

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 21ST DAY OF MARCH 2023 / 30TH PHALGUNA, 1944

CRL.MC NO. 5191 OF 2020

CRA 533/2019 OF SESSIONS COURT, KOZHIKODE

CC 702/2009 OF JUDICIAL MAGISTRATE OF FIRST CLASS - III, KOZHIKODE

PETITIONERS/ RESPONDENTS 2-6/ ACCUSED :

- 1 T. PEETHAMBARAN,
AGED 71 YEARS,
S/O THARAMMAL KRISHNAN,
SUNANDANAM, KARUVISSERY,
VENGERI AMSOM, KOZHIKODE - 673 006.
- 2 C K REENA,
AGED 60 YEARS,
W/O T PEETHAMBARAN, SUNANDANAM,
KARUVISSERY, VENGERI AMSOM,
KOZHIKODE-673006.
- 3 C K VIMAL RAJ,
AGED 53 YEARS,
S/O C K. RAMAN, SREEMOOKAMBIKA,
POTHUVACHERY P O, KANNUR-670 002.
- 4 C K SUNIL KUMAR,
AGED 62 YEARS,
S/O C K RAMAN, SREEMOOKAMBIKA,
POTHUVACHERY P O, KANNUR-670002.
- 5 C K REEJA,
AGED 50 YEARS,
D/O C K RAMAN, SREEMOOKAMBIKA,
POTHUVACHERY P O, KANNUR - 670 002.

BY ADVS.

SRINATH GIRISH

SRI.P.JERIL BABU

RESPONDENTS STATE AND DEFACTO COMPLAINANT (APPELLANT) :

1 THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM - 682 031.

2 USHA KRISHNAN,
AGED 81 YEARS
D/O LATE T KRISHNAN,
FLAT NO. 102, HERITAGE CHSL,
SHERLY RAJAN ROAD, BANDRA WEST,
MUMBAI-400050.

BY ADVS.
SRI.SUBAL J.PAUL
SMT.SHEEBA THOMAS

BY SMT.SREEJA V., PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
06.03.2023, THE COURT ON 21.03.2023 PASSED THE FOLLOWING:

“C.R.”

BECHU KURIAN THOMAS, J.

Crl.M.C.No.5191 of 2020

Dated this the 21st day of March, 2023

ORDER

When a victim files an appeal, belatedly, against a judgement of acquittal, is it essential to file an application to condone the delay? Is it also necessary in such an instance for the appellate court to pass an order relating to the delay? These questions arise for determination in this petition under Section 482 of the Code of Criminal Procedure, 1973, challenging an order admitting a criminal appeal.

2. By a judgment of 09.06.2016 in C.C.No.702/2009, the Judicial First Class Magistrate's Court-III, Kozhikode acquitted all the accused who faced prosecution for the offences under Sections 143, 447, 448, 467, 468, 420& 120B r/w Section 149 of the Indian Penal Code, 1860. The defacto complainant/ victim filed an appeal against the said judgment on 07.12.2019, apparently after three years. An affidavit was filed by the victim stating that though the appeal ought to have been filed on or before 09.07.2016, she came to know about the judgment only in 2019, there was a delay of 1249 days in filing the said appeal. It was also mentioned that the appellant has been living in Mumbai since 1962 and that after her husband's death, she left for the United States to reside

with her son and was not available at her Mumbai address and that even though she used to enquire about the progress of the case, her relatives were misleading her due to the influence of the power of attorney holder of the first accused. The appellant also alleged that the complaint was filed as early as 2007 since it was realised that the person to whom she had executed the power of attorney committed forgery and misused the concocted documents and transferred her property. Appellant alleged that as she had not received any summons from the court, she could not even render evidence and also that she was 81 years of age, suffering from various ailments. In the affidavit, appellant had specifically explained the reasons for the delay in filing the appeal.

3. Based upon the said affidavit and obviously finding satisfaction in the reasonable explanation offered, the learned Sessions Judge admitted the appeal and issued notice to the respondents. There was no application to condone the delay nor is there any order condoning the delay. The memorandum of appeal was accompanied by the affidavit of the appellant explaining the delay.

4. Petitioners who are respondents 2 to 6 in the appeal and the accused before the learned Magistrate have in this petition challenged the order admitting the appeal. Petitioners contend that the learned Sessions Judge had failed to issue notice to the petitioners or hear them on the question of the delay in filing. It was pointed out that the trial court had in fact, initiated coercive steps against the defacto complainant and her

evidence was closed without examining her and also that the averments in the affidavit explaining the delay were mechanically accepted without conducting an enquiry into the truth of the averments. It was further contended that though the period of limitation and the explanations offered ought to be construed liberally, in cases of inordinate delay, as in the present case, the court ought not to have condoned the same, as a matter of course.

5. I have heard Sri.Srinath Girish, the learned counsel for the petitioners as well as Sri.Subal J. Paul, the learned counsel for the respondent and Smt.V.Sreeja, the learned Public Prosecutor .

6. An elaborate discussion on the issues raised is not necessary as the answers can be deciphered from two judgments - a Full Bench judgment of this Court and the other by that of the Supreme Court.

