

Bashir and Others

Vs

State of Haryana

Criminal Appeal No. 517 of 1976

(Syed M. Fazal Ali, P. S. Kailasam JJ )

03.10.1977

JUDGMENT

KAILASAM, J. -

1. This appeal is by special leave by the three appellants against the judgment of the High Court of Punjab and Haryana in Criminal Miscellaneous 4090-M of 1976 dismissing an application under Section 439, Criminal Procedure Code, praying that the appellants be released on bail during the pendency of their trial in a case under Section 304 read with Section 148, Indian Penal Code.

2. The facts of the case are briefly as follows. The three appellants, Bashir, Kundan and Sadiq, along with eight others are being prosecuted for offences under Section 302, read with Section 149, Section 347, read with Section 149 and Section 143, read with Section 147, Indian Penal Code for causing the death of one Sagru and grievous and simple injuries to three others. While eight others were released on bail, the appellants were refused bail as it was alleged that they caused injuries to Sagru. The First Information Report of the offence was lodged on December 2, 1975 and the three appellants and eight others were arrested on the same day. Though the other eight accused were released on bail, the bail application of the three appellants was rejected by the Sessions Court on December 15, 1975. The High Court also declined to release them on bail by an order dated February 5, 1976. But as no challan was filed by the police in the case within sixty days from the date of the arrest of the appellants they were released on bail on February 23, 1976 under Section 167(2) of the Criminal Procedure Code. Subsequently the police filed a challan and the Magistrate committed all the eleven accused to the Sessions Court and released them including the appellants on bail.

3. The complainant filed an application, out of which this appeal arises, before the Sessions Court for cancellation of the bail to the three appellants on the ground that their petitions for grant of bail were rejected on merits both by the Sessions Court and the High Court. The Sessions Judge relying on a decision of the Punjab High Court in *Ajaib Singh v. State of Punjab* held that the consideration for grant of bail at the stage when no report under Section 173, Criminal Procedure Code, was filed were entirely different because if the report is not produced within two months, the Court has no option but to grant bail to the accused howsoever heinous the nature of the offence may be. Holding that when once a report under Section 173, Criminal Procedure Code, is filed by the police the Court has jurisdiction to cancel the bail the Court allowed the application of the complainant and cancelled the bail.

4. An appeal against the order of the Sessions Judge cancelling the bail was dismissed by the High Court. It was contended before the High Court that when the appellants were released under the

proviso to Section 167(2) of the Code of Criminal Procedure unless there was an allegation of misconduct or misuse of the terms of the bail bond by them the bail order could not be withdrawn. It was further contended that the order of bail could be cancelled only under the provisions of Section 437(5), Criminal Procedure Code, as the order of bail passed under Section 167(2) is deemed to be a bail order passed under Chapter XXXIII, Criminal Procedure Code. Disagreeing with the contention of the learned Counsel for the appellants, the High Court held as follows :

The order of bail is passed by the Magistrate in such cases only because of the technicalities in law, that is the failure of the investigating agency to discharge its duties in time in presenting the challan against the accused within the period directed by Section 167, Criminal Procedure Code. This bail order is not on merits of the case. As soon as that ground for which the Court has no option but to release the accused on bail is fulfilled or complied with by the investigating agency, the Magistrate or the Court of Session or the High Court can on that ground cancel the bail allowed earlier. When such an order of cancellation is passed it is to be presumed that the Court, while cancelling the bail, has taken into consideration the final report of the police laid against the accused, first information report, statement under Section 161, Criminal Procedure Code, and the other material collected by the police during the investigation of the case.

5. The view taken by the High Court is challenged in the appeal before us. It was submitted that when once the bail is granted under Section 167(2), Criminal Procedure Code, it cannot be cancelled on the mere ground that subsequently the police had filed a challan but that the bail order can only be cancelled under the provisions of Section 437(5), Criminal Procedure Code.

