

Devindrappa and anr. Vs. State of Karnataka

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Court : Karnataka

Decided On : Jan-07-2004

Reported in : 2004CriLJ1506; ILR2004KAR909; 2004(2)KarLJ291

Judge : Manjula Chellur, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167(2), 309, 309(2) and 439; [Indian Penal Code \(IPC\), 1860](#) - Sections 324 and 300

Appeal No. : Criminal Petition No. 2892 of 2003

Appellant : Devindrappa and anr.

Respondent : State of Karnataka

Advocate for Def. : P.M. Nawaz, High Court Government Pleader

Advocate for Pet/Ap. : Ravi B. Naik, Adv.

Judgement :

ORDER

Manjula Chellur, J.

1. Heard the learned Counsel for the petitioners and the learned High Court Government Pleader for the respondent-State and perused the records.

2. These two petitioners are accused before the Trial Court for offences punishable under Sections 143, 147, 148, 324, 307 and 302 read with Section 149 of the 1PC. The petitioners had filed bail application under Section 439 of the Cr. P.C. before the I Additional Sessions Court, Bangalore which was rejected on 6-8-2003. Therefore, they have come up before this Court under Section 439 of the Cr. P.C. for grant of bail.

3. The petitioners are accused 1 and 5. They have sought for bail on two grounds; one on the question of law and the other on merits.

4. Sri Ravi B. Naik, learned Counsel for the petitioners contended that on 6-2-2003, the petitioners were arrested and produced before Judicial Magistrate First Class and since then, they are in judicial custody. The charge-sheet came to be filed on 10-6-2003 which was beyond the period of 90 days. The learned Magistrate took cognizance of the offence on the basis of the charge-sheet only on 27-6-2003. In between, on 12-6-2003 and 26-6-2003, they were remanded to judicial custody. Therefore, their custody from 10-6-2003 till 27-6-2003 is illegal and hence, petitioners are entitled for bail.

5. So far as 2nd ground i.e., on parity is concerned, it is argued that the other accused are granted bail against whom it is alleged that they also assaulted the deceased on the head with a stick and are. Therefore, on these two grounds, the petitioners are entitled for bail.

6. Heard both sides.

7. It is contended by the petitioners that on the basis of the two grounds mentioned above, the petition deserves to be allowed.

8. As against this, learned High Court Government Pleader Sri P.M. Nawaz, contended that if the petitioners/accused have not filed an application under Section 167 of the Cr. P.C. seeking for bail before filing of charge-sheet on 10-6-2003, the petitioners are not entitled to be released on bail.

9. On perusal of the lower Court records, it is seen, these two petitioners were produced before the Court on 6-2-2003. The entire order sheet is perused in order

to ascertain when the charge-sheet is filed. However, the order sheet dated 27-6-2003 shows that on 10-6-2003, the Police Sub-Inspector, Shahabad Rural Police Station, has submitted charge-sheet against six accused persons including these two petitioners. It is also noted on 27-6-2003 that accused 1 and 5, the petitioners herein were in judicial custody. Section 167 of the Cr. P.C. reads as under:

Section 167. Procedure when investigation cannot be completed in twenty-four hours.--(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the Police Officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 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.

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.--For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.--If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

(2-A). Notwithstanding anything contained in Sub-section (1) or Sub-section (2), the officer-in-charge of the police station or the Police Officer making the investigation, if he is not below the rank of a Sub-Inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made the period during which the accused

person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to Sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer-in-charge of the police station or the Police Officer making the investigation, as the case may be. (3) A Magistrate authorising under this Section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under Sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

10. Learned Counsel for the petitioners relied on the following decisions:

State of Maharashtra v. Mrs. Bharati Chandmal Varma alias Ayesha Khan, : 2002 CriLJ575 :

This was a case where offences under the Maharashtra Control of Organised Crime Act, 1999, was discovered apart from IPC offences. Originally, they were

