(1993) ILR (MP) 350 : (1993) JLJ 537

Madhya Pradesh High Court

Case No: Miscellaneous Cr. Case No. 299 of 1993

Banwari		APPELLANT
	Vs	
State of M.P.		RESPONDENT

Date of Decision: June 11, 1993

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 167, 167(2), 309, 309(2), 437(1)

Citation: (1993) ILR (MP) 350 : (1993) JLJ 537

Hon'ble Judges: Shacheendra Dwivedi, J

Bench: Single Bench

Advocate: B.N. Kulshreshtha, for the Appellant; M.K. Jain, Deputy Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Shacheendra Dwivedi, J.
This petition is preferred u/s 439 read with Section 167(2), Code of Criminal Procedure. It raises two important issues. Firstly, whether by filing challan soon after the 90th day of the custody of an accused, his accrued right under the proviso of Section 167(2), Code of Criminal Procedure is lost, and secondly, whether the Court has also to examine the merits of the case for considering the release when the challan has been filed before the accused could be released from custody u/s 167(2) Code of Criminal Procedure (for short the "Code").

2. In the above two situations, when the prosecution fails to complete the investigation and does not file challan within the period of 90 days, but files it immediately on 91st day or even later in order to defeat the right, before the accused could furnish bail or could be released on bail under the proviso of Section 167(2), Code of Criminal Procedure and also when there are challan papers before the Court, while the question of the release of

accused on bail is being considered, after the period of 90days of his custody, whether merits of the case could also be considered by the Court, along with the legal effect of the proviso to Sub-section (2) of Section 167 of the Code.

3. The doubts which I had entertained about the ambit and interpretation of the provisions of Section 167(2), of the Code in the above two situations that whether the power of the Court of keeping an accused in custody has been surrendered to the wisdom and discretion of the Police as even in the most heinous and ghastly crimes, it may not complete the investigation or may not file challan within the period of 90 days and later in order to save its own position, may file the challan soon thereafter, whether the right of the accused of being released on bail under the proviso of Section 167(2), of the Code would still survive ? If the interpretation that the right survives, is to be adopted, will the situation be not a "paradise for the criminals" and particularly if the Court was to be precluded from examining the merits, although the complete challan record is before it and it was required to release the accused on bail since the right had accured to him under Sub-section (2) of Section 167 of the Code. I may hold my view but then to my doubts, a Division Bench authority of this Court in Umashankar and Ors. v. State of M.P. 1982 JLJ 697, is itself the complete answer.

4. Even the Apex Court in this regard was somewhat critical of the provisions of Section 167(2) of the Code. In Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, their Lordships considered the situation where the accused earns the right of being released on bail on the investigation not being completed by police within 60 days (this was the period earlier to the Amendment Act of 1978), even in serious and ghastly type of crimes. It was observed that:

8....But if it is not possible to complete the investigation within a period of 60 days then even in serious 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 sometimes it is supposed to be because of the Courts. It would be so under the command of the Legislature.

The proviso to the section was amended after such an expression of the Apex Court and the period of 60 days was raised to 90 days. But even after the strong criticism by the Supreme Court that the situation created by the proviso of Section 167 of the Code was a paradise for criminals under the command of the legislature, such right of the accused of being released on bail, was not token away by Legislature and no substantial change was made except that the Court was authorised to detain an accused in custody pending investigation, only in the serious offences where the sentence of imprisonment is prescribed as death or imprisonment for life or imprisonment for a term of not less than ten years, upto the maximum period of 90 days, keeping as it was, the period of 60 days for the other offences. The proviso to Section 167(2) of the Code is an innovation in the new Code and is intended to speed up investigation by the police so that the accused does not have to languish unnecessarily in prison waiting for the trial. The right once

accured to the accused could not be defeated by filing of the challan, before he could be released, was found by this Court in Umashankar''s case (supra.). It was observed that:

4....The applicants could not be deprived of their right to be released on bail under proviso (a) to Section 167(2) by the Magistrate''s in action which enable the filing of the challan before disposal of the bail application and the Magistrate ought to have allowed that application...

5. Their Lordships of Supreme Court in Raghubir Singh and Others Vs. State of Bihar, held that:

An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody u/s 309(2).

6. Under proviso (a) of Section 167(2), the Magistrate cannot also postpone the release of an accused to enable the police to file the challan and then to alter the detention of an accused from Section 167 to one u/s 309 of the Code of Criminal Procedure.

7. There may be a situation where the accused has although earned the right of bail on his completing the period of custody of 90 days, yet due to his failure to furnish bail or due to some other reason or because of the inaction of the Magistrate, was not released and in the meantime the challan is filed, even in such situation, the right of the accused to be released from custody on bail, is not defeated by the mere filing of the challan. However, the accused has to furnish bail. Merely on the expiry of 60 or 90 days, as the case may be, he cannot just walk out of the custody. He is required to exorcise his right by furnishing bail, only then no discretion would be left with the Court and it would be legally obligatory on the Magistrate to release the accused from custody as such release is the mandate of law and not the discretion of the Court. The Division Bench of this Court in Umashankar''s case (supra) held that:

5....If an accused is not released on bail under proviso (a) to Section 167(2) after expiry of the maximum period of detention allowed under that provision due to inaction of the Magistrate although he is prepared to furnish bail, his right cannot be defeated by filing of the challan.

