

**(2009) 10 P&H CK 0130**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** CRM-M 24090 of 2009

Smt. Kamlesh

APPELLANT

Vs

State of Haryana

RESPONDENT

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**Date of Decision:** Oct. 15, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 437(6)

**Citation:** (2009) 4 RCR(Criminal) 974

**Hon'ble Judges:** Rakesh Kumar Jain, J

**Bench:** Single Bench

**Advocate:** S.P. Chahar, for the Appellant; Amit Khatkar, AAG, Punjab, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Rakesh Kumar Jain, J.

The petitioner has applied for regular bail u/s 437(6) of Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") in case FIR No. 263 dated 14.8.2007, registered under Sections 406/420 IPC, at Police Station, Civil Lines, Rohtak.

2. Learned counsel for the petitioner has argued that charge in this case was framed on 15.4.2009 and first date for prosecution evidence was fixed for 15.5.2009. Since the prosecution has not completed its evidence, therefore, in view of Section 437(6) Cr.P.C, the petitioner is entitled to be released on regular bail as he is in custody since 23.12.2008.

3. Before coming to this Court, the petitioner had applied for bail u/s 437(6) Cr.P.C, in the Court of Judicial Magistrate Ist Class, Rohtak, which was dismissed on the ground that the allegations against the petitioner are serious in nature. Thereafter, the petitioner had filed an application for bail before learned Addl.Sessions Judge, Rohtak, u/s 437 (6) Cr.P.C, alleging that the Magistrate had not recorded any reason for declining him bail except the fact that the offence is of very serious nature. However, the learned Addl.Sessions Judge, Rohtak, vide his order dated 12.8.2009

dismissed the bail application observing that the reasons are apparent on record because on 12.5.2009, one PW was present but his cross examination was deferred on the request of learned counsel for the defence and the case was fixed for 18.5.2009. On this date, cross examination of PW Raj Kumar was completed. The trial Court could not record other witnesses as summons sent to them were not received back either served or otherwise. One PW Head Constable Budh Ram was served but subsequently, he did not appear and his presence was secured throughailable warrant. On 11.7.2009, two Pws were present but they could not be examined as they did not bring complete record. On 20.7.2009, the case was transferred from the Court of Mr. Chander Hass, Judl. Magistrate Ist Class, Rohtak, to the Court of Sh. Sunil Chauhan, Judl. Magistrate Ist Class, Rohtak. On 8.8.2009, seven Pws were present but since Court time was over, only two witnesses could be examined and the case was fixed for 19.8.2009. It was observed by the learned Addl. Sessions Judge, Rohtak that though it is the responsibility of the prosecution to summon and examine all its witnesses, but if a witness is not present in the Court despite service of summons or witnesses could not be examined due to lack of time, then the prosecution cannot be blamed and for that, the accused does not become entitled to grant of regular bail by invoking the provisions of Section 437 (6) Cr.P.C. Learned counsel for the petitioner has argued that on 12.5.2009, when one PW was present, his cross examination had to be deferred on the request of learned counsel for the defence and the case was posted for evidence for 18.5.2009. It is submitted by him that if the period from 18.5.2009 is counted for the purpose of Section 437 (6) Cr.P.C, even then up to 19.8.2009, it comes to 93 days for which there is no fault of the petitioner.

Learned counsel for the petitioner in support of his arguments has relied upon a decision of this Court in the case of Sukhdev Singh v. State of Punjab, 2009 (3) RCR Cri 291.

Before referring to the submissions made by the learned counsel for the petitioner, it would be appropriate to refer to the provisions of Section 437 Cr.P.C. :-

437. When bail may be taken in case of non-bailable offence.

[(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 -

(i) Such person 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;

(ii) Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death,

imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a [a cognizable offence punishable with imprisonment for three years or more but not less than seven years];

Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm :

Provided further that the court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason :

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]

[Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub section without giving an opportunity of hearing to the Public Prosecutor.]

(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, subject to the provisions of section 446A and 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.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), [the Court shall impose the conditions, -

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may impose, in the interest of justice, such other conditions as it considers necessary.]

(4) An officer or a court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its [reasons or special reasons] for so doing.

(5) 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.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non bailable offence and before Judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

The provisions of Section 437(6) Cr.P.C. provide that if a case involving non-bailable warrant is being tried by the Magistrate, is not concluded within a period of 60 days from the first date fixed for taking evidence and the accused had remained in custody during whole period, then the accused becomes entitled for grant of bail but the Magistrate has still power to refuse the benefit of bail to the accused by recording reason in writing.

From the perusal of the afore-stated facts, it is clear that the petitioner is in custody since 23.12.2008. The charge was framed on 15.4.2009. The first date for prosecution evidence was fixed as 12.5.2009. The case was adjourned to 18.5.2009 on the request of learned defence counsel. Thereafter, on 18.5.2009, PW Raj Kumar was cross examined but summons issued to the remaining witnesses were not received back served or otherwise. On 13.6.2009, despite service, Head Constable Budh Ram did not appear and was summoned through bailable warrants. On 11.7.2009, two PWs were present but could not be examined as they did not bring the complete record. On 20.7.2009, the case was transferred from the Court of Mr. Chander Hass, Judicial Magistrate Ist Class, Rohtak, to the Court of Mr. Sunil Chauhan, Judicial Magistrate Ist Class, Rohtak. On 08.8.2009, seven PWs were present but since Court time was over, therefore, out of seven PWs, only two PWs could be examined. Thus, the delay that has been caused is not attributed to the petitioner.

Learned counsel for the State has argued that the bail application u/s 437(6) Cr.P.C. is only maintainable before the Magistrate and not in the Sessions Court. He has submitted that the Magistrate has given a reason that the offence is of serious nature, therefore, the petitioner cannot be released on bail by extending him the benefit of Section 437 (6) Cr.P.C.

After hearing the learned counsel for the parties and the fact that the petitioner is in custody since 23.12.2008 and a period of more than 60 days has expired after the first date of recording the evidence of the prosecution without attribution of delay on the part of the petitioner, in my view, the petitioner is entitled to bail.

Thus, in view of the above, the present petition is allowed. The order dated 29.7.2009 passed by the Judicial Magistrate Ist Class, Rohtak and order dated 12.8.2009 passed by learned Addl.Sessions Judge, Rohtak, are hereby set aside. The petitioner is ordered to be released on bail on her furnishing bail bonds to the satisfaction of Chief Judicial Magistrate, Rohtak.

Petition allowed.