

(2008) 05 GUJ CK 0028

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 2759 of 2008

Dabhi Rameshbhai Philipbhai

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 08-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 173(1), 439
Penal Code, 1860 (IPC) — Section 114, 304B, 363, 366, 376

Citation : (2008) 05 GUJ CK 0028

Hon'ble Judges : D.N. Patel, J

Bench : Single Bench

Advocate : Rajesh K. Shah, for the Appellant; K.T. Dave, Assistant Public Prosecutor for Respondent No. 1 and Shakeel A Qureshi, for the Respondent

Judgement

D.N. Patel, J.—The present Application has been preferred against the judgment and order dated 25th February, 2008 in Criminal Revision Application No. 65 of 2008 passed by the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara, whereby respondent No. 2 accused was enlarged on bail for the reason that charge-sheet was not filed within a period of 60 days and therefore, as per Sub-section (2) of Section 167 of the Code of Criminal Procedure, the respondent No. 2 accused was enlarged on bail.

2. Having heard the learned advocates for both the sides and looking to the facts and circumstances of the case and the evidence on record, the order dated 25th February, 2008 in Criminal Revision Application No. 65 of 2008 passed by the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara is hereby quashed and set aside, mainly for the following facts and reasons:

(i) It appears from the facts of the case that the offence was registered against respondent No. 2 accused bearing CR. No. I-390 of 2007 at Fatehganj police station, Vadodara on 7th December, 2007 for the offence punishable under Sections 363, 366 and 114 of the Indian Penal Code. The respondent No. 2 was arrested on 8th December, 2007. Thereafter, he was taken in judicial custody on

10th December, 2007. For the earlier days, from 10th December, 2007 he was given police remand. Thus, judicial custody of the respondent No. 2-accused started from 10th December, 2007.

(ii) It appears that the respondent No. 2 accused preferred bail application on 20th December, 2007. This bail application was preferred u/s 439 of the Code of Criminal Procedure which was rejected on 20th December, 2007.

(iii) It appears that thereafter on 18th February, 2008, respondent No. 2 accused preferred an application u/s 167(2) of the Code of Criminal Procedure for getting enlarged on bail mainly for the reason that charge-sheet was not filed by the Investigating Agency within a period of 60 days from the date on which he was taken in judicial custody.

(iv) It appears that charge u/s 376 of the Indian Penal Code was added on 20th February, 2008. Looking to the allegations levelled against respondent No. 2 accused, the offence alleged against respondent No. 2 is punishable for imprisonment of 10 years or more and this aspect of the matter has not been considered in Criminal Revision Application by the learned Additional Sessions Judge, which was preferred by respondent No. 2 accused.

(v) It also appears from the facts of the case that the learned Judicial Magistrate First Class has dismissed the application preferred by respondent No. 2 accused on 18th February, 2008 and held that respondent No. 2 accused is not entitled to bail under Sub-section (2) of Section 167 of the Code of Criminal Procedure (popularly known as default bail). Against this order, Criminal Revision Application No. 65 of 2008 was preferred before Sessions Court, Vadodara and the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara vide his judgment and order dated 25th February, 2008 has allowed Criminal Revision Application preferred by respondent No. 2-accused and enlarged the respondent No. 2-accused on bail u/s 167(2) of the Code of Criminal Procedure because Investigating Agency had not filed the charge-sheet within 60 days. The learned Additional Session Judge has not at all considered the allegations u/s 376 of the Indian Penal Code against respondent No. 2-accused. This is an error apparent on the face of the record. Had the learned Additional Sessions Judge, Vadodara considered Section 376 of the Indian Penal Code, for which charge was levelled against respondent No. 2-accused, he would not have enlarged respondent No. 2-accused on bail u/s 167(2) of Criminal Procedure Code. It also appears from the facts of the case that looking to the charges levelled against respondent No. 2, the offences now alleged against him is under Sections 363, 366, 114 and 376 of the Indian Penal Code. Thus, looking to this section, the respondent No. 2-accused can be awarded rigorous imprisonment of 10 years or more and hence charge-sheet can be filed within 90 days from the date on which accused was taken in judicial custody. Court has to see, what maximum sentence can be awarded and not the minimum. Words used in Section 167(2) are "punishable" means maximum punishable. "Not less than ten years" words used in Section 167(2) means ten years or more. If offence is punishable for ten years

or more, then charge-sheet can be filed within 90 days from judicial custody of accused. Here, order passed by learned Judicial Magistrate, Vadodara dated 18.2.2008 is correct interpretation of Section 167(2) (as per para 11 of judgment reported in Bhupinder Singh and Others Vs. Jarnail Singh and Another, in the case of Bhupinder Singh and Ors. v. Jainail Singh and Anr. Offence u/s 366 of Indian Penal Code is punishable for 10 years. Therefore also, charge-sheet can be filed within 90 days.

This aspect of the matter has not been considered by the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara while passing the order dated 25th February, 2008.

