

Matlub Vs. State and ors.

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Court : Rajasthan

Decided On : Nov-21-2005

Reported in : 2006CriLJ1102; RLW2006(1)Raj5; 2006(2)WLC67

Judge : Harbans Lal, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167(2) and 439(2);
Indian Penal Code (IPC) - Sections 143, 148, 302, 307, 323 and 447

Appeal No. : S.B. Cr. Misc. Bail Cancellation Application No. 5250 of 2005

Appellant : Matlub

Respondent : State and ors.

Advocate for Def. : R.P. Kuldeep, Public Prosecutor and; Bin Singh, for Accused-
Respondents Nos. 2 and 3

Advocate for Pet/Ap. : A.A. Naqvi,; A.N. Khan and; J.R. Tantia, Advs.

Disposition : Application allowed

Judgement :

Harbans Lal, J.

1. The instant application under Section 439(2) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') which has been filed by complainant-applicant Matlub

seeks cancellation of bail granted under Section 167(2) Cr.P.C. to non-petitioners No. 2 and 3 by the learned Sessions Judge, Sawai Madhopur vide his order dated 1.9.2005 in Bail Application No. 380/2005 arising out of FIR No. 154/2005 PS Mantown, Sawaimadhopur for offences under Sections 143, 148, 323, 447, 307 and 302 IPC.

2. The un-disputed facts are that the non-petitioner Nos. 2 and 3 were arrested on 17.5.2005. They were produced before the learned Magistrate on 18.5.2005 who remanded them to police custody upto 23.5.2005 on which date they were remanded to judicial custody. After investigation the challan was filed against them alongwith others on 16.8.2005. No application for bail on their behalf was pending before the court on that date. The bail application was moved on 23.8.2005 which was ultimately allowed on 1.9.2005.

3. Learned Counsel for the petitioner-complainant has contended that the non-petitioner Nos. 2 and 3 have been granted bail illegally in utter disregard of the settled legal position governing grant of bail under the provisions of Section 167(2) Cr.P.C. He has also submitted that the challan had been filed on the 90th day from the date of remand of the non-petitioners to the judicial custody. Besides this, 13th, 14th and 15th August, 2005 were holidays.

4. His second contention is that even if it be treated for the sake of argument, that the charge-sheet had been filed after the expiry of the period of 90 days, the bail application having been filed after filing of the challan, the non-petitioners were not entitled to be released on bail after the filing of the charge- sheet against them. In this regard he has referred to the cases of Asa Singh v. State of Punjab 2002 (2) Crimes 84, Sanjay Dutt v. State through CBI 1995 Cr.L.J. 477, Bhinya Ram v. State of Rajasthan 1995 Cr.L.R. (Raj.) 2 and Atma Ram v. State of Rajasthan 1995 (2) RLR 47 (1995 (2) RLW 572).

5. While strenuously opposing the application, learned Counsel for non-petitioner Nos. 2 and 3 has submitted that the detention of the non-petitioners was illegal after the expiry of the statutory period prescribed for filing charge-sheet against them.

6. I have carefully considered the rival submissions and have perused the relevant provisions as also the authorities cited at the bar.

7. Section 167(2) Cr.P.C. reads as under:-

167(2)-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 the detention of the accused person, otherwise than in the 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 paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, 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 Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter,

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I-For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused

shall be detained in custody so long as he does not furnish bail.

Explanation II-If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

8. While interpreting the provisions of Section 167(2) Cr.P.C. relying upon the cases of *Udai Mohanlal Acharya v. State of Maharashtra* 2001 (2) Recent Criminal Reports 452 and *Dolat Ram and Ors. v. State of Haryana* : (1995)1SCC349 , it has been held in the case of *Asa Singh v. State of Punjab* (supra), that bail under Section 167(2) Cr.P.C. cannot be pressed after the filing of challan if such application was not filed before filing of challan. The accused gets an indefeasible right to get bail if he makes a bail application under Section 167(2) Cr.P.C. before the challan is put up. Subsequent filing of challan during pendency of the bail application will not extinguish indefeasible right of the accused to get bail. But if bail application is moved after filing of challan then the right of the accused to invoke the provisions of Section 167(2) Cr.P.C. was not in subsistence and if the bail was granted under Section 167(2) Cr.P.C. after filing of the challan, the principles applicable for cancellation of bail could not be attracted and the bail was liable to be recalled because the right to grant of bail provided under Section 167(2) Cr.P.C. was not an indefeasible right that could not be taken away.

9. In the case of *Sanjay Dutt v. State through CBI, Bombay* (supra), a Constitution Bench of the Hon'ble Apex Court has authoritatively held that the indefeasible right of the accused to be released on bail under Section 167(2) Cr.P.C. in default of completion of the investigation and filing of the challan within the time allowed is a right which ensures 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. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage and not under the provisions of Section 167(2) Cr.P.C.

10. A Division Bench of this Court has also held in *Bhinya Ram v. State of Rajasthan* (supra), following the ratio propounded in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* : 1995 CriLJ517 and *Sanjay Dutt v. State through CBI, Bombay* : 1995 CriLJ477 (supra) that the right granted under Section 167(2) Cr.P.C. for grant of bail does not survive or remain enforceable after the challan is filed. It is only available in the intervening period.

11. An identical question arose in the case of *Atma Ram v. State of Rajasthan* (supra), as to whether right of the accused to be released on bail under Section 167(2) proviso (a) Cr.P.C. survives even after filing of challan after expiry of 90 days and it was held that the accused was not entitled to bail in view of the law laid down by the Hon'ble Apex Court in the case of *Sanjay Dutt*.

12. Thus, it is evident that bail could not and ought not to have been granted to the non-petitioner Nos. 2 and 3 under the provisions of Section 167(2) Cr.P.C. after the challan had been filed against them and, therefore, the order dated 1.9.2005 granting bail is unsustainable and deserves to be recalled being against the settled legal position in this behalf.

13. In this view of the matter, therefore, the second contention of the learned Counsel for the petitioner that the challan had been filed on 90th day from the date the non-petitioner Nos. 2 and 3 were produced before the learned Magistrate is insignificant and it is not necessary to go, into that aspect of the matter.

14. In the result, this application under Section 439 (2) Cr.P.C. is allowed and the order dated 1.9.2005 passed by the learned Sessions Judge, Sawai Madhopur is hereby recalled/withdrawn. The nonbailable warrants of arrest shall be issued against them and they shall be arrested and lodged in jail as per law. However, if thereafter they apply for bail before the Trial Court, the same shall be considered on merits.