
(1993) 08 PAT CK 0016

In the Patna High Court

Case No : Criminal Misc. No. 979 of 1993

Chaitu Sahni and Rama Sahni

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 25-08-1993

Acts Referred:

Citation : (1993) 08 PAT CK 0016

Judgement

S.K. Chattopadhyaya, J.—The petitioners have moved this Court with a prayer to quash the order dated 23-12-1992 passed by the learned C.J.M., Muzaffarpur by reason of which the Court has recalled the order dated 18-12-1992 passed u/s 167(2)(a) of the Code of Criminal Procedure (hereinafter referred to as the Code). By reason of said order dated 18-12-1992, the petitioners were released on bail on the ground that the charge-sheet in the case was not filed within prescribed statutory time.

2. Learned Counsel for the petitioners as well as the State have agreed that this case may be disposed of at the stage of admission itself had as such extensive hearing was given to the parties.

3. The question is to be decided in this case as to whether once the order of bail granted to the petitioners under the provisions of Section 167(2)(a) of the Code, the same could be recalled after filing of the charge-sheet and before the petitioner could furnish surety for their release.

4. The facts of the case, which are not in dispute, lies in a narrow compass.

5. On the basis of an F.I.R. lodged by one Sudama Devi, Bochha P.S. Case No. 80/92 was registered under Sections 498(A), 304(B) and 201 of the Indian Penal Code against the petitioners as well as one Jhilmiliya Devi. The allegation in the F.I.R. is to the effect that the daughter of the informant, namely Meera Devi was married with petitioner No. 2 nearly two years ago. The husband of the informant had gone the house of petitioner No. 2 for fixing the date of Rokshadi of her daughter and the date of Rokshadi was fixed on 17-8-1992 by the petitioner No.

1. When the husband of the informant had gone to his daughter, petitioner No. 1 and co-accused Jhilmiliya Devi informed the husband of the informant that Meera Devi had committed suicide on 15-8-1992. The husband of the informant returned to the house of his Sawral and narrated this fact to the mother-in-law i.e., the mother of the informant. It is alleged that subsequent hereto, the informant came to show that though petitioner No. 2 informed her that Meera Devi committed suicide but petitioner No. 1 and his wife Jhilmiliya Devi told the informant that Meera Devi had pain in her abdomen and she died. The informant alleged that her daughter was subjected to cruelty of her husband due to non-receipt of Silver Hasuli from the informant so Meera Devi had committed suicide.

6. On the basis of these allegations, the aforesaid case was registered against the petitioners and Jhilmiliya Devi under the above mentioned sections of the Indian Penal Code.

7. It appears that investigation was started but as no charge-sheet was submitted within the prescribed period of 90 days, the Petitioners filed a petition before the court below u/s 167(2) of the Code. The C.J.M. being satisfied that no charge-sheet was submitted within 90 days, released the petitioners on bail by his order dated 18-12-1992, as provided u/s 167(2) of the Code.

8. It is not in dispute that after the said bail order was passed on 18-12-1992, the petitioners did not furnish any bail bond either on 18-12-1992 or on 19-12-1992. In the meantime, it appears that the charge-sheet was submitted against them on 19-12-1992 at 7.30 p.m. On 22-12-1992; the petitioner filed bail bond with affidavit but a petition was filed by the A.P.P. on the same date stating therein that as the charge-sheet has already been submitted on 19-12-1992 and since till that date no bail bond was filed on behalf of the petitioners, the order granting bail to the petitioners should be recalled taking into consideration the heinous nature of offence. On such petition being filed the matter was heard at length and by reason of the impugned order, the learned C.J.M. recalled the order dated 18-12-1992.

9. Learned Counsel for the petitioners relying on the decision of Aslam Babalal Desai Vs. State of Maharashtra, , has contended that once order for releasing the petitioners was passed u/s 167(2) of the Code, subsequent filing of the charge-sheet will not empower the court below to cancel the said order. It is further contended that once an order of release on bail is made under the proviso to Section 167(2) it is not defeated by lapse of time and on the mere filing of the charge-sheet at a subsequent date.

10. On the other hand, learned Counsel for the State relying on the decision of Sankar alias Gowri Sankar and others Vs. State of Tamil Nadu, and Abdul Wahid Vs. State of Maharashtra, , has contended that an order for release on bail is an order on default meaning hereby that it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed time. It is submitted further that though by order dated 18-12-1992, the petitioners were released on

bail by the court below on the ground of non-filing of the charge-sheet within the prescribed period, but admittedly the petitioner did not furnish surety and as such on filing of the charge-sheet on 19-12-1992, the order dated 18-12-1992, will be deemed to have been extinguished.

