Taqween Raza Vs. State

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Court : Delhi

Decided On : Aug-18-1977

Reported in : ILR1978Delhi121

Judge : F.S. Gill, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 167(2)

Appeal No. : Criminal Miscellaneous (Main) Appeal Nos. 251 and 374 of 1977

Appellant : Taqween Raza

Respondent : State

Advocate for Pet/Ap. : R.N. Vats,; D.C. Mathur and; R.N. Tikku, Advs

Judgement :

F.S. Gill, J.

(1) As identical questions of law are involved in Criminal Misc. (Main) 251 of 1977 and Criminal Misc. (Main) 374 of 1977, they will be disposed of by this one judgment.

(2) The facts of the first petition are :

(3) A case under section 302 of the Indian Penal Code was registered against Taqween Raza petitioner for the alleged murder of one Saleem Raza. The

petitioner surrendered before the Additional Sessions Judge, Delhi on 18-12-1976 and prayed for the grant of anticipatory bail. The bail was, however, declined on the same day. Thereafter, on that very day the Ilaqa Magistrate 'remanded the petitioner to police custody for the purpose of investigation.

(4) After investigation, the police report under section 173(2) of the Code of Criminal Procedure, 1973 was filed before the Metropolitan Magistrate on 16-2-1977. On behalf of the accused, it was urged that the challan in the court had been filed on the 61st day of the arrest and, thereforee, under section 167(2) proviso (a) of the Code the petitioner was entitled to the grant of bail. This argument prevailed with the learned Magistrate and on 17-2-1977, the petitioner was allowed bail on his furnishing two surety bonds in the sum of Rs. 10,000 each and executing a personal bond for the like amount.

(5) The petitioner could not furnish the surety bonds before the Magistrate in spite of the above order. The case, however, proceeded. Copies of the documents were supplied and the petitioner was committed to Session for trial on 28-3-1977. After his commitment, the petitioner produced the surety bonds before the learned Additional Sessions Judge in accordance with the order passed by the Magistrate. The learned Additional Sessions Judge, however, observed that a fresh order by the Sessions Court was necessary to be passed and that in his view there was not sufficient reason to grant the bail. Consequently the petitioner was declined his release on bail on 26-4-1977. The petitioner has now approached this Court for the grant of bail.

(6) The facts leading to the other petition are that a' case under section 302/392 read with section 34 of the Indian Penal Code . was registered against Narain Singh, the present petitioner, and others. Narain Singh was arrested by the police on 18-1-1977 and an incomplete challan was filed in the court on 19-3-1977. Narain Singh then made an application before the learned Session Judge for the grant of bail by invoking the provisions of section 167(2) proviso (a). The learned Sessions Judge dismissed the application, although the petitioner had relied on a judgment of this Court given in Hari Chand and another v. State Cr. Misc, (Main) 99 of 1977 and Cr. Misc. (Main) 111 of 1977(1). While declining the bail on 20-4-

1977, an effort was made to distinguish the decision in Hari Chand's case.

(7) Narain Singh then filed Cr. Misc. (Main) No. 374 of 1977 in this Court on 8-7-1977. It is admitted on behalf of the petitioner that a complete challan against the petitioner had been filed in the court on 24-6-1977 i.e. before the present petition was presented. The petitioner has prayed for bail on the strength of section 167(2) of the Code stating that a valuable right had accrued to him for not filing the 'police report' within 60 days and that he is entitled to exercise that right even after the complete challan had been filed.

(8) The questions, which arise in the two cases, are formulated as under :-

1. If the police is unable to complete the investigation within 60 days, what legal consequences flow on the expiry of this period ?

2. in a case, triable by Court of Sessions, when police report has been filed, whether before or after the expiry of sixty days, has the Magistrate taking cognizance, power to remand the accused to custody till his commitment. If so, under what provisions ?

