(1985) 10 KL CK 0023

High Court Of Kerala

Case No: Criminal M.C. No. 845 of 1985

Antony Koruth and Others	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision: Oct. 3, 1985

Acts Referred:

- Constitution of India, 1950 - Article 141, 21
- Criminal Procedure Code, 1973 (CrPC) - Section 167, 167(1), 167(2), 173(8), 309
- General Clauses Act, 1897 - Section 10
- Penal Code, 1860 (IPC) - Section 201, 302, 34

Hon'ble Judges: Padmanabhan, J

Bench: Single Bench

Advocate: M.N. Sukumaran Nair, B. Raman Pillai, Sunny Varghese and S. Vijqyakumar, for the Appellant; Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Padmanabhan, J.
This application under sections 437 and 439 read with Section 482 of the Code of Criminal Procedure was filed by accused 1, 3 and 4 in Crime No. 201 of 1985 of the Quilon East Police Station for being enlarged on bail. The case Was registered against them along with the 2nd accused for having committed offences punishable under sections 302 and 201 read with Section 34 of the Indian Penal Code alleging murder of Francis alias Vinu, a boy aged 18, said to be the son of the third accused as well as for having caused disappearance of evidence. Third accused is the sister of accused 1 and 2 and 4th accused is their mother.

2. Petitioners were arrested on 14th June 1985 at 9-15 p.m. and produced before the Judicial First Class Magistrate, Quilon on 15th June 1985 at 8.30 p.m. Second accused

surrendered before the Magistrate on 8th July 1985. Their bail applications were rejected by the Magistrate, the Sessions Judge and this Court on earlier occasions. The Petitioners moved the Magistrate for their release on bail as provided u/s 167(2)(a) of the Code of Criminal Procedure. By order dated 17th September 1985, the Magistrate dismissed the application on the ground that he was informed by the Assistant Public Prosecutor that this Court gave some directions while rejecting their previous bail applications and therefore without producing that order it may not be safe to release them on bail. Hence they came up before this Court.

3. Section 167(2) and the proviso reads as follows:

The Magistrate to whom an accused person is forwarded under this section may, whether he has or he has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,- (i) 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;

(ii) sixty days, where the investigation relates to any other offonce, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter; # ** **

4. The first question for consideration in this respect is the point of time when the Petitioners are entitled to be released as of right after the expiry of ninety days authorised detention u/s 167(2)(a)(i). I am proceeding to discuss this aspect only because Mr. M.N. Sukumaran Nair, Advocate for the Petitioners, contended that ninety days of authorised detention was over by 12th September 1985, while the Public Prosecutor argued that it was over only by 8-30 p.m. on 13th September 1985. The Publie Prosecutor further contented that by 8-30 p.m. on 13th September 1985, when the period of authorised detention of ninety days u/s 167(2)(a)(i) was over, the office hours which extends only upto 5 p.m. alfeady ran out and hence the final report, even if filed on 14th September 1985, was within time. He also argued that the charge was filed on 16th September 1985 and it must be considered to be within time because 14th September 1985 and 15th September 1985 were public

holidays.

5. I do not think that there is much merit in the arguments advanced by the Public Prosecutor. There was no dispute on the question that the period of ninety days or sixty days, as the case may be u/s 167(2)(a) has to commence not from the date or time of arrest but from the date on which detention was authorised by the Magistrate on production of the accused before him after arrest. Sub-section (2) of Section 167 provides that the Magistrate before whom the accused is forwarded has to "authorise" the detention in such custody as he thinks fit. What proviso (a) also says is the Magistrate may authorise detention beyond the period of fifteen days, for a total period not exceeding 90 days or 60 days as the case may be. In calculating the period of authorised detention of 15 days, 90 days or 60 days, as the case may be, the period of detention by the police u/s 57 of the Code has to be excluded. After arresting a person the police in exercise of the power u/s 57 of the Code, can keep him in custody for a limited period of 24 hours excluding the time taken for the journey. u/s 167(1), only if it appears that investigation cannot be over within 24 hours and there are grounds for believing that the accusation or information is well-founded, the police officer need forward the accused to the Magistrate. It is evident that the period of permitted detention by the police officer before the accused is forwarded to the Magistrate and the detention authorised by the Magistrate cannot be included in calculating the period of sixty days or ninety days as the case may be. This position was not disputed. Further, authorities for the position could be had from the decisions in Jai Singh and Another Vs. State of Haryana, ; Raj Kumar Vs. The State of Punjab, , Bashir and Others Vs. State of Haryana, and Babubhai Parshottamdas Patel Vs. State of Gujarat, . Therefore it could be taken as an undisputed fact that the period of permissible detention of ninety days could be calculated only from 15th June 1985, on which day the Magistrate authorised the detention.