arrested for offences under the Indian Penal Code and they were in custody from 2-4-2001. During the investigation of IPC offences, police discovered that crimes under the Maharashtra Control of Organised Crime Act was also committed by the accused. Therefore, they commenced investigation under the Special Act from 21-4-2001 after obtaining sanction from the concerned authority under the said Act. The question which came up before their Lordships was whether 2-4-2001 should be the date for consideration of 90 days under Section 167 of the Cr. P.C. or 21-4-2001, the date on which permission was obtained for investigation under the special enactment. In this regard, their Lordships held that though investigation under the Special enactment commenced on 21-4-2001, to apply Section 167(2) proviso of the Code, there was no necessity to consider when actually the investigation had commenced. It was further held that said proviso was intended only for the purpose of keeping the arrested person under detention during investigation where a maximum period of such detention is envisaged. It was held that on expiry of period provided under Section 167 of the Cr. P.C., further custody becomes unauthorised and the person in custody shall be released on bail if he is prepared to and furnish bail. It was also held in this case that if accused is found to have committed more than one offence, distinct from each other, the period of custody or detention in one crime cannot be related to the distinct crime. But however, it was held if initially the detention in one crime is for an offence and during investigation, some other crime is also revealed pertaining to the same cause of action, the period envisaged in the proviso to Section 167(2) do not get extended. It was held the respondent/accused would get a right to be released on bail on account of default of investigating agency to complete the investigation without the period envisaged from the date of first remand of the accused. 2. Uday Mohanlal Acharya v. State of Maharashtra, : 2001 CriLJ1832 :

Where after expiry of period of 60 days for filing challan the accused filed an application for being released on bail and was prepared to offer and furnish bail, however, the Magistrate rejects application on erroneous interpretation about non-application of Section 167(2) to case pertaining to Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999 and accused approaches higher forum and in meanwhile, charge-sheet is filed, the indefeasible right of accused of being released on bail does not get extinguished by

subsequent filing of charge-sheet. The accused can be said to have availed of his right to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail.

An accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to Sub-section (2) of Section 167 of the Code, if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. Such an interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at the stage will not take away right of the accused. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society, at large, in lawful preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency. Personal liberty is one of the cherished object of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions, thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody upto a maximum period as indicated in the proviso to Sub-section (2) of Section 167, any further detention beyond the period without filing of challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Cr. P.C. and as such, could be violative of Article 21 of the Constitution.

3. Dharmanand alias Mahato v. State, 1994 Cri. L.J. 730 (All.):

The right of the accused to be released on bail if the charge-sheet is not filed within the period of 90/60 days, as the case may be, is absolute and cannot be defeated or taken away on subsequent filing of charge-sheet or by remand under Section 309(2) of the Code of Criminal Procedure. The right of bail in such a case continues till the accused is released on his furnishing bail bonds etc. In default of non-filing of charge-sheet by prosecution within the prescribed period, the Magistrate should pass an order enlarging the accused on bail, irrespective of the fact whether an application for bail is or is not moved by the accused and should call upon the accused to furnish bail bonds. If the accused is prepared and does furnish bail bonds, then he has to be released on bail. If the accused fails to furnish bail bonds, then only he should be remanded under the provisions of Section 309(2) of the Cr. P.C. But, if after remand the accused furnishes bail bonds, even after receipt of charge-sheet, then he has to be released from the custody because the order of bail survives even after filing of charge-sheet. The Magistrate cannot detain an accused in custody on furnishing bail bonds. The Magistrate has to follow the provisions strictly if the accused furnishes bail bonds.

4. Umashankar and Ors. v. State of Madhya Pradesh, 1982 Cri. L.J. 1186:

A person accused under Sections 302, 364 and 365 of the Indian Penal Code, after being under continuous detention for more than 90 days filed an application for release on bail under Section 167(2), proviso (a). The challan was filed pending the application. On filing of the challan the Magistrate took cognizance of the offence and remanded the accused to custody under Section 309. Thereafter, he disposed of the application, dismissing it on the ground that as the remand under Section 167(2) stood altered to one under Section 309 the proviso to Section 167(2) was no more applicable and hence the applicant could not be released on bail.

Held: Alteration of the remand under Section 167(2) to one under Section 309 pending the application under Section 167(2), proviso (a) was illegal. Rejection of bail was also illegal.

If a challan is filed before the expiry of the maximum period for which an accused can be detained in custody under Section 167, further remand to custody can be ordered under Section 309. No maximum period of remand is provided for under Section 309. The Magistrate however cannot postpone the release of an accused on bail under proviso (a) to Section 167(2) after the expiry of 90 days or 60 days as the case may be, just to enable the police to file the challan and to alter the detention under Section 167 to 309. It is the duty of the Magistrate soon after the expiry of the maximum period, to inform the accused of his right to be released on bail under Section 167(2), proviso (a). Once the accused of his own or on being told of his right by the Magistrate, is prepared to furnish bail the Magistrate must order the accused to be released on bail without waiting for the challan and must release him when bail is furnished.

