

Mohd. Abdul Subhan Vs. State of A.P. and ors.

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Court : Andhra Pradesh

Decided On : Aug-01-2001

Reported in : 2001(2)ALD(Cri)507; 2001(2)ALT(Cri)297

Judge : T. Ch. Surya Rao, J.

Acts : Code of Criminal Procedure (CrPC) , 1978 - Sections 207, 208 and 209

Appeal No. : Criminal Petition No. 1417 of 2001

Appellant : Mohd. Abdul Subhan

Respondent : State of A.P. and ors.

Advocate for Def. : Public Prosecutor and ;C. Praveen Kumar, Adv. for R.3 and R.5 to R.7

Advocate for Pet/Ap. : C. Damodar Reddy, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

T. Ch. Surya Rao, J.

1. The petitioner seeks to cancel the order of bail granted to the accused by the Judicial Magistrate of First Class, Sangareddy in P.R.C. No.1 of 1999 while

committing the case to the Court of Session on 21.06.1999.

2. Briefly stated the facts are thus: The petitioner is the de facto complainant who filed a private complaint against the respondents 3 to 7 herein who are the Excise Officials alleging that they murdered his son late Mohammed Noorullah, who had been working as Junior Assistant in the Excise Department. A crime was registered earlier against respondents 3 to 7 in Crime No. 123 of 1996 under Section 302 of the Indian Penal Code on 06.05.1996 by the Town Police Station, Sangareddy. Later, investigation in the case was taken up by the C.B.C.I.D, and eventually it submitted a final report dated 22.08.1997 recommending for dropping the proceedings against the accused. Having been aggrieved by the same, the petitioner filed a private complaint against the accused. After conducting enquiry, the learned Magistrate took the complaint on file as P.R.C. No.1 of 1999 against the accused.

3. When the accused appeared before that Court pursuant to the summonses issued in P.R.C No 1 of 99, the learned Magistrate directed each one of them to enter into a bond for Rs 5000/- by his order Dt, 6-4-99. Accordingly they executed the bonds. After complying with the provisions of Section 208 of the Criminal Procedure Code ('the Code' for brevity) the learned Magistrate committed the case to the Court of Session by his order Dt. 21-6-99, in P.R.C 1 of 99. After pronouncing the committal order the learned Magistrate directed the accused to be bound over under Sec, 209(b) to secure their presence before the Sessions Court. Inter alia in the order the learned Magistrate observed that since all the accused are on bail they are directed to continue on bail as contemplated under Sec, 209(b) of the Code.

4. As against that order, the petitioner carried the matter in Revision to the Sessions Court in Cr.I. R.P. No.11 of 1999. The learned Additional Sessions Judge, Medak, by an order dated 04.04.2000 dismissed that Revision Petition. After the case against the accused was committed to the Court of Sessions, the learned Additional Sessions Judge took cognizance of the offence against the accused in S.C. No.146 of 1999 and the case is now pending trial. A4 seems to have obtained an anticipatory bail. It appears the petitioner also filed a similar

petition before that Court seeking to cancel the bail granted to the accused by the learned Magistrate. That application is pending adjudication. At that stage, the petitioner filed the present Criminal Petition before this Court.

5. The petitioner who appears in person contends that in the interest of justice the respondents shall be committed to custody. In view of the said contention and having regard to the facts of the case a short but important question that might arise time and again for consideration is as to whether, 1) A Magistrate while adjourning the P.R.C, for compliance of the provisions of Sec, 207 and 208 as the case may be and 2) at the time of committal shall remand the accused into custody invariably?

