(2001) 08 AHC CK 0129

Allahabad High Court

Case No: Criminal Miscellaneous Bail Application No. 6195 of 2001

Hafiz Afzal		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision: Aug. 29, 2001

Acts Referred:

- Constitution of India, 1950 - Article 22(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 154, 167, 167(1), 167(2), 209
- Evidence Act, 1872 - Section 27
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 67

Citation: (2002) CriLJ 141

Hon'ble Judges: S.K. Agarwal, J

Bench: Single Bench

Advocate: Daya Shankar Mishra, for the Appellant; A.G.A. and P.K. Srivastava, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.K. Agarwal, J.
Heard learned Counsel for the applicant, learned A.G.A. and Sri. P. K. Srivastava, learned Counsel for the Union of India.

2. As contended by the learned Counsel for the applicant, ''B'' warrant (production or transit warrant) was served upon the applicant for the present offence during his incarceration in District Jail, Howrah (West Bengal) where he was confined in an offence of the same nature. His detention, therefore, in the present offence will be deemed from the date of service of the production warrant. The applicant was never produced in Court in the present case and no remand was obtained. In a nutshell his contention is that the detention of the applicant and his custody in the present case

is illegal in the absence of any order of remand. There is no legal sanction behind his confinement in jail in the present offence. He drew my attention to Article 22(1) of the Constitution of India, Section 57, Cr. P.C. and Section 167(1), Cr. P.C. in support of his contention.

3. Learned Counsel for the Union of India submitted that the applicant being involved in the offence at hand and production warrant having been served on him his non-production in this case in Court in the circumstances in pursuance to that has no bearing to the facts of this case. Since he was not produced in Court in this State, he is not detained in this case at all. He has referred to the order of the learned Sessions Judge also. A Division Bench judgment of this Court was also referred to. It is reported in Bobby alias Premveer and Another Vs. State of U.P., . In its paragraph No. 80, quoted as under, it has clearly been observed that "If the Criminal Courts'' transit warrant or ''B'' Warrant is executed and the prisoner is brought and produced, the Court''s custody is to continue over the prisoner because of having secured the production of the prisoner through the ''B'' Warrant." Thus, apparently, these lines clearly indicate that the production of the prisoner in pursuance to Transit Warrant or ''B'' Warrant before the Court which has directed its issuance for his production is a must. Following lines from paragraph No. 81 of the aforesaid judgment need reference in the context of this submission :

The arrest of the prisoner shall have been an accomplished fact known to the Court issuing ''B'' Warrant and the Investigating Officer seeking the ''B'' Warrant. Therefore, on the production of the accused in the criminal Court issuing the production warrant, his remand to judicial custody or police custody, has to be only in accordance with the provisions of Section 167 of the new Code.

4. The purpose behind issuance of ''B'' warrant is normally obtained to further cause of the investigation. It is generally claimed by any Investigating Officer to record the statement of any accused who is confined in some jail which is beyond his reach or control to obtain some incriminating information or for holding his test identification parade, or effecting some discoveries at his instance or his pointing out u/s 27 of the Indian Evidence Act or for obtaining his handwriting, finger prints and measurements from accused or getting some other test done which is permissible in law, etc. ''B'' warrants are generally obtained by an Investigating Officer when he has sufficient evidence in a particular offence which he is investigating against a prisoner who is confined in another jail either in the same State or outside that State in connection with some other offence. The purpose is to conclude the investigation against him in that offence. Issuance of ''B'' warrant does not contemplate a case of formal arrest on lodging of an F.I.R., against an accused person. On receiving an F.I.R. regarding a cognizable offence by the Police Officer concerned u/s 154, Cr. P.C, such a warrant is always sought by any Investigating Officer after he has collected sufficient material against such offender or prisoner. Such warrants are issued by the Court after full satisfaction from the case diary or

