

izhar Ahmad Vs. State

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Court : Allahabad

Decided On : Aug-30-1977

Reported in : 1978CriLJ58

Judge : V.N. Varma, J.

Appellant : izhar Ahmad

Respondent : State

Judgement :

ORDER

V.N. Varma, J.

1. These are two bail applications, one filed by Mohammad Farooq and the other filed by Izhar Ahmad alias Izhar Ali, which I propose to dispose of together as they are inter-connected and involve the same questions of law and fact.

2. Both the applicants (Mohammad Farooq and Izhar Ahmad alias Izhar Ali) are wanted in a case Under Section 302 I.P.C. for the murder of one Brij Bhushan Dubey. At the relevant time, Brij Bhushan Dubey was Deputy Jailpr in Sampurnanand Open Air Jail, Gurua. On 30-4-77, at about 6 A. M., Brij Bhushan Dubey was taking his tea at the tea-stall of one Kenhaiya when six persons came there in a Jeep bearing No. D.L.L 7173. Those six persons alighted from the jeep. They were armed with guns and pistola They threatened to kill Brij Bhushan

Dubey saying that he had maltreated one of their relations while he was in Sampurnanand Open Jail. Brij Bhushan Dubey felt panicky, threw down his cup of tea and started running to save his life. Those persons gave him a chase, fired upon him and killed him. They then left the place with a view to escape. One of them (went to the jeep which was parked near the tea-stall of Kanhaiya and drove it away while the remaining five, ran towards Markandi Hills. This incident was seen by one of the wardens, of Sampurnanand Open Air Jail and he went to P.S. Chohan and made a report there. The Superintendent of Sampurnanand Open Air Jail was also informed about this ghastly incident. A posse of P.A.C. constables had been posted in the vicinity and the Jailor contacted them immediately. Some constables at once left in a jeep to apprehend the miscreants, in the way they noticed the jeep of Platoon Commander Sheo Kumar Chaubey coming from the direction of Canal Inspection House. The constables stopped his jeep and informed him about the murder of Brij Bhushan Dubey; Platoon Commander Sheo Kumar Chaubey joined them and they all proceeded towards Markandi Hills in search of the miscreants. They sighted six persons climbing Markandi Hills. It appears that the person who had driven away Jeep No, DLI 7173 had abandoned his jeep in the way and had joined his other five associates. The police party opened fire on the miscreants and killed three of them. The remaining three were chased and caught alive. Two of those caught are the applicants before me. Pistols, guns and cartridges were recovered from them: After arrest all the three of them were lodged in Mirzapur Jail.

3. During the course of investigation, the first remand was taken for 15 days, Thereafter the Judicial Magistrate made remand orders dated. 14-5-77, 21-5-77, 2-6-77 and 16-6-77. : On the last four days the applicants were not produced before the Judicial Magistrate when remand orders were passed. On 29-6-77 charge-sheet against both the applicants was received in Court the next date fixed in the case was, 12-7-77, On 12-7-77 the Magistrate was on leave and the case was adjourned to 27-7-77. Nothing happened on 27-7-77 and the case was adjourned to 9-8-77. On 9-8-77 nothing in particular happened. In the order-sheet of 9-8-77 all that is mentioned is that the applicants are needed for identification at Allahabad and they should therefore be sent to Allahabad. The case was then adjourned to 22-8-77. On 22-8-77 the applicants were still at

Allahabad in connection with their identification. The case was then adjourned to 4-9-77. On none of the dates mentioned above, either at the stage of Section 167 Cr.PC or at the stage of Section 209 Cr.PC the applicants had been produced in Court.

