

Mohd Ashraf Vs. State

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Court : Jammu and Kashmir

Decided On : Oct-13-2005

Reported in : 2006(2)JKJ47

Judge : Y.P. Nargotra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 19, 24, 27A, 36A, 36(1), 36A(4) and 37; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167, 167(2), 167(4) and 439; ;Jammu and Kashmir Code of Criminal Procedure (CrPC) , Svt. 1989 - Section 167(2)

Appeal No. : Cr. Rev. 67/2005

Appellant : Mohd Ashraf

Respondent : State

Advocate for Def. : S.C. Gupta, AAG

Advocate for Pet/Ap. : I.H. Bhat, Adv.

Judgement :

Y.P. Nargotra, J.

1. Heard.

Whether the provisions of Section 167 of J&K; Code of Criminal Procedure Svt. 1989 can be applied for considering the question of bail to an accused who is in custody of police for commission of offences under Narcotic Drugs and Psychotropic Act, 1985, (hereinafter referred to as the Act), on account of default of the investigating agency in presenting the charge sheet in the court? is the question arising for consideration in this revision petition.

2. Narcotic Drugs and Psychotropic Substances Act 1985, which is a Central Act and is applicable to the State of Jammu & Kashmir, also contains a special provision for regulating the grant of bail, regarding commission of offences under the Act. Section 37 of the Act reads as follows:

37. Offences to be cognizable and non-bailable-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless;

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

2. The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973(2 of 1974), or any other law for the time being in force on granting of bail.

3. From the bare perusal of Section 37 it is manifest that the exercise of power to grant bail by the Special Judge is not only subject to the limitations prescribed by Section 439 of Central Cr.P.C. but is also subject to the limitations prescribed by Section 37 which opens with non-obstante clause. Under Section 37 of the Act bail

to an accused, who is alleged to have committed an offence under Section 19, 24 or 27A and also for offences involving commercial quantity cannot be granted unless the two conditions enumerated in the section are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application and second that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, bail cannot be granted. Since the limitation for grant of bail regarding satisfaction of the aforesaid two conditions is in addition to the limitations under the Code of Criminal Procedure, applicability of proviso to Section 167(2) Cr.P.C. cannot be excluded.

4. For applying Section 167(2) a special provision has also been enacted in Section 36A of the Act which reads as follows:

36A. Offences triable by Special Courts -d) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) all the offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area by such one of them as may be specified in this behalf by the Government:

(b) Where a person accused of or suspected of the commission of an offence under this act is forwarded to a Magistrate under Sub-section (2) or sub-section(2A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorize the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole if such Magistrate is an Executive Magistrate;

Provided that in cases which are triable by the Special Court, where such Magistrate considers-

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorized by him,

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;

(d) A Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorized in this behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act a Special Court may also try an offence other than an offence under this Act with which the accused may under the Code of Criminal Procedure, 1973 be charged at the same trial;

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 and the High Court may exercise such powers including the power under Clause (b) of Sub-section (1) of that section as if the reference to 'Magistrate' in that section included also a reference to a 'special Court' constituted under Section 36.

(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity the reference in Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 thereof to 'ninety days' where they occur, shall be construed as reference to 'one hundred and eighty days'.

Provided that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said

period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the code of Criminal Procedure, 1973, the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.

5. Thus under Sub-section (4) while it has been provided that while applying Section 167(2) the words "90 days' have to be construed to be 180 days, meaning thereby that if a charge sheet is not filed within 180 days the Special Court empowered to grant bail to an accused, who is alleged to have committed offences Under Sections 19 or 24 or 27A or for offences involving commercial quantity, who is in custody. However, the Special Court instead of granting bail after expiry of 180 days can extend the period of the investigation of the case to one year if in its opinion it is not possible for the investigating agency to complete the investigation within the said period of 180 days but in that case obtaining of Public Prosecutor's report for indicating the progress of investigation and recording of specific reasons, for extending the period of detention of the accused beyond said period of 180 days is necessary. It requires to be noticed that Section 36A and Section 37 of the Act also refer to Central Criminal Procedure Code 1973.

6. In the present case accused Molid Ashraf and Mohd Shafi came to be arrested by Police Station Udhampur in connection with FIR No. 73/2005 for commission of the offences under the Act. They were produced before the learned Sessions Judge Udhampur, who is Special Judge for the purposes of N.D.P.S. Act by the police for obtaining judicial remand. On their behalf application was filed for invoking the provisions of Section 167(2) of the J&K; Cr.P.C. Svt.1989. It was contended before the learned Special Judge that investigation has not been completed and no charge sheet has been filed despite expiry of 120 days from the date of their arrest, therefore, an indefeasible right has accrued in favour of the accused for being enlarged on bail on account of the default of the investigating agency in completing the investigation and filing the charge sheet. Learned Special Judge accepted the contention of the accused being of the view that

proviso to Section 167(2) J&K; Cr.P.C. Svt. 1989 which alone is in force in the State applies and therefore the accused are entitled to bail. He has observed in the order impugned:

