

SUPREME COURT OF INDIA

Sayed Mohd. Ahmed Kazmi

Vs.

State, GNCTD

Crl.A.Nos.1695-1697 of 2012

(Altamas Kabir CJI., Surinder Singh Nijjar and J.Chelameswar JJ.)

19.10.2012.

ORDER

ALTAMAS KABIR, CJI.

1. Leave granted.

2. These appeals arise out the judgment and orders dated 2nd July, 2012, 6th July, 2012 and 6th August, 2012, passed by the Delhi High Court in Crl. M.C. No.2180 of 2012.

3. By virtue of the first order dated 2nd July, 2012, the High Court issued notice on the question whether the Court of the Chief Metropolitan Magistrate was competent to remand the accused beyond 15 days for offences under the provisions of the Unlawful Activities (Prevention) Act, 1967. Notice was also issued to the learned Additional Solicitor General since the case involved interpretation of the provisions of the National Investigation Agency Act, 2008, the Code of Criminal Procedure, 1973 and the abovementioned Unlawful Activities (Prevention) Act, 1967. Proceedings pending before the learned Additional Sessions Judge, Central-II, Delhi, in CR No.86 of 2012, were also stayed till the next date of hearing and the matter was directed to be listed on 9th October, 2012. By a subsequent order dated 6th July, 2012, the High Court modified its earlier order and directed the Chief Metropolitan Magistrate to extend the remand of the accused and to take cognizance of offences under the Unlawful Activities (Prevention) Act, 1967. By yet another order dated 6th August, 2012, the High Court rejected the Appellant's prayer for early hearing of the matter indicating that in view of the heavy board of

the Court it was not possible to accommodate the Appellant's request for early hearing.

4. Although, the Special Leave Petition was directed against the said three orders, during the hearing thereof, another question of substantial importance surfaced when on behalf of the Appellant an application, being CrI. M.A. No.19883-85 of 2012 for grant of statutory bail under Section 167(2) Cr.P.C. was filed, and was taken up for hearing along with the appeal.

5. Appearing in support of the Appeals, Mr. Mehmood Pracha, learned Advocate, urged that on 13th February, 2012, the police registered FIR No.4 of 2012 in respect of offences alleged to have been committed under Sections 307, 427 and 120-B of the Indian Penal Code in connection with an explosion involving an Israeli Embassy vehicle carrying the wife of an Israeli Diplomat which had occurred at about 3.15 p.m. at the Aurangzeb Road/Safdarjung Road crossing. The alleged offences were later amended to cover Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967.

6. On 6th March, 2012, the Appellant, Sayed Mohd. Ahmed Kazmi, was apprehended by some unidentified men in plain clothes from outside the Indian Islamic Culture Centre at Lodhi Road at about 11.30 p.m. He was produced before the learned Chief Metropolitan Magistrate on 7th March, 2012, who remanded him to 20 day police custody, subject to certain conditions. On 25th March, 2012, the Investigating Agency completed its investigation, two days prior to the expiry of the 20 day remand period, and the learned Magistrate was informed that no further custodial interrogation of the Appellant was required. Consequently, the Appellant was sent to judicial custody for a further period of 14 days.

7. On 28th March, 2012, a prayer for bail was made on behalf of the Appellant under Section 437 Cr.P.C. The said application was heard, but the Appellant's prayer for bail was rejected on 3rd April, 2012. In between various other proceedings were taken with regard to the inspection of the damaged car.

8. On 2nd June, 2012, the Appellant was produced before the Chief Metropolitan Magistrate, since his 90 days' period of custody was to expire on 3rd June, 2012, and further custody of 90 days' was sought for by the prosecution. The learned Magistrate by his order dated 2nd June, 2012, extended the period of investigation and the custody of the Appellant by another 90 days. The said order dated 2nd June, 2012, was challenged by the Appellant by way of CR No.86 of 2012 which came up for consideration before the learned Additional Sessions Judge on 8th

June, 2012. The learned Additional Sessions Judge, inter alia, held that it was only the Sessions Court and not the Chief Metropolitan Magistrate which had the competence to even extend the judicial custody of the accused and to entertain cases of such nature.

9. On 22nd June, 2012, the Appellant was produced before the learned Chief Judicial Magistrate for extension of his custody. However, on behalf of the Appellant, an application had been made under Section 167(2) Cr.P.C. on 17th July, 2012, seeking default bail as no charge-sheet had been filed within the 90 day period of the Appellant's custody. The said application was dismissed by the learned Magistrate despite the observations made by the Additional Sessions Judge in his order of 8th June, 2012.

