

(2019) 01 RAJ CK 0110

In the Rajasthan High Court

Case No : Criminal Miscellaneous Bail No. 9538 Of 2018

Paras Ram S/o Shri Haja Ram

APPELLANT

Vs

State Of Rajasthan

RESPONDENT

Date of Decision : 14-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(1)

Code Of Criminal Procedure, 1973 — Section 167(2), 376(1), 439

Protection Of Children from Sexual Offences Act, 2012 — Section 3, 4

Citation : (2019) 01 RAJ CK 0110

Hon'ble Judges : Vijay Bishnoi, J

Bench : Single Bench

Advocate : J.S.Choudhary, Pradeep Choudhary, Ashok Upadhyay, Moti Singh

Final Decision : Allowed

Judgement

The petitioner has been arrested in connection with FIR No.49/2017 of Police Station, Siwana, District Barmer for the offence punishable under Section 376(1) IPC. He has preferred these bail applications under Section 439 CrPC.

Learned counsel for the petitioner has submitted that the petitioner was arrested by police on 12.06.2017, however, on the expiry of 90 days i.e. 11.09.2017, the police filed charge-sheet against the petitioner in the Court of Judicial Magistrate, Siwana. The Judicial Magistrate, Siwana returned the said charge-sheet with a remark that as the charge against the petitioner is under the POCSO Act, the charge-sheet be filed in Special POCSO Court, Barmer only. The Judicial Magistrate, Siwana also extended the judicial custody of the petitioner up to 25.09.2017. The police then filed charge-sheet against the petitioner in the Special POCSO Court, Barmer on 11.09.2017 itself, however, the Special Judge returned the said charge-sheet while treating it as incomplete and gave direction to the police to remove the deficiencies on certain points. Thereafter the police filed charge-sheet before the Judicial Magistrate, Siwana on 14.09.2017, however, the Judicial Magistrate, Siwana returned the said charge-sheet while

observing that in view of the order dated 11.09.2017 passed by the Special Judge, POCSO Court, Barmer, the same is not liable to be accepted.

Learned counsel for the petitioner has submitted that in the meantime on 13.09.2017, the petitioner preferred an application under Section 167(2) CrPC before the Judicial Magistrate, Siwana with contention that since charge-sheet was not filed on 11.09.2017, the day, when limitation had expired, the petitioner is entitled to be released on default bail. The Judicial Magistrate, Siwana rejected the said application of the petitioner vide order dated 13.09.2017 while observing that since charge-sheet against the petitioner is filed within 90 days, he is not entitled for default bail. Thereafter, when the Judicial Magistrate again refused to accept the charge-sheet on 14.09.2017, an application was moved on behalf of the petitioner before the Special Court, Barmer under Section 167(2) CrPC on 15.09.2017 with a prayer for releasing him on default bail on the ground that no charge-sheet has been filed by the police against the petitioner within the prescribed limit. The said application of the petitioner was rejected by the Special Judge vide order dated 20.09.2017 while observing that as the charge-sheet against the petitioner was filed under Section 376(1) CrPC, the petitioner is not entitled to be released on bail.

Learned counsel for the petitioner has submitted that as a matter of fact, no charge-sheet was filed against the petitioner because the final conclusion filed by the police was incomplete and, therefore, the Special Court returned the said incomplete charge-sheet to the police on 11.09.2017 and thereafter the charge-sheet was filed against the petitioner only on 20.03.2018, whereas prior to that the petitioner had already moved an application under Section 167(2) CrPC. Learned counsel for the petitioner has also submitted that in the facts and circumstances of the case, the petitioner is entitled to be released on default bail.

In support of the above submissions, learned counsel for the petitioner has placed reliance on a decision of Hon'ble Supreme Court rendered in Achpal @ Ramswaroop and Anr. vs. State of Rajasthan, reported in AIR 2018 SC 4547.

In the alternative, learned counsel for the petitioner has submitted that the petitioner was arrested as there is allegation against him that he had sexually assaulted a minor girl, however, the police have only filed charge-sheet for the offence punishable under Section 376(1) CrPC and found that the allegation against the petitioner of committing rape upon a minor girl is not true and, therefore, the offence punishable under Section 3/4 of the POCSO Act is not made out.

Learned counsel for the petitioner has also submitted that the FIR in respect of sexual allegation has been filed with great delay and from the statements of witnesses recorded by the police, particularly the statement of witness Kana Ram, it is clear that the petitioner has falsely been implicated in this case because the complainant party demanded money from the petitioner, which he refused to give.

Learned counsel for the petitioner has also submitted that from medical report, the allegation of sexual assault has not been proved. It is further submitted that charge-sheet has already been filed and trial of the case will take time, therefore, the petitioner may be released on bail.

Per contra, learned Public Prosecutor as well as counsel for the complainant have opposed the bail application.

Learned Public Prosecutor has argued that as now the charge-sheet has been filed against the petitioner for the offence punishable under Section 376(1) IPC, he is not entitled for grant of default bail. Learned Public Prosecutor has further argued that from the statements of the witnesses recorded during the course of investigation, particularly the statement of the prosecutrix, it is clear that charge of sexual assault against the petitioner is fully proved and, therefore, on merit also, the petitioner is not entitled to be released on bail.