11. In order to appreciate the rival contentions of the parties, it is necessary to have a glance to the provisions, as contained in Section 167 of the Code :

167. Procedure when Investigation cannot be completed on twenty-four hours.--

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom no accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole ; and if he has no Jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provide that--

(a) the Magistrate may authorise the detention of the accused person, otherwise than in 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 authorise the detention of the accused person in custody under this paragraph 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 so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him ;

(c) no Magistrate of the second class, not specially empowered in this behalf by

the High Court, shall authorise detention in the custody of the police.

(2-A) notwithstanding anything contained in Sub-section (1) or Sub-section (2), the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven day; in the aggregate ; and, on the expiry of the period of detention, so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order ; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this Sub-section, shall be taken into a count in computing the period specified in Paragraph (a) of the proviso to Sub-section (2) :

Provided that before the expiry on the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer-in-charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded Within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Session Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under Sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

12. From the provisions, as quote above, it appears that proviso (a) to Sub-section (1) of Section 167 contemplates that Magistrate shall have no power to detain an accused in custody after expiry of 90/60 days if the accused is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII of the Code for the purposes of that Chapter (emphasis added).

13. Taking into consideration this mandate of the Legislature, it is clear that even after the order is passed for releasing the petitioner on bail the petitioner will be released only when he furnishes bail bond and not before that. In the instant case, the order to release the petitioners was issued on 18-12-1992, but neither on the same date nor on 19-12-1992 till 7.30 p. m., when the charge-sheet was submitted, the petitioners filed any bail bond. It thus appears that the petitioners admittedly did not avail the opportunity of getting themselves released on the basis of the order of bail dated 18-12-1992. .

14. In the case of Aslam Babalal Desai (supra), their Lordships of the Supreme Court were dealing with a case where by order dated 11th March, 1991 the learned Sessions Judge directed the release of the appellant on bail under the proviso to Section 167(2) of the Code on the ground that the investigation has not been completed within 90 days After the charge-sheet in the said case was submitted and the documents were tendered subsequent thereto, the State moved an application u/s 439(2) of the Code in the High Court for cancellation of bail granted by the learned Sessions Judge. The High Court cancelled the bail on the ground that since the learned Sessions Judge had granted bail on a technical ground, namely, failure to file the charge-sheet within the time allowed and since the investigation revealed the commission of a serious offence of murder, the High Court was empowered to cancel the order of bail. When the matter was brought to the notice of the apex court, the apex court, dealing with catena of decisions, has held that cancellation of bail order on ground of subsequent filing of charge-sheet was not permissible. In ray view, this decision is of no help to the petitioners, inasmuch as, in the aforesaid case, the appellant was release on bail obviously by filing bail bonds and as such the Supreme Court has observed that a person who has been enlarged on bail under the provisions of Section 167(2), the Court should proceed on the basis that he has been deemed to have been released u/s 437 (1) and (2) of the Code.

15. The Supreme Court in the aforesaid case inter alia has held, as follows:

The deeming fiction of correlation the release on bail under Sub-section (2) of Section 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release, is by fiction of law an order passed u/s 437 (1) or (2) or 439(1) it follows as a natural consequence that the said order can be cancelled under Sub-section (5) of Section 437 or Sub-section (x) of Section 439 on considerations relevant for cancellation of an order thereunder.

In the aforementioned case the apex court was not considering a case in which though order granting bail was passed but the accused did not furnish any bail bond for getting himself released on the basis of the said order before filing of the charge-sheet. Thus, the facts and circumstances of the present case differ from that of the case of Aslam Babalal Desai (supra).

16. On the other hand, Madras High Court in the case of Shankar Gowri Shankar and Ors. (supra), relying on the Full Bench decision of 1982 Criminal Law Journal 284, which Full Bench relied on the decision of the Supreme Court in Brahmin's case AIR 1982 SC 439, has held as follows:

In the light of the discussion as made above, the legal position obtaining as on date regarding the right of the person accused of a non-bailable offence to be enlarged on bail, under the beanvolant provision of Section 167(2), Cr.P.C. any succinctly be summarised as follows:

