

Ramesh Das Vs. State of Orissa

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Court : Orissa

Decided On : Sep-08-1999

Reported in : 2000(1)ALT(Cri)3; 88(1999)CLT487; 2000CriLJ2473; 1999(II)OLR451

Judge : R.K. Dash, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 51 and 167(2); Code of Criminal Procedure (CrPC) (Amendment) Act, 1978; ;Indian Penal Code (IPC) - Sections 376 and 506; Narcotic Drugs and Psychotropic Substances Act - Sections 37; Terrorist and Desruptive Activities Act - Sections 20

Appeal No. : Criminal Misc. Case No. 1528 of 1999

Appellant : Ramesh Das

Respondent : State of Orissa

Advocate for Def. : S.K. Nayak, Addl. Standing Counsel

Advocate for Pet/Ap. : Manoj Mishra, Adv.

Disposition : Case allowed

Judgement :

R.K. Dash, J.

1. The petitioner, accused of having committed an offence Under Sections 376 and 506, IPC read with Section 3 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act has filed this petition praying for his release on bail.

2. Shri Manoj Mishra, learned counsel appearing for the petitioner, in course of argument submitted that the charge-sheet having not been filed within 120 days from the date of remand to judicial custody, the petitioner, as of right, is entitled to bail as envisaged in proviso (a) of Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (for short, 'the 1973 Code'). He contended that the petitioner was remanded to custody by the learned Special Judge on 2.10.1998 and the outer limit for filing charge-sheet, that is 120 days, having expired on 1.2.1999, within which charge-sheet was not filed, the petitioner exercised his right under proviso (a) to Section 167(2) and applied to the Court for his release. The learned Special Judge instead of passing orders on the very day, adjourned the case to next day. On the adjourned date, the prosecution filed the charge-sheet, as a result the learned Court below refused to grant compulsive bail by invoking power conferred by the aforesaid provision. Shri Mishra strenuously urged that on the failure of the prosecution to file charge-sheet within the maximum time allowed by law, the petitioner exercised his indefeasible right and applied to the Court for his release on bail. The learned Special Judge instead of passing orders on the very day, adjourned the matter to enable the prosecution to file charge-sheet which he ought not to have done in view of what has been ruled by the Hon'ble Supreme Court in Mohamed Iqbal Madar Sheikh and Ors. v. State of Maharashtra : (1996) 1 SCC 722. He further urged that the learned Special Judge being a senior Judicial Officer honoured the provision of Section 167 of the 173 Code more in breach than in observance, inasmuch as charge-sheet having not been filed within the prescribed period further remand of the petitioner after expiry of the said period Under Section 167 was not permissible. Therefore, it was obligatory of him to pass orders for release of the petitioner forthwith, as has been observed in various judicial pronouncements of the apex Court and of this Court. In that view of the matter, Shri Mishra urged that the petitioner's prayer for bail on the ground of default in completion of investigation within the statutory period should be allowed.

3. Shri S.K.Nayak, learned Additional Standing Counsel, on the other hand, submitted that it has been authoritatively held by the Supreme Court in *Sanjaya Dutt v. State* : (1994) 5 SCC 410, *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra* : (1994) 4 SCC 602, and *State of M.P. v. Rustam and Ors.* : 1996 (11) OCR (SC) 167, that Court is required to examine the availability of the right of compulsive bail on the date of consideration of the prayer and not on the date of presentation of the petition. In the present case on the date of consideration of the petitioner's prayer for bail charge-sheet having been filed, the learned Special Judge was right in not admitting the petitioner to bail with the aid of proviso (a) to Sub-section (2) of Section 167 of the 1973 Code.

4. In View of the submissions made by the learned counsel appearing for the parties, the question arises for consideration is whether the petitioner's right for compulsive bail which he enforced was lost in view of submission of charge-sheet after expiry of the period as envisaged by Section 167(2), Cr.P.C.

