Santosh Kumar Mandal Vs State

Bail Appeal No. 1763 of 2016

Court: DELHI HIGH COURT

Date of Decision: Sept. 28, 2016

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 437#Penal Code, 1860 (IPC) â€" Section 342, 354(D), 363, 506#Protection of Children from Sexual Offences Act, 2012 â€" Section 12

Citation: (2016) 8 ADDelhi 337 : (2016) 4 JCC 2206

Hon'ble Judges: Ms. Mukta Gupta, J.

Bench: Single Bench

Advocate: Mr. Vikas Malik and Mr. Nishant Gautam, Advocates, for the Petitioner; Mr. Ravi Nayak, APP with SI Pradeep Rawa, PS Vasant Kunj, North, for the State

Final Decision: Dismissed

Judgement

Offence,"Cognisable or non-

cognisable",Bailable or non-bailable,By what court triable

If punishable with death, imprisonment for life, or

imprisonment for more than 7 years,",Cognisable,Non-bailable,Court of Session.

If punishable with imprisonment for 3 years, and

upwards but not more than 7 years",Cognisable,Non-bailable,"Magistrate of the first

class

If punishable with imprisonment for less than 3

years or with fine only",Non-cognisable,Bailable,Any Magistrate

imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life. In other words, the minimum sentence",,,

is 7 years but in a given case sentence of imprisonment for life can be awarded. Put differently, sentence of imprisonment for life can be awarded in",,,

respect of an offence punishable under Section 304-B IPC. The proviso to sub-section (2) of Section 167 consists of three parts. The first part,,,

relates to power of the Magistrate to authorise detention of the accused person. This part consists of two sub parts. In positive terms it prescribes,,,

that no Magistrate shall authorise detention of the accused in custody, under this paragraph [meaning sub-section (2)(a)] for a total period",,,

exceeding (i) 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not",,,

less than 10 years, and (ii) 60 days where the investigation relates to any other offences. The period of 90 days is applicable to cases where the",,,

investigation relates to the three categories of offences which are punishable with (i) death, (ii) imprisonment for life, or (iii) imprisonment for a term",,,

of not less than ten years. The question is whether Section 304-B is an offence ""punishable"" with imprisonment for life. Strong reliance was placed",,,

by Mr D.K. Garg, learned counsel appearing for the appellant on Rajeev Chaudhary v. State (NCT) of Delhi [(2001) 5 SCC 34 : 2001 SCC",,,

(Cri) 819 : AIR 2001 SC 2369] . A reference is also made to the decisions of the Jharkhand, the Delhi and the Karnataka High Courts where",,,

the ratio in Rajeev Chaudhary case [(2001) 5 SCC 34 : 2001 SCC (Cri) 819 : AIR 2001 SC 2369] has been made applicable to cases,,,

involving offence punishable under Section 304-B IPC. The Jharkhand High Court"s decision is Sunil Kumar v. State of Jharkhand[(2003) 2,,,

Rec Cri R 135 : 2002 Cri LJ 2507 (Jhar)]. Contrary views appear to have been taken by the Rajasthan and the Himachal Pradesh High Courts,,,

in Keshav Dev v. State of Rajasthan [2005 Cri LJ 3306 (Raj)] and State of H.P. v. Lal Singh 2003 Cri LJ 1668 (HP). The Punjab and,,,

Haryana High Court appears to have taken a somewhat different view in two different cases. In Kuldeep Singh v. State of Punjab (2005) 3,,,

RCR 599 (P&H) it was held that the period is 90 days, as has been held in the case at hand. But a different view (though in relation to some other",,,

offences) was taken in Abdul Hamid (Crl. Misc. No. 40599 M of 2005 disposed of on 21-9-2005). A bare reading of Rajeev Chaudhary case,,,

[(2001) 5 SCC 34 : 2001 SCC (Cri) 819 : AIR 2001 SC 2369] shows that the same related to an offence punishable under Section 386 IPC,,,

and the sentence in respect of the said offence is not less than 10 years. This Court held that the expression ""not less than"" means that the",,,

imprisonment should be 10 years or more to attract 90 days" period. In that context it was said that for the purpose of clause (i) of proviso (a) of,,,

Section 167(2) CrPC the imprisonment should be for a clear period of 10 years or more. The position is different in respect of the offence,,,

punishable under Section 304-B IPC. In the case of Section 304-B the range varies between 7 years and imprisonment for life. What should be,,,

the adequate punishment in a given case has to be decided by the court on the basis of the facts and circumstances involved in the particular case.,,,