10. The matter was, thereafter, referred by the learned Chief Metropolitan Magistrate to the District and Sessions Judge who directed that the judicial custody of the Appellant be extended till 3rd July, 2012. On 30th June, 2012, without serving any notice to the Appellant, the State filed Crl. M.C. No.2180 of 2012 under Section 482 Cr.P.C. before the High Court questioning the validity of the order passed by the learned Additional Sessions Judge on 8th June, 2012. By its order dated 2nd July, 2012, the High Court stayed the observations of the Additional Sessions Judge, Central II, Delhi, in CR No.86 of 2012. The Appellant's application for grant of statutory bail could not, therefore, be taken up by the Additional Sessions Judge till the High Court on 13th July, 2012, vacated the stay in respect of the proceedings in CR No.86 of 2012, subject to an undertaking to be given that the question of law involved would not be agitated and the revision would be restricted only to the factual aspects of the case. In that context, on the same date, the counsel for the Appellant moved another application before the learned Chief Metropolitan Magistrate under Section 167(4) Cr.P.C. and the same was listed for consideration on 17th July, 2012. In the meantime, on 16th July, 2012, CR No.86 of 2012 which had been filed by the Appellant came up for final arguments and on 17th July, 2012, the Additional Sessions Judge allowed the application and held that the custody of the Appellant was illegal.

11. In view of the order passed by the Additional Sessions Judge declaring the Appellant's custody to be illegal, on the same day, counsel for the Appellant appeared before the Chief Metropolitan Magistrate and the application under Section 167(2) Cr.P.C. was listed for hearing, but, instead of hearing the application on the said date, the Chief Metropolitan Magistrate renotified the hearing for 18th July, 2012.

12. On 18th July, 2012, the State filed a fresh application before the Chief Metropolitan Magistrate seeking further extension of the Appellant's custody and the investigation period. On receiving the said application, the learned Chief Metropolitan Magistrate directed a copy of the said application to be served on the counsel for the Appellant and renotified the matter for hearing on 20th July, 2012.

13. On 20th July, 2012, the Chief Metropolitan Magistrate took up the application for extension of custody filed on behalf of the prosecution instead of considering the Appellant's application under Section 167(2) Cr.P.C. and by his order of even date, the learned Chief Metropolitan Magistrate extended the time of interrogation and custody of the Appellant for 90 days with retrospective effect from 2nd June, 2012.

14. The aforesaid order of the learned Chief Metropolitan Magistrate was challenged by the Appellant by way of CR No.86 of 2012 in the Sessions Court. The Additional Sessions Judge in his order of 30th July, 2012, observed that the said revisional application involved mixed questions of law and fact and adjourned the matter till 12th October, 2012. In the meantime, on 31st July, 2012, the prosecution filed charge-sheet. This was followed by the Appellant's application before the High Court in Crl. M.A. No.13484 of 2012 for early hearing, on which the High Court made the observation that on account of the heavy board of the Court it was not possible to accommodate the request for early hearing and the matter was renotified to 9th October, 2012, which is the impugned order in these appeals.

15. Appearing for the Appellant, Mr. Mehmood Pracha, learned Advocate, contended that once the period of 90 days, as stipulated under clause (a)(i) of the proviso to Subsection (2) of Section 167 Cr.P.C., came to an end, the right of a person arrested in connection with the commission of an offence to be released on statutory bail commenced and could not be extinguished by a subsequent application for extension of the period of custody. Mr. Pracha submitted that on 17th July, 2012, the Appellant's custody was held to be illegal by the Additional Sessions Judge in CR No.86 of 2012 and on the same day, the Appellant's application under Section 167(2) Cr.P.C. was pending hearing before the learned Chief Metropolitan Magistrate, who, however, did not hear the application and renotified the hearing for 18th July, 2012. The fact that the application stood renotified for the next day, did not take away the fact that the application was pending on 17th July, 2012, when the period of custody of the Appellant had not only ended, but had been declared to be illegal. Mr. Pracha submitted that the application of 18th July, 2012, filed on behalf of the prosecution for extension of

the period of custody, which was allowed by the learned Chief Metropolitan Magistrate on 20th July, 2012, without considering the Appellant's application under Section 167(2) Cr.P.C. and the subsequent extension of time of investigation and custody of the Appellant with retrospective effect from 2nd June, 2012, did not improve the matter to any extent, as far as the prosecution is concerned, since on the expiry of the first period of custody beyond 90 days, there was no application pending for extension of the period of custody, as contemplated under the amended provisions of Section 167(2) Cr.P.C.

16. At this juncture, it may be useful to indicate that the provisions of Section 167(2) of the Code were modified by virtue of Section 43D of the Unlawful Activities (Prevention) Act, 1967. The modification of the provisions of Section 167(2) Cr.P.C. by virtue of Section 43D of the aforesaid Act is extracted hereinbelow:-

“43D. Modified application of certain provisions of the Code. –

(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and cognizable case as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

(a) the references to fifteen days, ninety days and sixty days, wherever they occur, shall be construed as references to thirty days, ninety days and ninety days respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:-

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from

judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody..

17. By virtue of the aforesaid modification to the provisions of Section 167(2) Cr.P.C., the period of 90 days stipulated for completion of investigation and filing of charge-sheet, was modified by virtue of the amended proviso, which indicated that if the investigation could not be completed within 90 days and if the Court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond the period of 90 days, extend the said period upto 180 days. In other words, the custody of an accused could be directed initially for a period of 90 days and, thereafter, for a further period of 90 days, in all a total of 180 days, for the purpose of filing charge-sheet. In the event the charge-sheet was not filed even within the extended period of 180 days, the conditions directing that the accused persons shall be released on bail if he is prepared to do and does furnish bail, would become operative.

