

Mohd. Shafi and anr. Vs. State

Mohd. Shafi and anr. Vs. State

SooperKanoon Citation : sooperkanoon.com/684401

Court : Delhi

Decided On : Sep-20-1974

Reported in : 1975CriLJ1309; ILR1975Delhi74

Judge : M.R.A. Ansari, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167

Appeal No. : Criminal Miscellaneous (Main) Appeal Nos. 131 and 141 of 1974

Appellant : Mohd. Shafi and anr.

Respondent : State

Advocate for Pet/Ap. : P.P. Grover and D.R. Sethi, Advs

Judgement :

M.R.A.Ansari, J.

(1) As the points for determination in both these cases are identical, they are hereby disposed of by a common judgment.

(2) The petitioners in Cr.M.(M) No. 131/74 are Mohd. Shafi and Mohd. Ramzan. Mohd. Shafi was arrested on 16-4-1974 and Ramzan was arrested on 15-4-1974 in pursuance of F.I.R. No. 365 dated 16-4-1974 of Police Station Sadar Bazar under sections 302/34 IPC. The petitioners in Cr.M.(M) No. 141/74, namely, Sabir

Ali, Raunaq Ali and Zubed Ali, were arrested on 13-5-1974 in pursuance of F.I.R. No. 422/74 of the same Police Station under sections 147, 148, 149, 186, 336, 353, 436, 307 and 302 IPC. When no challan was filed against them within 60 days after the date of their arrest, they applied for bail invoking the provisions of section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code). The learned Magistrate, however, refused to grant bail to the petitioners on the ground that there appeared to be reasonable grounds for believing that they were guilty of an offence punishable with death or imprisonment for life. The petitioners thereupon moved the Court of Session for bail, but the learned Sessions Judge dismissed the applications holding that the provision of section 167(2) of the Code have to be read along with the provisions of section 437(1) of the Code and that when so read, the Magistrate could not release the petitioners on bail if he was satisfied that there were grounds for believing that the petitioners were guilty of an offence punishable with death or imprisonment for life. The petitioners have, therefore, filed the present applications in this Court for the grant of bail.

(3) The relevant portion of section 167(2) of the Code under which the petitioners' claim that they are entitled to be released on bail, reads:-

'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 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 and 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.'

(4) Under section 167 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the Old Code) a Magistrate could authorise the detention of an accused person in custody for a maximum period of 15 days. On the expiry of the said period, he had to forward the accused to a Magistrate having jurisdiction to try the case. Then the latter Magistrate could under section 344 of the Old Code remand the accused to custody for any further period. The accused could be so remanded whether or not the Magistrate had taken cognizance of the offence. This position was explained by a Full Bench of this Court in *Ajit Singh v. State* : AIR1970 Delhi154 in the following terms:-

'If the investigation of the offence, for which the accused is arrested, cannot be completed within twenty-four hours by the police fixed by section 61 and there are grounds for believing that the accusation or information against the accused is well founded the police are bound under section 167 of the Code to forward the accused along with copies of the entries in the diary to the nearest Magistrate. Such a Magistrate can authorise the detention of the accused in the police custody from time to time for a term not exceeding 15 days in the whole, x x x It may be noticed that the word 'remand' as such is not used in section 167 and what is authorised by the Magistrate for making an order under that section is the detention of the accused in police custody. In some cases, specially those relating to murder, dacoity or conspiracy, it happens that the investigation is not completed within 15 days. Question arises whether the accused in such a case can be kept in custody beyond that period. Section 344 of the Code provides an answer to that. The section deals with postponement and adjournment of proceedings as well as with remand. According to sub-section (IA) of that section, if, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor from time to time, 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. The words 'postpone the commencement of any inquiry or trial' indicate that an order under the above provision can be made at a stage preceding the

commencement of inquiry or trial, x x x In case, however, an order for remand to custody is made by the Magistrate the proviso to sub-section (IA) makes it clear that the term of the remand shall not exceed 15 days at a time. xxxxxx There is nothing, in our opinion, in section 344 which makes it imperative that an order for remand can only be made after a charge-sheet under section 173 of the Code has been forwarded to the Magistrate. In the absence of any words in the section and in the absence of anything in the context, it would, in our view, be not permissible to read in the section a limitation on or condition attached to the power of Magistrate to grant remand only in case a charge-sheet under section 173 has been put in Court, xxxxxxxxxx. We are unable to subscribe to the proposition laid down by the learned Judges in the above case as we do not find anything in section 344 which makes it obligatory on the part of the Magistrate to take cognizance of an offence before remanding the accused to custody.'

The position, however, is different under the Code. The relevant portion of section 309 of the Code which corresponds to section 344 of the old Code reads as follows :-

'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 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. xxxxxxxxxxxxxx Explanationn 1.-If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.'

It would, thus, be seen that the Court gets the power of remanding the accused to custody under sub-section (2) only after taking cognizance of the offence. This clear intention of the legislature is to be gathered from the following passages from the Forty-first Report of the Law Commission :-

'In order to make it very clear that remands under section 344(IA) can only be given after cognizance has been taken of the offence and not at the stage of investigation we recommend that the opening words of this section should be

altered to read :- If the Court, after taking cognizance of an offence finds it necessary or advisable to postpone etc.'

(5) The import of Explanation I to sub-section (2) is not quite clear. This Explanation was in existence in section 344 of the old Code before its amendment in 1955 when sub-section (1) of that section contained the words 'reasonable grounds' and when sub-section (1A) which was introduced in 1955 also contained the words 'reasonable cause'. The Explanation then afforded guidance for the words 'reasonable grounds' and 'reasonable cause'. Now these words are omitted in section 309 of the Code. Further, the Explanation cannot override the provisions of sub-section (2) of section 309 and it cannot be invoked for the purposes of remanding the accused to custody when the Court has not taken cognizance of the offence.

