

(2020) 09 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : Criminal Appeal No. 03 Of 2020

Mohammad Amin Illahie And Others

APPELLANT

Vs

Union Territory Of J&K

RESPONDENT

Date of Decision : 09-09-2020

Acts Referred:

National Investigation Agency Act, 2008 — Section 21(3)
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 302, 307
Arms Act, 1959 — Section 7, 27
Unlawful Activities (Prevention) Act, 1967 — Section 13, 16, 18, 43(D)
Code Of Criminal Procedure, 1973 — Section 107, 167, 167(2)
Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2020) 09 J&K CK 0017

Hon'ble Judges : Ali Mohammad Magrey, J; Sanjay Dhar, J

Bench : Division Bench

Advocate : Wajid Haseeb, B. A. Dar,

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) This appeal under Section 21 (3) of the National Investigation Agency Act (for brevity NIA Act) is directed against the order dated 06.02.2020, passed by the learned Special Judge Designated under NIA Act, Srinagar, whereby petition of the appellants/accused for grant of bail by default has been rejected.

2) It is averred in the appeal that the appellant No.1 was arrested on 08.03.2019 whereas appellants No.2 and 3 were taken into custody on 15.03.2019 in connection with case FIR No. 229/2017 for offences under Section 302, 307 RPC, 7/27 Arms Act and Sections 13, 16, and 18 of ULA(P) Act, of Police Station, Budgam. It is further averred that on 02.09.2019, the custody of the appellants/accused was changed to FIR No.69/2018 of Police Station, Budgam, and at that time, appellant No.1 had completed 177 days in custody whereas appellants 2 and 3 had completed 170 days in custody in connection with investigation of FIR

No.229/2017.

3) It is also averred that on 16.09.2019, the appellants/accused were admitted to bail in case FIR No.69/2018 but in spite of that, they were not released from the custody nor their custody was shifted to FIR No.229/2017. It is further contended in the appeal that the appellants No.1 and 3 were taken into preventive custody under Public Safety Act whereas appellant No.2 was placed under preventive custody in terms of Section 107 of Cr.P.C.

4) With the aforesaid factual background, it appears that the appellants had moved an application for grant of default bail in their favour before the Court of learned Special Judge (Designated under NIA Act), Srinagar. Vide the impugned order, the learned Special Judge, after obtaining report from the Investigating Agency, declined to enlarge the appellants/accused on bail.

5) Apart from claiming bail on merits, the appellants/accused have, primarily, assailed the order of Learned Special Judge on the ground that the said Court has not correctly appreciated their contentions and arguments with regard to their right to be enlarged on bail in default because of non-production of challan against them within the stipulated time.

6) It is contented by the learned counsel for the appellants that mere shifting of custody of the appellants/accused from one case to another and thereafter detaining them under preventive detention laws, would not absolve the Investigating Agency of its duty to present the challan within 180 days of arrest of the appellants/accused. The Id. Counsel has relied upon the judgment of the Supreme Court in *Manoj vs. State of Madhaya Pradesh* reported in (1999) 3 SCC 715.

7) We have heard learned counsel for the parties and perused the grounds of appeal and the impugned order. We have also gone through the record including the Case Diary.

8) At the very outset we would like to clarify that the learned counsel for appellants has, during the course of arguments, confined his challenge to the order passed by learned Special Judge to the issue pertaining to default bail. In fact, the impugned order is also confined to the aspect of default bail and it does not touch the merits of the case. The learned counsel for the appellants has not argued on merits of the prosecution case against the appellants and, therefore, we are confining this judgment to the aspect of the default bail only.

9) Briefly stated case of the prosecution against the appellants/accused is that on 03.10.2017, they had transported three militants from Rawalpura to the BSF Camp located at Gogoland and these three militants launched a suicide attack on the BSF Camp leading to death of ASI B. K. Yadav as also the death of three militants.