3. If the police report is not filed on the expiry of 60 days and the Magistrate instead of reading an order of release on bail, remands the accused to custody, but later on the accused moves the court for the grant of bail and when that application comes up for hearing, investigation is meanwhile completed and report under section 173(2) is forwarded; is the accused still entitled to invoke proviso (a) of section 167(2) and claim bail ?

Question No. 1

(9) Obviously this question involves the interpretation of proviso (a) of sub-section (2) of section 167 of the Code of Criminal Procedure, 1973. The proviso is in these terms :

'THE Magistrate may authorise detention of the accused person. otherwise than in 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 section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to aid does furnish bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter Xxxiii for the purposes of that Chapter ;'

(10) The construction of the above provision, which accords best with the intention of the legislature, is that where the case is still under investigation and the period of 60 days has expired, the Magistrate cannot further authorise the detention of the accused under section 167 of the Code. The language is neither intractable nor flexible to adopt any other meaning.

(11) Two divergent views of different High Courts have, however, emerged. According to the Allababad, Karnataka and Himachal High Courts there is a qualified power of detention. Their opinion is that the Magistrate can continue authorising the detention of the accused in custody, until the accused applies for bail; his application is granted and actually furnishes the bail bond. Till all this is done detention, even after 60 days, is legal. Thus, his release is held to be contingent on carrying into effect all these conditions. This view was originally taken by Malik, J. of the Allahabad High Court in Heeraman v. State of U.P. 1975 Crl. L.J. 1508 and was later approved by a Division Bench of the same High Court in Lakshmi Brahaman and another v. State 1976 Crl. L.J. 118 . Karnataka High Court followed the Allahabad view in Gaynu Madhu Jamkhandi and others v. The State of Karnataka, 1977 Crl. L.J. 632 (4) ; whereas Himachal Pradesh adopted it in Parshotam Chand v. The State of H.P. 1977 Chandigarh Law Reporter (H.P.) 51(5). Thus according to these High Courts an accused person can only exercise his right of bail by intimating his desire to the Magistrate that he is ready and prepared to furnish bail Thereafter alone the Magistrate can pass the order granting the bail. If the accused fails to exercise this right, the view of these Courts is that the power and jurisdiction of the Megistrate to authorise detention beyond the period of 60 days Continues to vest in him and he can justifiably exercise the same.

(12) A contrary view has been taken by this Court in Mohd. Shafi and another v. The State, 1975 Crl. L.J. 130 and also by the Rajasthan High Court in Prem Raj and another v. The State of Rajastham, 1976 Crl. L.J. 455. These decisions lay down that section 167(2)(a) is mandatory in character and, thereforee, the remand and detention of the accused beyond the period of 60 days is illegal. No. option or discretion is left to the Magistrate in this regard. On the other hand he is explicitly injuncted from detaining the accused for any further period. Manifestly, there is a ligislative command requiring the Magistrate to record an order of bail on the expiry of 60 days. For making such an order he needs no green signal from the person in custody. It is a statutory function, which he is enjoined to perform under the above proviso.

(13) Antithesis of detention is release. The intention of the Legislature is amply reflected in the word 'released' occurring in the proviso. Section 167(2) prescribes a statutory prohibition and in a way fixes an outer limit with the object of curbing the vagaries of the invesigating agency, especially the infamous tendency of prolonging the Invesigation indefinitely. This results in the denial of personal liberty, which has been jealously protected by the statute. According to the view of this Court, to which I fully subscribe, the Magistrate cannot authorise further detention after the expiry of 60 days. He is bound to pass an order for the release of the accused. Of course, such an order cannot be unconditional. It has to be on furnishing bail as warranted in the circumstances of the case.

(14) With profound respect it is difficult to counten,ance the diverse view expressed by the Allahabad, Karnatka and Himachal High Courts, viz. before an order for bail can be passed, there has to be an application from the accused and till the same is made and decided by the Court, he can be lawfully detained in custody even after the expiry of 60 days. Making of an, application, written or oral, is not intended by proviso (a). The language is plain and unambiguous. It cannot be strained to place a construction which will stultify the apparent legislative intention in a provision which was introduced to cure the mischief of keeping the sword of damocles hanging over a person suspected of an offence.

