

The State Vs. Md. Samin

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Court : Kolkata

Decided On : Feb-25-1991

Reported in : 1991CriLJ1691

Judge : Monoj Kumar Mukherjee and ;Haridas Das, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 302 and 307; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 167, 167(2), 192(1), 207, 309, 309(2) and 468

Appeal No. : Criminal Revn. No. 103 of 1991

Appellant : The State

Respondent : Md. Samin

Advocate for Def. : D.K. Dutt, ;Sekhar Kr. Bose, ;K.J. Ahmed and ;T.K. Choudhuri, Advs.

Advocate for Pet/Ap. : B.C. Roy, ;N.A. Choudhuri, ;R.B. Mahato and ;Aslam Khan, Advs.

Judgement :

Monoj Kumar Mukherjee, J.

1. In connection with Jorasanka P. S. Case No. 402 dated 7-8-90 registered Under Sections 307/34 of the Indian Penal Code (subsequently converted to one Under

Sections 302/34 of the IPC), the opposite party and four others were arrested on 25-9-90 and forwarded to the learned Additional Chief Metropolitan Magistrate, Calcutta ('Magistrate' for short) on 26-9-90. By orders made from time to time, the learned Magistrate authorised their detention, initially in police custody for twelve days and thereafter in jail custody for fifteen days at a stretch awaiting report, in final form, of investigation. The last of such orders was made by the learned Magistrate on 17-12-90 authorising detention of the accused persons in jail custody till 31-12-90. In the meantime on 21-12-90 to be precise the Investigating Officer submitted chargesheet against the five accused persons and on receipt thereof, the learned Magistrate passed the following order on that day:--

'Received C.S, today against all the accused persons who are in J/C till 31-12-90.

Cog. taken Under Section 302/34, IPC. The next date for further hearing is fixed on 26-12-1990. Put up on 26-12-90 for orders.'

2. The case was put up before the learned Magistrate on 26-12-1990 as directed and on subsequent dates also and various orders were passed. Ultimately, by an order dated 9-1-91, the learned Magistrate transferred the case to the learned Metropolitan Magistrate, 7th Court, Calcutta in accordance with Section 192(1) of the Code of Criminal Procedure. While the case was pending inquiry before the transferee Court, the opposite party, whose prayer for bail had earlier been rejected by the learned Magistrate, moved the City Sessions Court with a similar prayer. By his order dated 28-1-91, the learned Chief Judge of that Court granted bail to the opposite party after recording the following finding:--

'The Ld. Magistrate not having passed any order of remand on 21-12-90 Under Section 309(2) of the Cr. P.C., the period of detention from 21-12-90 to 31-12-90 cannot be considered as the period of remand fixed by the Magistrate in exercise of his powers either Under Section 167 or Under Section 309(2), Cr. P.C. and, in terms of the aforesaid authority, the accused concerned must be held to have been detained in custody between 21-12-90 and 31-12-90 without any valid and legal orders of detention in custody passed by the Ld. Magistrate.'

The above order is under challenge in this revisional application filed by the State.

3. It appears that in passing the impugned order, the learned Judge relied upon the judgment delivered by the Karnataka High Court in the case of Gyanu v. State of Karnataka, reported in 1977 Cri. LJ 632, Undoubtedly, the judgment fully supports the view expressed by the learned Sessions Judge, but then having considered the relevant provisions of law, we regret our inability to share the steps of reasoning of the learned single Judge in the case of Gyanu (Supra).

4. Undisputably, during investigation, an accused can be detained in judicial custody pursuant to an order passed by a competent Magistrate Under Section 167(2) of the Code of Criminal Procedure and therefore, in the instant case, the order dated 17-12-1990, authorising detention of the accused persons in judicial custody till 31-12-1990, was a valid and legal one when it was made. The question therefore is whether, consequent upon submission of chargesheet by the police and taking of cognizance thereupon by the learned Magistrate, the order lost its validity and legality. As a corollary thereto, the other question that requires an answer is whether consequent upon taking of cognizance in the instant case, it was absolutely necessary to pass an order Under Section 309(2) of the Code of Criminal Procedure on 21-12-1990 to continue the detention of the accused legally. To answer the questions, it will be profitable at this stage to refer to Section 309 of the Code of Criminal Procedure. The said section so far as it is relevant for our present purposes read as under:--

'Power to postpone or adjourn proceedings.

(1).....

(2) 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 by a warrant remand the accused if in custody:

In answering the questions in the affirmative in the case of Gyanu (1977 Cri LJ 632) (Supra), facts of which are similar to the facts of the instant case, the learned Judge observed as under (at pp. 636-37) :--

'If, on the filing of the charge-sheet, a Magistrate does not, for a number of days proceed to apply his mind and take cognizance of the offence or offences made out, he cannot for those number of days exercise powers of remand to judicial custody either Under Section 167 or Under Section 309(2) of the Code of Criminal Procedure. This situation can be solved by a Magistrate applying his mind to the facts and material available in the final report and the documents produced along with it in no time after the filing of the final report and deciding whether cognizance of the offence or offences made out should be taken or not; if he decides to take cognizance of the offence or offences, then he can, Under Section 309(2) of the Code of Criminal Procedure, proceed to exercise his power of remand.