the material brought before it against any such prisoner. In this connection the learned Sessions Judge has made reference to a judgment of the Apex Court, reported in Manoj Vs. State of Madhya Pradesh, Learned Counsel for the applicant also laid emphasis on this judgment to further of strengthen his case. In the case of Manoj (supra) a ''B'' warrant (transit warrant) was sent to Rajasthan from Madhya Pradesh for production of the accused in Madhya Pradesh. The warrant was sent to the concerned Court as well as to the Superintendent, District Jail, Kota. Despite service of the warrant accused Manoj (prisoner) was not produced before the Madhya Pradesh Court. Therefore, no charge-sheet was submitted in that case within 90 days. Manoj claimed benefit of Section 167(2), Cr. RC. His plea was refused by the lower Courts as well as by the Madhya Pradesh High Court. The matter went to the Apex Court. The Apex Court has held that provisions of Sections 167(1) 167(2) and 57, Cr. P.C. are fully applicable in the case of Manoj and finally the Apex Court had directed the accused to be released with a further direction that as and when the police of Madhya Pradesh wants it can arrest him. The learned Sessions Judge has not accepted the Apex Court judgment on the ground that it pertains only to the cases under the Sections referred to therein. Section 167, Cr. P.C. prescribes two things, if the investigation is not completed within 24 hours. Firstly, it provides for remand of an accused both judicial as well as police. Secondly, it provides period, maximum, for the conclusion of investigation, 90 days in those cases which are punishable with sentence of death or life imprisonment and 60 days for the cases other than the above. Thus, the analogy adopted therein cannot be used as any ratio decided to the facts of the present case. The analogy adhered to clearly by the Apex Court, was based on the facts that the police is required under this section to conclude the investigation within a specified length of time and if it fails to do so, no accused can be denied the benefit of Section 167(2), Cr. P.C. Section 57, Cr. P.C. lays down that no accused can be detained at a police station for beyond 24 hours. The other case referred to in the order of the Sessions Judge does not hold any water in the face of the abovesaid judgment of this Court. Therefore, from the two judgments (one of this Court and the other of the Apex Court, supra) what transpires is that the production of the accused in Court in pursuance of ''B'' warrant (Transit warrant) is a necessity and it otherwise, if served, but not given effect to, does not enable any accused to claim any other benefit, made available to him by any other provision of the Code of Criminal Procedure or any other law for the time being in force.

5. In the Apex Court judgment and the present case there is glaring distinction that in that case the remand could have been granted only u/s 167, Cr. P.C. since no charge-sheet was submitted by the police. Due to non-production of the accused Manoj and non-submission of any charge-sheet the Apex Court allowed him benefit of Section 167(2), Cr. P.C. In the case at hand a complaint has already been submitted in Court and the Court has taken cognizance in the matter. The remand now will be only u/s 309, Cr. P.C. The case is pending before the Special Judge

(N.D.P.S. Act), Varanasi. Therefore, the provisions of Sections 167(1) 167(2) and 209, Cr. P.C. are no more applicable in such a situation to this applicant. In the present case, from the narration in the application, it is not apparent as to whether this accused was lodged in jail at Varanasi. However, in paragraph 12 of the counter-affidavit filed on behalf of Union of India it is made clear that the accused is still lodged in some jail at Kolkata (West Bengal) and was never transferred to the jurisdiction of Varanasi Court where his trial presently, on the basis of a complaint preferred by the Narcotics Department, is going on. It is also available from paragraph No. 15 that the applicant had absconded for about 4-1 /2 years in the present offence and was arrested by the Narcotics Department, Kolkata, in another case of recovery of 31.820 Kg. of Heroin and he is still in jail there in connection with that offence.

6. The complaint in this case was filed in the Court of Special Judge (N.D.P.S. Act), Varanasi, in March 1996. Some evidence has already been recorded in trial. The arguments are going on. The evidence against the applicant was of being seen running away from the truck at the time when it was stopped and seized. His further role in the offence has also emerged out during investigation by the Narcotics Department. Thus, in the present case so far as ''B'' warrant or production warrant is concerned, which was earlier issued on the request of the Narcotics Department, has lost all its utility to this applicant since a complaint has already been preferred in his absentia against the accused-applicant. In the face of these facts, the provision of Section 309, Cr. P.C. shall be applicable in his case so far his remand is concerned, as and when he either appears before the concerned Court itself or is brought or produced.

7. In these circumstances, his non-production in Court in pursuance to transit warrant is of no help to the applicant. The present case is not u/s 167, Cr. P.C. The stage of remand is already over long ago due to the filing of a complaint against him and 14 others in the Court of Special Judge (N.D.P.S.) Act, Varanasi. He is now an accused and is facing trial though in absentia. Therefore, in view of the fact that provisions of Section 309, Cr. P.C. instead of Section 167 or 209, Cr. P.C. are applicable to the case of the accused, no benefit of his non-production in Court in pursuance to ''B'' warrant is available to him.

