

State Vs. Mohd Anwar and ors.

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Court : Jammu and Kashmir

Decided On : Apr-27-2005

Reported in : 2005(2)JKJ534

Judge : Y.P. Nargotra, J.

Acts : Indian Arms Act - Sections 6, 7, 25, 26, 27, 49(2) and 49(6); ;Ranbir Penal Code (IPC) - Sections 120B, 121, 122, 123, 302 and 307; ;TADA Act - Section 20 and 20(4); ;POTA - Sections 2, 3, 5, 34, 34(1) and 49; ;Code of Criminal Procedure (CrPC) , 1989 - Sections 167, 167(2), 173, 344, 378(3), 497 and 497(5)

Appeal No. : Cr. Rev. 31/2003

Appellant : State

Respondent : Mohd Anwar and ors.

Advocate for Def. : H.A. Siddiqui, Adv.

Advocate for Pet/Ap. : Aruna Thakur, Dy. A.G.

Judgement :

Y.P. Nargotra

1. The accused-respondents are alleged perpetrators of ghastly crime in which 12 persons out of whom eight were minor children have been brutally massacred by spraying bullets from AK-47 gun on the intervening night of 20/21.1.2002. FIR No.

13 was registered on 21.1.2002 for commission of offences under Sections 302, 307, 120B, 121, 122, 123 RPC and 7/25, 26 & 27 Indian Arms Act and 3/2 POTA at Police Station Mendhar at 10-AM. One of the accused involved in the crime, namely Tazeem Ahmed son of accused-respondent Mohd Sharief and nephew of Mohd Anwar and Mohd Taj was eliminated by militants on the night of occurrence itself. The accused-respondents came to be arrested on 15.2.2002 and investigation was commenced. Challan however could not be filed till 23.8.2002 i.e. Within 180 days from the date of registration of the case and arrest of the accused. Learned Presiding Officer of the Designated Court under POTA was approached by the accused for grant of bail by way of an application-dated 31.7.2002. Learned Presiding Officer issued notice to the Public Prosecutor for objections and report. Prosecution filed objections admitting the fact that the accused stood arrested on 15.2.2002 but it was submitted that in view of the nature of the offences involved and in the interest of security of the State prayer of the accused for bail be not considered. Learned Presiding Officer of the Designated Court however granted bail to the accused by taking into consideration the fact of non-filing of challan within the prescribed period of 180 days in terms of Section 49 POTA read with Section 167 Cr.P.C. Pursuant to the furnishing of bail bonds the accused were released from custody on 14.11.2002. After obtaining sanction charge sheet was filed on 13.11.2002 for trial of the accused for the said offences. Charges were framed against the accused for commission of offences Under Sections 302, 307, 120B, 121 RPC and 7/25, 26, 27 I.A.A. and 3/5 POTA. And on their pleading not guilty prosecution was directed to lead evidence. By now prosecution has examined four witnesses. During the trial of the accused on 27.12.2002 prosecution filed an application for cancellation of bail of the accused but no order for disposal of the application one way or the other has been passed.

2. About 25 persons, some of whom are eye witnesses and who were injured in the occurrence, sent an application to My Lord the Chief Justice of this Court praying for His lordship's intervention and cancellation of bail granted to the accused-respondents. The application has been registered as Cr.Revision. Learned Advocate General and the accused, who are respondents, were put on notice.

3. I have heard the Dy. Advocate General for the State and learned counsel for the respondents and have perused the record of the case, which has been summoned from the trial court thoroughly.

4. The basic questions arising for consideration are whether the learned Trial Judge was right in granting bail to the accused for default of the prosecution in presenting the challan? And what is the effect of filing the challan on the right of the accused for continuing to be on bail?

5. General power of a magistrate to grant bail for default in presentation of challan is regulated by Section 167 Cr.P.C. For the offences covered under POTA such power is governed by Section 49(2) of the said Act, which reads as follows:-

'(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in Sub-section (2)-

(a) the reference to 'fifteen days', 'ninety days' and 'sixty days' wherever they occur, shall be construed as reference to 'thirty days', 'ninety days' and 'ninety days', respectively and

(b) after the proviso the following proviso shall be inserted namely-'Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days.'

6. From a bare perusal of this section it transpires that the provisions of Section 167 Cr.P.C.(Central) with specified modifications have been adopted and made part of section Section 49 of POTA which is a Central legislation made applicable to the State of J&K.; The modification is to the effect that in Sub-section 2 of Section 167 reference to 15 days, 90 days and 60 days shall be construed as reference to 30 days, 90 days and 90 days respectively. After the proviso in Sub-section 2 a new proviso has been added which empowers the Special Court to extend the period for completion of investigation to 180 days, if it is not possible to