6. In this case, as I have earlier stated, arrest was on 14th June 1985 at 9-15 p.m. and production before the Magistrate was at 8-30 p.m. on 15th June 1985. A day starts and ends at midnight. Normally irrespective of the exact time of arrest or authorisation for detention, the date of arrest or the date of authorised detention must end by midnight on that day. From midnight it is calculated as the next day. I was not shown any authority that if authorisation was at 8-30 p.m. the date of authorisation ends only by 8-30 p.m. the next day. If such an argument is accepted the duration of the day must vary in each case depending upon the time of arrest or authorisation from the magistrate. That does not appear to be the correct position.

7. The argument advanced by the Public Prosecutor seems to be on the basis of Section 10 of the General Clauses Act which reads:

Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day of within a prescribed period, then, if the Court of office is

closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

8. In H.H. Raja Harinder Singh Vs. S. Karnail Singh, , it was observed at paragraph 5:

Broadly stated, the object of Section 10 is, to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a Court or office, and that period expires on a holiday, then according to the section the act should be considered to have been done within that period, if it is done on the next day on which the Court or office is open. For that section to apply, therefore, all that is requisite is that there should be a period prescribed, and that period should expire on a holiday.

9. Section 167(2) has not prescribed any period for performance of an act in a Court or office. The section does not make any such provision in express or implied terms. What the section provide is only that if the investigating agency fails to submit the charge-sheet within ninety days, then they are not entitled to approach the Court for the authorised detention of the accused person who is in custody. That section does not provide a period of limitation for filing the charge-sheet before Court. Therefore I am of opinion that Section 10 of the General Clauses Act has no application to such a case.

10. In this particular case that question does not arise at all. If 15th June 1985 is also included in the period of authorised detention the period of ninety days will expire on 12th September 1985. If 15th June 1985 is excluded, then also the ninety days will expire on 13th September 1985. On account of the fact that the Magistrate has given authorisation for detention only at 8-30 p.m. on 15th June 1985, the investigating agency need not and cannot wait till 8-30 p.m. on 13th September 1985. They could have very well filed the charge-sheet before the Magistrate during office hours on 13th September 1985. Therefore the contention of the Public Prosecutor that period of authorised detention expired after office hours on 13th September 1985 and therefore it was not necessary to lay charge on that day is without any force. For the self-same reason the investigating agency is not entitled to take advantage of the two intervening holidays on 14th September 1985 and 15th September 1985. The bail application u/s 167(2)(a) was filed on 16th September 1985. At that time also the charge was not laid. The magistrate called for the case diary. It was only that evening the charge was presented before the Magistrate and that too in a defective manner. The charge was not accompanied by the requisite copies and therefore the Magistrate returned the same, Thereafter the charge sheet was presented with the requisite copies only on the next day. It is evident that this is a case in which the charge was not presented within the period of authorised

detention of ninety days.

11. The proviso to Section 167(2), which is applicable to the facts of this case, says that no Magistrate shall authorise the detention of the accused person in custody under this paragraph 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. It is further stated that on the expiry of the said period of ninety days, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

12. The law incorporated in proviso (a) to Section 167(2) and Section 309 of the Code confers the powers of remand to jail custody during the pendency of investigation only in cases coming under the proviso to (a) to Section 167(2) and not in the case of Section 309. Section 309(2) which reads:

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Is applicable only after cognizance or commencement of the trial proceeded. The command of the Legislature in proviso (a) to Section 167(2) is that the accused person has to be released on bail if he is prepared to and does furnish bail. He cannot be kept in custody beyond the period of ninety days even if investigation may be still proceeding. In Natabar Parida v. State of Orissa 1975 Cri.L.J. 1212 it was held:

But if it is not possible to complete the investigation within a period of 60 days then even in sei\\ous and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a ''paradise for the criminals'', but surely it would not be so, as some times it is supposed to be, because of the courts. It would be so under the command of the Legislature.

13. In the decision in State of Rajasthan Vs. Bhanwaru Khan and Others, it was observed:

There may be delay in investigation on account of no default of the policc or the accused may have committed an offence punishable with death or imprisonment for life, but these cannot be the grounds for detention of the accused beyond sixty days firstly because of a new provision contained in Section 173(8), Code of Criminal Procedure and secondly because of the provision contained in proviso (a) to Section 167(2) that every person enlarged on bail u/s 167 shall be deemed to have been released under the provisions of Chapter XXXIII which includes Section 437 also.

In that decision it was further held:

That proviso (a) to Section 167(2) must be held to be of a mandatory nature, meaning thereby that the contravention thereof renders illegal the detention of the accused u/s 167, Code of Criminal Procedure a total period of 60 days from the date of his arrest.

So far as this case is concerned that period is ninety days.

