

Ram Millan Vs. State

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SooperKanoon Citation : sooperkanoon.com/698604

Court : Delhi

Decided On : Feb-16-1999

Reported in : 1999IIIAD(Delhi)85; 79(1999)DLT226; 1999(49)DRJ199

Judge : J.B. Goel, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167(2) and 439

Appeal No. : Crl.M.(M) No. 4292/98

Appellant : Ram Millan

Respondent : State

Advocate for Def. : Mr. Pawan Behl, Adv.

Advocate for Pet/Ap. : Ms. Alpana Poddar, Adv

Judgement :

ORDER

J.B.Goel, J.

1. This is a petition for bail under Section 439 read with Section 167(2) of the Code of Criminal Procedure (for short 'the Code').

2. In this application the petitioner while seeking the bail is also challenging the legality and validity of order dated 7th October, 1998 passed by the learned

Additional Sessions Judge rejecting his application for bail sought because of the right accrued under proviso to subSection (2) of Section 167 of the Code.

3. Briefly, the facts which are not disputed during arguments, are that on the basis of alleged recovery of 300 Gms. of Ganja the petitioner was arrested by the police on 30th July, 1998 and was remanded to judicial custody on 31st July, 1998 and the remand was extended from time to time. Challan, having not been filed, on 28th September, 1998 an application for bail was filed by the petitioner under Section 439 of the Code read with proviso to subSection (2) of Section 167 of the Code. The learned Addl. Sessions Judge on 28th September, 1998 ordered notice be issued to the State for 30th September, 1998 but it perhaps was not served because of paucity of time, and on 30th September, 1998 fresh notice was issued for 5th October, 1998. The application was taken up on 7th October, 1998. In the meantime, challan for an offence under Section 20 of the NDPS Act was filed on 3rd October, 1998. The bail application was rejected by the learned Addl. Sessions Judge on 7.10.1998 on the ground that the challan had already been filed and the benefit for bail was not available under the said proviso. Dr. Bipin Shantilal Panchal Vs . State of Gujarat : 1996 CriLJ1652 ; and Sanjay Dutt v. State through CBI 1994 AIR SCW 3857 had been cited.

4. I have heard learned counsel for the parties. Learned counsel for the petitioner has contended that the learned Addl. Sessions Judge has not correctly applied the law laid down in : 1996 CriLJ1652 inasmuch as application for bail had been filed before challan was filed; whereas learned counsel for the State relies on State of M.P. Vs . Rustam and Ors. and contends that on the day bail application came to be considered challan had already been filed and so benefit of S.167(2) proviso did not survive.

5. In the case of Union of India Vs . Thamisharasi : 1996(54)ECC7 , it has been held that Section 37 of the NDPS Act does not exclude application of the proviso to subsection (2) of Section 167 of the Code even in respect of persons who are accused for offences under N.D.P.S. Act. The scope of the power to grant bail under the right conferred by proviso to subSection (2) of Section 167 of the Code has been examined by the Constitution Bench of the Hon'ble Supreme Court in the

case of Sanjay Dutt Vs . State Through CBI Bombay (II), : 1995 CriLJ477 wherein it has been observed as under :

'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 enures 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....'

6. In Dr. Bipin Shantilal Panchal (supra) it has been laid down that if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the chargesheet within the maximum time allowed by law, he cannot contend that he had an enforceable right to exercise it at any time notwithstanding the fact that in the meantime the charge sheet is filed.

In the present case the petitioner was arrested on 30.7.98, was remanded to judicial custody on 31.7.98 and the challan was filed in Court 3.10.1998 i.e. on the 64th day. The offence is punishable with a sentence of less than 10 years. The challan having not been filed within 60 days, the accused was entitled to the benefit of proviso to subSection (2) of Section 167 and an application for bail had also been filed by him before the challan was filed.

7. In the case of Rustam & Ors (supra) cited by the learned counsel for the State, the accused after arrest for an offence under Section 302 IPC etc. were sent to judicial custody on 3.9.93 and judicial custody was extended from time to time, on 2.12.93 the challan was submitted in the Court. The accused applied for bail thereafter on the ground that 90 days had expired on 1.12.93. The Court held that clear 90 days had to expire before the right accrues and that after excluding 3.9.93 the challan filed on 2.12.93 was filed on 90th day and was not beyond the period of 90 days.

8. In the facts of that case it was held that when the High Court entertained the petition for bail and granted it to the accused the challan had been filed in the Court and then the right as such was not available. This authority does not lay down a different principle of law.

9. The result is that in this case the challan was filed after the expiry of 60 days and before the filing of the challan, an application for invoking the right available under proviso to subSection (2) of Section 167 of the Code had been filed which had come before the Court on 28th and then on 30th September, 1998. On 30th September, 1998 it was 61st day after remand. The petitioner was thus entitled to be released on bail under this provision and the learned Addl. Sessions Judge was not justified in refusing bail. The impugned order thus is not valid and is liable to be set aside.

10. This petition is accordingly allowed. The petitioner be admitted to bail on his furnishing personal bond in the sum of Rs. 20,000/ with one surety in the like amount to the satisfaction of the trial court.