5. Before advertng to the question posed, it is necessary to trace the legislative history necessitating amendment of Section 167 of the old Code of Criminal Procedure, 1898 (hereinafter referred to as 'old Code'). As provided in the said section, a Magistrate to whom accused was forwarded was not authorised to detain him in custody for a term exceeding 15 days in the whole. Difficulties were experienced for further remand of an accused beyond 15 days when investigation could not be completed in serious offences and the Magistrate on consideration of the case diary and the circumstances was of the opinion that the materials already obtained raised reasonable suspicion about the involvement of the accused in the crime. Therefore, a practice grew up for the police to file a preliminary charge-sheet and move the Court for remand of the accused Under Section 344 of the old Code (corresponding to Section 309 of the 1973 Code). There was controversy whether before or after taking cognizance of the offence the Magistrate could remand the accused under the said section. Though there was no provision empowering the police to submit a preliminary charge-sheet, such a device, however, was adopted in order to seek further remand of the accused. It may be noted that Section 344 of the old Code was intended to be invoked after the Magistrate had taken cognizance of the offence which could only be after report

Under Section 173 was received and not while the investigation was in progress. It was noticed that by obtaining orders of remand beyond 15 days by resorting to Section 344, investigation was unduly delayed, as a result the accused had to languish in custody for long period. So in order to remedy the situation necessary amendments were brought in the 1973 Code. Accordingly, a time limit of 60 days with a provision for its extension under certain circumstances was fixed by adding proviso (a) to Sub-section (2) of the said section. Difficulties were realised that the ceiling limit of 60 days to complete the investigation in serious cases involving sentence of death and imprisonment for life, etc. was not sufficient. As a consequence, certain amendments were made by Act 45 of 1978. For better appreciation, the amended Section 167 of the 1973 Code, relevant for the purpose is reproduced below :

' 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 - 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. xx xx xx xx'

6. Sub-section (1) is to be read in conjunction with Section 57.. A reading of the said section along with Sub-section (1) of Section 167 would show that if the investigation cannot be completed within 24 hours, the police officer shall forward the accused to the Magistrate and simultaneously transmit a copy of the entries in the diary in order to enable the Magistrate to take a decision whether the accused should be detained in custody further or not. So far as Sub-section (2) of Section 167 is concerned it lays down that after the accused is produced the Magistrate may, whether he has or has not jurisdiction to try the case, from time to time, authorise detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole, and if such Magistrate 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.

Proviso (a) to sub-section which has been brought to the statute book by way of amendment empowers the Magistrate to order detention of the accused beyond the period of 15 days if he is satisfied that sufficient grounds exist for doing so and such detention will not exceed 90 days (120 days by Orissa Amendment) in total where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, and 60 days, where the investigation relates to any other offence. Therefore, total period of detention of the accused in custody from the date of remand will be for 120 days or 60 days, as the case may be, within which the police shall complete the investigation and submit the charge- sheet, otherwise on expiry of the said period, the accused acquires a right to be released on bail. Therefore, legislative intention is apparent that the detention of the accused during investigation should not be permitted beyond 120 days or 60 days, as the case may be. Question now arises in the present case, whether the petitioner is entitled to bail on 'default clause' as of right notwithstanding that by the time his petition for bail was considered charge-sheet had been laid.

7. Shri S. K. Nayak, learned Addl. Standing Counsel, conceded the factual position that after expiry of the prescribed period the petitioner moved the Court for bail. He, however, submitted that on the date the said petition was taken up for consideration charge-sheet having been filed the right that had accrued in favour of the petitioner stood extinguished and therefore, no fault can be found with the learned Court below in not giving the benefit to the petitioner under the default clause. Elaborating his argument Shri Nayak submitted that it has been authoritatively held by the Supreme Court that in order to obtain an order for release on bail on account of default of the Investigating Officer in not completing the investigation and filing charge-sheet within the time prescribed, the accused is required to make an application to the Court expressing that he is prepared to go on bail on furnishing necessary bail bond and such application being filed, the Court is to issue notice to the Public Prosecutor and then pass necessary orders. In the event charge-sheet is filed in the meanwhile when the petition is taken up for consideration, in that case the benefit under the default clause stands extinguished.

Shri M. Mishra while not disputing the legal position as pointed out by Shri Nayak, contended that the view expressed by the Supreme Court relates to the cases arising out of special statute, viz., Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, 'TADA') where certain provision obligates the Designated Court to hear the prosecution before releasing the accused on bail on ground of 'default' of the prosecution in not submitting the charge-sheet within the prescribed period.

8. The question whether filing of a petition by the accused to enforce his right under proviso (a) to Sub-section (2) of Section 167 is a must or not does not arise in the present case since admittedly the petitioner had filed such a petition immediately after expiry of the prescribed period and a copy thereof was served upon the State counsel. So, the only point remains for consideration whether it was obligatory of the Magistrate to pass necessary orders on the very day the petition for bail was presented. Before answering the same, a brief reference may be made to various judicial pronouncements cited at the Bar.