The stage of imposing a sentence comes only after recording the order of conviction of the accused person. The significant word in the proviso is,,,

punishable"". The word ""punishable"" as used in statutes which declare that certain offences are punishable in a certain way means liable to be",,,

punished in the way designated. It is ordinarily defined as deserving of or capable or liable to punishment, capable of being punished by law or",,,

right, may be punished or liable to be punished, and not must be punished.",,,

12. In Bouvier"s Law Dictionary meaning of the word ""punishable"" has been given as ""liable to punishment"". In Words and Phrases (Permanent",,,

Edn.) the following meaning is given:,,,

The word ""punishable"" in a statute stating that a crime is punishable by a designated penalty or term of years in the State prison limits the penalty",,,

or term of years to the amount or term of years stated in the statute."""",,,

13. Corpus Juris Secundum gives the meaning as:,,,

Deserving of, or liable to, punishment; capable of being punished by law or right; said of persons or offences. The meaning of the term is not ""must",,,

be punished"", but ""may be punished"", or ""liable to be punished"".""",,,

14. While dealing with a case relating to the Punjab Borstal Act, 1926, this Court held that a person convicted under Section 302 IPC and",,,

sentenced to life imprisonment is not entitled to the benefit of Section 5 of the said Act as the offence of murder is punishable with death. (See,,,

Sube Singh v. State of Haryana [(1989) 1 SCC 235 : 1989 SCC (Cri) 101].),,,

15. Where minimum and maximum sentences are prescribed, both are imposable depending on the facts of the cases. It is for the court, after",,,

recording conviction, to impose appropriate sentence. It cannot, therefore, be accepted that only the minimum sentence is imposable and not the",,,

maximum sentence. Merely because minimum sentence is provided that does not mean that the sentence imposable is only the minimum sentence.,,,

The High Court"s view in the impugned order that permissible period of filing of challan is 90 days is the correct view. Contrary view expressed by,,,

the Jharkhand, the Delhi and the Karnataka High Courts is not correct. The Himachal Pradesh, the Rajasthan and the Punjab and Haryana High",,,

Courts taking the view that 90 days is the period, have expressed the correct view. Therefore, on that ground alone the appeal fails."""",,,

8. From the perusal of the decisions in Rajeev Chaudhary and Bhupinder Singh (supra), it is evident that in Rajeev Chaudhary (supra) the Supreme",,,

Court was dealing with provision of Section 167 Cr.P.C. which provided that no Magistrate shall authorise the detention of the accused person in,,,

custody for a total period exceeding ninety days where the investigation relates to an offence punishable with death, imprisonment for life or",,,

imprisonment for a term of not less than ten years. Thus, the thrust of the Supreme Court decision was on the interpretation of the words ""not less",,,

than"". As held in Bhupinder Singh (supra) word ""punishable"" means ""may be punished"", or ""liable to be punished"" and is not ""must be punished""",,,

which is stage which comes at the end of trial after a judgment of conviction is passed. Thus to ascertain the category in which the offence falls the,,,

maximum punishment that can be provided by the statute is to be seen even though the discretion of the Court may be to award minimum sentence,,,

or fine or both as well.,,,

9. A three Judge Bench of the Supreme Court in the decision reported as (2011) 14 SCC 1 Om Prakash and anr. v. UOI and anr. considering,,,

the distinction between offences punishable under the IPC and that under Central Excise Act 1944 and Customs Act 1962 held-,,,

16. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines ""bailable offence"" to be an offence shown as bailable in",,,

the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals,,,

with classification of offences is in two parts. The first part deals with offences under the Penal Code, while the second part deals with classification",,,

of offences in respect of other laws. Inasmuch as, the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule",,,

which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for,,,

less than three years or with fine only, the offence will be non-cognisable and bailable. Accordingly, if the offences come under the said category,",,,

they would be both non-cognisable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9-A, all offences under",,,

the Act have been made non-cognisable and having regard to the provisions of Section 155, neither could any investigation be commenced in such",,,

cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.",,,

34. Mr Parasaran"s next submission was with regard to the provisions of Part II of the First Schedule to the Code of Criminal Procedure and it,,,

was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the,,,

Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognisable",,,

and bailable. On the other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more,",,,

notwithstanding the fact that he has discretion to provide a sentence of less than three years, the same will make the offence fall under the second",,,

head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head,,,

under which the offence falls in Part II of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.,,,