An order for release on bail under proviso (a) to Section 167(2) is an order on default. The accused is entitled to be released on bail on account of default on the part of the prosecution to file charge-sheet within the prescribed period if he is prepared to and does furnish bail. It is a legislative command and not Court's discretion. In other words, 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. The Magistrate has no power to remand the accused beyond the stipulated period of 90/60 days, and he should be released on bail if he is prepared to and furnishes bail. The accused cannot claim any special right to remain on bail. In other words, the accused cannot claim that his right to remain on bail can, under no circumstances, be defeated. If the investigation reveals that (i) the accused has committed a serious offence and (ii) charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled. If the accused has not made application for his release on bail, after expiry of the period prescribed by the proviso (a) to Section 167(c) and before filing of the charge-sheet had no right to claim his release on bail after filing of the charge-sheet/final report, solely on the ground that the charge-sheet/final report was not submitted within the prescribed period. The Magistrate who is not otherwise having the power to release a person accused of a non-bailable offence acquires such a power in the contingency of the investigating agency not filing the final report within the prescribed statutory period, and such release on bail, if the person is prepared to and does, furnish bail, shall be deemed to be a release under Chapter XXXIII of the Code of Criminal Procedure and there is no warrant for the inference or deduction that the accused shall be deemed to have been released on bail on the expiry of 90/60 days, thereby making the further detention illegal.

17. The Division Bench decision of the Bombay High Court in the case of Abdul Wahid (supra) relied on behalf of the State, in my considered opinion is not relevant in the facts and circumstances of the present case, In the aforesaid

case, the applicant was in custody even after the expiry of the 90 days. The charge-sheet was filed on 92nd days from the date of arrest. The applicant's prayer for bail was refused by the learned Sessions Court despite the contention of the applicant that he was entitled to be released on bail under proviso (a) to Section 167(2) of the Code. Dealing with the facts and circumstances of the case and several decisions, the Division Bench observed that the right accrued to the accused who is in custody, under the proviso to Sub-section (2) of Section 167 of the Code can be exercised by him only before the charge sheet is filed, If, however, he continues to be in custody because no order granting him bail is passed under that proviso, the Magistrate's power of granting bail once the charge-sheet is filed, can be exercised only u/s 437 of the Code. In the latter case, the right to bail cannot be claimed under the proviso to Sub-section (2) of Section 167 of the Code.

18. In the case of *Ashok Paswan v. the State of Bihar*, reported in 1988, PLJR 274, this Court has held that two conditions have been laid down in Section 167 of the Code for release of a accused on bail. The first condition is that the report u/s 173 of the Code is not submitted within the prescribed time and secondly, the accused in custody must furnish bail bond. Failure on the part of the police to submit the charge-sheet within the prescribed period, alone, cannot entitle an accused to be released on bail unless he furnished bail bond. After submission of the charge-sheet by the police, a new legal situation emerged and the right which is available to the accused for being released on bail during the course of police investigation, is extinguished. The provisions of Chapter XII cease to become applicable under the changed situation. As the report is submitted after the completion of the investigation, the power of the Magistrate's to remand the accused to custody under this section comes to an end. The remedy for the accused, therefore, lies in taking recourse to the provisions of Chapter XXXIII of the Code.

19. Having considered the relevant provisions of law and the decision cited at the Bar, I am of the view that although the petitioners were ordered to be released on bail by order dated 18-12-92, but the petitioners admittedly failed to furnish bail bond before submission of charge sheet on 19-12-92. The bail bond was admittedly furnished on 22-12-92 i.e. three days after the submission of the charge-sheet and, as such by that time the effect of order dated 18-12-92 deemed to have been extinguished.

20. Lastly, it has been submitted by the petitioners that the learned Magistrate could not have cancelled and/or recalled his own order. It is true that a criminal court has got no power to recall or review its order except to correct its clerical or arithmetic error as laid down u/s 362 of the Code, but in my view, the petitioners themselves having failed to furnish bail bond, they were not released on bail and as such the impugned order passed by the Magistrate cannot be said to be an order of recall or cancellation of bail. Although, the Court below has used the expression "deemed to be cancelled", but in substance it was neither an order of

recall nor cancellation of the bail bond. In such view of the matter, I find no merit in this submission also.

21. In the result, I find no merit in this application and, as such, it is dismissed.

22. However, as the case is of August, 1992 and the petitioners are in custody, the trial Court is directed to conclude the trial as expeditiously as possible, preferably by 31st of January, 1991. The trial Court is further directed to take all possible steps under the law to secure the attendance of the prosecution witnesses.

23. The office is directed to send down the lower Court records along with a copy of this order to the Court below forthwith.