(15) In holding the above view I am fortified by the decision of the Supreme Court in Natabar Parida and others v. The State of Orissa, : AIR 1975 SC1465 . It has been candidly held there that under proviso (a) the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation, may still be proceeding. It has been further observed there that 'the intention of the legislature seems to be to grant no discretion to the court and make it obligatory for it to release the accused on bail'.

(16) As a result of the above discussion, I hold that if the investigation is not completed in 60 days, the Magistrate is bound to record an order of bail on the expiry of this period. On the failure of the accused to furnish the requisite bail bond, the Magistrate is competent to authorise' further detention and not otherwise. Such a release cannot be termed as just walking out of the place of detention. It is restricted and conditional on executing the bail bond- These steps flow from and fall within the ambit of proviso (a). Question No. 1 is answered accordingly. Question No. 2

(17) After the police report has been filed the Magistrate takes cognizance of the offence and is required to commit the accused to Sessions under section 209 of the Code. The point, which arises is, whether the Magistrate can remand the accused to custody till the passing of the commitment order If so, under which provision. Undoubtedly, detention cannot be authorised under section 167 of the Code, for the simple reason that this section ceases to apply as soon as the police report is forwarded to the Megistrate and he takes cognizance. Section 209 itself does not contain any provision for the grant of remand. The only other provision, which can possibly apply, is section 309 of the Code. Its sub-section (2), which is relevant for our present purpose, is in the following terms :-

'309(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 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. '

(18) There is a conflict of opinion about the application of this provision amongst the various High Courts. Allahabad view is expressed in Lakshmi Brahman's case (Supra) according to which remanding of the accused to custody is not justified under section 209 or section 309 of the Code. The relevant portion of this judgment is as below :-

'HIS (Magistrate's) authority to remand an accused to custody, after he has taken cognizance of an offence, cannot also be gathered from Section 209 of the Code. The power to remand the accused to custody under Section 209 can be exercised only while making an order committing the accused to court of Session. Thus, if for some reason, the Magistrate defers the making of an order committing the case to the Court of Session, the Magistrate cannot after taking cognizance of the offence remand the accused to custody under Section 209. The power to remand the accused to custody un,der Section 309(2) can be exercised only when a Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourns, any enquiry or trial. In a case which is exclusively triable by a Court of Session, the Magistrate, while proceeding to commit an accused under Section 209 of the Code does not conduct an enquiry as contemplated by Section 309 of the Code. Accordingly, in a case where, for some reason, the Magistrate defers the' making of an order committing the case to the Court of Session, he does not postpone the commencement of or adjourn any inquiry contemplated by Section 309(2) of the Code. Thus, the order remanding the applicants to custody made after the police had submitted the charge-sheet cannot be justified even under Section 309(2) of the Code.'

(19) A plain, reading of section 309(2) shows that an adjournment can be granted under this section where' an inquiry or trial is pending before a competent court. Surely, when the case is triable by a court of Session, the Magistrate does not hold the trial. The question, which naturally arises is : whether the proceedings before the Magistrate. which terminate in committal of an accused, can be termed as an inquiry within the meaning of section 309(2) of the Code. To find an answer to this query, it seems necessary to consider the impart and intendment of the word 'inquiry' occurring in the present context.

(20) INQUIRY' has been defined in section 2(g) of the Code in the following words :-

'INQUIRY' means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court; '

It has now to be seen whether the various steps taken from the point of entertainment of the final report under section 173(2) to the passing of the commitment order under section 209. constitute an inquiry. Indubitably, every Magistrate is not competent to take cognizance of the police report. He has to be a Magistrate empowered under section 190(l)(b) of the Code. But, after having taken cognizance and before the order for commitment is passed, the Magistrate has also to perform certain statutory functions.

(21) The first peremptory act to be carried out is provided in section 207 of the Code. It relates to the supply of copies of documents to the accused According to sub-section (5) of section 173, the police officer forwards the following documents to the Magistrate along with the report :-

'(A) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation ;

(B) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.'

