SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Usha Devi Vs. the State of Bihar and ors.

Usha Devi Vs. the State of Bihar and ors.

SooperKanoon Citation : sooperkanoon.com/125599

Court : Patna

Decided On : Jun-20-2006

Judge : Chandramauli Kr. Prasad, J.

Acts : Indian Penal Code (IPC) - Sections 363, 364A and 365; Code of Criminal Procedure (CrPC) - Sections 57, 167, 167(2), 173, 309(2), 437, 437(1), 437(2), 437(3), 437(5), 439, 439(1), 439(2), 446A and 482

Appeal No. : Criminal Misc. No. 10151 of 2006

Appellant : Usha Devi

Respondent : The State of Bihar and ors.

Advocate for Def. : Maya Nand Jha, Additional Public Prosecutor

Advocate for Pet/Ap. : Surendra Kishore Thakur, Adv.

Disposition : Application dismissed

Prior history : Chandramauli Kr. Prasad, J. 1. A child aged about four and half years old, kidnapped for ransom was recovered from the house of the petitioner. Earlier case under Section 363 and 365 of the Indian Penal Code was registered. According to the prosecution, the accused persons were demanding ransom of Rs. five lakhs for release of the child. During the course of investigation petitioner was found involved in the crime. She was arrested and on the failure of the Investigating Officer to submit cha

Judgement :

Chandramauli Kr. Prasad, J.

1. A child aged about four and half years old, kidnapped for ransom was recovered from the house of the petitioner. Earlier case under Section 363 and 365 of the Indian Penal Code was registered. According to the prosecution, the accused persons were demanding ransom of Rs. five lakhs for release of the child. During the course of investigation petitioner was found involved in the crime. She was arrested and on the failure of the Investigating Officer to submit charge sheet within 90 days she was released on bail in terms of Proviso (a) to Section 167(2) of the Code of Criminal Procedure. Later on, charge sheet was submitted against the petitioner under Section 364A, 363 and 365 of the Indian Penal Code and the learned Magistrate took cognizance of the offence and the case was committed to the Court of Sessions. After commitment of the case petitioner appeared before the trial Court and prayed that she may be allowed to continue on bail, which prayer has been rejected by the 5th Additional Sessions Judge, Fast Track Court, Vaishali by order dated 7.2.2005 passed in Sessions Trial No. 449 of 2004.

2. Aggrieved by the same, petitioner has preferred this application under Section 482 of the Code of Criminal Procedure and her prayer is to quash the aforesaid order and direct continuance of the petitioner on bail.

3. It is relevant here to state that aggrieved by the aforesaid order refusing to allow the petitioner to continue on bail, petitioner earlier filed application for grant of bail under Section 439 of the Code of Criminal Procedure before this Court, which was registered as Criminal Misc. No. 7569 of 2005 Usha Devi v. State of Bihar and this Court by order dated 14.3.2005 rejected the prayer of the petitioner but while doing so it observed as follows:

Hence the learned Chief Judicial Magistrate took cognizance under Section 364A of the Indian penal Code and gave the above direction and when the petitioner appeared before the learned Additional Sessions Judge and prayed to remain on previous bail, her prayer was rejected by order dated 7.2.2005. It seems that the order of the Additional Sessions Judge dated 7.2.2005 has not been challenged

separately and the petitioner has filed this petition under Section 439 of the Code for grant of bail.

Now when the petitioner was granted bail under Section 167(2) of the Code, of course, it cannot be denied that her bail bond can be cancelled only under the provisions of Section 439(2) of the Code but at the same time it is also clear that if during investigation prima facie evidence of graver offence is found, that is also a ground to cancel the bail already granted. In this case also the case was registered under Sections 363 and 365 of the Indian Penal Code but during investigation, prima facie, evidence of graver offence under Section 364A of the Indian Penal Code was found, Therefore, the learned Additional Sessions Judge could cancel the bail and as the victim boy was admittedly recovered from the premises of the petitioner, I do not feel inclined to release the petitioner on bail.

4. Petitioner thereafter filed another application for grant of bail which was registered as Criminal Misc. No. 31721 of 2005 Usha Devi v. State of Bihar and this Court by order dated 6.12.2005 again rejected the prayer of the petitioner but while doing so it gave liberty to the petitioner to assail the order impugned in the present application in the following words:

It, however, may be made clear that this order and the earlier order passed by this Bench rejecting prayer of the petitioner will not prejudice any Court while considering the legality of the order dated 7th February, 2005 by which the bail of the petitioner granted under Section 167(2) Cr. P.C. was cancelled.

5. Mr. Surendra Kishore Thakur, appearing on behalf of the petitioner contends that bail ones granted for not completing the investigation within stipulated time in terms of Proviso (a) to Section 167(2) of the Code of Criminal Procedure, cannot be cancelled only on the submission of the charge sheet and can be cancelled only on the well known grounds known to law under Section 437(5) and 439(2) of the Code of Criminal Procedure.

