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Ramu Vs. State of Karnataka

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Court : Karnataka

Decided On : Apr-18-1991

Reported in : ILR1991KAR1861; 1991(1)KarLJ494

Judge : Mirdhe, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 167(2), 437(5) and 439(2)

Appeal No. : Cri. Petn. No. 1317 of 1990

Appellant : Ramu

Respondent : State of Karnataka

Advocate for Def. : C.H. Jadhav, HCGP

Advocate for Pet/Ap. : C.H. Hanumantharaya, Adv.

Disposition : Petition allowed

Judgement :
ORDER

Mirdhe, J.

1. This Petition is filed by the petitioner under Sections 439 and 167(2) Cr.P.C. praying for grant of bail to him in Crime No. 114 of 1989 of Nazarbad Police

Station, Mysore City. Originally the petition was filed under Section 439 Cr.P.C. Subsequently, by an amendment, Section 167(2) Cr.P.C. is also added, in addition to Section 439 Cr.P.C. But, at the time of the hearing of this petition, learned Counsel for the petitioner submitted that this petition may be considered only under Section 167(2) Cr.P.C.

2. I have heard the learned Counsel for the petitioner and the learned Government Pleader fully and perused the records of the case.

3. The case of the prosecution is as follows:-

Deceased Savitha was the daughter of C.K. Ramu. The petitioner is an Instructor in the Department of Tele Communications in Mysore. He was a tenant of C.K. Ramu. There was illicit intimacy between the petitioner and deceased Savitha. He intended to marry her and when the parents of deceased Savitha resisted the proposal, there was some altercation between the petitioner and the family of deceased Savitha. On 30-9-1989 at about 9-30 a.m. in Siddartha Layout near Karanji Tank Road, the petitioner met Savitha and stabbed her with a knife and also attempted to commit suicide by stabbing himself on his stomach. Subsequently Savitha died in the hospital. The police registered a case on the complaint of one Manjunatha of Siddartha Layout, a colleague of the petitioner, at Crime No. 114 of 1989 for the offences punishable under Section 302 read with Section 307 and Section 309 I.P.C.

4. The doctor who conducted the post mortem examination over the dead body of the deceased has opined that the death of the deceased was due to bleeding and shock as a result of stab injury to heart and liver by single edged weapon and he noticed 10 injuries on the dead body of Savitha. In respect of the petitioner, the doctor noticed two incised wounds and the doctor has opined that the injuries were grievous in nature. In view of the post mortem report on the dead body of deceased Savitha, it will have to be held that this is a case of homicidal death and also in view of the medical report in respect of the petitioner there appears to be a prima facie case for attempt on his part to commit suicide. The offence took place at 9-00 a.m. and there are statements of C.K. Ramu - father of the deceased Savitha, Shanthi - mother of the deceased, Satish kumar - brother of the deceased

and they have spoken about the illicit intimacy between the petitioner and the deceased and resistance of the proposal of their marriage and the altercation between the petitioner and the family of the deceased. The police have recorded the statements of Syed Dliyas Pasha and Shivanna who have stated before the police that the petitioner stabbed Savitha with a knife and he attempted to commit suicide by stabbing himself on the stomach. In view of the statements of the eye witnesses, there is a strong prima facie case against the petitioner for an offence punishable with death or imprisonment for life.

5. But the petitioner is seeking bail not under Section 439 Cr.P.C. but under the provisions of Section 167(2) Cr.P.C. on the ground that the police have filed charge sheet more than 90 days after his arrest. The offence is alleged to have taken place on 30-9-1990 at 9-30 am. The petitioner was admitted into the hospital on that day and the petitioner got himself discharged on 12-11-1989 and he was taken into the custody of the police on 12-11-1989 and the charge sheet is filed on 13-2-1990. According to the contention of the learned Counsel for the petitioner, the period of the petitioner's stay in the hospital also amounts to custody and, therefore, taking into consideration that period, the charge sheet is filed more than 137 days after the arrest of the petitioner. On the other hand, the learned Government Pleader contends that the petitioner was taken into custody only on 12-11-1989 and till then he was under police surveillance only during his stay in the hospital. According to the learned Government Pleader, the period of police surveillance cannot be treated as a period of custody and, according to him, the charge sheet is filed after 88 days after the arrest of the petitioner on 12-11-1989.