10) Since Id. Counsel for the appellants/accused has confined his argument to the aspect of default bail only, as such, we are not making any observation as to

whether or not, the aforesaid allegations find support from the material collected by the Investigating Agency.

11) For the purpose of testing the arguments of Id. Counsel for the appellants/accused, it is necessary to understand the scope of provision contained in Section 167 of Cr. P. C which deals with remand of the accused and the circumstances in which an accused becomes entitled to default bail. However, the said provision applies to the offences under Unlawful Activities (Prevention) Act, 1967, in a modified form.

12) Section 43D of the Act provides that certain provisions of the Code of Criminal Procedure would apply in modified form in case of proceedings pertaining to the offences under the said Act. Sub-section

(2) of the said Section is relevant to the context and the same is reproduced here-under:

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section

(2),-

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:-

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

13) From a perusal of the aforesaid provision it becomes clear that in cases relating to investigation of offences under the provisions of ULA(P) Act, even if it is not possible to complete the investigation in such cases within a period of ninety days, the Court, if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the reasons for detention of the accused beyond the period of ninety days, can extend the said period up to 180 days. It means that the right to claim bail in default will accrue to the accused facing investigation relating to offences under ULA(P) Act only upon expiry of 180 days from the date of his first arrest. However, beyond ninety days, there has to be a specific order of the Court authorizing his further custody which must be

based upon satisfaction of the Court with the report of the Public Prosecutor indicating the progress of the investigation along with specific reasons of detention of the accused.

14) With the aforesaid backdrop of the legal position on the subject, let us now advert to the facts of the instant case.

15) A perusal of the case diary, which has been produced before us, reveals that the appellant No.1 has been arrested on 08.03.2019 whereas appellants 2 and 3 have been arrested on 15.03.2019. It is the admitted case of the parties that the custody of these accused was transferred to case FIR No.69/2018 of P/S Budgam, on 02.09.2019. Thus on the said date, the appellant/accused No.1 had undergone 177 days' custody whereas appellant/accused No.2 and 3 had undergone 170 days' custody in case FIR No.229/2017. It is not in dispute that the appellants/accused were admitted to bail on 16.09.2019 in case FIR No.69/2018.

16) According to learned counsel for the appellants, the appellants No.1 and 3 were kept in illegal custody for quite some time and thereafter they were detained under the provisions of Public Safety Act whereas appellant No.2 was detained under Section 107 of Cr. P. C some time in the month of October, 2019.

17) The aforesaid allegation made by the appellants regarding their illegal custody is not borne out from the record of the case diary. Even the documents placed on record by the appellants along with their appeal are contrary to what is being contended by the learned counsel for the appellants. Annexure-III to the appeal comprises two communications of District Magistrate, Budgam, addressed to father of appellant/ accused No.1 and father of appellant/accused No.3, informing them that their wards have been detained under Section 8 of the Jammu and Kashmir Public Safety Act vide orders No.DMB/PSA/73 of 2019 dated 14.09.2019 and DMB/PSA/74 of 2019 dated 14.09.2019. Both these communications are dated 14.09.2019. As per Annexure-II to the appeal, the appellants have been admitted to bail in FIR No.69/2018 on 16.09.2019, which means that even before they were admitted to bail, both these appellants were detained under Public Safety Act. Thus there is no question of illegal custody of the appellants.

18) What is borne out from the record is that after spending 177 days in custody in FIR No.229/2017, the custody of appellant No.1 was shifted to FIR No.69/2018 and he was bailed out in the said FIR on 16.09.2019 but before that he was detained under Public Safety Act on 14.09.2019. Similarly in case of appellant No.2, after spending 170 days in custody in FIR No.229/2017, his custody was shifted to FIR No.69/2018 in which he was bailed out on 16.09.2019 but in the interregnum period, he was detained in terms of Section 107 of the Code of Criminal Procedure. The custody of appellant No.3 was shifted from FIR No.229/2017 to FIR No.69/2018 after he had undergone 170 days in custody in the former FIR. He was bailed out in FIR No.69/2018 on 16.09.2019 but before

that he was detained under Public Safety Act on 14.09.2019.