6. Dr. Maya Nand Jha, Additional Public Prosecutor, however, contends that the bail granted for non-submission of the charge sheet can be cancelled on merits also in addition to the well known grounds for cancellation of bail.

7. For decision of the aforesaid question, it would be apt to understand the purport of bail granted under the Proviso (a) to Section 167(2) of the Code of Criminal Procedure, hereinafter referred to as the Code. Proviso (a) to Section 167(2) of the Code which is relevant for the purpose reads as follows:

167. Procedure when investigation cannot be completed in twenty-four hours,-

(1) xxx xxx xxx

(2) The Magistrate to whom an accused person is forwarded under this Section may, whether he has or 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 offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused persons shall be released on bail if he is prepared to an does furnish bail, and every person released on bail under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purpose of that Chapter.

8. From a plain reading of the aforesaid provision it is evident that the Magistrate to whom the accused is forwarded may authorise his detention for a term not exceeding 15 days in the whole. Further in a case in which the Magistrate has no

jurisdiction to try the case or commit it for trial and considers further detention unnecssary he is required to order the accused to be forwarded to the Magistrate having jurisdiction. Such Magistrate may authorise the dtention of the accused beyond the period of 15 days if adequate grounds exists but no Magistrate can authorise the detention of the accused persons in custody for a total period exceeding 90 days or 60 days as the case may be, depending upon the nature of the crime alleged to have been committed. The proviso, therefore, fixes the outer limit within which the investigation is to be completed and if the same is not completed within the period prescribed the accused has right of release on bail if he is prepared to and furnish bail. An accused released on bail for not completing the investigation within the prescribed period is deemed to be released under the provisions of Chapter XXXIII of the Code. It is relevant here to state that the investigation culminates by submission of report under Section 173 of the Code of Criminal Procedure and accordingly, it is said that in case the charge sheet is not submitted within 90 days or 60 days as the case may be, depending upon the nature of crime alleged to have been committed accused has a right to be released on bail if he is prepared to and furnish bail.

9. True it is that by fiction of law an accused released on bail for not completing the investigation within the stipulated time shall be deemed to have been released under Chapter XXXIII of the Code and therefore, the question is as to whether such release shall be considered to be release on bail under Section 437 or 439 of the Code of Criminal Procedure, which fall in Chapter XXXIII of the Code.

10. Section 437 of the Code, confers power on a Court other than High Court or Court of Sessions to grant bail in case of non-bailable offence, same reads as follows:

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 Sessions, 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 of 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 non bailable and cognizable offence.

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.

(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 may impose any condition which the Court considers

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

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

(c) otherwise in the interests of justice.

(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.

11. The aforesaid provision enumerates grounds for grant of bail but prohibits grant of bail in a case when, it appears to a Court other than the High Court or Court of Sessions that, reasonable ground for believing that the accused is guilty

of an offence punishable with death or imprisonment for life or cognizable offence in which he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or having previously convicted on two or more occasions of non bailable and cognizance offence.

12. Section 439 confers power to the High Court or Court of Sessions to grant bail and to cancel the bail, same reads as under:

439. Special powers of High Court or Court of Session regarding bail. - (1) A High Court or Court of Session may direct -

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable. with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

13. From a plain reading of the aforesaid provisions, it is evident that there is no restriction either to the Court of Sessions or the High Court to release an accused on bail and in respect of the offence of specified nature may impose any condition which it considers necessary. Proviso to Section 439(1) casts an obligation on the Court to give notice of application for bail to the Public Prosecutor in a case which is exclusively triable by the Court of Sessions or which though not so triable, is punishable with imprisonment for life unless for reasons to be recorded in writing,

it is not practicable to give such notice.

14. Section 439(2) of the Code confers power to a High Court or a Court of Sessions to direct arrest and commit such accused who has been released on bail. From a conjoint reading of Section 437 and 439 of the Code of Criminal Procedure, it is evident that so far as power of the Court other than the High Court or the Court of Sessions, meaning thereby the Courts of Magistrate of different classes do not possess power to release such accused persons on bail for offence providing punishment of death or imprisonment for life or cognizable offence in which accused had been previsouly convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or convicted on two or more occasions of a non bailable and cognizance offence. However, there is no such restirction sofar as the Court of Sessions or the High Court is concerned.

15. I would like to add a word of caution here. The purport of Section 437 of the Code is not that in every case registered for offence punishable with death or imprisonment for life the Magistrate is denuded of its power. In a case, although registered for offence punishable with death or imprisonment for life or imprisonment for seven years or more but it appears to the Magistrate that reasonable ground does not exist for believing that the accused had committed offence punishable with death or imprisonment for life nothing prevents him to release such accused on bail. In nutshell it is the substance of the accusation and believe of the learned Magistrate not the nomenclature under which the case is registered.