Such an officer, investigating the case, is not bound to supply the copies of the various documents to the accused on which the pro secution relies. He has, however, a discretion under sub-section (7), which is as under :-

'WHERE the police officer investigating the case finds it convenient so to do. he may furnish to the accused copies of all or any of the documents referred to in sub-section (5)'.

So, primarily it is the statutory duty of the Magistrate to ensure that the copies of the requisite documents have been duly supplied. Preparation of these copies, their supply and checking by or on behalf of the accused do require time All these

proceedings cannot be taken instantaneously when the police report is forwarded to the Magistrate. It is thus implicit in the various provisions that, for the completion of the proceedings as enjoined by law, the accused can be remanded to custody. That is only possible if the Magistrate has the jurisdiction and power to authorise such detention.

(22) Further, take the case of an accomplice, to whom pardon has been. granted by the Court. He is bound to be examined as a witness under sub-section (4) of section 306 of the Code, otherwise the order of commitment is not legally sustainable. For examining such a witness an adjournment is inevitable. Consequently remanding of the accused to custody is essential and cannot be avoided. There is no other alternative provided by the Code.

(23) Moreover, sub-section (5) of section 306 speaks of 'further inquiry' in the following manner :-

'306(5). Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,- (a) commit it for trial-- (i) to the Court of Session if the offence is teriable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate .... The expression 'further inquiry' is very significant. It obviously indicates that the previous proceedings constitute an 'inquiry'. If there is no 'inquiry', how can there be 'further inquiry'. Thus an examination of the person, to whom pardon has been granted, is during the course of an inquiry and that evidently is the reason for using the expression 'further inquiry'.

(24) In my view, all these proceedings can, quite safely and without any demur, be termed as an 'inquiry' falling within the definition of section' 2(g) and also as contemplated by section 309(2) of the Code. It is difficult to agree with the restricted interpretation placed by the Allahabad High Court in Lakshmi Brahman's case, for the obvious reason that all the situations discussed above had not been brought to the notice of the said Court.

(25) It may be further observed that the provisions of section 209 cannot be read in isolation and have to be applied in conjunction with other provisions of the Code. This is necessary for giving harmoneous interpretation.

(26) The Karnataka High Court has, however, in Gyanu Madhu Jamkhandi and others v. The State of Karnataka , held that the power to remand an accused to custody does vest in a Magistrate under section 309(2), but the same is subject to a qualification. Before considering the import of this judgment and also its accord with the relevant provision, its following portion is reproduced:-

'AFTER a Magistrate takes cogniza'nce to an offence or offences on the filing of the final report by the police under Section 173, his powers of remanding the accused who is in custody, to custody, flow from the provisions of S. 309(2) and not from the provisions of S. 167.

If, on the filing of the charge-sheet, a Magistrate does not, for a number of days proceed to apply his mind and take cognizance of the offence made out, he cannot-for those number of days-exercise powers of remand to judicial custody either under S. 167 or under S. 309(2). The situation can be solved by a Magistrate applying his mind to the facts and material available in the final report and the documents produced along with it in no time after the filing of the final report and deciding whether cognizance of the offence made out should be taken or not; if lie decides to take cognizance of the offence, then he can, under S. 309(2), proceed to exercise his power of remand.'

(27) The above decision lays down that as soon as final report under section 173(2) is forwarded by the police, the Magistrate is forthwith, bound to apply his mind to the entire evidence. His failure to do so, does not vest any authority or power in him to grant the remand. In my opinion, such a condition is neither intended nor warranted by the legislative mandate as it leads to anomalous results. As for example, if on the last day of the year, some investigating officers, in their zeal to show minimum number of cases pending investigation, file twenty complete challans before the same Magistrate, will it be physically possible for the said court to apply its mind by scrutinising the evidence of all those cases, before taking cognizance and then remanding the accused to custody. It is also not

infrequent when even at the fag end of the day several police challans are presented before a Magistrate. Is he required to go through the various documents immediately, apply his mind and then remand the accused to custody This would be an impossible task. With profound respect I record that the Karnataka view does not convey the real intention of the legislature. There is no embargo or restriction placed on the power of a Magistrate for remanding an accused under section 309(2) of the Code. He is simply required to have a glance over the offences mentioned against the accused in the final report and then remand him to custody. No application of mind, on the evidence produced, is intended at this stage.