19) In the light of aforesaid facts, let us now address the question whether by virtue of shifting of custody of the accused/appellants from one FIR to another FIR and thereafter detaining them under preventive detention laws, an indefeasible right of bail under Proviso (a) of sub-section (2) of Section 167 of the Code of Criminal Procedure is available to the appellants/accused.

20) The question whether custody in a particular case for investigation can be treated as custody in another case, came up for consideration before the Supreme Court in the case of CBI v. Anupam J. Kulkarni, reported in (1992) 3 SCC 141. In the said case the Supreme Court observed in para 11 as follows:

".....In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this that limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be as different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody."

21) It is clear from the above observations of the Supreme Court that if one case is registered against the accused in which during the course of investigation it is found that he has committed more than one offence then it will be treated to be one investigation and for each offence a separate police remand cannot be sought. But in case it is a different offence which has been committed by him then it will be a separate case registered and separate investigation will be taken up and for that the detention by the accused in the previous case cannot be counted towards a new case or different case registered against the accused. In fact, the following observations of the Supreme Court in the aforesaid judgment answers the question raised in this petition:

"The occurrences constituting two different transactions give rise to two different cases and the exercise of power under Section 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody

in the context of Sections 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody.

22) The ratio laid down by the Supreme Court in the above judgment has been followed in *State of West Bengal vs. Dinesh Dalmia*, reported in (2007) 5 SCC 773, in which the Supreme Court has held that for separate offences accused has to be tried separately and for that the proceedings will be initiated separately and independent remand can be sought.

23) From the above, it is clear that for a separate offence, the accused has to be tried separately and for that the proceedings will be initiated separately and independent remand of the accused can be sought. Accordingly, the custody of the accused in one case cannot be counted for the purposes of another case to which his custody is shifted.

24) Applying the aforesaid ratio of the law laid down by the Supreme Court to the facts of the instant case, it becomes clear that the period of custody undergone by the appellants in FIR No.69/2018 cannot be added to the period of custody which they have undergone in FIR No.229/2017. The contention of the learned counsel for the appellants that after the appellants were bailed out in FIR No.69/2018, their custody was again shifted to FIR No.229/2017, is not borne out from the Case Diary and there is nothing in it to show that the custody of the appellants was shifted back to the said FIR. The record, however, shows that even before the appellants were bailed out in FIR No.69/2018, they were taken into preventive custody.

25) The judgment of the Supreme Court in *Manoj vs. State of Madhya Pradesh* (supra), relied upon by learned counsel for the appellants, does not apply to the facts of the instant case. In the said case, it was held by the Supreme Court that where a person arrested was neither an enemy alien nor was arrested under and law for preventive detention, the omission on the part of police officer to forward the accused to the nearest Judicial Magistrate within 24 hours of arrest vitiates the further detention of the arrested person, whereas in the instant case the appellants even before their admission to bail in FIR No.69/2018 were detained under preventive detention laws, therefore, there was no requirement of producing them before the Magistrate for further remand etc.

26) For what has been discussed hereinbefore, it becomes crystal clear that the appellants/accused have not undergone custody of 180 days in case FIR No.229/2017. Therefore, their right to claim default bail in terms of Proviso (a) to Section 167(2) of the Code of Criminal Procedure read with Section 43D of ULA(P) Act has not accrued to them. Thus the application for grant of bail, on this ground, was rightly declined by the learned Special Judge and we do not find any illegality or infirmity in the impugned order

27) For the foregoing reasons the appeal, being without any merit, is dismissed along with connected CM. However, the appellants are at liberty to approach the

learned Special Judge to claim bail on merits of the case.

28) No order as to costs.

29) CD file be returned back.