8. It is next contended by the learned Counsel for the applicant that now since the trial is pending in Court against this applicant also, though in absentia of this applicant, it is not open to the Narcotics Department to take him into police custody for examining him to elicit any information regarding the offence. So far as this contention is concerned, learned Counsel for the Narcotics Bureau has pointed out that the complaint was filed against 5 accused persons by the Department, who were arrested and were confined in jail. The submission has been made on the ground that subsequent to the filing of the complaint against all the accused some of the accused, who were not confined in jail till then, were taken in their custody by

the men of the Narcotics Bureau and they were examined by them. It has been pointed out by learned Counsel for the Narcotics Bureau that the Narcotics Department is entitled to seek the custody of those accused persons against whom the case is under investigation and no charge-sheet was submitted against them or any complaint filed.

9. In order to appreciate the contention of both the parties, it shall be relevant to consider the contents of the complaint. In the prayer part, in paragraph No. 15, it has very clearly been adverted to by the complainant Ram Autar Rai that accused numbers 6 to 15 are absconding and the investigation is still continuing against them and the process of collecting evidence is also continuing, so far as these accused persons are concerned. In the end the prayer shows as under :

AATAH : NAYALAYA SE PRARTHANA HAI KI UPARAKT ABHIYUKTGAN SANKHYA 1 SE 5 KO JAIL SE TALABKAR TATHA ABHIYUKTGAN SANKHYA 6 SE 15 KE BIRUDH GAAIR JAMANATI WARRANT BHEJKAR PARIWAD MAIN WARNIT ABHIYUKTON KE BIRUDH PARIKSHAN KI KARWAHI KARTE HUYEN UNHEYE DANDIT KIYA JAYE! 6 SE 14 KE BIRUDH 82-83 KI KARWAHI HO CHUKI HAIN PAR AABHITAK WAH UPASTHIT NAH1 HUYEN HAI! ABHIYUKT SANKHYA 15 KE BIRUDH USE GIRAFTAR KARNE KI KARWAHI KI GAYE PAR WOHA GIRAFTAR NAHI HO SAKA ! AATAHA : USKE BIRUDH 82-83 KI KARWAHI KE JAYE !

The translation of the same in English is as under;

It is, therefore, prayed from this Court that accused Nos. 1 to 5 summoned from jail and non-bailable warrants be issued against 6 to 15 to stand their trial and they be convicted.Section 82/83, Cr. P.C. proceedings were already drawn against 6 to 14, but they had not appeared as yet. Against accused No. 15 attempt to apprehend him was made but he could not be arrested. Therefore, against him proceedings u/s 82/83, Cr. P.C. be drawn.

10. Reading paragraphs Nos. 14 and 15 together the only possible inference is that an intention for their prosecution and trial is clear and explicit. Paragraph No. 8 categorically shows that summons u/s 67 of the N.D.P.S. Act were sent to the absconding accused persons Nos. 6 to 14, but they did not appear before the officer of the Department. It is further said in this paragraph that, thereafter against all the suspected absconders, on 23-1-1996, from the Court of the In charge, Sessions Judge, Varanasi, notification u/s 82, Cr. P.C. were got issued. According to this notification the abovesaid accused persons were to appear either in the Court by 2-2-1996 or before the Investigating Officer, but none of them appeared at any of the two places. Some of the absconders filed a petition against the abovesaid order dated 23-1-1996 before the Lucknow Bench of this Court. Those accused persons were 6 to 13. The Lucknow Bench of this Court by its order dated 26-2-1996 stayed the operation of the order for a week and directed them to appear within a week before the Investigating Officer. The order is quoted in the paragraph itself, it. is

