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P.K. CHOUDHURY

v.

COMMANDER, 48 BRTF (GREF)

(Criminal Appeal No. 480 of 2008)

MARCH 13, 2008

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[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

Code of Criminal Procedure, 1973:

s.190 – Delay in filing complaint petition – Not condoned C *– Cognizance of offence after expiry of period of limitation – Held: Is bad in law – Penal Code, 1860 – ss.166, 167.*

s.197 – Sanction under – Requirement of – Commission of offence under ss.166 and 167 IPC by member of Armed D *Forces – Cognizance of, without obtaining sanction of competent authority – Held: Is bad in law – Penal Code, 1860 – ss.166, 167.*

The prosecution case was that during the relevant period, the appellant was a member of Armed Forces. He E **committed offences under ss. 166 and 167 IPC during the period 5.1.1989 to 11.2.1992 . A complaint was filed in November, 2000 on the basis of report dated 20.12.1996. The Magistrate took cognizance of the offences against the appellant.**

F **Appellant filed application under s.482 Cr.P.C. for quashing the proceedings, which was dismissed by the High Court.**

In appeal to this court, the appellant contended that G **the order taking cognizance was bad in law as the same was filed beyond the prescribed period of limitation and also was not preceded by a valid order of sanction of the competent authority as envisaged under s.197 Cr.P.C.**

Respondents contended that no sanction under

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s.197 Cr.P.C. was required to be taken as the appellant would be governed by the provisions of ss.125 and 126 of the Army Act, 1950. A

Allowing the appeal, the Court

HELD: 1.1 Whereas s.166 IPC prescribes a sentence of simple imprisonment for a term which may extend to one year; the sentence which can be imposed under s.167 IPC is one of either description for a term which may extend to three years or with fine or with both. [Para 6] [980-D] B

1.2. S.468 Cr.P.C. specifies the period of limitation within which the cognizance of an offence can be taken. Clause (c) of Sub-section (2) of s.468 specifies the period of limitation to be three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. There is no doubt or dispute that the Court has the power to condone the delay. No order condoning the delay has however, been passed by the Judicial Magistrate in this case. [Paras 7, 8] [980-E, F] C D

1.3. The Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon the appellant to show cause as to why the delay should not be condoned. Before condoning the delay, the appellant was not heard. Appellant was entitled to get an opportunity of being heard before the delay could be condoned. [Paras 9-10] [981-B-H] E F

State of Maharashtra v. Sharadchandra Vinayak Dongre and Ors. (1995) 1 SCC 42 – referred to.

2. Appellant admittedly is a public servant. He is said to have misused his position as a public servant. S.197 Cr.P.C. lays down requirements for obtaining an order of sanction from the competent authority, if in committing the offence, a public servant acted or purported to act in discharge of his official duty. As the offences under ss.166 and 167 IPC have direct nexus with commission of a G H

A criminal misconduct on the part of a public servant, indisputably an order of sanction was pre-requisite before the Judicial Magistrate could issue summons upon the appellant. [Para 11] [982-A-C]

3.1. The provisions of ss.125 and 126 of the Army Act, B 1950 have no application whatsoever. [Para 12] [982-D]

3.2. S.125 of the Army Act postulates a choice of the competent authority to try an accused either by a criminal court or any court or proceedings for court martial. S.126 C provides for the power of the Criminal Court to require delivery of offender. [Para 13] [982-E]

3.3. As an option to get the appellant tried in ordinary criminal court had been exercised by the respondent, there cannot be any doubt whatsoever that all the pre-requisites D therefor in regard to the period of limitation as also the necessity to obtain the order of sanction were required to be complied with. [Para 14] [982-F-G]

4.1. A Court of law cannot take cognizance of an offence, if it is barred by limitation. Delay in filing a E complaint petition therefore has to be condoned. If the delay is not condoned, the court will have no jurisdiction to take cognizance. Similarly unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred. [Para 14] [982-G-H; 983-A]

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4.2. S. 197 C r.P.C. unlike the provisions of the Prevention of Corruption Act postulates obtaining of an order of sanction even in a case where public servant has ceased to hold office. The issues raised by the G appellant were jurisdictional ones. The same should have been adverted to by the High Court. [Para 15, 17] [983-B; 984-B]

S.K. Zutshi and Anr. v. Bimal Debnath and Anr. **(2004) 8 SCC 31**; *State of Orissa through Kumar Raghvendra Singh* H *and Ors. v. Ganesh Chandra Jew* **(2004) 8 SCC 40**; *Raghunath*

Anant Govilkar v. State of Maharashtra and Ors. **2008 (2) SCALE 303 – relied on.** A

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 480 of 2008

From the final Judgment and Order dated 21.03.2006 of the High Court of Gauhati, Itanagar Bench in Criminal Revision No. 1 (AP) 2006 B

Nagendra Rai, D. Bharat Kumar, Anand, M. Indrani and Abhijit Sengupta for the Appellant.

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R.G. Padia, Savitri Pandey and D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted. D

1. Appellant herein is aggrieved by and dissatisfied with a judgment and order dated 21st March, 2006 passed by a learned Single Judge of the Gauhati High Court.