14. The Gujarat High Court had occasion to consider an identical question in the decision in Babubhai Parshottamdas Patel Vs. State of Gujarat, It was held:

The power of the Magistrate to remand the accused to Jail custody comes to an end with the expiry of ninety days or sixty days from the date when the accused was first produced befoie the Magistrate after his arrest in accordance with Section 167(1). That basic restriction on the power of the Magistrate to authorise detention of the accused concerned in jail custody must operate once the period of ninety days or sixty days expires. That is the command of the Legislature and, if that is so, the fact that Section 167(2)(a) occurs in the chapter relating to investigation and trial is totally immaterial. u/s 309, Sub-section (2), after first taking cognizance of the onence the Court may by a warrant remand the accused it in custody, but that power of remand has to be read in the light of the right of entitlement of the accused to be released on bail once the period of ninety days or sixty days mentioned in Section 167(2)(a) comes to an end.

15. The same position has been considered by the Orissa High Court in the decision in Mangal Hemrum and Others Vs. State of Orissa, .

Theprinciples regarding granting of bail are: (1) Detention beyond 60 days or 90 days, as the case may be, when no charge-sheet has been filed, is unwarranted and illegal u/s 167(2); (2) No application for bail is necessary. It is the duty of the Court to ascertain the desire of the accused and release him on bail if he furnishes security; (3) Section 167(2) does not cease to apply if charge-sheet is submitted after the prescribed period; and (4) There is no distinction between, bail granted u/s 167(2) and bail granted on merits under Chapter 33 and can only be cancelled on grounds well established in law and not on the mere filing of a charge-sheet.

In Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, it was laid down:

When an under trial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the under trial prisoner with a view to enable him to apply for bail in exercise of his right under proviso (a) to Sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the under trial

prisoner to the assistance of a lawyer provided at State cost is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated 12th February, 1979. We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrate and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper obse-vance of the rule of law.

What was laid down by the Supreme Court will have to be considered in the light of Article 141 of the Constitution of India and treated as law laid down by the Court as an addition to Section 167(2) of the Code of Criminal Procedure. It is therefore clear that this is a case in which charge was not laid by the investigating agency within the prescribed time and therefore the Petitioners are as a matter of right entitled to be released on bail. The authoritative decisions have laid down that in such a case even an application from the accused for bail is not necessary and that it is the duty of the Magistrate on the expiry of the prescribed period, when no charge-sheet has been filed, to ask the accused if he desires to go on bail. In Mangal Hemrum and Others Vs. State of Orissa, it was further held that an order of detention has to pass the test of Article 21 every moment of its existence. It is the obligation of the Magistrate and every other authority to justify the detention by refeience to law. So far as this case is concerned, even though the Petitioners applied for bail and expressed their willingness to execute bonds, they were not released on bail.

16. It was argued by the Public Prosecutor that this is a case depending purely on circumstantial evidence and if the Petitioners are released on bail at this stage they may tamper with the evidence and thereby the prosecution may find it difficult to produce before Court all the links in the chain of circumstantial evidence. I was told by the Public Prosecutor that the witnesses are illiterate and that they are either the neighbours or the relations of the accused and that they may not find it difficult to influence those witnesses even during trial if they are released on bail. I think that argument cannot be entertained for the purpose of denying the statutory right to which the Petitioners are entitled to under the proviso to Section 167(2) of the Code of Criminal Procedure. I have already stated that the provisions of Section 309(2) of the Code of Criminal Procedure cannot be attracted in this case. Section 309(2), as I have already stated, is applicable only after cognizance of the offence is taken. Proviso to Section 167(2) says that every person released on bail under the sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter. Section 437 of the Code of Criminal Procedure appears in that Chapter. Section 437(5) provides that any Court which has released a person on bail undef 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. The apprehension entertained by the PubliG Prosecutor could be safeguarded by sufficient provisions to be made in this order. If those provisions are violated, the

investigating agency is entitled to request the Court to invoke the provisions of Section 437(5) and irrespective of what is stated in this order, the Court will be entitled to exercise its authority and discretion in the matter. Therefore that argument also cannot stand in the way of the application for bail being rejected.

In the result, I allow the petition and order the Petitioners to be released on bail on their executing bonds for Rs. 15,000 each with two solvent sureties each for a like amount to the satisfaction of the Judicial Magistrate of the First Class, Quilon on the following conditions:

(1) Till otherwise directed by the Sessions Judge they shall not enter the limits of Quilon East Police Station.

(2) They shall not in any way directly or indirectly attempt to influence the witnesses.

(3) They shall intimate the residence and whereabouts to the investigating agency then and there and any change of residence will also be intimated to the investigating agency promptly, and

(4) They shall not leave the limits of Quilon Sessions Division without the permission of the concerned Sessions Judge and even in case of leaving Quilon Sessions Division they will have to furn''sh their address to the investigating agency promptly.