6. Section 209 of the Code is the relevant provision, which is germane for consideration is expedient here to be excerpted, insofar as is relevant for the present purpose, for brevity and better understanding of the matter thus:

'209. Commitment of case to Court of Session when offence is triable exclusively by it: - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that offence is triable exclusively by the Court of Sessions, he shall-

(a) commit, after complying with the provisions of the Sections 207 or 208, as the case may be, the case to the Court of Session, and subject to the provisions of this code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of the trial;'

7. A perusal of Section 209 of the Code shows that in a case instituted on a police report or on a private complaint when the accused appears or is brought before the Magistrate, and the offence alleged is exclusively triable by the Court of Sessions, the Magistrate shall commit the case to the Court of Session after complying with the provisions of Sections 207 and 208 of the Code. The expression 'appears or is brought before the Magistrate' clearly denotes the

appearance of the accused pursuant to the summons issued or production of the accused before the Court while in custody either in execution of the warrant or by arrest. In either course the Court shall proceed with the case for compliance of the provisions of Sections 208 and 207 respectively before committal. Clause (a) of Sec, 209, enables the Court to remand the accused to custody until such commitment has been made and clause (b) thereof clearly envisages the remand of the accused to custody during and until the conclusion of the trial. A plain reading of these two clauses apparently shows that the Magistrate shall remand the accused to the custody until commitment is made before committal and at the time of committal, during and until conclusion of the trial subject however to the provisions relating to bail. Ostensibly no discretion seems to have been left to the Magistrate except to remand the accused to custody subject to the provisions relating to bail. Doubtless, when the accused is brought before the Court while in custody, it is automatic that he shall be remanded to custody. What happens when the accused appears pursuant to the summons before the Court? Instances are not lacking where the case is instituted on a private complaint i.e. otherwise than on a police report, and the offence alleged is exclusively triable by a Court of Session it would be registered as what is colloquially known as a private P.R.C. The accused appears before the Court pursuant to the summons issued by it. In such cases, either during the tendency of committal proceedings or at the time of the committal proceedings under clauses (a) and (b) of Section 209 of the Code respectively the accused shall invariably be remanded to custody or not is the moot question. It is expedient, under the circumstances, to examine critically the provisions of Section 209 of the Code in conjunction with other cognate provisions in the Code, without going by the ostensible meaning of the Section.

8. Earlier, the unamended clause (a) of Sec, 209 of the Code reads as extracted hereunder:

(a) commit the case to the Court of Session;

9. An interpretation was sought to be given by some of the High Courts in the country that the Magistrate has no power to remand the accused to custody when he was brought before him before the committal and, therefore, the case should

be committed forthwith without there being any delay. In usual course, the case cannot be committed forthwith to the Court of Session as the Magistrate has to comply with the provisions of Sections 207 and 208 of the Code, which requires an adjournment of the case to a future date due to certain contingencies which might result in the delay in supplying the copies. Obviously the unamended clause (a) does not authorize the Magistrate to remand the accused to custody. Clause (b) however specifically authorizes the Magistrate, while passing committal order to remand the accused to custody.

10. In an attempt to surmount the said problem a Division Bench of this Court in C.BOLLAYYA v. STATE OF ANDHRA PRADESH¹ held at page 1351 as excerpted hereunder, thus;

'We are therefore of the view that the Magistrate is entitled to adjourn the case from time to time under S. 309(2), Cr.P.C. even in a case covered by Section 209, Cr.P.C. provided that the conditions mentioned in S. 309(2) are satisfied. Section 309(2) specifically empowers the Magistrate to remand the accused while adjourning the case. The orders passed in the present case remanding the accused while adjourning the case from time to time pending receipt of the report of chemical examiner were in our opinion fully justified'.

11. The Apex Court in STATE OF U.P. v. LAKSHMI BRAHMAN² also addressed itself to the problem. The unamended clause (a) of Section 209 of the Code was the subject matter of interpretation by the Supreme Court in that case. At page 446 in para 13 the Apex Court held as follows:

'If, therefore, the proceedings before the Magistrate since the submission of the police report under Sec. 170 and till the order of commitment is made under Sec. 209 would be an inquiry and if it is an inquiry, during the period, the inquiry is completed, Sec. 309(2) would enable the Magistrate to remand the accused to the custody.'

12. Although that was not the stage strictly coming within the ambit of the expression 'inquiry' realizing the difficulty, Section 309 of the Code was made applicable to that stage before the committal. Section 309(2) enables the Court to

remand the accused to custody. It is apt here to consider the said provision as extracted hereunder insofar as it is relevant for the present purposes.

'309. Power to postpone or adjourn proceedings:-

(1)

(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.