6. The first point to be considered is whether the period of stay of the petitioner in the hospital under police surveillance in the hospital can be considered as a period of custody. The learned Government Pleader relied on ASHAK HUSSAIN ALLAH DETHA ALIAS SIDDIQUE AND ANR. v. ASSISTANT COLLECTOR OF CUSTOMS (P) BOMBAY AND ANR., 1990 Crl. LJ. 2201 wherein the Bombay High Court has held as follows:-

'The word 'arrest' is a term of article. It starts with the arrestor taking a person into his custody by action or words restraining him from moving anywhere beyond the

arrester's control, and it continues until the person so restrained is either released from custody or having been brought before a Magistrate, is remanded in custody by the Magistrate's Judicial Act. In substance, 'arrest' is the restraint on a men's personal liberty by the power or colour of lawful authority. In its natural sense also 'arrest' means the restraint on or deprivation of one's personal liberty. It stands to reason therefore, what that label the investigating officer affixes to his act of restraint is irrelevant. For the same reason, the record of the time of arrest is not an index to the actual time of arrest. The arrest commences with the restraint placed on the liberty of the accused and not with the time of 'arrest' recorded by the Arresting Officers.'

He also relied on ULHAS NATURE CURE CENTRE, BANGALORE AND ORS. v. STATE OF KARNATAKA AND ORS., 1987 Crl. LJ. 1435 wherein it has been held as follows:

'There is no statutory provision in the Karnataka Police Act directly dealing with surveillance. The police surveillance was sought to be justified under Section 65 which deals with 'Duties of Police Officer.'

His Lordship has considered the ground on which the acts of police for keeping surveillance can be justified.

7. The defence, on the other hand, relied on the Decision of Calcutta High Court in MIHIR ADHIKARY v. THE STATE, 1983(2) Crl.L.J. 1559 wherein it has been held as follows:-

'A man may be in custody without having been formally arrested. Custody includes a state of affairs in which the accused can be said to have come into the hands of the police or have been under some form of police surveillance or restriction on the movements by the police.'

He has also relied on KANHIYA v. STATE OF RAJASTHAN, 1965(1) Crl.L.J. wherein it has been held that where the accused gives information to the police and he is arrested 30 minutes thereafter he will be deemed to be in constructive custody of the police at the time of giving information and hence Section 27 of the

Evidence Act will come into play.

8. The learned Counsel for the petitioner has also relied on PUNJA MAVA v. STATE OF GUJARAT, 1976(2) Crl.L.J. 1652 wherein their Lordships have held as follows:-

'Thus, the 'police custody' is deemed to extend even when the accused was deemed to have submitted to such custody of a police officer by submitting to the interrogation and by making statements about discovery and who could not thereafter be said to be a free man.'

Another Ruling relied upon by the learned Counsel for the petitioner is reported in STATE OF UTTAR PRADESH v. DEOMAN UPADHYAYA, : 1960 CriLJ1504 wherein the Supreme Court has held as follows:-

'When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police and may be deemed to be in the 'custody' of the police officer within the meaning of Section 27 of the Evidence Act.'

A man can be in custody without his being formally arrested when restriction is imposed on his movements either by police surveillance or some other restriction by the police. Arrest commences with the restraint placed on the liberty of the accused and not with the time of the formal arrest recorded by the Arresting Officer. In this case, it is not in dispute that the petitioner was under police surveillance during his period of stay for treatment in the hospital from 30-9-1989 to 12-11-1989. There were restrictions on the movement of the petitioner even in the hospital. Therefore, there were restrictions placed in the form of surveillance on the movement of the petitioner even when he was in the hospital. The period of surveillance over the petitioner in the hospital from 30-9-1989 to 12-11-1989 will have to be considered as a period of custody in the light of the various Rulings cited above. Besides, there is a mahazar produced at Annexure D which is drawn by the police on 12-11 -1989 at the time when this petitioner was taken into the formal custody. In that mahazar the wordings are as follows:-

From this averment also, it can be seen that the petitioner was under custody even before this mahazar was drawn up. Taking into consideration all these factors, I am of the opinion that the period from 30-9-1989 to 12-11-1989 during which the police kept surveillance over the accused in the hospital will have to be termed as a period of custody. The police have filed the charge sheet on 13-2-1990. So taking into consideration the period of custody from 30-9-1989 to 13-2-1990, it is dear that the police have filed the charge sheet after 137 days which is more than the prescribed period of 90 days.