18. Mr. Pracha submitted that in the instant case on 17th July, 2012, when the Appellant's initial custody was held to be illegal, the right of the Appellant to grant of statutory bail under clause (a)(ii) of Sub-section (2) of Section 167 became operative and the Appellant became entitled to grant of statutory bail and the mere fact that on a subsequent application for extension of the period of custody, such custody was extended, was immaterial and was of no consequence, as had been contended in the High Court on behalf of the prosecution.

19. In support of his submissions, Mr. Pracha referred to and relied upon a Three-Judge Bench decision of this Court in Uday Mohanlal Acharya Vs. State of Maharashtra [(2001) 5 SCC 453], wherein while referring to the earlier decision of this Court in the case of Sanjay Dutt Vs. State through CBI [(1994) 5 SCC 410], this Court interpreted the expression "if not already availed of" to mean that the Magistrate has to dispose of an application under Section 167(2) forthwith and on being satisfied that the accused had been in custody for the specified period, that no charge-sheet had been filed and that the accused was prepared to furnish bail, the Magistrate is obliged to grant bail, even if after the filing of the application by the accused a charge-sheet had been filed. Mr. Pracha submitted that so long as an application was pending before a charge-sheet had been filed after the expiry of the stipulated period for filing of charge-sheet, the accused had an indefeasible right to be released on statutory bail, as contemplated under the proviso to Section 167(2) Cr.P.C. Mr. Pracha submitted that the aforesaid decision was ad idem with the

facts of the instant case, wherein the Appellant's application for grant of statutory bail was pending on the day when the Appellant's custody was declared to be illegal by the Additional Sessions Judge.

20. Mr. Pracha submitted that the order passed by the learned Chief Metropolitan Magistrate as also the High Court, were not sustainable, having been made in contravention of the provisions of Section 167(2) Cr.P.C. and were, therefore, liable to be set aside and the Appellant was entitled to be released on statutory bail.

21. On the other hand, learned Additional Solicitor General, Mr. Harin P. Raval, contended that there had been no breach of the provisions of Section 167(2) Cr.P.C. as the right of the Appellant for grant of statutory bail stood extinguished once the application for extension of the time for completing investigation had been filed by the prosecution on 18th July, 2012. Mr. Raval contended that it was settled law that if an accused did not avail of the remedy contemplated under Section 167(2) Cr.P.C. before the charge-sheet was filed, such right was no longer infeasible and was rendered nugatory upon filing of the charge-sheet.

22. In support of his submissions, the learned Additional Solicitor General referred to the Constitution Bench decision of this Court in the case of Sanjay Dutt (supra), wherein the aforesaid proposition of law was considered. The learned Additional Solicitor General submitted that it had been held by the Constitution Bench that in matters relating to the Terrorist and Disruptive Activities (Prevention) Act, 1987, default in completion of investigation within 180 days gave the accused an infeasible right to bail, but the time of default continues till the filing of the challan, but does not survive thereafter. It was held that after filing of the challan, grant of bail would have to be decided on merit. Reference was also made to the decision of this Court in Dr. Bipin Shantilal Panchal v. State of Gujarat [(1996)1 SCC 718], in which the same legal position was reiterated.

23. The learned Additional Solicitor General submitted that once the period for completing investigation was extended on 18.7.2012 and the Appellant's application, if any, for statutory bail remained undecided, by virtue of the ratio of the decisions in the case of Sanjay Dutt (supra) and the subsequent case of Dr. Bipin Shantilal Panchal (supra), the right, if any, of the Appellant for grant of statutory bail was rendered null and void. The learned Additional Solicitor General, therefore, submitted that no interference was called for in the order passed by the learned Additional Sessions Judge and also of the High Court and the appeal was liable to be dismissed.

24. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General, Mr. Raval. There is no denying the fact that on 17th July, 2012, when CR No.86 of 2012 was allowed by the Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application under Section 167 (2) Cr.P.C. was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20th July, 2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2nd June, 2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody. Such right, as has been commented upon by this Court in the case of Sanjay Dutt (supra) and the other cases cited by the learned Additional Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

25. The circumstances, in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

26. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the Appellant acquired the right for grant of statutory bail on 17th July, 2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the Appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.

27. We therefore, allow the appeal, set aside the order dated 20th July, 2012, passed by the Chief Metropolitan Magistrate extending the time of investigation and custody of the accused for 90 days, with retrospective effect from 2nd June, 2012, and the orders of the High Court dated 2nd July, 2012, 6th July, 2012 and 6th August, 2012, impugned in the appeal and direct that the Appellant be released on bail to the satisfaction of the Chief Metropolitan Magistrate, upon such conditions as may be deemed fit and proper, including surrender of passport, reporting to the local police station, and not leaving the city limits where the Appellant would be residing without the leave of the Court, so as to ensure the presence of the accused-Appellant at the time of the trial.