

RAJNIKANT JIVANLAL PATEL & ANOTHER
v.
INTELLIGENCE OFFICER NARCOTIC CONTROL BUREAU
NEW DELHI.

JUNE 26, 1989

[K. JAGANNATHA SHETTY, J.]

Criminal Procedure Code, 1973: Sections 167(2) proviso (a), 437, 439 and 482—Accused remanded to jail custody—Charge sheet filed after ninety days—Magistrate releasing accused on bail—High Court ordering re-arrest of accused by cancelling bail—Validity of High Court order.

Narcotics Drugs & Pyschotroic Substance Act, 1985: Sections 21, 23 and 29—Accused released on bail by Magistrate on ground charge-sheet not filed within ninety days—High Court cancelling bail and ordering re-arrest of accused—Validity of High Court order.

The petitioners were arrested on March 23, 1988 and produced before the Chief Metropolitan Magistrate, who remanded them to jail custody. During the pendency of petitioner's application for bail, the prosecution filed charge-sheet on June 23, 1988 for offences under Section 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Thereafter, on the petitioners' application for bail under Section 167(2) Cr.P.C. on the ground that the charge-sheet was filed after the expiry of ninety days of their arrest, the Magistrate enlarged them on bail.

On an application, under sec. 439(2) read with Section 482 of the Cr.P.C., filed by the prosecution for cancellation of the bail, stating that since two of the accused were earlier absconding, the investigation in the case could not be completed within the time frame, the High court cancelled the bail order. Hence, the special leave applications by the petitioners.

On the question: whether the discretion exercised by the High Court was legally sustainable and whether the accused had a special right to remain on bail merely because they had been enlarged under Proviso (a) to Section 167(2) of the Code,

A Dismissing the Special Leave Petitions,

B HELD: An order for release on bail under proviso (a) to Section 167(2) of the Code of Civil Procedure may appropriately be termed as on *order-on-default*. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under the provision is absolute. It is a legislative command and not Court's discretion. If the investing agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. At that stage, merits of the case are not to be examined. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. [381E-G]

D The accused cannot claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled under Sections 437(5) or 439(2) of the Code. [381H]

E In the instant case, the offences alleged are of serious nature and the discretion exercised by the High Court does not call for any interference. [382A]

Raghubir Singh v. State of Bihar, [1986] 3 SCR 802, referred to.

CRIMINAL APPELLATE JURISDICTION: Petitions for Special Leave to Appeal (Criminal) Nos. 1090-91 of 1989.

F From the Judgment and Order dated 8.5.1989 of the Delhi High Court in Misc. Appln. No. 106/89 & 107/1989.

U.R. Lalit, Tushar Shah and B.V. Desai for the Petitioners.

J.S. Arora and Satish Agarwala for the Respondent.

G The Judgment of the Court was delivered by

H K. JAGANNATHA SHETTY, J. The petitioners were released on bail by the Enquiry Magistrate under proviso (a) to Section 167(2) of the Code of Criminal Procedure. After filing of the charge-sheet the High Court ordered their re-arrest by cancelling the bail. The order of

the High Court is now under challenge.

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I do not find any merit in these petitions. But before dismissing, I wish, however, to draw attention to some aspects of the question raised.

The facts:

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On 23 March, 1988 the petitioners were arrested in Bombay by officers of the Narcotic Control Bureau. They were ordered to be produced before the competent Magistrate at New Delhi. They were accordingly produced before the Additional Chief Metropolitan Magistrate, New Delhi. On 29 March, 1988 they were remanded to jail custody till 12 April, 1988. The remand order was subsequently renewed from time to time. On 10 May, 1988 the petitioners moved the Chief Metropolitan Magistrate for bail. When that petition was pending consideration, the prosecution submitted charge-sheet. The charge-sheet was filed on 23 June, 1988 for offences under Sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On July 22, 1988 the petitioners filed an application for bail under Section 167(2) Cr. P.C. on the ground that the charge-sheet was filed after the expiry of 90 days of their arrest. On 29 July, 1988 learned Magistrate enlarged them on bail on their furnishing self bonds in the sum of Rupees two lakhs each with two surety bonds in the sum of Rs.1 lakh each.

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The efforts of the prosecution to have the bail cancelled could not succeed before learned Magistrate. So they moved the Delhi High Court under Section 439(2) read with section 482 of the Cr.P.C. In that application, the nature of the offence committed, the part played by the accused, the gravity of the offence etc., were all set out. It was also stated that since two of the accused were earlier absconding, the investigation in the case could not be completed within the time frame.

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The High Court by following the decision of this Court in *Raghubir Singh v. State of Bihar*, [1986] 3 SCR 802 and after considering the material on record cancelled the bail order.

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The High Court said:

“In the present cases, no doubt an order was passed granting bail because the charge sheet was not filed within the statutory period of 90 days but it was filed on 92 days.

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- A There is no doubt that the charge against the respondents is very serious in nature because they are alleged to have entered into a conspiracy to export heroin out of India. The minimum punishment prescribed in such offence is a sentence of 10 years rigorous imprisonment, and a fine of Rupees one lakh. I am, therefore, of the view that the authority referred above is fully applicable to the facts of the present case. Respondents are further alleged to have procured services of one H.S. Gala and a lady carrier Manjula Ben who carried 3 Kg. heroin from India to USA in November 1987. Therefore it was on the basis of the statements made by those persons in USA that the respondents were arrested in India.
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I am, therefore, of the view that it is a fit case where order of bail should be cancelled."

- D The question is whether the discretion exercised by the High Court is legally sustainable? Whether the accused have a special right to remain on bail merely because they have been enlarged under proviso (a) to Section 167(2) of the Code?

- E It is not disputed and indeed cannot be disputed that when an accused is granted bail, whether under proviso (a) to Section 167(2) or under the general provisions of Chapter XXXIII, the only method by which the bail may be cancelled is to proceed under Section 437(5) or Section 439(2). That is because the person released on bail under the proviso to Section 167(2) shall be deemed to be so released under the provisions of Chapter XXXIII of the Code.

- F Sub-section (5) of Section 437 provides:

"Any Court which has released a person on bail under sub-section (1) or sub-section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody."

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Sub-section (2) of Section 439 provides:

"A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

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Under sub-section (5) of Section 437, the Court if it considers it necessary, direct that the person on bail be arrested and committed to custody. The bail may be cancelled by the Court if it comes to the conclusion that there are sufficient grounds that the accused has committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. This is what this Court observed in *Raghubir Singh v. State of Bihar*, [1986] 3 SCR 802. It was said (at 826):

“Where bail has been granted under the proviso to section 167(2) for the default of the prosecution in not completing the investigation in sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed.”

And said:

“The order for release on bail was not an order on merits but was what one may call an order-on-default, and order that could be rectified for special reasons after the defect was cured.”

An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as *an order-on-default*. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.

The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.

A I examined the material on record. The offences alleged are of serious nature. I am of the opinion that the discretion exercised by the High Court does not call for any interference. The Petitions, are, therefore, rejected.

B N.P.V.

Petitions dismissed.