

Hari Om Vs. State of U.P.

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Court : Allahabad

Decided On : Feb-18-1991

Reported in : 1992CriLJ182

Judge : B.P. Singh, J.

Acts : Dowry Prohibition Act - Sections 13; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201, 302, 304B and 498A; Code of Criminal Procedure (CrPC) , 1974 - Sections 167 and 167(2)

Appeal No. : Criminal Misc. Bail Appln. No. 13403 of 1990

Appellant : Hari Om

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : V.C. Tewari and ;A.K. Awasthi, Advs.

Disposition : Application dismissed

Judgement :

ORDER

B.P. Singh, J.

1. The applicant Hari Om alias Baboo is facing prosecution in Crime No. 73 of 1990 under Sections 304B, 201 and 34, IPC P. S. Shera Mau North, district Shahjahanpur. The applicant was married to Guriya daughter of Ram Larait of village Mahuwa Gunday district Shahjahanpur about three years back. On 2-6-1990 a F.I.R. was logged by the father-in-law of the applicant under Sections 302/498A, I.P.C. and Section 13 of the Dowry Prohibition Act. The case was subsequently converted into a case under Sections 304B/201/34, I.P.C.

2. The applicant applied for bail before the Sessions Judge, Shahjahanpur, but his application did not find favour. Consequently, the present bail application has been filed in this Court.

3. The main ground taken by the applicant is that the charge-sheet was filed beyond 90 days, as such he was entitled to be released on bail in view of the provisions contained in the proviso (a) of Sub-section (2) of Section 167, Cr. P.C. The contention of the learned A. G. A. is that no doubt the charge-sheet was submitted beyond 90 days, the applicant was not entitled to be released on bail under the proviso (a) to Sub-section (2) of Section 167, Cr. P.C. because he did not avail of the right during the date on which the period of 90 days ended and the date on which the charge-sheet was submitted.

4. I have heard the learned counsel for the parties at some length. Proviso (a) to Section 167(2), Cr. P.C. provides that if on the expiry of the said period of 90 days the charge-sheet is not submitted, the accused person shall be released on bail if he is prepared to and does furnish bail, and every such person so released on bail shall be deemed to be so released under the provisions of Chapter XXXIII of the Code. Section 167(2), Cr. P.C. makes it clear that the accused has a right to be released on bail if in his case a charge-sheet has not already been submitted after the expiry of 90 days from the date on which the first remand was given by the Magistrate. No doubt, this is a valuable right to the accused, but the above section also provides that the accused shall be released on bail provided he is prepared to and does furnish bail. The accused is free to exercise his right. There may be cases where the Magistrate asked the accused to furnish bail in a case where charge-sheet has not been filed within 90/60 days, as the case may be, the accused for

his own reasons may not be prepared to furnish bail. He may have his own reasons for doing so. One of the reasons may be that he may be afraid of his life. Another reason that he may not be in a position to arrange for bail bonds etc.

5. The provisions of Section 167(2) proviso (a) of the Code of Criminal Procedure were considered in the case of *Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi*, 1990 Cri LJ 62 : (AIR 1990 SC 71). The Supreme Court has held as follows (para 12):

'An order for release on bail under proviso (a) to Section 167(2) may appropriately 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 above cited ruling makes it clear that the accused's right to bail under Section 167(2) proviso (a) thereto is absolute and there is legislative command that the Magistrate is bound to pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. But, it has been further held in the above cited case that this order of release under Section 167(2) proviso (a) is in fact an order on default and the accused therefore cannot claim any special right to remain on bail in case he has been so released by the Magistrate in view of the provisions of Section 167(2) proviso (a) of the Code. If the investigation reveals that the accused has committed serious offence and a charge-sheet has been submitted against him for the same, the bail granted to the accused can be cancelled, but the question still remains if the accused has not made any application for release on bail after the expiry of the period prescribed by proviso (a) to Section 167(2) or the Magistrate does not point out to the accused that he was entitled to be released on bail under the proviso (a) to Section 167(2) of the

Code, has the accused a right to claim his release on bail even after the charge-sheet has been filed in the case on the sole ground that the charge-sheet was filed after the period prescribed for the same under the above mentioned section. In my opinion, the accused has no such right. As I have already pointed out, the release of an accused under proviso (a) to Section 167(2) of the Code is for the simple reason that the Investigating agency has committed default in completing the charge-sheet within the stipulated period of 90/ 60 days, as the case may be, such an order for release on bail is not an order on merits. Such an order can be passed only on technical ground mentioned in Section 167 of the Code. In this view I find support from a Full Bench decision of Gujarat High Court given in the case of Shardulbhai Lakhmanbhai Pancholi v. State of Gujarat, 1990 Cri LJ 1275. The Full Bench has held that on the failure of an accused to make application prior to submission of charge-sheet, the accused has no right to be released on bail after filing of the charge-sheet solely on the ground that the charge-sheet was not submitted within the prescribed period.

6. Learned counsel for the applicant has also argued the application on merits and has raised two contentions. Firstly, that the applicant has been in jail for about 8 months; secondly, that all the remaining co-accused have been enlarged on bail. Both these contentions have no force. The accused is charged with a heionous offence. Before her death, as would appear on a perusal of the F.I.R. the deceased had made a statement to her father and mother that it was the accused who had poured kerosene upon her and had set her on fire. No such allegation was made by the deceased against the remaining co-accused. Thus, according to the statement of the deceased, the main role was played by the accused which resulted in the death of Smt. Guriya. He cannot claim parity with the other co-accused. The mere fact that the applicant has been in jail for about 8 months would not justify his release.

7. The bail application is hereby rejected.