(6) Reading sections 167 and 309 of the Code together, the position appears to be that before the charge-sheet is filed, the Magistrate before whom the accused is produced can remand him to custody for a maximum period of 60 days. The remand of the accused to custody for a further period can be made by a Magistrate under section 309 of the code only if the said Magistrate has taken cognizance of the offence. If the Magistrate has not taken cognizance of the offence for the reason that no charge-sheet was filed, then, he has no power under sub-section (2) of section 309 to remand the accused to custody. Under section 167, the Magistrate, as already stated, has no power to remand the accused to custody beyond the period of 60 days. therefore, neither under section 167 nor under section 309 can the accused be remanded to custody after the expiry of 60 days from the date of his arrest if no charge-sheet has been filed before that date. Further there is an injunction given to the Magistrate under section 167 that the Magistrate shall on the expiry of the said period of 60 days release the accused on bail if he is prepared to and does furnish bail. therefore, if sections 167 and 309 are construed independently of the other provisions of the Code, then it would appear that if no charge-sheet is filed within 60 days from the date of the arrest of the accused then he cannot be remanded to custody for any further period and he has to be released on bail.

(7) The question, however, arises whether sections 167 and 309 have to be read along with section 437 of the Code. the relevant portion of which reads as follows :-

'WHENAny person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, other than the High Court or Court of Session, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.'

The question that arises is whether in view of the prohibition imposed on a Magistrate from releasing the accused on bail if he has reasons to believe that he is guilty of an offence punishable with death or imprisonment for life, an accused person is entitled to be released on bail on the expiry of 60 days. Proviso (a) to section 167(1) of the Code contains the following words :- and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXII for the purposes of that Chapter.'

(8) What do these words imply Do they imply that the duty cast upon a Magistrate to release an accused person on bail on the expiry of 60 days is subject to the prohibition mentioned in section 437(1) of the Code from releasing an accused if there are reasonable grounds for believing that he is guilty of an offence punishable with death or imprisonment for life If the Legislature had intended that the duty cast upon the Magistrate under section 167 to release an accused on bail on the expiry of 60 days was to be performed only in cases which do not come under the prohibition contained in section 437(1) then the Legislature would have made it clear in the language of section 167. On the other hand, the language used in the proviso to section 167 only makes the provisions of Chapter XXIII applicable to a person who is released on bail under the proviso to section 167. In other words, the provisions of Chapter XXIII of the Code come into play only after a person is released on bail under the provisions of section 167. Further, sections 167 and 309 deal with the power of the Magistrate to remand the accused to custody. These sections have nothing to do with the powers of a Court to release

an accused on bail under Chapter XXXIII. These two provisions are quite distinct in their ambit and scope. When no charge-sheet has been filed within 60 days after the arrest of the accused, then the accused cannot be remanded to custody for a further period either under section 167 or under section 309 of the Code. The question of release of the accused on bail under Chapter Xxxiii arises only where the accused can be lawfully remanded to custody. If under the proviso to section 167, the Magistrate has no power to remand the accused to custody for a further period and if in the absence of a charge-sheet the Court has no power under section 309 to remand the accused to custody, then the prohibition cast on a Magistrate under section 437(1) does not come into play. It is only when the accused can be lawfully remanded to custody that the power is given to a Magistrate under Chapter Xxxiii to release him on bail. The Magistrate could then exercise such power subject to the prohibition contained in sub-section (1) of section 437. The Magistrate, therefore, cannot refuse bail to an accused person under the proviso to section 167 on the ground that there were reasonable grounds for believing that the accused was guilty of an offence punishable with death or imprisonment for life.

(9) It is not necessary for the purpose of these petitions to consider the circumstances under which the provisions of Chapter Xxxiit will apply to a person who is released on bail under the proviso to section 167. But it is easy to think of various situations in which the provisions of Chapter Xxxiii may be applied to a person who is released on bail under the proviso to section 167. Chapter Xxxiii contains various provisions relating to the fixation of the amount of bond to be executed by the accused and by the sureties, for the variation of the amount of the bond from time to time, for the discharge of sureties etc. There is no question, therefore, of a conflict arising between the provisions of sections 167 and 437 of the Code. The rule of harmonious construction is also not violated by construing these sections in the manner that I have done. It is not for me to suggest how the prosecution should get out of this difficult situation where it has not been possible to complete the investigation within a period of 60 days in cases of serious offences like murder. But, it appears to me that one way of surmounting the difficulty is to file a charge-sheet under section 173(1) even before the investigation is fully completed and to file a further charge-sheet under sub-section

(8) of section 173 after further investigating into the offence. In any case, if the language of the proviso to section 167 is quite clear, then there is no justification for not complying with the provisions of this section merely on the ground that this will entail some difficulty for the prosecution.

(10) therefore, the learned Magistrate before whom the petitioners applied for bail on the expiry of 60 days after the date of their arrest on the ground that the charge-sheet had not been filed within this period, was wrong in refusing to release the petitioners on bail merely on the ground that there was a prohibition against their release under section 437(1) of the Code.

(11) In view of the circumstances stated above, the petitioners are entitled to be released on bail under the proviso to section 167 of the Code. The petitioners shall be released on bail on their furnishing security to the satisfaction of Shri Bharat Bhushan, Metropolitan Magistrate, Delhi.