(vi) The learned Additional Public Prosecutor has relied upon the decision rendered by the Hon''ble Supreme Court in the case of Bhupinder Singh and Others Vs. Jarnail Singh and Another, whereof read as under:

11. A bare reading of Section 304B, I.P.C. shows that whoever commits "dowry death" in terms of Section 304B, IPC shall be punished with an imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life. 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 u/s 304B, IPC. Proviso to Sub-section (2) of Section 167 consists of three parts. The first part relates to power of Magistrate to authorise detention of the accused person. This part consists of two sub-parts. In positive terms it prescribes that no Magistrate shall authorise 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 Section 304B is an offence "punishable" with imprisonment for life. Strong reliance was placed by Mr. D. K. Garg, learned Counsel appearing for the appellant on the decision in Rajeev Chaudhary Vs. State (N.C.T.) of Delhi, . A reference is also made to the decisions of the Jharkhand, Delhi and Karnataka High Courts where the ratio in Rajiv Chaudhary's case (supra) has been made applicable to cases involving offence punishable u/s 304B, IPC. The Jharkhand High Court's decision is Sunil Kumar v. State of Jharkhand and Ors. 2003(2) RCR (Cri 135 . Contrary view appears to have been taken by the Rajasthan and the Himachal Pradesh High Courts in Keshav Dev and Others Vs. The State of Rajasthan, and State of H.P. Vs. Lal Singh, The Punjab and Haryana High Court appears to have taken somewhat different view in two different cases. In Kuldeep Singh v. State of Punjab, RCR (Criminal) 599 it was held that the period is 90 days, as has been held in the case at hand. But a different view (though in

relation to some other offences) was taken in Abdul Hamid and another (Cri. Misc. No. 40599 M of 2005 disposed of on 21st September, 2005). A bare reading of Rajiv Chaudhary's case (supra) shows that the same related to an offence punishable u/s 386, IPC and the sentence in respect of the said offence is not less than 10 years. 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 Clause (i) of proviso (a) of Section 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 u/s 304B, IPC. In case of Section 304B the range varies between 7 years and imprisonment for life. What should be the adequate punishment in a given case has to be decided by the Court on the basis of the facts and circumstances involved in the particular case. The stage of imposing a sentence comes only after recording the order of conviction of the accused person. The significant word in the proviso is "punishable." The word "punishable" as used in statutes which declare that certain offences are punishable in a certain way means liable to be punished in the way designated. It is ordinarily defined as deserving of or capable or liable to punishment, capable of being punished by law or right, may be punished or liable to be punished, and not must be punished.

12. In Bouviers Law Dictionary meaning of the word "punishable," has been given as "liable to punishment." In "Words and Phrases" (Permanent Edition) following meaning is given:

The word "punishable" in a statute stating that a crime is punishable by a designated penalty or term of years in the State prison limits the penalty or term of years to the amount or term of years stated in the statute.

"Corpus Juris Secundum" gives the meaning as:

Deserving of or liable to, punishment; capable of being punished by law or right; said of persons or offences. The meaning of the term is not "must be punished" but "may be punished" or "liable to be punished."

14. Where minimum and maximum sentences are prescribed both are imposable depending on the facts of 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. Therefore, on that ground alone the appeal fails. But since another point urged for consideration which as noted above arises in many cases, we are considering that matter. In Tara Singh Vs. The State, four-Judge Bench of this Court inter alia

had examined the effect of supplementary report. The contents of the report as required to be given u/s 173(1)(a) of Criminal Procedure Code, 1898 (in short the "old Code") were examined. In para 14 it was noted as follows:

When the police drew up their challan of the 2nd October, 1949, and submitted it to the Court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and the drawing of a sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore the mere fact that a second challan was put in on the 5th October would not necessarily vitiate the first. All that Section 173(1)(a) requires is that as soon as the police investigation under Chapter XIV of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form:

Setting forth the names of the parties, the nature of the information and the names of the person who appear to be acquainted with the circumstances of the case.

All that appears to have been done in the report of the 2nd October which the police called their incomplete challan. The witnesses named in the second challan of the 5th October were not witnesses who were "acquainted with the circumstances of the case." They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were "acquainted with the circumstances of the case." Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind which Section 173(1)(a) of the Code contemplates. There is no force in this argument and we hold that the Magistrate took proper cognizance of the matter.

In view of the aforesaid decision also, if the offence is punishable for more than 10 years imprisonment, then charge-sheet is required to be filed within a period of 90 days and not within a period of 60 days. u/s 376 of Indian Penal Code, punishment can be awarded upto life imprisonment. This aspect of the matter has not been at all appreciated by the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara. The trial court has correctly dismissed the application preferred by respondent No. 2-accused for getting enlarged on bail u/s 167(2) of the Code of Criminal Procedure, whereas in Revision Application, the learned Additional Sessions Judge has not at all considered the maximum sentence of life imprisonment which can be awarded for the offence punishable u/s 376 of the Indian Penal Code.

4. As a cumulative effect of the aforesaid facts and reasons, the judgment and order dated 25th February, 2008 in Criminal Revision Application No. 65 of 2008 passed by the learned Additional Sessions Judge and Fast Track Court No. 10, Vadodara is hereby quashed and set aside. The respondent No. 2-accused is hereby directed to surrender to judicial custody on or before 30th May, 2008.

Rule made absolute accordingly. Direct service permitted.