Kana Vs. the State

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Court : Rajasthan

Decided On : Aug-24-1979

Reported in : 1980CriLJ344

Judge : Mahendra Bhushan, J.

Appellant : Kana

Respondent : The State

Judgement :
ORDER

Mahendra Bhushan, J.

1. This is yet another bail application moved on behalf of the accused petitioner Under Section 439, Cr. P. C. The learned Advocate does not seek bail on merits and if is only submitted that because at some anterior date prior to the commitment of the case to the Court of the learned Sessions Judge, Ajmer, custody of the accused was illegal, therefore the accused is entitled to bail. It is, therefore, not necessary to give the facts if the case for the disposal of this bail application. But, some dates are material and now they need be mentioned.

2. The accused-petitioner was arrested in a case Under Section 302 I. P. C. etc. on 24-8-1978 and was remanded to police custody. Therefore, on 1-9-1978 the accused was remanded to judicial custody up to 15-9-1978 and was ordered to be

produced before the Court' on that date. He was produced in the Court of Munsif & Judicial Magistrate 1st class, Kekri on 15-9-1978, but the presiding officer of the court! was transferred and his successor had not taken over, and as such the Reader attached to that court ordered that the accused be produced on 29-9-1978. Again, on 29-9-1978, the Presiding Officer had not taken over and the Reader adjourned the case to 13-10-1978 on which date the Presiding Officer had taken over. Thereafter there were some adjournments and remand of the accused was given by the Presiding Officer but again on 27-11-1978 the Presiding Officer was out in connection with official work and the Reader of the Court ordered that the accused be produced on 4-12-1978. On 4-12-1978, the Presiding Officer was present and he ordered that the accused be produced on 13-12-1978. On 13-12-1978 the learned Magistrate was on leave and the Reader passed an order 'Accused in judicial custody present. P. O. Sahib is on leave. Put up on 2-1-1979'. The accused was thereafter again committed to the court of learned Addl. Sessions Judge Under Section 209, Cr. P. C. Previously, on the same ground, that is, because the detention of the accused was illegal, as there was no proper remand to judicial custody, a bail application was filed in this Court, which was numbered as 323/79, and Hon'ble Justice Kasliwal dismissed that application on 30-5-1979 observing that the Reader had only adjourned the case and had not' passed any order of remand to judicial custody. Initially, the Magistrate passed an order of remand till further orders and, therefore, there is no force in the contention of the learned Advocate that the detention of the petitioner is illegal.

3. In this Court, the learned Counsel for the petitioner does not even say that' the remand by warrant Under Section 209, Cr. P. C. while committing the accused to the Court of Sessions was not proper. All that is submitted is that because the remand by the Reader was not in accordance with law, and the remand by the learned Magistrate was not proper, therefore on the ground of previous illegal detention, the accused is entitled to be released on bail.

4. Once the court takes cognizance of a case, the accused can only be remanded under the provisions of Section 309(2), Cr. P. C., which are to the following effect:

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 be a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

A perusal of the above provision will make it clear that if after taking cognizance of an offence or commencement of trial, it is felt necessary or advisable by the court to postpone the commencement of or adjourn any enquiry or trial, then it can do so from time to time, but only after recording reasons for such postponement or adjournment, and on such terms as it thinks fit. Therefore, reasons only for postponement or adjournment' are required to be given Under Section 309(2), Cr. P, C, and it is not necessary that the reasons for remanding the accused, who is in custody, to judicial custody, by warrant have also to be recorded. All that is required is, that while adjourning or postponing the case, for which the court! must record reasons, the court can remand the accused by warrant. It will be useful to make a reference to a Full Bench Decision of the Allahabad High Court reported in Urooj Abbas v. State of U.P. 1973 Cri LJ 1458, in which It has been held that the statutory requirement of a separate order in writing with reasons thereof is only in respect of postponement or adjournment of the enquiry or trial and not' in respect of remanding the accused to jail custody, for which mere issue of warrant of remand is sufficient.

5. It is only the court, which can, by warrant, remand the accused, if he is in custody, to judicial custody, and the Reader of the Court has no power to remand the accused : to judicial custody Under Section 309(2), Cr. P. C. Therefore, the remand of the accused by the Reader of the Court on 15-9-78, 29-9-78 and 27-11-78 and 22-42-78 cannot be said to be in accordance with law, and the custody of

the accused then cannot be said to be legal. It may be observed here, that a practice appears to have developed in Courts in Rajasthan, that in the absence of the Presiding Officer and even at times, in his presence, the Reader of the Court remands the accused to judicial custody' by mentioning 'By Order'. Section 309(2), Cr. P. C. only empowers the court to remand the accused by a warrant and the powers of the court cannot be delegated to the Reader of the Court. Therefore, the sooner this practice is stopped, the better it will be otherwise, in case of remand of the accused to judicial custody by the Reader of the Court, the detention of the accused will be illegal.

