

Vinu and Others Vs. State of Kerala Represented by Public Prosecutor and Another

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Court : Kerala

Decided On : Dec-08-2011

Judge : K.T. Sankaran

Appeal No. : Bail Appl.Nos.8049 of 2011, 8706 of 2011 & 8752 of 2011

Appellant : Vinu and Others

Respondent : State of Kerala Represented by Public Prosecutor and Another

Judgement :

The question involved in these Bail Applications is whether the period of 90 days or 60 days will apply for default bail under the proviso (a) to sub-section (2) of Section 167 of the Code of Criminal Procedure in respect of an offence under Section 457 of the Indian Penal Code.

2. The Bail Applications are filed by accused Nos.1, 2 and 5 in Crime No.638 of 2011 of Panthalam Police Station. The offences alleged against the accused are under Sections 457, 461, 380, 201 and 465 read with Section 34 of the Indian Penal Code.

3. The prosecution case is the following: The accused, after making all preparations for breaking open Mazhuveli Service Co-operative Bank Ltd. for the purpose of committing theft, broke open the bank at about 11 P.M. on 20.8.2011.

They broke open the storing room of the bank and committed theft of Rs.3,79,204/-. They could not break open during that night the chest drawer where gold was kept, since time ran out. They left the place at about 5 A.M. At about 11 P.M. on 21.8.2011, which was a Sunday, the accused again stealthily entered into the bank through the way which they had cut open and committed theft of 4223.7 grams (527.96 sovereigns) of gold kept in the chest drawer. For committing the offence, the accused used gas cylinder, gas cutter and other equipments and implements. They had also arranged a van with a fake registration number for the purpose of committing the offence.

4. Accused Nos.1, 2 and 5 were arrested and they were remanded to judicial custody. Final report was not filed by the investigating officer within 60 days. According to the learned counsel for the petitioners, the offences alleged against the accused would attract proviso a(ii) to sub-section (2) of Section 167 of the Code of Criminal Procedure. Hence they are entitled to default bail since the charge sheet was not filed within 60 days.

5. The learned Public Prosecutor submitted that for the offence under Section 457 of the Indian Penal Code, the imprisonment provided for is 14 years and hence proviso a(i) to sub-section (2) of Section 167 of the Code of Criminal Procedure would apply. It is submitted that the accused would be entitled to default bail only if the final report is not filed within 90 days from the date of remand.

6. Clause (a) of the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure reads as follows:

“Provided that -

(a) the Magistrate may authorize 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 authorize 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 released under the provisions of Chapter XXXIII for the purposes of that Chapter;”

(emphasis supplied)

7. It is apposite to extract Section 457 of the Indian Penal Code.

“457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment:-- Whoever commits lurking house trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.”

8. In *Rajeev Chaudhary v. State (N.C.T.) of Delhi* (AIR 2001 SC 2369 = (2001 (5) SCC 34), the expression “offence punishable with imprisonment for a term of not less than 10 years” occurring in proviso (a) to Section 167(2) of the Code of Criminal Procedure came up for consideration. In that case, the offence alleged was under Section 386 of the Indian Penal Code. Section 386 of the Indian Penal Code provides for a punishment with imprisonment of either description for a term which may extend to ten years and also with fine (emphasis supplied). The Supreme Court held as follows:

“6. From the relevant part of the aforesaid sections, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term “not less than 10 years”, the Magistrate is empowered to authorize the detention of the accused in custody for not more than 90 days. For rest of the offences, period

prescribed is 60 days. Hence in case, where offence is punishable with imprisonment for 10 years or more, accused could be detained up to a period of 90 days. In this context, the expression “not less than” would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider Clause (i) of Proviso (a) to Section 167(2) it would be applicable in case where investigation relates to an offence punishable (i) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the I.P.C. imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.”

9. In *Bhupinder Singh and others v. Jarnail Singh and another* (AIR 2006 SC 2622), the Supreme Court considered the question whether Section 304B of the Indian Penal Code would attract clause (a)(i) of the proviso to Section 167(2) of the Code of Criminal Procedure and it was held in the affirmative. Section 304B of the Indian Penal Code provides that whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. The Supreme Court held thus:

“11. In other words, the minimum sentence is 7 years but in a given case sentence of imprisonment for life can be awarded. Put differently, sentence of imprisonment for life can be awarded in respect of an offence punishable under S.304B, IPC. Proviso to sub-section (2) of S.167 consists of three parts. The first part relates to power of Magistrate to authorize detention of the accused person. This part consists of two sub-parts. In positive terms it prescribes that no Magistrate shall authorize detention of the accused in custody, under this paragraph (meaning sub-section (2)(a) for a total period exceeding (i) 90 days where the investigation relates to an offence punishable under death,

imprisonment for life or imprisonment for a term of not less than 10 years (ii) 60 days where the investigation relates to any other offences. The period of 90 days is applicable to cases where the investigation relates to the three categories of offences which are punishable with (i) death, (ii) imprisonment for life; or (iii) imprisonment for a term of not less than ten years. The question is whether S.304B is an offence “punishable with imprisonment for life.”