35. In support of his submissions, Mr. Parasaran referred to the decisions of this Court in CBI v. Tapan Kumar Singh (2003) 6 SCC 175 :",,,

2003 SCC (Cri) 1305 and Bhupinder Singh v. Jarnail Singh (2006) 6 SCC 277 : (2006) 3 SCC (Cri) 101, to which reference will be made,",,,

if necessary.,,,

36. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to",,,

the Central Excise Act, 1944, is whether all offences under the said Act are non-cognisable and, if so, whether such offences are bailable? In order",,,

to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question.",,,

37. Sub-section (1) of Section 9-A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything",,,

contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognisable within the meaning of that Code.",,,

There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr Rohatgi that",,,

since all offences under Section 9 are to be deemed to be non-cognisable within the meaning of the Code of Criminal Procedure, such offences",,,

must also be held to be bailable.,,,

38. The expression ""bailable offence"" has been defined in Section 2(a) of the Code and set out here in above in para 6 of the judgment, to mean an",,,

offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in,,,

force. As noticed earlier, the First Schedule to the Code consists of Part I and Part II. While Part I deals with offences under the Penal Code, Part",,,

II deals with offences under other laws. Accordingly, if the provisions of Part II of the First Schedule are to be applied, an offence in order to be",,,

cognisable (sic non-cognisable) and bailable would have to be an offence which is punishable with imprisonment for less than three years or with,,,

fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and",,,

upwards, but not more than seven years, has been shown to be cognisable and non-bailable. If, however, all offences under Section 9 of the 1944",,,

Act are deemed to be non-cognisable, then, in such event, even the second item of offences in Part II could be attracted for the purpose of",,,

granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognisable.""",,,

10. It is thus evident that the main thrust of the decision to ascertain whether the offence was bailable or non-bailable was on the point that the,,,

offence being non-cognisable it had to be bailable. Section 19 POCSO Act notes that the offences punishable under POCSO Act are cognisable,,,

in nature and provides a special mechanism to deal with crimes effecting the children. Section 19 POCSO Act reads as under:-,,,

19. Reporting of offences.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child),",,,

who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall",,,

provide such information to,-",,,

(a) the Special Juvenile Police Unit; or,,,

(b) the local police.,,,

(2) Every report given under sub-section (1) shall be-,,,

(a) ascribed an entry number and recorded in writing;,,,

(b) be read over to the informant;,,,

(c) shall be entered in a book to be kept by the Police Unit.,,,

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the",,,

child understands contents being recorded.,,,

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an",,,

interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to",,,

understand the same.,,,

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care,,,

and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including",,,

admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.",,,

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to",,,

the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the",,,

child for care and protection and steps taken in this regard.,,,

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)."""",,,

11. Thus, the decisions of Supreme Court in case of Rajeev Chaudhary and Avinash Bhosale (supra) have no application to the facts of the case",,,

as discussed in detail by three Judge Bench in Om Prakash (supra) holding that the offences under Section 9 of Central Excise Act 1944 and,,,

Section 135(1)(ii) of the Customs Act 1962 were non-cognisable and thus bailable offences. Considering the gravity of the offences and the,,,

special mechanism provided under POCSO Act to hold that the offences are bailable though cognisable and would fall in category 3 would be,,,

rendering an interpretation to the classification provided in second part of First Schedule of Cr.P.C contrary to the object of the special enactment.,,,

Thus offences punishable under POCSO Act including Section 12 are cognisable and non-bailable offences.,,,

12. The allegations against the petitioner in the above-noted FIR are that while he was working as a home tutor to the prosecutrix he called her,,,

outside her house in the midst of night and took her to the institute. All this was on the threat that he would kill her parents. The prosecutrix was,,,

wrongly confined by the petitioner at a lonely place, when the parents of the prosecutrix along with the Police reached the institute and",,,

apprehended the petitioner at the spot. Though the prosecutrix states that she had been calling the petitioner however a perusal of the call detail,,,

record of the mobile phone of the petitioner reveals that on the intervening night of 8th and 9th June, 2016 from 22.52 hours he had been",,,

continuously calling the prosecutrix.,,,

13. Considering the facts and circumstances of the case and that the prosecutrix is yet to be examined I do not find it to be a fit case for grant of,,,

bail to the petitioner. Petition is dismissed.,,,