

State Vs. Mangi Lal

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Court : Rajasthan

Decided On : Sep-23-2004

Reported in : RLW2005(1)Raj232

Judge : Krishan Kumar, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167(2)

Appeal No. : S.B. Criminal Revision Petition No. 35 of 1994

Appellant : State

Respondent : Mangi Lal

Advocate for Def. : Sandeep Mehta, Adv.

Advocate for Pet/Ap. : O.P. Rathi, Public Prosecutor

Disposition : Petition dismissed

Judgement :

Krishan Kumar, J.

1. This revision petition has been filed against the order dated 20.10.1993 passed by Special Judge, NDPS Act Cases, Bhilwara, granting bail to the accused-respondent under Section 167(2) Cr.P.C.

2. The accused respondent - Mangilal was arrested on 8.7.1993 and charge-sheet against him was filed on 18.10.1993 i.e. after 104 days. Learned Special Judge after hearing both the parties has granted bail to the accused-respondent.

3. Learned Public Prosecutor stated that learned Special Judge has not considered the judgment of this Court in Harendra @ Hari Singh v. State of Raj., 1993 C.L.R. (Raj.) 417, RLW 1993(1) 487, and relied upon the judgment of this Court in Kasva v. State of Raj., 1991 R.C.C. 438. He has also argued that the charge-sheet was filed on 18.10.1993 and accused was released on bail after filing of the charge-sheet. Learned Public Prosecutor has placed reliance upon the judgment rendered by Hon'ble Supreme Court in Dr. Bipin Shantilal Panchal v. State of Gujrat, 1996 Cri.L.J. 1652 (1996) 1 SCC 718, RLW 1996(2) SC 73, and has argued that in view of the aforesaid decisions of Hon'ble Supreme Court, the order passed by Special Judge deserves to be set aside.

4. Learned counsel for the respondent has cited before me the judgment rendered by the Hon'ble Supreme Court in Union of India v. Thamisharasi and Ors., (1995) 4 SCC 190, and has argued that it is settled position that provisions of Section 167(2) Cr.P.C. also apply to the NDPS cases. He has also argued that in this matter, the application under Section 167(2) Cr.P.C. was moved on 18.10.1993 and charge-sheet was also filed on 18.10.1993. Therefore, accused has exercised his right before filing of the charge-sheet. Although the order was passed on 20.10.1993. He has further argued that the accused was under remand under Section 167 Cr.P.C. upto 28.10.1993 and no further order of remand was passed on the date of filing of the charge-sheet. Therefore, his main contention is that judgment rendered by Hon'ble Supreme Court in case of Dr. Bipin Shantilal Panchal (supra), cannot help the Public Prosecutor as the facts of this case altogether different. He has also cited before me the judgment rendered by Hon'ble Supreme Court in case of Uday Mohanlal Acharya v. State of Maharashtra, 2001 Cr.L.R. (SC) 472 as has argued that the order passed by learned Special Judge may not be interfered with. In alternate, learned counsel for the accused respondent has also argued that since the accused is on bail for last 10 years and the opium recovered from the accused was also below commercial quantity, therefore, as per the prevailing legal position, the bail granted to the

accused may not be cancelled.

5. I have considered the rival arguments made by both the learned counsel for the parties.

6. The Hon'ble Supreme Court in para 4 of the judgment rendered in case of Dr. Bipin Shantilal Panchal (supra), as cited by learned Public Prosecutor has held that if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet.

7. The Hon'ble Supreme Court in case of Union of India v. Thamisharasi and Ors. (supra), while holding that provisions of Section 167(2) Cr.P.C. also apply to the NDPS cases has held in para - 13 of the judgment that provision of Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provision in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in Sub-section (2) of Section 37, these limitations on granting of bail specified in Sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to Sub-section (2) of Section 167 Cr PC which operates in a different field relating to the total period of custody of the accused permissible during investigation.

8. The Hon'ble Supreme Court in case of Uday Mohanlal Acharya v. State of Maharashtra (supra), has given following conclusions:-

1. Under Sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not

exceeding 15 days in the whole.

2. Under the proviso to aforesaid Sub-section (2) of Section 67, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused or being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already availed of used by this Court Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is

prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

9. In the present case, the accused filed the bail application under Section 167 Cr.P.C. on 18.10.1993. The application for bail dated 18.10.1993 was heard on 19.10.1993 and accused was granted bail on 20.10.1993. In the bail application moved by accused, it has been specifically mentioned that the period of 90 days has expired and challan has not been filed in the Court, therefore, he may be released on bail. The charge-sheet was also filed on 18.10.1993. Learned Special Judge has taken cognizance on 18.10.1993 but since accused was under custody upto 28.10.1993, no further remand was given on 18.10.1993. From perusal of the record, I find that there is no endorsement of the Public Prosecutor for submission of charge-sheet nor anytime has been mentioned as to at what time the charge sheet was filed. Even on 18.10.1993, copies of police papers were not supplied to the accused or his counsel. On the next date, on 19.10.1993 copies of police papers were supplied to the accused. Therefore, from perusal of record, it is not clear whether the charge-sheet was filed prior to filing of the bail application or not. The accused has exercised his right as no charge-sheet was filed before filing of the bail application as narrated by him in the bail application moved under Section 167(2) Cr.P.C. In the meantime on the same day charge-sheet was also filed but the bail application was not heard by the Court and was heard on 19.10.1993 and the order was passed on 20.10.1993. Therefore, it cannot be said that the accused has not exercised his right before filing of the charge-sheet. Thus, the judgment cited by learned Public Prosecutor in case of Dr. Bipin Shantilal Panchal (supra), does not help him as facts of this case are altogether different.

10. As far as the alternate argument of the learned counsel for the accused is concerned, looking to the prevailing legal position as well as the factual position of this case since accused has remained on bail for 10 years and the recovered

opium is also below commercial quantity as per the changed legal position, thus, on this count also, the order of Special Judge granting bail to the accused respondent does not require any interference.

11. In view of the above discussions and the principles laid down by Hon'ble Supreme Court in case of Union of India v. Thamisharasi (supra), and Uday Mohanlal Acharya (supra), I do not find any ground to interfere with the order passed by the learned Special Judge. Accordingly, the revision petition stands dismissed. The record of the case be sent back forthwith.

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