8. When the accused earns the benefit under proviso to Section 167(2) of the Code, he is to get bail on default. The sole consideration at that stage is the non-completion of the investigation by the investigating agency within the period prescribed, depending on the nature of offence. The order of bail has to come for such default of the investigating agency, under the Legislature''s command. The consequences are inevitable and the release may be a statutory paradise to the criminals, not by judicial fiat but by legislature''s mandate. It is on the default of the investigating agency in completing the investigation that the right has been given to the accused and their Lordships of Supreme Court observed in Aslam Babalal Desai Vs. State of Maharashtra, that:

11....The purpose and object of providing for the release of the accused under Sub-section (2) of the Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time-frame.

However, if the non-completion of the investigation within the stipulated time is deliberate, it would be open to the State to take stern departmental action against the erring officials, but the accused would certainly be entitled to be released on bail under the proviso and cannot be kept in custody with the aid of Section 309 of the Code. On the accused becoming entitled under the proviso of Sub-section (2) of Section 167 of the Code, Court is required to release the accused on bail without adverting to the merits of the case.

9. In Bashir and Others Vs. State of Haryana, their Lordships of Supreme Court went to the extent that even if the application for the grant of bail of an accused was dismissed earlier on merits of the case, the accused would still be entitled to seek his release later by the thrust of proviso to Section 167(2) of the Code. When earlier rejection of bail application on merits is not relevant, while considering the release of an accused u/s 167(2) of the Code, the question of consideration of the merits at that stage would also not arise. While granting the benefit of Section 167(2) of the Code to an accused the merits of the case are pushed in the background and are not to be considered, else it would be defeating the very purpose of enacting the provision and would be reducing the proviso of Sub-section (2) of Section 167 of the Code as redundant and nugatory.

10. In Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, it was reiterated that at that stage "the merits of the case are not to be examined. Not at all.. "This view still holds the field as this part of the authority has not been overruled by the larger Bench of the Surpeme Court under Aslam Babalal"s case (supra). The other authorities which arc repugnant to the views of the Apex Court and of the Division Bench decision of this Court in Umashankar"s case (supra), deserve no consideration.

11. After considering the earlier views, it has been observed by the Apex Court in Aslam Babalal Desai Vs. State of Maharashtra, that while keeping the accused in custody and investigating the offence-

15...The prosecution cannot be allowed to trifle with individual liberty if it does not take its task seriously and does not complete it within the time allowed by law...

12. Now the question still remains whether the merits of the case would have no role to play in such a situation. Section 167(2) of the code itself provides that every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII of the Code. Section 439(2) of the Chapter empowers the High Court or the Court of Session to direct the arrest of an accused who has been

released on bail under the Chapter and may commit the accused to custody on being arrested. Section 437 falling under the Chapter has also made a provision in Sub-section (5) which reads-

(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.

The prosecution is at liberty to seek the cancellation of bail granted to an accused u/s 167(2) of the Code agitating the merits of the case as a ground for cancellation of bail in the larger interest. It would be at that stage that the Court would be required to take into account the merits of the case. It may be hazardous to say that once bail has been allowed under the proviso of Section 167(2), the Court is precluded forever to see the merits of the case, although it has otherwise the power to cancel the bail. It would surely mean depriving the Court of its elementary function to administer justice and weigh the claim on merits inter se. For a fresh look to cancel the bail, the Court has power to go through the merits of the case, in order to examine the propriety of the cancellation of bail, on the consideration of challan paper. Although strong grounds would be required for cancellation and bail once granted to an accused under the proviso of Section 167(2) of the Code, would not be liable to be cancelled on mere filing of challan. The liberty so allowed is not co-terminous with the filing of the charge-sheet as found by Apex Court in Aslam Babalal Desai (Supra). "But during investigation some strong prima facie evidence and gravity and magnitude of the crime or the manner in which the crime was committed and other attending circumstances may be relevant as prima facie grounds to have a fresh look to cancel the bail", was observed by His Lordship K. Ramaswami, J., while concurring and constituting the majority view in the matter. It was also observed that:

40....Law punishes for defiance, transgression, violation or omission. Liberty of the individual and security and order in the society or public order are delicate and yet paramount considerations. Undue emphasis on either would impede harmony and hamper public good as well as disturb social veal and peace. To keep the weal balanced, must be the prime duty of the Judiciary.

13. As such being bound by the Division Bench authority of this Court in Umashankar''s case (supra) and by implication of the pronouncements of the Apex Court, no option is left under the law but to release the Petitioner on bail under the proviso of Sub-section (2) of Section 167 of the Code, as in the instant case the challan was filed much beyond the period of 90 days, whereas the application by the Petitioner for his release was made on 23.10.92 soon after the expiry of the prescribed period.

14. The application is, therefore, allowed. The Petitioner is directed to be released on bail under the proviso to Sub-section (2) of Section 167 of the Code on his furnishing a personal bond in the sum of Rs. 20,000/- with two sureties of Rs. 10,000/- each to the satisfaction of the Chief Judicial Magistrate, Morena.

15. Before parting with the order. I must record my deep appreciation for the valuable assistance rendered in the case by the senior counsel Shri J.P. Gupta, as amicus curiae.