-----Explanation 1:- -----Explanation 2:-
----- (Emphasis is mine)

Sub-section (2) of Section 309 enables the Magistrate to adjourn the case from time to time for reasons to be recorded and may by a warrant remand the accused if in custody. If the accused is not in custody and is appearing before the Court in all the adjournments having already put in his appearance pursuant to the summons issued by that Court, there is no compulsion to remand the accused to the custody.

13. The Apex Court in RAJ KISHORE PRASAD v. STATE OF PUNJAB³ has taken a different view and held that the period interregnum from taking cognizance of the case by the Magistrate till committal cannot be considered to be an inquiry as envisaged under Section 2(g) of the Code placing reliance upon the objects and reasons given by the Parliament for dispensing with the enquiry before the committal and amending Section 209 of the Code suitably and held that the Magistrate was not conducting at that stage any inquiry except seeing that the package to be sent to the Court of Session was in order and committing the case to the Court of Session. In the instant case, we are not concerned with the said difference.

14. No person shall be deprived of his life or personal liberty except according to the procedure established by law is the constitutional mandate under Article 21. The Magistrate has no inherent power to remand the accused to custody in the absence of any provision under the Code and power to remand the accused shall be conferred upon the Court. Vide, NATWAR PARIDA vs. STATE OF ORISSA⁴. Under the scheme of the Code a police officer can detain a person in custody without warrant after his arrest for a period of twenty-four hours. Thereafter excluding the time necessary for journey he shall produce the accused before the Magistrate as ordained by section 57 of the Code. Section 167 confers power on the Magistrate to authorize further detention subject of course to the limitations contained therein. Section 167 covers the stage of investigation. Section 309(2) applies to the stage of inquiry or trial and authorizes the Court to remand the accused to custody from time to time if he is brought in custody. At the stage of committal as the section 209 originally enacted clause (b) thereof authorizes the Magistrate to remand the accused to custody during and until the conclusion of trial. However under clause (a) thereof during the tendency of committal proceedings no such power has been conferred on the Magistrate.

15. To obviate the aforesaid contingency clause (a) of section 209 has been amended under the Criminal Procedure Code Amendment Act 45 of 1978. The objects and reasons for amending the said Section are expedient to be extracted hereunder for better understanding of the matter:

'Clause 19. Clause (a) of section 209 is being replaced by a new clause which clarifies that the commitment is to be made after complying with the provisions of section 207 or 208 and that the committing Court will also have the power to make an order for the remand of the accused in custody until the commitment has been made. This is intended to remove the difficulty actually experienced in cases where the committing Magistrate is unable to commit the accused on the same day.'

16. In none of the above cases the amended provisions of clause (a) of section 209 have come for consideration although clause (a) has been amended way back in the year 1978 itself. Having regard to the object and reasons in amending

clause (a) of Section 209 of the Code, it was only to facilitate the Magistrate to remand the accused to custody during committal proceedings; the provision has been amended suitably. When that is the object under clause (a), the remand envisaged under clause (b) of section 209 cannot be for a different purpose. The intention of the Parliament is manifest thus so as to confer the power on the Court to remand the accused to custody, clause (a) of Section 209 has been suitably amended. Amendment is further necessitated inasmuch as Sec. 309(2) has no application to committal proceedings. Therefore section 209 is to be read and understood in the above context and one shall not go by the ostensible meaning of the same.

17. However unlike in section 309(2), the expression 'if in custody' has not been incorporated either in clause (a) or (b) of section 209 while amending the same. No significance need be attached to such omission in view of the object and purpose in amending the provision in my considered view, nor one need be swayed away by the expression 'shall' used in the section.

18. The clause 'subject to bail' used in the section certainly gives discretion to the Magistrate. In KEWAL KISHAN vs. SURAJ BHAN⁵, the Apex Court held as follows:

'If the committing Magistrate thinks that it is not necessary to commit the accused who may be on bail to custody he may not cancel the bail. This has been made clear by the words 'subject to the provisions of this Code relating to bail' occurring in clause (b) of Sec, 209'.