10. After referring to Rajeev Choudhary’s case, it was held thus:

“This Court held that the expression “not less than” means that the imprisonment should be 10 years or more to attract 90 days period. In that context it was said that for the purpose of Cl.(i) of proviso (a) of S.167(2), Cr.P.C. the imprisonment should be for a clear period of 10 years or more. The position is different in respect of the offence punishable under S.304B, IPC. In case of S.304B the range varies between 7 years and imprisonment for life.

.....

14. Where minimum and maximum sentences are prescribed both are imposable depending on the facts and the cases. It is for the Court, after recording conviction, to impose appropriate sentence. It cannot, therefore, be accepted that only the minimum sentence is imposable and not the maximum sentence. Merely because minimum sentence is provided that does not mean that the sentence imposable is only the minimum sentence. The High Court’s view in the impugned order that permissible period of filing of challan is 90 days is the correct view. Contrary view expressed by Jharkhand, Delhi and Karnataka High Courts is not correct Himachal Pradesh, Rajasthan and Punjab and Haryana High Courts taking the view 90 days is the period have expressed the correct view.”

11. In *Sreerangan v. State of Kerala* (2001 (1) KLJ 537), in respect of an offence under Section 8(1) and (2) of the Abkari Act which provides for a punishment of imprisonment which may extent upto 10 years, the Kerala High Court held thus:

“According to the Public Prosecutor, the expression “offence punishable with imprisonment which may extent up to 10 years includes all offences where the

punishment is imprisonment for a term not less than 10 years referred to in proviso (a)(i) of Section 167 Cr.P.C. I cannot agree. To attract the proviso (a)(i) of Section 167(2), the offence must be punishable with death, imprisonment for life or imprisonment for a term not less than 10 years. But in the case of an offence punishable with imprisonment which may extend up to 10 years, the court is competent to pass a sentence of imprisonment less than 10 years. Therefore, an offence punishable with imprisonment which may extend up to 10 years is covered by the proviso (a)(ii) to Section 167(2) and not covered by proviso (a)(i). In all cases where the offences are punishable with imprisonment which may extend up to 10 years, the legislature does not expect the imposition of sentence of imprisonment not less than 10 years. In case covered by proviso (a)(i) of Section 167 (2) the minimum punishment is imprisonment for 10 years whereas in the case of an offence punishable with imprisonment which may extend up to 10 years the maximum punishment is imprisonment for 10 years. Therefore the two cases cannot be included in the same category. In this case the petitioner is alleged to have committed an offence punishable with imprisonment for a term which may extend to 10 years and with fine which shall not be less than Rs.1 lakh. As already noticed, the petitioner is in custody since 23.12.2000. Therefore, he has to be released on bail if he is prepared to and does furnish bail in view of the proviso (a)(ii) to Section 167 of the Cr.P.C.”

12. Under Section 457 of the Indian Penal Code, a person who commits lurking house trespass by night, or house-breaking by night in order to commit theft can be punished for imprisonment which may extend to fourteen years. The expression “imprisonment may be extended to fourteen years” occurring in Section 457 I.P.C. would attract the expression “imprisonment for a term of not less than ten years” in proviso (a) (i) of sub-section (2) of Section 167 of the Code of Criminal Procedure. The court can punish such an offender for a term of more than ten years. If so, he can be detained up to a period of 90 days, without there being a final report under Section 173(2) of the Code of Criminal Procedure. In the light of the decisions of the Supreme Court in *Rajeev Choudhary* and *Bhupinder Singh*, I am of the view that the contention put forward by the counsel that the petitioners are entitled to default bail since the final report was not within sixty days is unsustainable.

13. I am of the view that the observation in *Sreerangan v. State of Kerala* : 2001 (1) KLJ 537) to the effect that a minimum punishment of imprisonment for 10 years is required to attract proviso (a) (i) of sub section (2) of Section 167 CrI.P.C. does not appear to be correct in view of the decision of the Supreme Court in *Bhupinder Singh and others v. Jarnail Singh and another* : AIR 2006 SC 2622.

14. When the arguments were advanced in the Bail Applications, the period of 90 days from the date of remand of the petitioners was not over. However, now the period of 90 days elapsed and it is submitted that no final report is filed even now. Therefore, the petitioners are entitled to default bail under the proviso to Section 167(2) of the Code of Criminal Procedure.

15. The Petitioners shall be released on bail on their executing bond for Rupees fifty thousand each with two solvent sureties each for the like amount to the satisfaction of the Judicial Magistrate of the First Class, Adoor, subject to the following conditions:

(a) The petitioners shall report before the investigating officer between 9 A.M. and 11 A.M. on all Mondays and Thursdays for a period of one month and thereafter on all Mondays, till the final report is filed or until further orders;

(b) The petitioners shall appear before the investigating officer for interrogation as and when required;

(c) The petitioners shall surrender their Passports before the Court of the Judicial Magistrate of the First Class, Adoor. If the petitioners do not hold Indian Passport, an affidavit to that effect shall be filed by them before the learned Magistrate;

(d) The petitioners shall not leave India till the trial of the case is over;

(e) The petitioners shall not try to influence the prosecution witnesses or tamper with the evidence;

(f) The petitioners shall not commit any offence or indulge in any prejudicial activity while on bail;

(g) In case of breach of any of the conditions mentioned above, the bail shall be liable to be cancelled.

These Bail Applications are allowed as above.

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