9. In *Hitendra Vishnu Thakur* (supra) three questions arose before the Supreme Court for consideration of which one was as to what is the true ambit and scope of Sections 20(4) and 20(8) of TADA in the matter of grant of bail to an accused brought before the Designated Court and the factors which the Designated Court has to keep in view while dealing with application for grant of bail Under Section 20(4) and for grant of extension of time to the prosecution for further investigation under Clause (bb) of Section 20(4), and incidentally whether the conditions contained in Section 20(8) of TADA control the grant of bail Under Section 20(4) thereof also. Section 20(4) of TADA makes Section 167 of 1973 Code applicable in relation to a case involving an offence punishable under TADA, subject to the modifications specified therein. Clause (bb) of Section 20(4) of TADA provides :

'x x x Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days;'

Taking note of the entire provisions of Section 20(4) of TADA their Lordships in paragraph 21 of the judgment observed :

'x x x In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the Court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the Court under Clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. xx xx xx'

A reading of the entire judgment would show that notice to public prosecutor before grant of bail on 'default' clause was considered necessary since under TADA there is a provision for extension of the period of detention of the accused in custody and such extension can be allowed on the report of public prosecutor indicating specific reasons for the detention of the accused beyond the prescribed period. So when the accused applies for release under 'default' clause, the public prosecutor should be informed so that he can enlighten the Court that either extension of the period of detention has been obtained or before expiry of the prescribed period, charge-sheet has been filed before the Designated Court. In 1973 Code, which is a general statute there is no provision empowering the Court to extend the period of detention of the accused. On a conspectus of the entire judgment, I find that no argument was advanced by the counsel appearing for the parties as to whether notice to the public prosecutor in a case arising under general law was necessary before passing orders on the petition for bail under 'default' clause. In my opinion, the view expressed by their Lordships about the need of issue of notice to public prosecutor in a case under TADA cannot be made applicable to a case under general law, to which Section 167 of the 1973 Code applies.

10. In Sanjaya Dutt (supra), a Division Bench hearing the case referred it to larger Bench to answer the questions of law as under :

'(1) The proper construction of Section 5 of the TADA Act indicating the ingredients of the offence punishable thereunder and the ambit of the defence available to a person accused of that offence;

(2) The proper construction of Clause (bb) of Sub-section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein; and

(3) The proper construction and ambit of Sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder.'

Counsel appearing for the parties advanced their arguments with reference to the relevant provisions of TADA and cited various judicial pronouncements. Their Lordships having made threadbare discussions answered the questions in concluding paragraph of the judgment, the relevant portion of which is extracted below :

'xx xx xx xx(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167 (2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage. xx xx xx'

11. Reliance was also placed in the case of Mahammed Iqbal Madar Sheikh (supra). In that case prayer for bail having been rejected by the Designated Court, move was made to the Hon'ble Supreme Court. In view of serious allegations, counsel appearing for the appellants did not press the appeal on merit. It was, however, contended that the appellants were denied the benefit of proviso (a) to Section 167(2) of the 1973 Code of their being released on the ground of default in submission of charge-sheet within the statutory period. Admittedly charge-sheet was submitted beyond the statutory period prescribed Under Section 20(4)(b) and therefore, the appellants were entitled to be released on bail under proviso (a) to Section 167(2) of the 1973 Code read with Section 20(4)(b) of TADA. But no application for bail on the said ground was made on behalf of the appellants. In the circumstances, their Lordships held that right for release on the ground of default in completion of investigation within the statutory period cannot be exercised after charge-sheet has been submitted and cognizance has been taken. Paragraph 12 of the judgment which has relevance to the present case may be referred to where their Lordships disapproved the action of the Courts in keeping the application for bail on 'default' clause pending to defeat the rights of the accused persons. For better appreciation, the observation made in the said paragraph is extracted hereunder :

'During hearing of the appeal, it was pointed out by the counsel appearing on behalf of the appellants that some Courts in order to defeat the right of the accused to be released on bail under proviso (a) to Section 167(2) after expiry of the statutory period for completion of the investigation, keep the applications for bail pending for some days so that in the meantime, charge-sheets are submitted. Any such act on the part of any Court cannot be approved. If an accused charged with any kind of offence becomes entitled to be released on bail under proviso (a) to Section 167(2), that statutory right should not be defeated by keeping the applications pending till the charge-sheets are submitted so that the right which had accrued is extinguished and defeated. So far the present case is concerned, we are informed by the counsel for the appellants that a petition for grant of bail on merit had been filed which was rejected on 22.3.1993. But admittedly no petition for grant of bail after the expiry of the statutory period for the submission of the charge-sheet had been filed. There is no statement that any application for grant

of bail had been filed on behalf of the appellants under proviso (a) to Section 167(2) after the expiry of the statutory period which application was kept pending till 30.8.1993. Now the appellants have forfeited their right to be released on bail under proviso (a) to Section 167(2) as they are in custody on basis of orders for remand passed under other provisions of the Code. In such a situation, we are left with no option but to dismiss these appeals. x x x'

In the aforesaid case there being no material that the application for grant of bail under proviso (a) to Section 167(2) of the 1973 Code was filed after expiry of the statutory period and the same was kept pending till charge-sheet was filed, their Lordships were not inclined to admit the appellants to bail.