19. Following the said judgment, this Court in V.CHINNA REDDY v. N.VIDYASAGAR REDDY⁶ held as follows:

'If the accused are enlarged on bail, the committing Magistrate has no power to cancel it on the ground that he is committing the accused to Sessions Court for trial. The legislature in its wisdom, has, therefore, employed the expression ' Subject to the provisions of the Code relating to bail in clause (b) of Sec. 209 Cr.P.C. for the guidance of the Magistrate. This expression makes it abundantly, clear that the Magistrate will have to remand the accused at the time of committing

the accused to Sessions Court for trial 'subject to the provisions of the code relating to bail'. This expression used in Clause (b) of Sec. 209 Cr.P.C, clearly refers to Sections 436, 437, 438 and 439 Cr.P.C, which contain the provisions relating to bail. In the absence of any such misuse or abuse, this provision requires the Magistrate not to remand the accused to custody if he was already on bail granted by the Sessions Court or the High Court and he should be on bail during and until the conclusion of the trial. The Magistrate should therefore, have due regard to this expression 'subject to the provisions of this code relating to bail' employed in clause (b) of Sec. 209 Cr.P.C. while passing an order committing the accused to Sessions Court for trial. The Magistrate has no right or power to ignore this important expression used in Sec. 209 and consequently has no jurisdiction to remand the accused to custody, while committing the accused to Sessions Court for trial'.

20. That was a case where initially a crime was registered under section 447, 324, 326 IPC in Crime No. 5/81 by the police. The accused therein apprehending arrest obtained anticipatory bail from the Sessions Court. After completion of investigation, the S.I. of police referred the case as one of civil nature. Therefore, the complainant Vidyasagar Reddy filed a private complaint before the Magistrate Nirmal for the offences under sections 148, 447, 324, 326 and 307 IPC and the same was registered as PRC 4/81. Before the committal proceedings, the accused filed a petition before the Sessions Court seeking a direction to the Magistrate not to take them into custody as per the provisions of section 209 of the Code. That petition was dismissed by the Sessions Court. Hence they approached this court under section 482 of the Code. Under such circumstances, this Court held as excerpted herein above.

21. In FREE LEGAL AID COMMITTEE, JAMSHEDPUR v. STATE OF BIHAR⁷, the Apex Court held as follows:

'It is also clear from S. 209 Cl. (b) of the Cr.P.C. that the Magistrate has discretion to release the accused on bail 'during and until completion of trial' even in cases where the offence is triable by the Court of Session. We, therefore, feel that it would avoid hardship to an accused if the Magistrate, while releasing the accused

on bail, requires execution of a bond with or without surety, as the case may be, binding the accused not only to appear as and when required before him but also to appear when called upon in the Court of Session'.

22. The situation before the Apex Court was that there had been a practice in the State of Bihar that when the accused was released on bail by the Magistrate, the bail used to be granted to him only during the tendency of inquiry before the Magistrate and, therefore, when the case used to be committed to the Court of Session, the accused used to be re-arrested and brought before the Court of Session when he had to apply once again for fresh bail. To obviate that difficulty, the above excerpted observations came to be made by the Apex Court. The Apex Court held that in such a situation in future under Section 441(3) of the Code the accused can be asked to enter into a bond binding himself to appear before the Court of Session and in the event of committal he would not have to be re-arrested and brought before the Court of Session.

23. It is obvious thus that if the accused has already been enlarged on bail prior to the committal proceedings he cannot be remanded to custody during the committal proceedings. Even when the bail was granted limiting it to investigation stage the accused can be asked to enter into a bond. As a necessary corollary it follows that it is not an absolute rule to remand the accused into custody and both the clauses (a) and (b) are only the enabling provisions to remand the accused into custody subject to the provisions contained in the Code relating to bail. The scheme of the Code and the back drop under which the amendment was brought in as discussed supra shows that such a power to remand him to custody is necessary or otherwise, the further remand would become illegal in the absence of any legislative mandate.

24. The mandatory or directory nature of the word 'shall' has been considered in Bullayys's case. The Division Bench at page 1352 held as follows;

'It is true as pointed by the Supreme Court in Gurbachan Singh v State of Punjab, : 1957 CriLJ1009 AND Narayan Rao v State of Andhra Pradesh, : 1957 CriLJ1320 that the provisions of Ss 207 and 208 requiring the Magistrate to furnish copies of the various documents mentioned therein are not mandatory notwithstanding the

use of the expression 'shall'.'

