

Rajnikant Jivanlal and Another

Vs

Intelligence Officer, Narcotic Control Bureau, New Delhi

Petition for Special Leave to Appeal (Cri) No. 1090-91 of 1989

(K. Jagannatha Shetty JJ)

26.06.1989

ORDER

K. JAGANNATHA SHETTY, J. –

1. The petitioners were released on bail by the Enquiry Magistrate under proviso (a) to Section 167 (2) of the Code of Criminal Procedure. After filing of the charge-sheet the High Court ordered their re-arrest by cancelling the bail. The order of the High Court is now under challenge.

2. I do not find any merit in these petitions. But before dismissing, I wish, however, to draw attention to some aspects of the question raised.

3. The facts :

On March 23, 1988 the petitioners were arrested in Bombay by officers of the Narcotic Control Bureau. They were ordered to be produced before the competent Magistrate at New Delhi. They were accordingly produced before the Additional Chief Metropolitan Magistrate, New Delhi. On March 29, 1988 they were remanded to jail custody till April 12, 1988. The remand order was subsequently renewed from time to time. On May 10, 1988 the petitioners moved the Chief Metropolitan Magistrate for bail. When that petition was pending consideration, the prosecution submitted charge-sheet. The charge-sheet was filed on June 23, 1988 for offences under Sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On July 22, 1988 the petitioners filed an application for bail under Section 167(2) CrPC on the ground that the charge-sheet was filed after the expiry of 90 days of their arrest. On July 29, 1988 learned Magistrate enlarged them on bail on their furnishing self bonds in the sum of Rs. 2 lakhs each with two surety bonds in the sum of Rs. 1 lakh each.

4. The efforts of the prosecution to have the bail cancelled could not succeed before learned Magistrate. So they moved the Delhi High Court under Section 439(2) read with Section 482 of the CrPC. In that application, the nature of the offence committed, the part played by the accused, the gravity of the offence etc., were all set out. It was also stated that since two of the accused were earlier absconding, the investigation in the case could not be completed within the time frame.

5. The High Court by following the decision of this Court in Raghbir Singh v. State of Bihar ((1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802) and after considering the material on record cancelled the bail order.

6. The High Court said :

In the present cases, no doubt an order was passed granting bail because the charge-sheet was not filed within the statutory period of 90 days but it was filed on 92 days. There is no doubt that the charge against the respondents is very serious in nature because they are alleged to have entered into a conspiracy to export heroin out of India. The minimum punishment prescribed in such offence is a sentence of 10 years rigorous imprisonment, and a fine of Rs. 1 lakh. I am, therefore, of the view that the authority referred above is fully applicable to the facts of the present case.

Respondents are further alleged to have procured services of one H. S. Gala and a lady carrier Manjula Ben who carried 3 kg. heroin from India to USA in November 1987. Therefore it was on the basis of the statements made by those persons in USA that the respondents were arrested in India.

I am, therefore, of the view that it is a fit case where order of bail should be cancelled.

7. The question is whether the discretion exercised by the High Court is legally sustainable ? Whether the accused have a special right to remain on bail merely because they have been enlarged under proviso (a) to Section 167(2) of the Code ?

8. It is not disputed and indeed cannot be disputed that when an accused is granted bail, whether under proviso (a) to Section 167(2) or under the general provisions of Chapter XXXIII, the only method by which the bail may be cancelled is to proceed under Section 437(5) or Section 439(2). That is because the person released on bail under the proviso to Section 167 (2) shall be deemed to be so released under the provisions of Chapter XXXIII of the Code.

9. Sub-section (5) of Section 437 provides :

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.

10. Sub-section (2) of Section 439 provides :

A High Court or Court of Session may direct that any person who been released on bail under this Chapter be arrested and commit him to custody.

11. Under sub-section (5) of Section 437, the court, may, if it considers it necessary, direct that the person on bail be arrested and committed to custody. The bail may be cancelled by the court if it comes to the conclusion that there are sufficient grounds that the accused has committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. This is what this Court observed in *Raghubir Singh v. State of Bihar* ((1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802). It was said : (SCC p. 502, para 22 : SCR p. 826)

Where bail has been granted under the proviso to Section 167 (2) for the default of the prosecution in not completing the investigation in sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed.

12. And said : (SCC p. 502, para 23)

The order for release on bail was not an order on merits but was what one may call an order-on-default, and order that could be rectified for special reasons after the defect was cured.

13. An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.

14. The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.

15. I examined the material on record. The offences alleged are of serious nature. I am of the opinion that the discretion exercised by the High Court does not call for any interference. The petitions, are, therefore, rejected.

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