Be that as it may, on-completion of investigation within the prescribed period stipulated under Section 167(2) Cr.P.C. guarantees a right to bail to the accused persons even in the heinous offences. Proviso of Section 167(2) Cr.P.C. of 1989 which alone is applicable to this State, prohibits in the first instance a Magistrate to authorise detention of accused involved in the commission of a non-bailable offence, in custody beyond a period of 60 days and secondly empowers the Magistrate to release the accused on bail if he is ready to furnish the bail on the condition that the charge sheet or challan, as the case may be, is not produced against the accused persons arrested in connection with a non-bailable offence despite the expiry of period of 60 days. Section 36A(4) of the Act is a replica of the above referred Section 167(2) Cr.P.C. in as much as it empowers to release of the accused arrested for the commission of non-bailable offence under Section 19 or 24 or 27A or offence involving the commercial quantity of contraband. The only added difference between the two is that, in the former case a Magistrate is required to release the accused on bail on the expiry of 60 days when the investigation is not complete, in cases where some special law does not lay down condition overriding the same and in the later case, in view of the unambiguous provision of Section 36A which has doubled the period for completion of investigation, to enlarge the accused on bail, as prescribed in Section 167(2) Cr.P.C. The difficulty that arises is the interpretation of the words mentioned in Sub-section (4) of the Section 167(2) Cr.P.C., that the reference in sub-section 167 of the Code of Criminal Procedure of 1973. Section 167 Cr.P.C. of 1973, which is exclusively applicable in other parts of the country, excludes the State of J&K; from its ambit. The period of detention and completion of investigation is 90 days whereas Under Section 167(2) Cr.P.C. of 1989 which though analogous provision, is exclusively applicable to the State of J&K;, the period prescribed for completion of investigation and in the event of failure to do so and produce challan in the court, is only 60 days and not ninety days as prescribed in the 1973 Code.

In this part of country the provisions Code of Criminal Procedure 1989 only apply and the provisions of Code of Criminal Procedure 1973 have no application to the State of J&K.; Reading Section 167(2) of the code of Criminal Procedure of 1989 in juxtaposition with Section 36A of the Act, an irresistible inference that can be safely drawn is that the period of 60 days proscribed in Section 167(2) of the 1989 Code has to be doubled and not the period of 90 days prescribed in 1973 code is to be taken into consideration. Considering the provision 167(2) of 1989 Code the accused persons are proved to be in police judicial custody for the last 121 days that is the period of 120 days has since expired and investigation is not complete as yet. In view what has stated here in above and in view of right guaranteed to the accused person under Section 167(2) Cr.P.C. read with Section 36A of the NDPS Act, 1988, I direct that the accused persons be released from custody forthwith if they furnish cash security of one lac each failing which they shall continue to remain in judicial custody till further orders. This arrangement of cash security is being made considering of heinous offence charged against the accused persons, which is a vice against the modern society & malignant to the progress of the country, as also the quantity of heroin recovered from their possession, value whereof is lakhs of rupees in the international market.

7. The interpretation given by the learned Special Judge (Sessions Judge) Udhampur to the provisions of Section 36A in my considered view is absurd. His order is patently illegal. It is cardinal rule of interpretation of statutes that a provision of a statute is to be read as it is without any addition or alteration. The provisions of the N.D.P.S. Act are applicable in the State of J&K; therefore, its Section 36A has to be read in the same language in which it has been enacted. As Section 36A refers to the provision of Section 167 of Central Cr.P.C. 1973, therefore, by applying the legal fiction the same are to be treated as part of the section itself and have to be read within the section. Section 167 of Central Cr.P.C. though a Central Act and independently not applicable to the State of J&K; yet by its incorporation in Section 36A of the Act it is to be deemed to be applicable in the State in its modified form in the manner indicated in Section 36A and construed as integral part of the section itself. Learned Special Judge could not have legally read the -provisions of Section 167(2) of J&K; Cr.P.C. into the provisions Section 36A of the NDPS Act. Taking the provisions of Section 36A as

it is, period of '90 days, and 180 days cannot be read as '60 days' and '120 days'. The period of completion of investigation in a case Under Section 36A ordinarily is 180 days, further extendable to the period of one year on the satisfaction of the stipulated conditions. Therefore, the accused were not entitled to the grant of bail on the ground that investigation has not been completed within 120 days.

8. The order of the learned Special Judge (Sessions Judge) Udhampur, being palpably wrong cannot be sustained in law. Accordingly order impugned dated 18.8.2005 is set aside. If the accused, pursuant to the said order, has been released on bail, his bail shall stand cancelled and the learned Special Judge (Sessions Judge) Udhampur shall cause him to be arrested and sent to custody. The record received from the Trial Court shall be returned to it forthwith, alongwith copy of this order. However, this order shall not come in the way of the accused for applying afresh for bail, if they become entitled thereto subsequently on the changed circumstances or on merits under law.

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