5. Gyanu Madhu Jamkhandi and Ors. v. State of Karnataka, 1976(2) Kar. L.J. 366 : 1977 Cri. L.J. 632 (Kar.): If on the filing of the charge-sheet, a Magistrate does not, for a number of days proceed to apply his mind and take cognizance of the offence made out, he cannot for those number of days, exercise powers of remand to judicial custody either under Section 167 or under Section 309(2). The situation can be solved by a Magistrate applying his mind to the facts and material available in the final report and the documents produced along with it in no time after the filing of the final report and deciding whether cognizance of the offence made out should be taken or not; if he decides to take cognizance of the offence, then, he can under Section 309(2), proceed to exercise his power of remand.

11. From the reading of the above decisions, it is very clear that on the expiry of the period envisaged from the date of arrest, the accused gets a right to claim that he should be enlarged on bail provided he furnishes bail as ordered by the concerned Court but this does not mean the accused can just walk out of the custody on the expiry of such period. He must file an application expressing his willingness to exercise that right and also expressing his willingness to furnish bail. Such right would be available till filing of the charge-sheet. In other words, prompt action is required on the part of the learned Magistrate to dispose of the application filed by the accused for bail for enforcement of his indefeasible right accrued in his favour on account of default on the part of the investigating agency

to complete investigation within specified period. If no charge-sheet has been filed by the investigating agency, if the accused is unable to furnish the bail, the further custody of the accused even beyond specified period in the said section, will not be unauthorised. If investigation is completed and charge-sheet is filed during that period, then, the so-called indefeasible right of the accused would stand extinguished.

12. As could be ascertained from the order sheet of the Trial Court, the petitioners herein have not filed an application either under Section 167(2) of the Cr. P.C. for bail or under Section 439 of the Cr. P.C. after the expiry of 90 days and before the cognizance was taken on 27-6-2003. Here, we have to see, before cognizance is taken for the offence, whether the order of custody by the learned Magistrate is in order or not. Section 309 of the Cr. P.C. has to be read here, which reads as under:

'Section 309. Power to postpone or adjourn proceedings.--(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) 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:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him'.

13. The power of Magistrate to remand the accused to custody could be exercised either under Section 167 or 309 of the Cr. P.C. Once charge-sheet is filed, period of remand under Section 167 of the Cr. P.C. comes to an end. If further custody is necessary, it can be done only under Section 309 of the Cr. P.C. To remand the accused to custody under Section 309 of the Cr. P.C., the learned Magistrate has to apply his mind to the facts and material available in the final report i.e., charge-sheet and decide whether cognizance of the offence could be taken or not. If he takes cognizance of the offence, then, he can exercise his power under Section 309(2) of the Cr. P.C. to remand the accused.

14. In the present case, the two citations of the Apex Court are not applicable to the facts of the present case because it is not a case where an application under Section 167(2) of the Cr. P.C. came to be filed by the accused after the expiry of the period envisaged therein and the same was kept pending for a long-time beyond filing of charge-sheet. On the other hand, the charge-sheet came to be filed on 10-6-2003 but till 27-6-2003, no cognizance was taken. When once charge-sheet is filed on 10-6-2003, the custody cannot be under Section 167(2) of the Cr. P.C. In this case, they were arrested on 6-2-2003 and the 90 days period would come to an end, at any post by 6-5-2003 or 7-5-2003. The period for investigation allowed under the Act would come to an end at any cost before 7-5-2003. After 7-5-2003, no application under Section 167 of the Cr. P.C. came to be filed though such right was available to the accused. In view of the Supreme Court decision in 2001, the detention from 7-5-2003 till 10-6-2003, did not become unauthorised. But however, after filing of the charge-sheet on 10-6-2003, he could not have been detained in custody under Section 167 of the Cr. P.C. The learned Magistrate ought to have exercised his mind to the material available on record to take cognizance. But unfortunately, he took cognizance on 27-6-2003. Subsequent to taking cognizance, the custody is under Section 309(2) of the Cr. P.C. and the same would be authorised. Therefore, the detention in the present case between 10-6-2003 to 27-6-2003 becomes illegal and they are entitled to be

released on bail under Section 439 of the Cr. P.C. as the custody was neither under Section 167 of the Cr. P.C. nor under Section 309 of the Cr. P.C.

15. Having regard to above discussion, petition deserves to be allowed and it is accordingly allowed, subject to the following conditions:

(a) The petitioners shall be released on bail on their executing a bond for Rs. 25,000/- each along with two solvent sureties for the like sum to the satisfaction of the lower Court;

(b) They shall not tamper the prosecution witnesses.

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