25. Having regard to the said interpretation of the word 'shall' in two of the cognate provisions the word 'shall' used in section 209 shall have to be construed as not mandatory. This interpretation in my considered view is consistent with the intention of the Parliament in bringing the amendment and scheme of the Code as discussed supra.

26. Be that as it may, it is obvious that the Magistrate shall have to remand the accused to custody during the committal proceedings and at the time of committal only subject to the provisions of bail. However, if the offence alleged is exclusively triable by a Court of Sessions and is punishable with death or imprisonment for life, the Magistrate cannot grant bail under section 437 of the Code. Vide, PRAHLAD SINGH BHATI v. N.C.T of DELHI.⁸ In such cases where, the accused is in custody not having been enlarged on bail, the Magistrate has no other go except to remand the accused to custody.

27. In private P.R.C cases, if there are any earlier proceedings initiated by the police, having been concluded by submitting a final report for dropping the same and in sequel thereto a private complaint has been filed by the complainant, if they obtained bail earlier during the police proceedings that would ensure to the benefit of the accused at the time of committal proceedings. But if no such earlier proceedings have been initiated by the police and the case emanated only on a private complaint filed by the complainant or even in the wake of initiation of criminal proceedings they have not been arrested by the police nor they obtained any anticipatory bail, they can be directed to enter into a bond to ensure their presence before the Sessions Court.

28. Sri C.Padmanabha Reddy, learned senior counsel appearing for the respondents 3 & 5 to 7 herein, contends that if the accused were directed to execute bonds in accordance with Section 88 of the Code and accordingly they executed the bonds after putting their appearance before the committal Court it tantamount to granting bail to them. Section 88 of the Code enables the Magistrate to require the accused to execute a bond with or without sureties for his appearance in such Court or any other Court to which the case may be transferred

for trial. Under Section 89 of the Code in the event of breach of the bond by the accused by committing default, the Magistrate may issue a warrant directing such person to be arrested and produced before him. A combined reading of these two provisions would show that to ensure the presence of the accused before the Court for all adjournments, the power is conferred upon the Court to direct the accused to execute a bond with or without sureties. The Apex Court in MADHU LIMAYE vs. VED MURTI⁹ held thus:

'In fact Section 91 applies to a person who is present in Court and is free because it speaks of his being bound over, to appear on another day before the Court. That shows that the person must be a free agent whether to appear or not. If the person is already under arrest and in custody, as were the petitioners, their appearance depended not on their own volition but on the volition of the person who had their custody. This section was therefore, inappropriate

It is not necessary to take a bond from a person who is already in detention and is not released. The danger arises when the man is free and not when he is in custody till he gives the bond. It is to prevent his acting that the bond is taken or he is kept in custody till he gives the bond.'

29. Section 91 of the old Code is akin to 88 of the present Code. A bond under sec. 88 can be taken even from the accused whose personal appearance is dispensed with. Therefore I am afraid, I cannot accede the contention of the learned senior counsel. However, the fact remains here that the respondents 3 to 7 herein did execute such bonds pursuant to the direction given by the committing Magistrate under Section 88 of the Code.

30. It is not known whether the respondents herein were arrested and they were released on bail in Crime No. 123/96 or they obtained any anticipatory bail in that crime. If they in fact obtained any bail either pre-arrest or post arrest, in view of Chinna Reddy's case referred supra, that would ensure to the benefit of the petitioners in the present private P.R.C. as the present proceedings are nothing but continuation of the earlier proceedings registered by the police. Respondents 3 to 7 were not arrested earlier nor remanded to custody during the committal proceedings before the Magistrate in accordance with clause (a) of sub-section (1)

of Section 209 of the Code. Similarly, the question of remanding them to custody under clause (b) thereof at the time of committal in such circumstances may not arise. Now in view of the fact that the respondents 3 to 7 have been appearing before the Court of Session to take the trial, at this stage in any view of the matter, the question of cancellation of bail would not arise.

31. For the foregoing reasons, the Criminal Petition fails and it is dismissed.

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