

**Suren Banerjee Vs. the State**

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**Court :** Kolkata

**Decided On :** Jul-30-1963

**Reported in :** AIR1964Cal220,1964CriLJ514,68CWN487

**Judge :** Debabrata Mookerjee and ;Amaresh Roy, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 173, 229, 251A(3) and 497(3A); ;Defence of India Rules, 1962 - Rule 155

**Appeal No. :** Criminal Misc. Case No. 101 of 1963

**Appellant :** Suren Banerjee

**Respondent :** The State

**Advocate for Def. :** S.N. Banerjee, D.L.R.

**Advocate for Pet/Ap. :** Arun Prokash Chatter, Adv.

**Judgement :**

**Debabrata Mookerjee, J.**

1. The petitioner Suren Banerjee is being prosecuted under Rule 41(5) of the Defence of India Rules, He prays that in the circumstances that have happened he is entitled to be released on bail. The contention requires examination.

2. The proceedings against him originated in a police report. On the 19th of April, 1963 he was charged under Section 11 of the West Bengal Security Act read with R. 41 of the Defence of India Rules, 1962, with having between 21st October 1962 and 21st November, 1962, been engaged in 'subversive and prejudicial activities affecting the safety and security of the State'. This charge was altered on the 4th May 1963 and the petitioner was charged in the alternative, under Section 11 of the West Bengal Security Act and R. 41 of the Defence of India Rules 1962. The dates of commission of the offence as previously charged were also altered. It appears that on the last-mentioned date two sets of charges were adopted. Thereafter, on the 27th June at the instance of the petitioner the learned Magistrate reconsidered the validity of the altered charges. The petitioner's objection was apparently based on the evidence which had since been heard by the learned Magistrate. The objection was considered and in a way upheld. The learned Magistrate accordingly cancelled the previous charges and framed new ones only under Rule 41 of the Defence of India Rules. The charge under the West Bengal Security Act was abandoned. The delay involved in the proceeding was taken advantage of and it was urged on the petitioner's behalf that he should in the circumstances be released on bail. That prayer was rejected. Thereafter, the prayer was repeated before the Sessions Judge of Birbhum, who by an order dated 13th July 1963 refused the petitioner bail. Thereafter the petitioner applied to this Court and obtained the present Rule.

3. The main contention on the petitioner's behalf in support of this application has been that in view of the amended provision contained in Section 497(3-A) of the Cr. P. C. the petitioner becomes entitled to bail as of right in terms of the new provision. It has been argued that an offence under R. 41 of the Defence of India Rules is a non-bailable offence and the petitioner being charged with it is entitled to the benefit of the amended provision. The contention is that since the trial was not concluded within a period of 60 days from the first date fixed for taking evidence in the case, the petitioner becomes entitled to be released on bail since he has been during the whole of the period in custody unless of course there were special reasons to be recorded in writing by the Magistrate for refusing bail. In aid of this contention reliance has been placed upon an excerpt in the Magistrate's order sheet dated the 19th April, 1963 by which the Magistrate fixed 10th May as

the date for taking evidence. It has been argued that since 60 days have elapsed from 10th of May, the petitioner becomes entitled to the benefit of Section 497(3-A) of the Code. We are unable to accept this contention. The Magistrate's proceeding makes it perfectly plain that the charges previously framed were cancelled. The cancellation was made at the instance of the petitioner himself and a new set of charges was adopted on the 27th of June 1963. The proceedings against the petitioner were from the very inception triable in accordance with the procedure prescribed under Section 251A since they had been initiated upon a police report. Consequently, it was open to the Magistrate on a reference to the documents referred to in Section 173 of the Code, to frame charges. That is the procedure which in fact was adopted in the case even before the new charges were adopted. In that view it can never be right to think that the prosecution was required under the law to adduce any evidence before the charges were actually framed. In this connection reliance has been placed upon an order dated 9th July 1963 appearing in the Magistrate's order-sheet by which he fixed 13th July 1963 for evidence of the prosecution. This is obviously a wrong approach. Charges having been framed the prosecution were directed to produce witnesses so that they might be examined and thereafter cross-examined by the petitioner.

4. There is another aspect of the matter. Section 228 provides that the trial may proceed immediately after alteration of charge. Then follows Section 229 which enables the Court to 'direct a new trial' when the charges have been altered or amended. In this case the Magistrate's order-sheet clearly shows that the previous charges were cancelled and the prosecution witnesses were summoned anew. Obviously, this leaves no scope for doubt that a new trial was directed in terms of Section 229 of the Code by the order dated 27th June, 1963. Assuming that Sub-section (3-A) of Section 497 Cr. P. C. applied, the petitioner could not be entitled to the benefit of the new provision since 60 days had not elapsed from the date fixed for 'taking evidence' in the case. It was sought to be argued on the petitioner's behalf that the indications in the Magistrate's order-sheet were in favour of merely the charges being amended and not a new trial being directed to be had. We are unable to accept this view, since in our opinion the relevant orders to which we have referred make the position plain that the Magistrate directed a rehearing of the evidence and summoned the witnesses anew to proceed with the

Trial in terms of Section 251A of the Code.

5. In another view the position which we have considered above does not arise. The prosecution being one under a notified Rule under the Defence of India Rules, Rule 155 stands in the way of the petitioner being released on bail. That Rule reads as follows:

'Special provision regarding bail -- Notwithstanding anything contained in the Code of Criminal Procedure 1898 (5 of 1898), no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or on his own bond unless-

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention'.

It is quite plain that a person accused of contravention of a notified Rule is not entitled to bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention and that the prosecution has been given an opportunity to oppose the application for such release.

6. It has been argued on the petitioner's behalf that the non obstante clause in R. 155 cannot completely override the provisions contained in the Code relating to the Court's power to release a person on bail in terms of Section 497 of the Code. It is not easy to appreciate this argument. Rule 155 appears to us to be an overriding provision which takes away the Court's power to release a person charged under a notified Rule on bail except upon fulfilment of certain conditions one of which is the Court's satisfaction that there are reasonable grounds for believing that the person charged is not guilty of the contravention. There is no dispute that the Rule for the contravention of which the petitioner is being

prosecuted, is a notified Rule, and we are far from satisfied on the materials that there are any reasonable grounds for believing that the petitioner is not guilty of the contravention. We think, therefore, that this application must fail and the relevant Rule must be discharged. In all the circumstances of the case we think that the trial should be concluded expeditiously and we hope that it would be possible for the trying Magistrate to conclude the trial by the 10th of September, 1963.

**Amaresh Roy, J.**

7.I agree.

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