6. We will now refer to the relevant provisions of the Criminal Procedure Code. Section 167(2) of the Criminal Procedure Code, Act 2 of 1974, is as follows :

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that -

(a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

Sub-section (2) of Section 167 and proviso (a) thereto make it clear that no Magistrate shall authorise the retention of the accused person in custody under this section for a total period exceeding sixty days. On the expiry of sixty days the accused person shall be released on bail if he is prepared to and does furnish bail. So

far there is no controversy. The question arises as to what is the position of the person so released when a challan is subsequently filed by the police. The last sentence in proviso (a) is relevant. It is "and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of the Chapter". Chapter XXXIII contains provisions as to bail and bonds. The relevant sub-sections (1) and (2) of Section 437 are :

(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life :

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(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

Sub-section (1) of Section 437 provides as to when bail may be taken in case of a non-bailable offence. A person accused of a non-bailable offence may be released by a court but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. The two provisos to sub-section (1) are not material and need not be considered. Sub-section (2) to Section 437 provides that if the investigating officer or the Court at any stage of the investigation, inquiry or trial, as the case may be, is of opinion that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, pending such inquiry, the accused shall be released on bail. Sub-section (5) to Section 437 is important. It provides that any court which has released a person on bail under sub-section (1) or sub-section (2), may if it considers it necessary so to do, direct that such person be arrested and commit him to custody. As under Section 167(2) a person who has been released on the ground that he had been in custody for a period of over sixty days is deemed to be released under the provisions of Chapter XXXIII, his release should be considered as one under Section 437(1) or (2). Section 437(5) empowers the Court to direct that the person so released may be arrested if it considers it necessary to do so. The power of the Court to cancel bail if it consider it necessary is preserved in cases where a person has been released on bail under Section 437(1) or (2) and these provisions are applicable to a person who has been released under Section 167(2). Under Section 437(2) when a person is released pending inquiry on the ground that there are no sufficient grounds to believe that he had committed a non-bailable offence may be committed to custody by court which released him on bail if it is satisfied that there are sufficient grounds for so doing after inquiry is completed. As the provisions of Section 437(1), (2) and (5) are applicable to person who has been released under Section 167(2) the

mere fact that subsequent to his release a challan has been filed, is not sufficient to commit him to custody. In this case the bail was cancelled and the appellants were ordered to be arrested and committed to custody on the ground that subsequently a chargesheet had been filed and that before the appellants were directed to be released under Section 167(2) their bail petitions were dismissed on merits by the Sessions Court and the High Court. The fact that before an order was passed under Section 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under Section 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under Section 437(5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds such as tampering of the evidence or that his being at large is not in the interests of justice. But it is necessary that the Court should proceed on the basis that he has been deemed to have been released under Section 437(1) and (2).

7. The learned Counsel appearing for the respondents referred to decisions of the various High Courts in *Lakshmi v. State* [1976 Cri LJ 118 (All HC).], *Ram Pal Singh v. State of U.P.* [1976 Cri LJ 288 (All HC).], *State of Gujarat v. Hirasing Kesarising Solanki* [1977 Cri LJ 104 (Guj HC).], *State of Maharashtra v. Tukaram Shiva Patil* [1977 Cri LJ 394 (Bom HC).] and *Sant Ram v. Kalicharan* [1977 Cri LJ 486 (Del HC).]. These decisions except *Ram Pal Singh v. State of U.P.* are not on the point and therefore need no discussion. In *Ram Pal Singh v. State of U.P.* a Single Judge of the Allahabad High Court held that the bail under Section 167(2), Criminal Procedure Code, has the same incidents as the bail granted under Chapter XXXIII, and is accordingly to remain valid will it is cancelled and the cancellation of a bail can only be on the grounds known to law and the receipt of the charge-sheet in Court can by itself be no ground for cancellation of the bail. The view expressed by the learned Judge is correct in law.

8. In the result we hold that the cancellation of the bail for the reasons stated by the High Court is not sound and direct that the appellants be set at liberty.

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