Learned counsel for the complainant has vehemently opposed the bail application and submitted that as a matter of fact, the petitioner being aggrieved with the order dated 20.09.2017, whereby the application for default bail of the petitioner was rejected by the Special Court, filed S.B.Cr. Appeal No.1536/2017 before this Court, however, he withdrew the said appeal on 09.10.2018 and, therefore, the ground of releasing the petitioner on default bail is not available to him.

Learned counsel for the complainant has also submitted that bail application under Section 439 CrPC of the petitioner was rejected by Sessions Judge, Balotra on 08.06.2018, wherein no grounds regarding release of the petitioner on default bail had been raised, therefore, the said bail application of the petitioner can only be treated as a bail application on merits and the Sessions Judge, Balotra has rightly rejected the said bail application on merits while taking into consideration the fact that ample evidence is available on record against the petitioner regarding sexual assault.

Learned counsel for the complainant has placed reliance on decision of Hon'ble Supreme Court rendered in Rakesh Kumar Paul vs. State of Assam, reported in 2018(Suppl.) Cr.L.R. (SC) 1 and opposed the prayer of the petitioner for releasing him on default bail.

Heard learned counsel for the rival parties and perused the material available on record.

The facts, not in dispute, are that the petitioner was arrested on 12.06.2017 and in connection with the FIR registered against him for the offence punishable under Section 376 IPC read with Section 3/4 of Protection of Children from Sexual Offences Act, 2012. As per the provisions of Section 167(2) CrPC, the charge-sheet against the petitioner was required to be filed within 90 days and the said 90 days expired on 11.09.2017. The police have filed charge-sheet against the petitioner in the Court of Judicial Magistrate, Siwana on 11.09.2017, however, the same was returned to the police for filing it before the POCSO

Court, Barmer. On 11.09.2017 itself, the police filed charge-sheet against the petitioner before the Special Court, Barmer, however, the Special Judge returned the said charge-sheet while treating it as incomplete and also gave certain directions to the police to complete the investigation on certain points.

In the meantime, an application under Section 167(2) CrPC was preferred on behalf of the petitioner before the Judicial Magistrate, Barmer, which came to be dismissed by that court while observing that no such application was preferred on 11.09.2017 and charge-sheet was filed against the petitioner within 90 days and, therefore, he is not entitled for grant of default bail. Thereafter, the petitioner moved an application under Section 167(2) CrPC before the Special Court, however, the Special Court also dismissed the said application while observing that since the charge-sheet is filed against the petitioner for the offence punishable under Section 376(1) IPC i.e. within 90 days from his arrest, he is not entitled for default bail.

After going through the orders passed by the Judicial Magistrate, Siwana on 11.09.2017, 13.09.2017 and 14.09.2017 and the orders passed by the Special Court on 11.09.2017 and 20.09.2017, I am of the opinion that the Judicial Magistrate, Siwana as well as the Special Court, Siwana erred in rejecting the application preferred on behalf of the petitioner under Section 167(2) CrPC.

The Judicial Magistrate, Siwana vide orders dated 11.09.2017 and 14.09.2017 returned the charge-sheet to the police firstly by directing to file it before Special Court and secondly by observing that in view of order passed by Special Court on 11.09.2017, charge-sheet cannot be accepted.

The Special Court, Barmer vide order dated 11.09.2017 has also returned the charge-sheet while treating it as incomplete and gave direction to the police to cure the deficiencies on certain points, so it is clear that on 11.09.2017 or thereafter up to 20.03.2018, no charge-sheet against the petitioner had been filed and in between the petitioner already moved applications for default bail twice i.e. on 13.09.2017 before the Judicial Magistrate, Siwana and on 15.09.2017 before the Special POCSO Court, Barmer.

The Hon'ble Supreme Court in Achpal @ Ramswaroop and Anr. vs. State of Rajasthan (supra) has observed as under:

"The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to custody dehors such consideration."

In view of above, the reasons given by the Judicial Magistrate, Siwana as well as the Special Judge, POCSO Court, Barmer for rejecting the application for releasing the petitioner on default bail are factually incorrect because as a matter

of fact from 11.09.2017 to 20.03.2018, no charge-sheet was filed against the petitioner and on account of that the petitioner was entitled for grant of default bail.

So far as argument of the learned counsel for the complainant to the effect that the criminal appeal preferred by the petitioner against the order of Special Judge, POCSO Court dated 20.09.2017 was dismissed as withdrawn, the argument of releasing him on default bail is not available to him in an application under Section 439 CrPC is concerned, the same is liable to be rejected in view of the following observations made by the Hon'ble Supreme Court in para 40 of the decision rendered in Rakesh Kumar Paul's case (supra)

"40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for 'default bail' on or after 4.1.2017 till 24.1.2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11.1.2017 in the Gauhati High Court - he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11.1.2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned Counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail."

In the present case, counsel for the petitioner has also raised the ground of releasing the petitioner on default bail and in the facts and circumstances of the case, I am convinced that the charge-sheet was not filed against the petitioner on expiry of 90 days, therefore, the petitioner is entitled for grant of default bail.

Accordingly, this bail application filed under Sec.439 Cr.P.C. is allowed and it is directed that petitioner Paras Ram son of Haja Ram shall be released on bail in connection with FIR No.49/2017 of Police Station, Siwana, District Barmer provided he executes a personal bond in a sum of Rs.1,00,000/- (Rupees one lac) with two sound and solvent sureties of Rs.50,000/-(Rupees fifty thousand) each to the satisfaction of learned trial court for his appearance before that court on each and every date of hearing and whenever called upon to do so till the completion of the trial.