4. The applicants have prayed for bail on merits as also on legal grounds. So far as their request for bail on merits is concerned, I may say here at once that it has no substance at all in it. The murder of Brij Bhushan Dubey had taken place in broad day-light. One of the wardens had seen five persons coming near Brij Bhushan Dubey and shooting him dead with gun⁹ and pistols. On seeing the ghastly murder of Brij Bhushan Dubey, he had rushed to P.S. Chopan to inform the police about it. He had also informed the Jailor at Sampurnanand Jail about it. The Jailor immediately contacted the P.A.C. which had been camping in the vicinity. A party of P.A.C. had rushed in a jeep to apprehend the miscreants. In the way Platoon Commander Sheo Kumar Chaubey had also joined that party. The miscreants had been seen running towards Markandi Hills end the police party, therefore, went after them in that direction. They saw the miscreants climbing Markandi Hills and they surrounded them. They fired upon the miscreants and killed three of them at the spot. The applicants and one person more were caught. Guns, pistols and cartridges were recovered from them. At the moment, there is nothing on record by reason of which one could doubt the correctness of these facts. To say that the applicants were caught on the basis of suspicion only, would not be correct. No case for bail on merits is, therefore, made out.

5. Now I come to the scrutiny of the case on legal grounds. Sri Virendra Saran, appearing on behalf of the applicants, has contended that the custody of the applicants was not lawful at any stage either at the stage of Section 167 Cr.PC or at the stage of Section 209 Cr.PC, and as such they were entitled to bail. I think there is some force in this contention of the learned counsel. It appears that at the stage of Section 167 Cr.PC the applicants were brought before the Court on 1st May 1977, and they were remanded to custody. Subsequent remands were granted to them on 14-5-77, 21-5-77, 2-6-77 and 16-6-77. Admittedly, on none of these dates the applicants were produced before the Magistrate. The last date fixed in the case at the investigation stage was 29-6-77. On that day also the

applicants were not produced before the Magistrate; the police, however, submitted a charge-sheet against them on that date. The learned counsel for the applicants contended that, as the applicants had not been produced before the Magistrate on any of the dates as mentioned above, their detention was illegal in view of the provisions contained in Section 167 Cr.PC Under the old Code it was not necessary for the accused to be produced before the Court at the time of the passing of the remand order. The Supreme Court in several cases (Raj Narain v. Supdt. Central Jail, New Delhi : 1971 CriLJ244 , Gauri Shanker v. State of Bihar : 1972 CriLJ505 and Sandip Kumar Dey v. Officer-in-charge Sakchi P.S. Jamshedpur : 1974 CriLJ740 remarked that it would be desirable for the Magistrate to have the prisoner produced before him when he commits him to custody. It appears that because of the observations made by the Supreme Court in the above cases, that a provision for the production of the accused before the Magistrate at the time of the passing of the remand order was made in the new Code. Proviso (b) to sub-clause (2) of Section 167 Cr.PC of the new Code says 'No Magistrate shall authorise detention in any custody under this section unless the accused is produced before him.' In view of this provision it has become mandatory for the Magistrate to have the prisoner produced before him when he commits him to custody. Therefore, as it is, there, can be no doubt about the fact that the detention of the applicants in jail at the stage of Section 167 Cr IPC was illegal because they had not been produced before the Magistrate on 14-5-77, 21-5-77, 2-6-77 and 16-6-77 when the orders of remand were passed against them. The question, however, is whether that illegal detention of the applicants would entitle them to be released on bail. I do not think that because the detention of the applicants at the stage of Section 167 Cr.P.C. was illegal, they should be released on bail. If their detention at the stage of Section 167 Cr.P.C. was illegal, that will stand cured if proper orders of remand were passed by the Magistrate Under Section 209. Cr.P.C. after the charge-sheet had been submitted. Therefore, now what we have to see is whether the orders of remand passed at the stage of Section 209 Cr.P.C. were valid orders or not.

6. The charge-sheet against the applicants, as stated above, was filed in Court on 29-6-77. On that date the applicants had not been produced before the Magistrate. The next dates fixed in the case were 12-7-77, 27-7-77, 9-8-77 and 22-8-77.