2. Indisputably, Appellant at all material times was a Commandant of 48 BRTF (GREF) as a member of the Armed Forces. While he was acting in the said capacity, allegations were made against him for commission of offences under Section 166 and 167 of the Indian Penal Code, 1860. E

3. The period during which the said offences are said to have been committed is 5.1.1989 to 11.2.1992. A complaint petition was filed in November, 2000 purported to be on the basis of a report dated 20.12.1996 of the then Commander, 48 BRTF at Tezu on 20.12.1996. F

The Judicial Magistrate, First Class, Tezu took cognizance of the said offences against the appellant by an Order dated 7.11.2000. G

4. The application filed by the appellant under Section 482 of the Code of Criminal Procedure, 1973 for quashing the said H

A proceedings has been dismissed by the Gauhati High Court by reason of the impugned judgment.

5. Mr. Nagendra Rai, the learned senior counsel appearing on behalf of the appellant would submit that the order taking cognizance is bad in law as the same was filed beyond the B prescribed period of limitation and in any event was not preceded by a valid order of sanction of the competent authority as envisaged under Section 197 of the Code of Criminal Procedure.

C 6. Section 166 and 167 of the Indian Penal Code provides for an offence by a public servant.

Whereas Section 166 prescribes a sentence of simple imprisonment for a term which may extend to one year; the sentence which can be imposed under Section 167 is one of D either description for a term which may extend to three years or with fine or with both.

7. Section 468 of the Code of Criminal Procedure, 1973 specifies the period of limitation within which the cognizance of an offence can be taken. Clause (c) of Sub-section (2) of Section E 468 specifies the period of limitation to be three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

8. There is no doubt or dispute that the Court has the power F to condone the delay. No order condoning the delay has however, been passed by the learned Judicial Magistrate in this case.

The ground taken for condonation of delay in the said complaint petition of the complainant is as under:-

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"8. That a Court of Inquiry was held by the Department against the irregularities in Supply Orders and thereafter the case was under consideration by Army HQ. The Central Vigilance Commission also investigated the matter since 20 Dec. 1996 and on the completion of investigation by

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> CVC, the matter was barred by limitation for taking action under the Army Act against the accused. Hence the delay in filing this complaint in the Court and the delay may be condoned under Section 473 Cr.P.C. as the delay was not intentional but inevitable in holding Court of Inquiry."

9. The learned Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon the appellant to show cause as to why the delay shall not be condoned. Before condoning the delay the appellant was not heard. In *State of Maharashtra Vs. Sharadchandra Vinayak Dongre and Others* [(1995) 1 SCC 42] this Court held;

> "5. 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."

10. In view of the aforesaid decision, there cannot be any doubt whatsoever that appellant was entitled to get an opportunity of being heard before the delay could be condoned.

A 11. Far more important however, is the question of non-grant of sanction. Appellant admittedly is a public servant. He is said to have misused his position as a public servant.

Section 197 of the Code of Criminal Procedure lays down requirements for obtaining an order of sanction from the B competent authority, if in committing the offence, a public servant acted or purported to act in discharge of his official duty. As the offences under Section 166 and 167 of the Indian Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction C was pre-requisite before the learned Judicial Magistrate could issue summons upon the appellant.

12. Respondents in their counter affidavit, however, would contend that no such sanction was required to be taken as the D appellant would be governed by the provisions of Section 125 and 126 of the Army Act, 1950. The said provisions in our considered opinion have no application whatsoever.

13. Section 125 of the Act postulates a choice of the E competent authority to try an accused either by a criminal court or any court or proceedings for court martial. Section 126 provides for the power of the Criminal Court to require delivery of offender.

14. As an option to get the appellant tried in a ordinary F criminal court had been exercised by the respondent, there cannot be any doubt whatsoever that all the pre-requisites therefor in regard to the period of limitation as also the necessity to obtain the order of sanction were required to be complied with.

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A Court of law cannot take cognizance of an offence, if it is barred by limitation. Delay in filing a complaint petition therefore has to be condoned. If the delay is not condoned, the court will have no jurisdiction to take cognizance. Similarly unless it is H held that a sanction was not required to be obtained, the court's

jurisdiction will be barred. A

15. Section 197 of the Code unlike the provisions of the Prevention of Corruption Act postulates obtaining of an order of sanction even in a case where public servant has ceased to hold office. The requirements to obtain a valid order of sanction have been highlighted by this Court in a large number of cases. B In *S.K. Zutshi and Another Vs. Bimal Debnath and Another* [(2004) 8 SCC 31], this Court held;

> "11. The correct legal position, therefore, is that an accused facing prosecution for offences under the old Act or the C new Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. *But the position is different in cases where Section 197 of the Code has application.*" D
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> (Emphasis adduced)

See also State of Orissa through Kumar Raghvendra Singh and Others Vs. Ganesh Chandra Jew [(2004) 8 SCC 40]. E

Recently in *Raghunath Anant Govilkar Vs. State of Maharashtra and Ors.* [2008 (2) SCALE 303], having regard to the 41st Report of the Law Commission, this Court observed; F

> "24. It was in pursuance of this observation that the expression "was" came to be employed after the expression "is" to make the need for sanction applicable even in cases where a retired public servant is sought to be prosecuted." G
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> It was furthermore held;
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> "26. The High Court, therefore, was in error in observing that sanction was not necessary because the expression used is "was". H

A 16. The High Court, therefore, in our opinion committed a manifest error in passing the impugned judgment.

17. The issues raised by the appellant were jurisdictional ones. The same should have been adverted to by the High Court.

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For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. Appeal is allowed. No costs.

C D.G. Appeal allowed.