6. But, the question is as to whether because of any anterior illegal custody of the accused on the basis of illegal remand, the accused is entitled for bail, if his custody on the date when the bail application is filed or comes up for hearing, is legal. The submission of the learned Advocate is that if once the custody is illegal, then any subsequent remand of the accused to judicial custody cannot be ordered, and, if ordered, the same will be illegal, as only such accused, who is 'in custody', which will mean a legal custody, can be remanded to custody. In support of his submission, he has placed reliance on Khinvdan v. State of Rajasthan 1975 WLN 132. The facts of that case were different. In that case, in spite of the fact that the report Under Section 173, Cr. P. C. was not filed within 60 days, and the investigation was not complete within 60 days, and in spite of the fact that the accused made a request that he should be released on bail, the accused was not released on bail. It was in the context of those facts that it was observed by this Court that if the custody or detention of a person is illegal, as it was in that case, and, if the person in custody is entitled to be released on bail, immediately before taking of cognizance of an offence by a Magistrate on police report, arid is ready to furnish bail, he cannot be recommitted to custody Under Section 309(2), Cr. P. C., although the other conditions laid down in that sub-section are fulfilled. It has not been laid down that in all cases in which at some anterior time the custody of an accused is illegal, the accused is entitled to be released on bail, even if at the time when the application was filed, or comes up for hearing, the custody is legal. The ratio of this case is that Under Section 167 Cr. P.C., the detention of an accused, during the investigation of the case, cannot extend beyond a total period of 60 days, now 90 days, and, if the investigation is not complete during the statutory

period, then the accused is entitled to be released on bail, if he is prepared to and does furnish bail. The learned Counsel for the petitioner has also placed reliance on Bir Bhadra Pratapsing v. District Magistrate, Azamgarh : AIR1959 All384 and Kedar v. State 1977 Cri LJ 1230 (All), Sayeed Ahmad v. State 1978 Cri LJ 541 (All) and Urooj Abbas v. State of U.P. 1973 Cri LJ 1458 (All) (FB). A perusal of these authorities will show that in all the cases the custody of the accused was held not to be legal even on the day when the applications were preferred arid the cases were decided. Therefore, those cases cannot be said to be authorities on the point involved in this case. In Kedar's case (Supra), some observations have been made, which lead to the inference that if there would have been any valid order of detention Under Section 209, Cr. P. C., perhaps they would have been considered by the court. The observations are to the following effect : 'On the last date, when the case came up for hearing, I called upon the learned Counsel for the State to inform the Court whether any order had been passed Under Section 209, Cr. P. C. remanding the applicant to custody while committing the case to the Court of Session, I called for this information, because I was of the view, that if a valid order Under Section 209, Cr. P. C. was passed by the Magistrate, remanding the applicant to jail custody, the fact that the previous orders were invalid, would have no bearing that the applicant cannot be granted bail on account of his previous detention being unlawful'.

7. In Basanta Chandra v. Emperor AIR 1945 FC 18 which was an appeal against the High Court at Patna dismissing the application of a detenu Under Section 491, Cr. P. C., it was observed as follows:

The analogy of civil proceedings in which the rights of the parties have ordinarily to be ascertained as on the date of the 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.

8. In Ramnarayan Singh v. State of Delhi : 1953 CriLJ113 , while dealing with habeas corpus proceedings, it has been held that in such proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. In Jagnnath Misra v. State of Orissa : AIR1969 Ori296 , also while disposing of a habeas corpus petition, it has been held that relevant date for considering legality of detention of applicant is not the date when application is filed, but the date on which the Court passes final order, or at least the date on which State shows cause in answer to the rule issued. It has further been held that in such proceedings the accused cannot be released Under Section 491, merely because of the antecedent illegality of detention, when detention is legal at the relevant date, and in holding this view, the two authorities of the Federal Court and the Supreme Court, referred to above, were relied upon. A Full Bench of the Patria High Court in Babunandan Mallah v. State 1972 Cri LJ 423 has taken a view that it is not a condition precedent for a valid order Under Section 344 (1-A), Cr. P. C. (1898), that the accused must at the time of passing of order of remand be in valid custody. It has also been held that the crucial date when the legality of the remand is to be looked into is the date when the petition comes up for hearing.

9. It can, therefore, be said that except in a case where Section 167, Cr. P. C. applies, and where the detention of the accused cannot be authorised, exceeding period of 90 days, and on this account the accused becomes entitled for being released on bail, if he is prepared to and does furnish bail, there is no warrant to hold that in all cases, in which at some anterior date the detention of the accused was illegal, the accused is entitled to be released on bail, if the detention is legal at the time when the bail application is filed or it conies for consideration. If the detention of the accused is legal, when the bail application is preferred, his previous illegal detention should not be considered.

10. In this case, because it has not been challenged that the present detention of the accused is illegal, the accused is not entitled to be released on bail, because some period of his detention before commitment to the Court of learned Sessions Judge was illegal.

11. The application is, therefore, dismissed.