

(2014) 01 CAL CK 0053
In the Calcutta High Court
Case No : W.P. No. 37935 (W) of 2013

Aparna Makhal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 309, 309(2)
General Clauses Act, 1897 — Section 3
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 29(b)(ii)(B)

Citation : (2014) 3 RCR(Criminal) 18

Hon'ble Judges : Shubhro Kamal Mukherjee, J;Asim Kumar Mondal, J

Bench : Division Bench

Advocate : Sabyasachi Banerjee, Ayan Bhattacharya and Arijit Ghosh, Advocate for the Appellant; Manjit Singh, Public Prosecutor and Pawan Kumar Gupta, Advocate for the Respondent

Judgement

1. This is an application under Article 226 of the Constitution of India for habeas corpus of the accused person, namely, Sanjay Makhal alias Raju. 3.6 kilograms "Ganja" was recovered from the possession of the accused person. Jagacha Police Station Case No. 42 of 2012 dated January 30, 2012 was started u/s 29(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act of 1985).

2. In this case charge-sheet has been submitted. Charges have been framed. The trial is in progress before the learned Additional District and Sessions Judge, Third Court at Howrah, who is designated as the Special Court for the purpose of the said Act of 1985.

3. On October 3, 2013 the accused person, namely, Sanjay Makhal alias Raju, was produced before the Court from the correctional home. One witness, that is, the prosecution witness No. 8 was cross-examined and discharged.

4. The said Court, considering its diary, fixed February 20, 2014 and February

21, 2014 for further evidence. The accused was directed to be produced on the next date.

5. Mr. Sabyasachi Banerjee, learned advocate appearing for the petitioner, strenuously argues that the Special Court under the said Act of 1985 is a court of original jurisdiction.

6. He draws our attention to sub-section (32) of Section 3 of the General Clauses Act. The said provision defines that Magistrate as every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.

7. He submits, therefore, that the Special Court cannot direct remand of an accused person to custody for a term exceeding fifteen days at a time.

8. Section 309(2) first proviso of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) provides that no magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time.

9. Mr. Banerjee, further, submits that remanding the accused person for more than fifteen days amounts to deprivation of its personal liberty de hors the provisions of law and, therefore, the petitioner is entitled to protections under the Constitution of India.

10. Mr. Banerjee refers to a decision of the Supreme Court of India in the case of Sapmawia Vs. Deputy Commissioner, Aijal,

11. The Supreme Court of India in Sapmawia (supra), inter alia, held that when an authority failed to satisfy the court that the deprivation of the personal liberty of the accused was according to the procedure established by the law, the accused person was entitled to his liberty. However, the Supreme Court of India, also, noted with caution that by virtue of such release only on habeas corpus did not deprive the authority of the power to arrest and keep him in custody in accordance with law as writ of habeas corpus was not designed to interrupt the ordinary administration of the criminal justice.

12. Mr. Banerjee, also, cites the decision of the Supreme Court of India in the case of Ram Narayan Singh Vs. The State of Delhi and Others, He submits that the writ of habeas corpus is maintainable when the lawfulness or otherwise of the custody of the person concerned was in question.

13. Finally, he cites a decision of the Full Bench of the Patna High Court in the case of Babu Nandan Mallah Vs. The State,

14. The Full Bench of the Patna High Court held that no magistrate could violate the command of the legislature and could remand an accused person to custody u/s 344 of the Code of Criminal Procedure, 1898, for a term exceeding fifteen days at a time. The custody in pursuance of an order of remand for a term exceeding fifteen days was illegal and bad on the expiry of fifteen days, if not

from the date of the order.

15. Mr. Manjit Singh, learned Public Prosecutor, per contra, argues that the order impugned is not illegal. The Code uses two expressions "Court" and "Magistrate" separately. He submits that had the remand been made by a Magistrate, the remand exceeding fifteen days would have been illegal, but since the remand has been made by the Special Court in course of trial, the order is not illegal and, therefore, the petitioner is not entitled to relief. He has referred to a decision in the case of Koomar Indraneel @ Caesar and Another Vs. The State of Bihar, where a Division Bench of the Patna High Court held that limit of fifteen days for remanding an accused to custody as provided u/s 309 of the Code of 1973 was meant for Magistrate only and not for the court of Sessions, which was clear from the proviso to Section 309(2) of the said Code of 1973. The absence of mention of Court of Sessions in this proviso left no room for any doubt that a Court of Sessions had been kept out of this proviso defining the limit of period of remand at a time of an accused to custody.

16. There is a practical aspect of the matter. The session is on. One witness has been examined, cross-examined and discharged.

17. The trial court considering the pendency of the cases in the court fixed February 20, 2014 and February 21, 2014 for recording further evidence of the case and directed the accused person to be produced on the next date.

18. If Mr. Banerjee's submission is accepted and the accused is produced every fortnight to rule out the rigour of proviso of Section 309(2) of the Code, no useful purpose will be served as the court will again send him on remand. This will only complicate the situation and embarrass the proceedings before the court.

19. When the legislation has exercised two expressions in the statute it has to be presumed that the expressions were used consciously.

20. In Section 309(2) of the Code the expression "Court" was mentioned, but in the proviso of Section 309(2) of the said Code the expression "Magistrate" was mentioned. It should have been better if the Court concerned fixed next date of the trial expeditiously, but we cannot say that fixing a date of trial after about four months vitiates the trial or makes the order illegal. The order asking the authorities to produce the accused on the next date is not also illegal.

21. The application under Article 226 of the Constitution of India is, therefore, rejected.

22. However, we grant liberty to the accused/person to apply before the learned trial Judge for bail. If any application is made, the learned trial judge is requested to decide the same in accordance with law expeditiously. The office is directed to supply photostat certified copy of this order to the applicant, if applied for, on urgent basis.