7. In the decision in **Sobhanakumari K. v. Santhosh @ Pallan Shaji** [2018 (1) KHC 195], a Full Bench of this Court had observed that after coming into force of the Code of Criminal Procedure Amendment Act of 2008 (Act 4 of 2009), the victim has a right of appeal against an order passed by the court acquitting the accused or convicting the accused for a lesser offence and that, there is no period of limitation prescribed for filing the appeal. The Full Bench also held that, notwithstanding the absence of any period of limitation, the victim must prefer the appeal after obtaining leave of the court and that though there is no period of limitation, it must be filed within a reasonable period of 90 days from the

date of the order appealed against. It was further observed that if the victim comes to know about the acquittal only later, that itself can be considered a good ground for explaining the delay. However, it was also held that an application to condone the delay cannot be filed, and only an affidavit would suffice. The Court also held that if there is inordinate delay, the leave under Section 378(3) of the Cr.P.C. can be refused. Apart from the above, the Full Bench concluded as follows :-

A victim who could not file his appeal within the reasonable time need not file an application under Section 5 of the Limitation Act. Rather, he cannot file such an application. Section 5 has application only in respect of appeals or applications filed after the prescribed period. In the absence of such a prescribed period to file an appeal by the victim against an order of acquittal, he only needs to file an affidavit explaining the delay. If he has no proper explanation, he is not entitled to the leave of the High Court under Section 378(3) of the Code of Criminal Procedure, 1973.

Based upon the above discussion, the Full Bench came to the following conclusions:-

28. *The reference is answered thus :*

(i) Clause (b) of Art.115 of the Limitation Act applies to an appeal under the proviso to S.372 of Cr.P.C. by a victim against an order convicting the accused for a lesser offence or against an order imposing inadequate compensation. If such an appeal lies only to the High Court, it shall be filed within 60 days from the date of the

order appealed against. If it lies to the Court of Session, it shall be filed within 30 days from the date of the order appealed from.

*(ii) No period of limitation is prescribed for an appeal by a victim under the said proviso from an order of acquittal. Art.14 of the Limitation Act does not apply to such an appeal. But the victim shall bring his appeal within a reasonable period of 90 days from the date of the order, whether it is to be filed in the High Court or in the Court of Session. If such appeal is filed beyond the reasonable period, the victim shall file an affidavit explaining why he could not file it within the reasonable period. The decisions in **Yohannan's** case (*supra*) and **Vinod's** case (*supra*) holding so hold the correct law.*

8. In the meantime, the Supreme Court in a subsequent decision in **Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and Others** [2018 (5) KHC 362] held that as per the language of the proviso to Section 372 of the Cr.P.C., a victim is entitled to file an appeal before the court to which an appeal ordinarily lies against the order of conviction and that there is no need even to file an application for leave.

9. On consideration of the above two judgments, the following propositions emerge:-

(i) A victim has a right to appeal against a judgment of acquittal or a judgment imposing a lesser sentence.

(ii) No leave petition is required to be filed nor is leave required to be obtained for filing an appeal by the victim and the rights of the victim under the amended Code are substantive in nature.

(iii) An affidavit explaining the delay is sufficient while a petition to condone the delay is not required.

(iv) Since a petition to condone the delay cannot be filed, a corresponding order is also not contemplated.

10. In view of the above propositions culled out from the binding precedents, it is evident that a delay condonation petition is not required to be filed by a victim who prefers an appeal even after a delay of more than 90 days. The only requirement is to file an affidavit explaining the delay. If the Appellate Court is satisfied with the explanations offered, the court is entitled to proceed to consider admission of the appeal.

11. Based on the above principles, when the affidavit explaining the delay and the order admitting the appeal in the present case are perused, it is evident that the Appellate Court was satisfied with the explanation offered and proceeded to admit the appeal on merits. Since petitioners are not put to any prejudice and would be getting an opportunity to have the appeal itself heard on merits, I am satisfied that no interference is warranted in the exercise of the powers under Section 482 of the Cr.P.C. as it cannot be termed as an abuse of the process of the court.

12. Having regard to the circumstances of the case, I am satisfied

that there is no merit in this petition. Taking into reckoning the circumstance that the crime is of the year 2009, it is necessary that CrI.A.No.533/2019 on the files of the Sessions Court, Kozhikode be considered on a priority basis, as the victim/appellant is quite aged. Therefore, I direct the learned Sessions Court, Kozhikode to take up the appeal on a priority basis and dispose of the same on merits as expeditiously as possible.

The CrI.M.C.is dismissed with the above observations.

Sd/-

BECHU KURIAN THOMAS, JUDGE

RKM

APPENDIX OF CRL.MC 5191/2020

PETITIONERS' ANNEXURES :

- ANNEXURE 1 CERTIFIED COPY OF THE JUDGMENT DATED
9/6/2016 IN C C 702/2009 ON THE FILE OF
THE JUDICIAL FIRST CLASS MAGISTRATE - III,
KOZHIKODE.
- ANNEXURE-2 CERTIFIED COPY OF THE MEMORANDUM OF APPEAL
DATED 7.12.2019 IN CRIMINAL APPEAL
533/2019 ON THE FILE OF THE COURT OF
SESSION, KOZHIKODE DIVISION.
- ANNEXURE-3 CERTIFIED COPY OF THE AFFIDAVIT DATED
7.12.2019 FILED TO CONDONE THE DELAY OF
1249 DAYS IN CRIMINAL APPEAL 533/2019 ON
THE FILE OF THE COURT OF SESSION,
KOZHIKODE DIVISION.
- ANNEXURE-4 CERTIFIED COPY OF THE ORDER DATED
19/12/2019 IN CRIMINAL APPEAL 533/2019
PASSED BY THE COURT OF SESSION, KOZHIKODE
DIVISION.