In the case on hand, the charge-sheet was filed on 6-9-1976 and the Magistrate took cognizance of the offences on 6-9-1976 itself. He did not exercise his powers of remand Under Section 309(2) of the Code of Criminal Procedure on or after 6-9-1976. He had remanded the petitioner to judicial custody by his order passed on 3-9-1976. The period of remand was upto 10-9-1976. The said order passed on 3-9-1976 was in exercise of the powers of the Magistrate Under Section 167 of the Code of Criminal Procedure. But the period of remand fixed by the order dated 3-9-1976 came to an end on 6-9-1976 when the charge-sheet was filed. The Magistrate having not passed any order of remand on 6-9-1976 in exercise of his powers Under Section 309(2) of the Code of Criminal Procedure, the period of detention of the petitioners from 6-9-1976 till 10-9-1976, which is the date of the order in question, cannot be considered, as the period of remand fixed by the Magistrate in exercise of his powers either Under Section 167 or Under Section 309(2) of the Code of Criminal Procedure. In this view of the matter, it will have to be held that the petitioners were detained in custody during this period, viz., between 6-9-1976 and 10-9-76 without any valid and legal orders of detention in custody passed by a Magistrate.'

5. We might have persuaded ourselves to accept the above quoted findings of the learned Judge if cognizance was taken on the date of, production of the accused persons from custody; but then having regard to the fact that in the instant case, as in the case of Gyanu (1977 Cri LJ 632) (Kant) (supra), cognizance was taken on an intermediate date and having regard to the meaning of the word 'remand',

we are unable to do so. 'Remand' means 'to send back' and therefore, when Section 309(2) says that a Magistrate may 'remand the accused if in custody' it means that the Magistrate can send back the accused to custody wherefrom he was brought. That necessarily means that such power under Section 309(2) of the Code of Criminal Procedure can be exercised by a Magistrate only when the accused is before him. This conclusion of ours gets support from the form of the warrant statutorily prescribed for remanding an accused Under Section 309(2) of the Code of Criminal Procedure whereby the Officer-in-Charge of the Jail is asked to 'received' the accused and to 'produce' him before the Magistrate on a particular date. It is, of course true that on a particular day of such production, the accused may not be produced before the Court due to illness or other similar reason and order of remand may have to be passed in his absence but such exceptional situation also arise in trials where presence of the accused is the rule and appearance through lawyer the exception.

6. In view of our finding that an order of remand can be made only when the accused is before the Court, and as cognizance of an offence can be and is usually taken in absence of accused, in the instant case there could not be an order of remand Under Section 309(2) of the Code of Criminal Procedure nor was it necessary, as the accused was in custody pursuant to a valid order on the date the cognizance was taken. If the view expressed the Karnataka High Court is considered in the light of the meaning of the words 'remand the accused if in custody' and the form of the warrant statutorily prescribed therefor, it would mean that if during investigation detention of an accused is lawfully authorised till a particular date and if a, chargesheet is submitted before that date, taking of cognizance should be deferred till the date of production of the accused; alternatively, the accused should be brought before the Court if the learned Magistrate intends to take cognizance immediately on receipt of the chargesheet only to be sent back to comply with the requirement of Section 309(2) of the Code of Criminal Procedure, though otherwise his presence was not necessary. The former course of action may, in a given case, affect the prosecution in view of Section 468 of the Code of Criminal Procedure and the latter would be an empty formality. We are, therefore, of the opinion that when the accused was sent to judicial custody pursuant to a valid order made during investigation, such order did

not become illegal consequent upon submission of the chargesheet, and for that matter, upon taking cognizance. On the conclusion as above, the impugned order granting bail cannot be supported.

7. Mr. Dutta appearing on behalf of the accused-opposite party, however, Contended that even if the finding of the learned Sessions Judge, was not a proper one, still then the detention of the accused persons after 31-12-1990 was illegal and unwarranted, as no order directing their remand was passed in accordance with Sub-section (2) of Section 309 of the Code of Criminal Procedure. It is true that no such order was made but then in our view, absence thereof did not make the remand of the opposite party in custody bad for he was remanded to custody by a warrant issued by the Magistrate, which is the only requirement of Section 309(2) of the Code of Criminal Procedure.

8. Mr. Dutt lastly contended that an any event on the merits of the case, the opposite party was entitled to get bail. To consider this submission of Mr. Dutt, we have carefully gone through the case diary. On perusal thereof, we do not feel inclined to grant bail to the accused-opposite party at this stage. We, however, refrain from detaining the merits list the opposite party carries the impression that his case has been prejudiced.

9. The revisional application is thus allowed and the impugned order is set aside. The learned Magistrate is directed to dispose of the case at his end as expeditiously as possible preferably within four weeks from the date of communication of this order. For that purpose, the learned Magistrate will ensure supply of copies of documents referred to Under Section 207 of the Code of Criminal Procedure to the accused if produced in Court or through the Superintendent of the Jail where they are detained.

10. Let this order be communicated to the learned Magistrate forthwith.

Haridas Das, J.

11. I agree.