9. The learned Counsel for the petitioner contended that the investigation continues even after the filing of the charge sheet. This is an argument which is difficult to accept in view of the fact that though the investigation can be ordered after the filing of the charge sheet under certain circumstances it cannot be said that the investigation continues even after filing of the charge sheet so as to entitle the accused to the grant of bail under Section 167(2) Cr.P.C. If this argument of the learned Counsel for the petitioner is accepted, then in every case the accused will have to be granted bail under Section 167(2) Cr.P.C. notwithstanding the fact that the police have filed charge sheet against him after the completion of investigation within the stipulated period.

10. The petitioner has not exercised his right under Section 167(2) Cr.P.C, to get bail for him which he could have got it. But he is praying to grant him bail under Section 167(2) Cr.P.C. after the filing of the charge sheet in this case. The contention of the learned Government Pleader is that when once the charge sheet is filed, the right of bail to an accused under Section 167(2) Cr.P.C. becomes lost and the accused cannot exercise it. In support of his contention, the learned Government Pleader relied on GYANU MADHU JAMKHANDI AND ORS. v. THE STATE OF KARNATAKA, 1977(1) Crl.LJ. 632 wherein this Court has held as follows:-

'If on expiry of sixty days from the date of arrest, the concerned accused does claim that he should be enlarged on bail and accordingly furnishes bail as ordered by the Magistrate, he should be enlarged on bail. It cannot be said that on the expiry of sixty days, the accused secures the right to be enlarged on bail and as

such he can just walk out of custody. He has got to exercise that right by expressing to the Magistrate that he is prepared to be enlarged on bail and to furnish bail, and then only the Magistrate has got to enlarge him on bail. If the concerned accused does not exercise the right, the power of the Magistrate to authorise detention beyond the period of sixty days, can be exercised, provided that the Magistrate is satisfied that adequate grounds exist for doing so, and the Magistrate would be right in remanding the concerned accused to judicial custody,'

He has also relied on NAWAL SAHNI v. STATE OF BIHAR, 1989(1) Crl.LJ. 733 wherein it has been held as follows:-

'Even in a case where charge sheet has been submitted beyond the statutory period but if the prayer for grant of bail is being considered after submission of such charge sheet then the stage of applicability of Section 167(2) proviso is over. With the submission of the charge sheet an enquiry shall be deemed to have commenced, as such, there is no question of lack of power in the Magistrate to remand such an accused; he can remand in exercise of power under Section 309(2). Of course, if the prayer for bail is being considered after the expiry of the statutory period and before the submission of the charge sheet there is no option with the Magistrate except to release the accused on bait if he furnishes bail bond. 1988 Patna IJR (HC) 201 overruled.'

Another Ruling relied upon by the learned Government Pleader is STATE OF U.P. v. LAKSHMI BRAHMAN AND ANR., : 1983 CriLJ839 wherein it has been held as follows:-

'From the time the accused appears or is produced before the Magistrate with the police report under Section 170 and the Magistrate proceeds to enquire whether Section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. Obviously Section 309 would enable the Magistrate to remand the accused to the custody tilt the inquiry to be made is complete.

On the expiry of 60 days from the date of the arrest of the accused, the further detention does not become ipso facto illegal or void, but if the charge sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail.'

He also relied on SHARDULBHAI LAKSHMANBHAI PANCHOLI AND ANR. v. STATE OF GUJARAT, 1990 Crl. LJ. 1275 wherein the Full Bench of the Gujarat High Court has held as follows:-

'If the accused has not made application for his release on bail, after expiry of the period prescribed by the proviso (a) to Section 167(c) and before filing of the charge sheet, had no right to claim his release on bail, after filing of the charge sheet, solely on the ground that the charge sheet was not submitted within the prescribed period.'

The learned Counsel for the petitioner relied on BALAPPA KARNAL v. STATE OF KARNATAKA, : ILR 1985 KAR3098 wherein it has been held as follows:-

'Accused arrested on 8-11-1983 were remanded to custody from time to time till 7-2-1984. On 6-2-1984 accused filed application for release on bail and on that very day final report was filed by police; release on bail was refused. Contended that accused were entitled to release on bail under Section 167(2) of the Code. Per contra contended that Section 167 ceased to apply and Section 309 came into play and that the period of 90 days had not expired, the date of arrest being excluded.'

Another Ruling relied on by the learned Counsel for the petitioner in HUSSAINARA KHATOON AND ORS. v. HOME SECRETARY, STATE OF BIHAR, PATNA, : 1979 CriLJ1052 wherein the Supreme Court has held as follows:-

'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 undertrial 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 costs is secured to him.'