further available from this paragraph that none of the absconders (6 to 13), petitioners, complied with the order passed by the Lucknow Bench of this Court. On 7-3-1996 the Incharge, Sessions Judge, Varanasi, had issued directions u/s 83, Cr. P.C. through the agency of Superintendent of Police, Barabanki. Moveable and immovable properties of these absconders were attached. Despite all these, the absconders did not co-operate with the investigation and appeared to give their statements in accordance with Clause (c) of Section 67 of the N.D.P.S. Act. On 11-3-1996, according to paragraph No. 9, a search of the house of Javed son of Mohd. Zabir was taken and a diary was recovered. On this diary BML ZIP was inscribed. It contained transactions worth huge accounts. During investigation Mohd. Ishrar son of Naseem identified the handwriting in the diary to be that of Javed in his statement to the I. O. on 20-3-1996 and disclosed that the accounts pertain to Morphine/Heroin business. He also disclosed that he identifies the handwriting of Javed. Paragraph No. 10 discloses collection of other evidences. Paragraph No. 11 shows that the I. O. had also collected evidences regarding antecedents of the nominated accused persons. The ownership of Maruti Car No. UP-32/F-0481 to Kuddus and Truck No. UP-78/B-6536 to Juber and Mohd. Anwar son of Mohd. Sahmad and Mohd. Husain is also traced. Truck No. UP-78/B-7554 was traced in name of Khalik Chaudhary and Juber. These were the vehicles which either were employed or were to be employed in the transit of the Heroin up to Kolkata. The addresses of persons in these registration papers were found fake. Thus, from the perusal of the complaint it is apparent that the investigation in the case is complete and the only thing that remains to be done by the Investigating Agency is the recording of the statement of the accused persons. The order-sheet filed along with supplementary affidavit indicates that the cognizance in the case has been taken against all the 15 persons by the Court. Accused Nos. 1 to 15 were summoned from Varanasi Jail and non-bailable warrants against the rest were issued for their first appearance on 29-3-1996. The trial is still going on. In the circumstances, as contended by the learned Counsel for the applicant, the investigation is complete and the presence of the accused is not required any more to further the investigation. Learned Counsel submitted that once the prosecution has commenced the right of the Investigating Agency to take the accused on remand in order to comply the provisions of Section 67 of the N.D.P.S. Act can no more be invoked. The accused cannot be given in its custody by the Court once the trial has commenced. It may be in absentia. No difference will be made by this situation. The Court is precluded from giving the accused in police custody. I do not see eye to eye with this submission. The Court is undoubtedly competent to grant the custody of an accused who is facing trial if the I. O, provides evidence to that Court with facts which are not as yet brought in the charge-sheet or the complaint. If the Court is satisfied by scrutiny of those facts that it shall be expedient in the interest of justice to grant custody of such an accused to the police or to officer of any other department which is investigating the concerned case, it shall be open for the Court to pass such an order, but where the Courts come to the conclusion that no useful

purpose will be served by granting custody of the accused to the police or other department, it can refrain from doing so. It will all depend upon the facts and circumstances of each and every case. Once the charge-sheet or the complaint discloses completion of the investigation and a case is clearly made out from those facts and circumstances against an accused, then it is advisable that such a liberty should not be extended to the Investigating Agency, be they police or any other agency, u/s 167(1), Cr. P.C. for the compliance of any provisions of the Code of Criminal Procedure or any other Act. The discretion rests in such cases with the concerned Courts. No specific guidelines other than the one discussed above would be prescribed to meet any, such situation. The Courts while passing any such order have to exercise their discretion diligently and earnestly.

11. However, the trial of the applicant cannot be conducted without his production here at Varanasi. The prosecution may in that direction make whatever efforts the law permits it to make to procure his presence in the trial, but the applicant cannot be allowed bail or cannot be set at liberty in accordance with what has been held by the Apex Court in the case of Manoj (supra). In the result his bail application cannot be allowed on his ground.

12. The other submission made by the learned Counsel for the applicant is that all other co-accused have been released on bail by either this Court or by the Special Judge (N.D.P.S. Act), Varanasi, but the fact still remains that there is nothing in the bail application or the counter-affidavits which may show that he is enlarged on bail in the offence in which he is in jail at Kolkata. If he is still in jail in that offence and no bail is granted, no useful purpose will be served by releasing the application on bail in this case. Moreover, he is not yet in judicial custody of the Varanasi Court. This Court or the trial Court has no jurisdiction to entertain any application for bail in the light of the facts and circumstances discussed above.

13. However, learned Counsel for the applicant has brought to the notice of this Court by an application that this accused is now in the custody of Varanasi Court (trial Court) and therefore, his case stands at par with all other co-accused persons.

14. In the light of this new development it shall be open for the trial Court to consider the bail application on merit as and when any such application is moved by this applicant and pass suitable orders in accordance with law.

15. In the result this bail application is rejected.