. 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the time limit of sixty days prescribed in sub-s. (4) of S. 417, the application would not be bare and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it.'

Therefore, the observations of the Division Bench in Crl.M.P.No.3375/1993 are per incuriam and not laying the correct position of law. This Crl.M.P. filed is

maintainable and preliminary objection is overruled.

3. The next question to be considered is whether sufficient grounds are made out by the State for condoning the delay. The Deputy Superintendent of Police, Crime Branch filed an affidavit stating that the judgment was pronounced on 4.9.1999 and copy was obtained only on 19.2.2000. Meanwhile Special Public Prosecutor on 10.12.1999 recommended for an appeal and the matter was forwarded to the Additional Director General of Police, Crimes and Additional Director General of Police forwarded the same to the office of the Advocate General on 17.1.2000 which was received in the office of the Advocate General on 21.1.2000. A letter dated 29.1.2000 was issued from the office of the Advocate General to the Additional Director General of Police, Crimes to forward the records were received on 25.2.2000. Thereafter appeal was filed on 29.5.2000. It is argued by the respondents that there is no explanation of delay in filing the appeal after the records were received in the office of the Advocate General on 25.2.2000. The appeal was filed on 29.5.2000. There is three months unexplained delay. Learned Public Prosecutor argued that as soon as the records were received, as usual concerned Government Pleader was entrusted with the file. Thereafter draft was given for approval to the Director of Public Prosecution and then back to the office of the Advocate General and there was unavoidable administrative delay.

In the above circumstances, an affidavit should have been filed by the Advocate General or Government Pleader explaining the delay. However, in this case Public Prosecutor explained how the delay occurred in Advocate General's Office. We are satisfied that there are sufficient ground to condone the delay. Therefore, delay is condoned. Post CrI.M.C. for leave to appeal along with Criminal Appeal for admission.