12. Reference was made to another decision of the Supreme Court in the case of Rustam (supra) wherein it was held that it is erroneous to entertain an application for compulsive bail after charge-sheet was filed. On facts their Lordships reversed the order of the High Court

13. Similar question, as in the present case, arose in the case of Ada alias Adeita Behera v. State ; 1996 (I) OLR 589 and this Court held that if on fact it was found that charge-sheet had not been laid by the time petition for bail was filed, the petitioner would be entitled to compulsive bail notwithstanding the fact that by the time his petition was considered, charge-sheet had been filed. Altogether a contrary view however, has been taken by a coordinate Bench in a later unreported decision in the case of Sudhakar Das v. Union of India Criminal Misc Case No. 2797 of 1997, decided on 3.9.1997. That was a case under the NDPS Act. The petitioner moved for bail on default clause, since charge-sheet was not filed within the prescribed period. As the copy of the said petition had not been served on the Special Public Prosecutor, the Court adjourned the matter to a future date. On the date his petition was taken up for consideration charge-sheet in the meanwhile having been filed, the Special Judge refused to grant bail. The petitioner then approached this Court and prayed for bail as of right under proviso (a) to Section 167(2) of the 1973 Code. Deriving support from the decisions in Hitendra Vishnu Thakur (supra) and Rustam (supra) and referring to Section 37(1)(b)(i) of the NDPS Act, the Court refused to extend the benefit of default

clause of Section 167(2) and consequently rejected the prayer.

14. Section 37(1)(b)(i) of the NDPS Act, relevant for the purpose, reads thus :

'XX XX XX XX Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

XX XX XX XX (b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and XX XX XX XX'

Needless to say, a person accused of an offence under the NDPS Act is entitled to compulsive bail if the report/charge-sheet is not filed within the prescribed period. Section 37 of the said Act comes into play where bail is sought on merit. So before consideration of such prayer it is imperative that the Court should give opportunity to the Public Prosecutor to oppose it as provided in Section 37(1)(b)(i). Similarly two separate provisions are there, one for compulsive bail and Anr. for regular bail in TADA. Section 20(4) relates to compulsive bail. So far as Section 20(8) is concerned it starts with a non-obstante clause and imposes a ban on release of a person accused of an offence punishable under the said Act or any rule made thereunder, unless the twin conditions contained in Clauses (a) and (b) thereof are satisfied. It may be noted that in *Hitendra Vishnu Thakur*, their Lordships on a conspectus of Sections 20(4) and 20(8) of TADA held that these two provisions operate in two different situations and are controlled and guided by different considerations. This being the authoritative pronouncements and in view of law laid down by this Court in *Ada alias Adeita Behera* (supra), the decision in *Sudhakar Das* (supra) does not hold good.

15. Proviso to Section 167(2) of the 1973 Code under which indefeasible right to bail has been given to. the accused should be given effect to in letter and spirit. Inaction or delayed action of the Court in extending the benefit thereof would make it nugatory. Therefore, uninfluenced by the nature and gravity of the offence it is

expected of the Court give the benefit of the default clause and release the accused forthwith if he is prepared to and does furnish bail. The maximum period of detention of an accused in custody as provided Under Section 167 should not be extended by Court's order to enable the prosecution to file charge-sheet so that right for compulsive bail would be defeated. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking : 'Judge was biased'.

16. To repeat with, in the present case after expiry of the prescribed period for filing charge-sheet, the petitioner moved for compulsive bail. The learned Special Judge instead of passing the orders on the very day adjourned the case to next day and on that day charge-sheet being filed, he rejected the prayer.

17. In the result, I am inclined to give the benefit of the 'default' clause as envisaged in Section 167(2) of the 1973 Code and admit the petitioner to bail. Accordingly it is ordered that the petitioner be released on his furnishing bond of Rs. 30,000/- (rupees thirty thousand) with two sureties each for the like amount to the satisfaction of the learned Additional Sessions Judge-cum-Special Judge, Angul, in Special Case No. 195 of 1998.