The learned Counsel for the petitioner has also relied on RAGHUBIR SINGH AND ORS. v. STATE OF BIHAR, : 1987 CriLJ157 wherein it has been held as follows:-

'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 sixty 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. Decision of Patna High Court, Reversed.'

The latest Ruling on this point is reported in RAJNIKANT JIVANLAL PATEL AND ANR. v. INTELLIGENCE OFFICER, NARCOTIC CONTROL BUREAU, NEW DELHI, : 1990 CriLJ62 wherein his Lordship Justice Jagannatha Shetty has held as follows:-

'An order for release on bail under proviso (a) to Section 167(2) may apportionately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. The accused cannot, therefore, claim any special right, to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.'

11. In Raghubir Singh and Ors. v. State of Bihar their Lordships of the Supreme Court have held that the right that has accrued to an accused under Section 167(2) Cr.P.C. is not defeated by lapse of time, by filing of the charge sheet or by remand to custody under Section 309(2) Cr.P.C. Their Lordships of the Supreme Court have held that the order for release on bail may however be cancelled under Section 437(5) Cr.P.C. or Section 439(2) Cr.P.C.

12. His Lordship Justice Jagannatha Shetty in Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi quoted above has stated that the right to bail under Section 167(2) proviso (a) Cr.P.C. thereto is absolute and it is a legislative command and not Court's discretion. His Lordship has stated in clear words that the Magistrate has no powers to remand a person beyond the stipulated period of 90/60 days, and the accused must be released on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted to the petitioner under proviso (a) to Section 167(2) Cr.P.C. could be cancelled.

13. The learned Government Pleader contended that the observation of his Lordship in Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic

Control Bureau is in the nature of obiter dictum.

14. In MUNICIPAL COMMITTEE, AMRITSAR v. HAZARA SINGH, : [1975]3SCR914 it has been laid down as follows:-

'Even obiter dictum of the Supreme Court should be accepted as binding. But statements on matters other than law have no binding force. Since on facts no two cases are similar. Supreme Court's decisions which are essentially on questions of fact cannot be relied upon as precedents for decision of other cases. 1975 Criminal LJ 97 (Ker) Approved. 1972 F.A.C. 549 (Punj) and AIR 1960 SC 195 followed.'

Therefore, even the obiter dictum expressed by the Supreme Court will be binding on this Court if it is on a point of law and the observation of his Lordship Justice Jagannatha Shetty in Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi in the first instance cannot be said to be obiter dictum and even if they are held to be obiter dictum they are on the point of law and, therefore, it will be binding on this Court. In that case the accused had applied for bail after the filing of the charge sheet under Section 167(2) Cr.P.C. and his Lordship has held that he was entitled to bail under Section 167(2) Cr.P.C.

15. In view of the various pronouncements of the Supreme Court mentioned above especially in Raghubir Singh and Ors. v. State of Bihar13 that the right that has accrued to the accused by not filing of charge sheet within the stipulated time cannot be defeated by lapse of time or by filing of the charge sheet. In view of the Rulings of the Supreme Court which are very clear on this point, the ratio in the Ruling of the Gujarat High Court in Punja Mava v. State of Gujarat relied upon by the learned Government Pleader cannot be accepted in this case. This Court in the case reported in Balappa Karnal v. State of Karnataka has granted bail to the accused in that case even though The police had filed a charge sheet on the very day when the accused had filed an application under Section 167(2) Cr.P.C. Therefore, I am of the opinion that the petitioner is entitled to bail under Section 167(2) Cr.P.C. even though he has applied for bail after the filing of the charge sheet by the police since the right accrued to him cannot be defeated by lapse of time or by filing of the charge sheet, The petitioner is getting bail not on the merits

of the case, but by the Legislative command and due to the fault of the prosecution in not filing the charge sheet within the stipulated period of 90 days. Further, the prosecution is at liberty to get his bail cancelled if it thinks fit under Sections 437(5) or 439(2) Cr.P.C. as the offence is a heinous one.

16. Hence, I make the following order-The petition is allowed. The learned Sessions Judge, Mysore, is directed to release the petitioner on bail on his executing a bond for a sum of Rs. 10,000/- with one solvent surety for the like sum to the satisfaction of the learned Sessions Judge, Mysore. This bail is granted subject to the following conditions:-

(1) The petitioner shall not tamper with the prosecution witnesses or records in any manner:

(2) The petitioner shall not leave the Municipal limits of Mysore City without the prior permission of the Principal Sessions Judge, Mysore.

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