

Sunil D. Thaware Vs. State of Maharashtra

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Court : Mumbai

Decided On : Jan-07-2010

Judge : D.G. Karnik, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 167(2); Indian Penal Code (IPC) - Sections 376

Appeal No. : Criminal Application No. 5693 of 2009

Appellant : Sunil D. Thaware

Respondent : State of Maharashtra

Advocate for Def. : M.R. Tidke, A.P.P.

Advocate for Pet/Ap. : P.N. Patil, Adv.

Disposition : Application dismissed

Judgement :
ORDER

D.G. Karnik, J.

1. Heard.

2. By this application, the applicant takes exception to the order dated 25th September 2009 passed by the Judicial Magistrate, First Class, Ichalkaranji

refusing to accept the bail and surety furnished by the applicant in pursuance of his earlier order dated 14th July 2009 passed under Section 167(2) of the Code of Criminal Procedure (for short 'the Cr. P.C.).

3. The facts giving rise to the present application are briefly given below:

The applicant, who is arrayed as the accused No. 2 in C.R. No. 44 of 2009 registered at Shivaji Nagar Police Station, Ichalkaranji for an alleged offence punishable under Section 376 and other sections of the I.P.C., was arrested by the police on 1st March 2009. The applicant was initially remanded to police custody and was thereafter remanded to the judicial custody and is presently in judicial custody. Investigation was not completed and a chargesheet was not filed within the period of 90 days of arrest, which expired on 30th May 2009. The applicant made an application for bail to the Magistrate on the ground that continued detention of the applicant in judicial custody beyond the period of 90 days was impermissible in view of Section 167(2) of the Cr. P.C. The Magistrate allowed the application on the same day and directed release of the applicant on bail on his executing P.R. Bond of Rs. 50,000/and furnishing two solvent sureties each of Rs. 50,000/. The applicant was unable to furnish two solvent sureties till 25th September 2009. On 25th September 2009, the applicant approached the Magistrate with two sureties and prayed that the sureties be accepted and he be released on bail. In the meanwhile, the chargesheet was filed by the police on 16th July 2009. The learned Magistrate held that the right which had accrued to the applicant for being released on bail under Section 167(2) of the Cr.P.C. was extinguished on the filing of the chargesheet on 16th July 2009 and, therefore, refused to accept the sureties and release the applicant on bail. The applicant has therefore, approached this Court.

4. At the hearing of the application, learned Counsel for the applicant submitted that he does not press for bail on merits but submitted that the order was violative of the indefeasible right of bail which had accrued to the applicant under Section 167(2) of the Cr.P.C.

5. The scope of the right of the accused to be released on bail for not filing of a chargesheet within 90 days of arrest in the light of Section 167(2) of the Cr.P.C.

has been considered by a three judge Bench of the Supreme Court in Uday Mohanlal Acharya v. State of Maharashtra : (2001) 5 SCC 453. After reviewing its earlier decisions, the Supreme Court (majority view) recorded the conclusions in para 13 of its decision as follows:

On the aforesaid premises, we would record our conclusions as follows:

1. Under Sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.
2. Under the proviso to the aforesaid Sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days when the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.
3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.
4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no chargesheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the

investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during the period the investigation is complete and the chargesheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already availed of' used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

Hon'ble Mr. Justice B.N. Agrawal, who wrote a partly dissenting judgment, has also concurred with conclusion Nos. 1 to 5 extracted above, and has dissented only with regard to conclusion No. 6. In the light of the decision of the Supreme Court in Uday Mohanlal Acharya (supra), it is clear that a Magistrate, before whom the accused is produced while the police is investigating the offence, can authorise detention of the accused in police custody for a period not exceeding 15 days and also authorise his detention in judicial custody for a total period not exceeding 90 days (inclusive of police custody, if any) where the investigation relates to an offence punishable with death, imprisonment for life or for a term not less than 10 years and 60 days where the investigation relates to any other offence. On expiry of the said period of 90 days or 60 days as the case may be, an indefeasible right accrues to the accused for being released on bail on account of default by the investigating agency in completing the investigation within the aforesaid period and the accused is entitled to be released on bail if he is prepared to furnish the bail as directed by the Magistrate. If the accused furnishes the bail forthwith as directed by the Magistrate, there would be no difficulty and the accused will have

to be released on bail. Difficulty however would arise where the accused is unable to furnish the bail, as ordered by the Magistrate, forthwith and takes some time to furnish the bail and in the meanwhile a chargesheet is filed. This situation was considered by the Supreme Court in the case of Uday Mohanlal Acharya (supra) and it was held that if the accused is unable to furnish the bail as directed by the Magistrate, then continued custody of the accused even beyond the period of 90 days or 60 days, as the case may be, will not be unauthorised. And if during that period the investigation is completed and chargesheet is filed, the so-called indefeasible right of the accused would stand extinguished. Thus, if for any reason the accused is unable to furnish the bail as ordered by the Magistrate and in the meanwhile, the chargesheet is filed by the police, the indefeasible right which had accrued to the accused for being released on bail by virtue of Section 167(2) of the Cr. P.C. would stand extinguished.

6. In the present case, the indefeasible right for being released on bail accrued to the applicant on 31st May 2009 when the period of 90 days from his arrest expired. The applicant did not exercise the right forthwith but filed the application for bail only on 14th July 2009. On the same day, the Magistrate passed the order directing his release on bail. The applicant however was unable to furnish bail. The applicant was not ready and willing to furnish the bail forthwith. The applicant showed his readiness and willingness to furnish the bail only on 25th September 2009 when he approached the Magistrate along with two sureties. Before that, the chargesheet had already been filed on 16th July 2009. Thus, the so-called indefeasible right of the applicant which had accrued to him by virtue of the order dated 14th July 2009 passed by the Magistrate stood extinguished on account of his unwillingness or inability to furnish the bail. The Magistrate was therefore right in holding that the so-called indefeasible right of the applicant of being released on bail had been extinguished.

7. For these reasons, the applicant cannot be granted bail on the basis of his so-called indefeasible right under Section 167(2) of the Cr.P.C. The application is accordingly dismissed.

8. It is clarified that this order would not prevent the applicant from making an application for regular bail on merits, and if such an application is made, it shall be considered by the appropriate court on its own merits.

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