complete the investigation within the said period of 90 days. Thus under Sub-section 2 of Section 49 rule of bail for default, in filing the charge sheet for trial of the accused within a period of 90 days and if extended upto 180 days stands incorporated. Therefore under this rule if the prosecution does not file the charge sheet against the accused after completion of investigation within 90 days or within 180 days if extended the accused becomes entitled to be released on bail if he is prepared and does furnish bail. Sub-section 6 of Section 49 opens with a non-obstante clause and provides that no person accused of an offence punishable under the Act shall, if in custody, be released on bail or on his own personal bond unless the court gives the Public Prosecutor an opportunity of being heard and Sub-section 7 provides that where the Public Prosecutor opposes the application of the accused to be released on bail no person accused of an offence punishable under the Act shall be released on bail until the court is satisfied that there are grounds for believing that he is not guilty of commission of such offences. It is further provided that after expiry of period of one year from the date of detention of the accused provision of Section 6 shall apply. The question arises whether the restrictions imposed by Sub-sections 6 & 7 on the power for grant of bail apply to the rule of bail enshrined in Sub-section 2 of Section 49 which provides for grant of bail for default of the investigating agency in presenting the challan.

7. An identical provision existed in Section 20 of TADA. While considering the scope of the provision contained in Section 20(4) TADA in relation to a case under the provision of TADA a Constitution Bench of the Supreme Court in *Kartar Singh v. State of Punjab*, observed:-

'Sub-section (8) which imposes a complete ban on release on bail against the accused of an offence punishable under this Act minimizes or dilutes that ban under two conditions, those being (1) the Public Prosecutor must be given an opportunity to oppose the bail application for such release; and (2) where the Public Prosecutor opposes the bail application the court must be satisfied that the two conditions namely (a) there are reasonable grounds for believing that the person accused is not guilty of such offence and (b) he is not likely to commit any offence while on bail. Sub-section (9) qualifies subsection(8) to the effect that the above two limitations imposed on grant of bail specified in Sub-section(8) are in

addition to the limitations under the Code or any other law for the time being in force on granting of bail. If either of the two conditions mentioned therein is not satisfied the ban operates and the accused person cannot be released on bail but of course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to the case under the provisions of TADA Act.'

8. Thus the restrictions on the power of the court for granting bail enshrined under Sub-sections 6&7 of Section 49 do not apply to the granting of bail to an accused for default of the investigating agency in presenting the challan. Section 167(2)(a) Cr.P.C. provides that the detention of the accused person in custody beyond the stipulated period shall not be authorized and on the expiry of said period the accused shall be released on bail if he is prepared and does furnish bail. The right of the accused to be released on bail after expiry of the stipulated period is subject to one exception, which is filing of the charge sheet in a court against the accused before expiry of stipulated period. The moment charge sheet is filed the proviso (a) to Sub-section 2 of Section 167 Cr..C. ceases to operate as the court before whom the charge sheet is filed acquires jurisdiction to remand the accused to custody Under Section 344 Cr.P.C. unless it grants him bail under Chapter 39 of the Code. From a bare reading of proviso 2(a) to Section 167 Cr.P.C. it is also manifest that bail granted for default of the investigating agency in presenting the charge sheet within the stipulated period is to be deemed to be bail granted under Chapter 39 of the Code i.e. to say Under Section 497 Cr.P.C. Such bail granted to the accused is not on the merits and circumstances of the case but solely on the ground of default of the investigating agency in filing the charge sheet within the stipulated period. While granting bail for default of the investigating agency the seriousness and gravity of the alleged offences for commission of which the accused may have been taken into custody are not required to be kept in view by the court/Magistrate. The moment stipulated period of detention of an accused person expires and the charge sheet is not filed before expiry of such period by the investigating agency the accused becomes entitled to be released on bail as matter of right provided he applies for and furnishes bail bonds. Such person may even be involved in the commission of most heinous offences yet bail for default of the investigating agency to file the charge sheet cannot be denied to him. The rule of bail for such default Under Section 167 Cr.P.C. applies to the offences under

POTA too, only with specified modifications by virtue of the provisions contained in Section 49 POTA.

9. In the present case admittedly the accused were arrested on 15.2.2002 and the charge sheet was filed in the court on 13.11.2002, un-disputedly after expiry of the stipulated period i.e. 180 days. The accused were admitted to bail on 23.8.2002 and actually released on 14.11.2002. No exception to the order passed by the learned Trial Judge can be taken.

10. Learned counsel for the respondents has contended that revisional powers cannot be invoked for challenging the legality of an order of granting bail as the only remedy available under the provisions of Section 34 POTA is that of an appeal to be heard by a Bench of two Judges of the High Court. Section 34 reads as follows:-

'34-(1) Notwithstanding anything contained in the Code an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

Explanation-For the purposes of this section, 'High Court' means a High Court within whose jurisdiction a Special Court which passed the judgment sentence, or order, is situated,

(2) Every appeal under sub-section(1) shall be heard by a bench of two Judges of the High Court;

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court;

(4) Notwithstanding anything contained in Sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail,

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from.

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.'