(28) The meaning and scope of the word 'inquiry' can be looked from another angle. Section 209 says that 'when an 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 commit it to the Court of Session'. The phrase, 'appears to the Magistrate' occurring in this section is very meaningful. Whether or not the case has to be committed, requires the scrutiny of the evidence by the Magistrate. For this process, he cannot merely act like a conduit pipe and forward or commit the case to Sessions. It is enjoined that the Magistrate should apply his mind to the matter and then pass the necessary order. This application of mind can conveniently be called an 'inquiry' as defined and contemplated in the Code.

(29) The above construction of Section 309(2) finds full support in the following observations of the Supreme Cote made in Natabar Panda and others v. State of Orissa, 1975 Crl. L. J. 1212-

'THE law as engrafted in proviso (a) to section 167(2) and section 309 of the New Code confers the powers of remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded.'

It is further observed in the same judgment that 'after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code.'

(30) Thus the power of a Magistrate to remand an accused to custody, after he has taken cognizance, unquestionably vests in him. He can evidently exercise the same during an inquiry contempleted by section 309(2) of the Code. Question No. 2 is answered accordingly. Question No. 3

(31) While endeavoring to find an, answer to this question it may be observed that as soon as the police report is filed, section 167 ceases to apply and the special powers bestowed on the Magistrate come to an end. Consequently he cannot assume jurisdiction to grant bail under this provision. After the report has been forwarded, the Magistrate can only consider the question of bail on merits, i.e. under section 437 of the Code. This view also finds support in Umedsingh Vakmatji Jadeja and others v. The State of Gujarat, : AIR1977 Guj11 , in the following words :-

'IF an application is made under Section 167 for bail by an accused person who is detained in custody pending investigation for a period exceeding 60 days, he is entitled to bail. But if pending such an application for bail a charge-sheet is filed in the Court, the investigation comes to an end and so also the power of the Magistrate of granting bail to the accused under the provisions of Section 167(2). The Magistrate then can exercise power of granting bail only under Section 437. The Magistrate to whom an application for bail under- Section 167(2) is made has to take the subsequent event into consideration the subsequent event being the filing of the chargesheet.'

(32) The other integral part of the question is about the effect on the accused's application for bail, if his detention is later on found to be illegal. In this connection it may be stated that the court is not concerned with the nature of detention prior to the initiation of the proceedings for the grant of bail. It has only to look to its nature on the date the application comes up for consideration. In a similar situation Federal Court in Basanta Chandra Ghose v. Emperor held that :-

'THE analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of institution of the proceedings 'cannot be invoked in habeas corpus proceedings. If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot

direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.'

(33) An identical question arose in Ram Narayan Singh v. The State of Delhi and others, : 1953 CriLJ113 , which too was a habeas corpus petition. It was held therein that the court is to have regard to the legality or oherwise of the detention at the time of the return and not with the institution of the proceedings. The same view was endorsed in Kanu Sanyal v. District Magistrate, Darjeeling and others, : 1974 CriLJ465 .

(34) On the analogy of the above decisions of the Federal and Supreme Courts, it can safely be held that the earlier detention, even if it is illegal, does not become relevant to advance the case of an accused for bail, provided his custody on the date, the petition is heard, is lawful. In the cases under consideration, on the dates the applications for bail were heard by the lower courts, police reporte under section 173(2) had already been filed and thereforee the provisions of section 167 had ceased to apply. Those applications could, thereforee, be decided on merits alone. Question No. 3 is decided in these terms.

(35) For the foregoing reasons, I find no merit in both the petitions : They are accordingly dismissed.