16. Thus an accused released on bail either under Section 437 or 439 of the Code is released on fulfilment of certain conditions, whereas only condition required for release under Proviso (a) to Section 167(2) of the Code is that the investigation is not completed/charge sheet is not submitted within the prescribed period and the accused is prepared to and furnish bail. Section 167(2) ordains that every persons released on bail shall be deemed to be so released under the provisons Chapter XXXIII of the Code but that does not ipso facto mean that the bail order assumes the content and character of the bail order of the kind conceived under Section 437 and 439 of the Code. A bail order under Proviso (a) to Section 167(2) of the

Code i.e. a bail order on default, as is popularly known in the legal circle.

17. It is well settled that the grounds for cancellation of bail under Section 437(5) and 439(2) of the Code are identical, namely, bail granted under Section 437(1) or 439(1) of the Code can be cancelled broadly when one or more of the following conditions are fulfilled:

(i) The accused misuses his liberty by indulging in similar activity,

(ii) Interferes with the Course of investigation,

(iii) Attempts to tamper with the evidence,

(iv) Threaten witnesses or indulges in similar activities which would hamper smooth investigation,

(v) There is liklihood of the accused fleeing away to another country.

(vi) Attempts to make himself scare by going underground or becoming unavailable to the Investigating Agency,

(vii) Attempts to place himself beyond the reach of the surety,

(viii) Bail has been granted by an inferior Court in a case involving serious offence shocking to the conscience of the superior Courts

(ix) After investigation the facts disclose commission of graver offence.

18. The grounds referred to above are illustrative and not exhaustive.

19. Are these the only grounds on which the bail granted for non submission of the charge sheet can be cancelled

20. On principle, I am of the opinion that when bail granted otherwise then under Section 167(2)(a) of the Code can be cancelled, if investigation discloses commission of graver offence, there is no justification to hold that an accused released on bail on default, his bail cannot be cancelled on submission of the charge sheet in case it discloses commission of graver offence. I am firmly of the

view that bail granted for default cannot be put on a higher pedestal than the bail granted otherwise. I would hasten to add that mere submission of the charge-sheet for graver offence only shall by itself be not the ground for cancelling the bail. Before cancelling the bail the Court will have to be further satisfied that the case is of such a nature in which no Court would had accepted the plea of bail.

21. There is ample authority to support the view which I have taken on principle to which I will refer hereinafter. In the case of Raghubir Singh and Ors. v. State of Bihar : 1987 CriLJ157 , the Supreme Court answered this question and held that mere submission of the charge sheet itself not entail cancellation of bail but at the same time if there exists reasonable grounds to believe that the accused had committed a non-bailable offence and it is necessary to commit him to custody, the bail can be cancelled. Paragraph 22 of the judgment which is relevant for the purpose reads as follows:

22. The result of our discussion and the case law is this: 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 under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc, The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging 'in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed.

(underlining mine)

22. In the case of Aslam Babala Desai v. State of Maharashtra : 1992 CriLJ3712 , the Supreme Court while dealing with this question held as follows:

14, We sum up as under:

The provisions of the Code, in particular Sections 57 and 167, manifest the legislative anxiety that once a person's liberty has been interfered with by the police arresting him without a Court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to Section 167(2) of the Code. It must be realised that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed, the accused would be entitled to be released on bail and the order passed to that effect under Section 167(2) would be an order under Section 437(1) or (2) or 439(1) of the Code. Since Section 167 does not empower cancellation of the bail, the power to cancel the bail can only be traced to Section 437(5) or 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or (2) or 439(1) of the Code. The fact, that the bail was earlier rejected or that it was secured by the thrust or proviso (a) to Section 167(2) of the Code then receds in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge sheet. Such a view would Introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge sheet but there must exist special reasons for so doing besides the fact that the charge sheet reveals the commission of a non-bailable crime .

23. The underlined portion of the judgment referred to above is a clear authority to support the view that if there exists special reasons the bail granted in default can be cancelled.

24. TO put the record straight, I may state here that the Counsel representing the petitioner had referred to the principles laid down in various authority while considering the cancellation of bail to an accused who has either been granted anticipatory bail or bail granted other than under Section 167(2)(a) of the Code. The present case does not involve cancellation of bail in the aforesaid category and, as such, I deem it inexpedient either to refer or analyse them.

25. Bearing in mind the aforesaid principle when I proceed to examine the merit of the case, I find that earlier a case under Section 363 and 365 of the Indian Penal Code was registered and after investigation it. has been found that a child aged about four and half years has been kidnapped for ransom and the petitioner had dominant role in that. Not only that the investigation had disclosed graver offence but offence of such nature that no Court would had granted bail to her. As such, the learned Judge rightly did not allow her to continue on bail granted earlier on default, after the submission of the charge sheet.

26. Any observation made by me in this case shall have no bearing at the later stage of the trial and further shall not prejudice the petitioner in case she resorts to remedy under Section 439 of the Code for grant of bail.

27. In the result, I do not find any merit in this application and it is dismissed accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com