11. From the bare reading of the provision it is abundantly clear that appeal against the judgment, sentence or order not being an interlocutory order lies to the High Court, which is required to be heard by a Bench of two Judges of the Court. Under Sub-section(4) appeal also lies to the High Court against an order of Special Court granting or refusing bail but there is no requirement of hearing such appeal by a Bench of two Judges because Sub-section(2) refers only to appeal filed under sub-section(2) and not to appeal under Sub-section(4). Sub-section (3) however creates a complete bar to the maintainability of appeal or revision against the judgment, sentence or order including an interlocutory order of the Special Court, except to the appeals provided in sub-section(1) and Sub-section(4). The revisional jurisdiction of this court thus cannot be invoked by the applicants but as the applicants are praying for cancellation of the bail of respondents, I, therefore, treat this application as an application for cancellation of bail.

12. The question arises whether right of the person released for default of the investigating agency in presenting the charge sheet before expiry of stipulated period to remain enlarged on bail continues even after filing of the charge sheet i.e. to say even after default of the investigating agency no more exists?

13. As the bail order passed Under Section 167(2)(a) Cr.P.C. is to be deemed to be an order under Chapter 39 of the Code in my considered opinion it is controlled and governed by the provisions of Section 497 Cr.P.C. Sub-section 5 of Section 497 reads as follows:-

'The High Court or court of session and, in the case of a person released by itself, any other court may cause any person who has been released under this section to be arrested and may commit him to custody.'

14. The provisions of Sub-section 5, of Section 497 Cr.P.C. thus vest a judicial discretion in the court which has passed the order of granting bail or the court of sessions or the High Court to cause any person released on bail to be arrested

and committed to custody. The power so vested can be exercised even without any application of the prosecution or of any other interested person. Undoubtedly such discretion being a judicial discretion is required to be exercised judicially with due circumspection after putting the accused on notice and after hearing him as to why his bail may not be cancelled. The court has to consider whether on the material placed before it in the charge sheet bail of such accused released for default of the investigating agency in presenting the charge sheet should be cancelled or not. Since the bail granted to such a person is not on merits but is only on account of the default of the investigating agency, therefore on the filing of the charge sheet against such person before the court competent to try the accused such court in the interest of criminal justice is under duty to advert immediately to the question whether bail of such person should be cancelled or not, by taking into consideration the nature of the offences alleged to have been committed by him and the investigational material placed before it in the police report submitted Under Section 173 Cr.P.C. and all those factors which are required to be kept in view if the bail were to be granted on merits of the case.

15. Thus an accused who would not have been entitled to be granted bail on merits and circumstances of the case in view of the heinousness of the offences alleged to have been committed by him but who has been released on bail on account of default of the investigating agency in presenting the charge sheet within the stipulated period, can be ordered to be arrested and committed to custody after filing of the charge sheet in the Court.

16. Criminal courts though are vested with power to cancel bail of an accused who has been released on bail for default of the investigating agency but the experience shows that such power is seldom exercised even in cases where circumstances so warrant and it results in hampering the course of criminal justice. After the charge sheet is filed in the court competent to try an accused who has been released on bail in terms of Section 167(2)(a) Cr.P.C. such court must examine the question of cancellation of his bail Under Section 497(5) Cr.P.C. If the grounds justify cancellation of his bail, it should not hesitate to make an order for cancellation of bail of such an accused provided the order of granting bail was passed by it or it is a court of Session or High Court. If the order of bail has not

been passed by it and such court is not the court of Session or High Court, then in appropriate cases it should report the matter to the Court of Session or the High Court for appropriate orders,

17. The accused in the present case are involved in commission of a crime in which twelve persons, out of whom eight were minor children, have been shot dead. There is sufficient material available on record to make out a prima facie case against them. The charges against them also stand framed by the Trial Court. Taking into consideration the nature of the offences alleged to have been committed by the accused, they would not have been entitled to grant of concession of bail on merits of the case. They, however, have been released on bail only on account of default of the investigating agency in presenting the charge sheet within the stipulated period. In my considered opinion it is a fit case where the power vested in this court Under Section 497(5) Cr.P.C. must be exercised and bail should be cancelled. This is unfortunate that before the learned Trial Court prosecution filed an application seeking cancellation of bail of the accused 'on 27.12.2002. Learned Trial Judge, however, has not disposed of the application one way or the other. Learned Trial Judge thus has failed to exercise his legally vested jurisdiction in the case of such a serious nature. His failure to act in the manner required speaks about his indifference towards his legal obligation.

18. For the aforesaid reasons, in exercise of the powers vested in this court Under Section 497(5) Cr.P.C. I cancel the bail granted to the accused persons and direct for their immediate arrest and after they are arrested they shall be sent to judicial lockup. The learned Trial Court to issue nonbailable warrants for securing their arrest and custody.

19. Record of the Trial Court shall be returned to it forthwith, alongwith a copy of this order.

20. Registrar (Judicial) shall circulate a copy of this judgment to all the Subordinate Courts of the State for guidance.