Admittedly, on these dates also the applicants had not been produced before the Magistrate when the so-called orders of remand were passed against them. We have to see whether the various orders of remand passed by the Magistrate in the absence of the applicants were valid or not. According to the learned counsel for the State, they were valid because at the stage of Section 209 Cr.PC it was not necessary that the applicants should have been produced before the Magistrate on every date when the order of remand was passed against them. Section 209 Cr.P.C. lays down that '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 the offence is triable exclusively by the Court of Session, he shall (a) as soon as may be after complying with the provisions of Section 207, commit the case to the Court of Session and (b) subject to the provisions of this Code relating to bail, remand the accused to custody until commitment of the case under Clause (a) and thereafter during and until the conclusion of the trial.' The learned counsel for the State has contended that the words 'appears or is brought before the Magistrate' occurring in Section 209 are not mandatory but directory in nature and, therefore, the production of the accused before the Magistrate on every date at the time of the passing of the order of remand is not necessary. According to him, there is no need for the production of the accused before the Magistrate at that time, because all that the Magistrate has to do at that stage is to commit the case to the Court of Session without entering into any inquiry of any kind. Much can be said in favour of this contention of the learned counsel, but so far as I am concerned, I am bound by a Division Bench decision of this Court rendered in Habeas Corpus Writ Petn. No. 3643 of 1975 (All). In this case H. N. Seth and G. D. Srivastava, JJ. had the occasion to interpret the provisions of Section 209 Cr.PC. After quoting the provisions of Section 209 Cr.P.C., they remarked as follows:-

A plain reading of Section 209 shows that an order for remanding an accused to Jail custody during and until the conclusion of the trial, can be made only when the accused appears or is brought before the Magistrate. No order remanding an accused to Jail custody under Clause (b) of Section 209, can be made in his absence or behind his back.

7. From the observations made above, It is thus clear that even at the stage of Section 209, no order of remand can be passed in the absence of the accused. In the instant case, admittedly, the applicants had not been produced before the Magistrate, when orders of remand dated 29-6-77, 12-7-77, 27-7-77, 9-8-77 and 22-8-77 were passed. This means that the detention of the applicants in Jail custody has been illegal during all these months.

8. The learned counsel for the State contended that even if the detention of the applicants had been illegal, they should not be released on bail under Section 439 Cr.PC and instead they should be asked to secure their release by filing a Habeas Corpus Writ Petition. He built up his contention on the plea that if the applicants were released on bail Under Section 439 Cr.PC then they cannot be re-arrested, once they furnish the required bail-bonds; but in case they were released through Habeas Corpus Writ Petition, it will be open to the authorities concerned to re-arrest them after (complying with the provisions of law. Merely because the applicants cannot be re-arrested if they are released on bail that by itself can be no ground for not, releasing them on bail. If their detention is illegal, they can certainly approach the Court for their release Under Section 439 Cr.PC In the instant case, as stated above, their detention is illegal and they, therefore, deserve to be released on bail.

9. In this case as would appear from the discussion made above, the applicants are going to be released on a technical ground. They have been accused of having committed a very gruesome murder for no rhyme or reason. That being so, it would not be improper if it is left open to the Magistrate to commit them to custody at the time of committing the case to the Court of Session, if, after going through the documents supplied to the applicants and the attending circumstances, he deems it proper.

10. In the result, I release the applicants (Mohammad Farooq and Izhar Ahmed alias Izhar Ali) on bail on each of them furnishing a personal bond with two sureties each in the like amount to the satisfaction of Chief Judicial Magistrate Mirzapur. It is, however, made clear that it would be open to the Magistrate to commit the applicants to custody at the time of committing the case to the Court of

Session, if in the circumstances of the case he thinks it proper.

11. The applicants are, however, directed not to visit village Gurma P.S. Chopan or any other place within 20 miles around it. They can, however, visit Mirzapur proper. They are also directed to keep themselves 'Ba Pardah' and make themselves available for identification.

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