

(2010) 01 MAD CK 0137

In the Madras High Court

Case No : Criminal O.P. No. 28108 of 2007

Periyasamy

APPELLANT

Vs

State by the Inspector of Police

RESPONDENT

Date of Decision : 19-01-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 209, 309(2), 436
Penal Code, 1860 (IPC) — Section 392, 397

Citation : (2010) CriLJ 3815 : (2011) 6 RCR(Criminal) 96

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : E. Edwig, for the Appellant; N.R. Elango, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The Petitioner/accused was arrested in connection with the case in Cr. No. 682 of 2005 on the file of the Respondent police for offences under Sections 392 r/w 397 of I. P. C. on 7-3-2005. Since the final report was not submitted within the statutory period as required u/s 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code"), on an application made by him, the learned Judicial Magistrate by order dated 30-5-2005 granted bail to him, however, on condition that he should execute a bond for a sum of Rs. 5,000/- with two sureties each for a like sum to the satisfaction of the Magistrate. But, the Petitioner did not produce the sureties and therefore, he continues to be in prison. Subsequently, on completing the investigation, final report was submitted and the case was committed to the Court of Session. Now, it is pending trial in S. C. No. 169 of 2007 on the file of the learned Assistant Sessions Judge, Hosur.

2. While so, the Petitioner produced sureties before the learned Judicial Magistrate on 12-11-2009. But, the learned Magistrate returned the same with the following remarks:

The case was already committed to the Court of Session and numbered as S. C. No. 169 of 2007. Hence, the sureties memo is returned.

Therefore, the Petitioner produced the sureties before the trial Court viz., the Assistant Sessions Judge and to that effect he represented the memo on 13-11-2009. The learned Assistant Sessions Judge, on 13-11-2009 returned the same with the following remarks:

How this Court is entitled to enlarge the accused on bail as the bail has been granted by the lower Court viz., the Judicial Magistrate No. 1, Hosur with her own satisfaction of sureties. (sic)

3. He, therefore, represented the same once again before the learned Judicial Magistrate No. I. But, the learned Magistrate, again declined to entertain the same on the very same ground and returned the same with the following remarks:

Petitioner obtained bail u/s 167(2) of Cr. P. C. during the pending of the trial. (sic) Now, the case was committed to Sessions Court u/s 209(a) of Cr. P. C. Petitioner is directed to apply fresh bail or resubmit with authority. Hence, returned.

4. Thus, the Petitioner is in "neither here nor there" position, as he is unable to get the relief either before the Assistant Sessions Court or before the Magistrate's Court and he has been thrown from pillar to post. That is how, he is now before this Court.

5. It is contended by the learned Counsel for the Petitioner that if once an order is passed u/s 167(2) of the Code, unless and until the same is cancelled, it would hold good and therefore, the Petitioner is entitled to produce the sureties before the learned Magistrate and to get released from the prison.

6. The learned Additional Public Prosecutor fairly conceded that the Petitioner is entitled for the relief as prayed for in the petition.

7. In my considered opinion too, the learned Magistrate was not right in declining to entertain the production of sureties. The order of the learned Magistrate would go to indicate that she is under the impression that the production of sureties should be made while the case is pending committal Court becomes functus officio to entertain the sureties. This view of the learned Judicial Magistrate does not reflect correct understanding of law. In this regard, it should be underlined that there are two judicial processes in the matter of release of an accused on bail. Firstly, an order granting bail is passed either u/s 436 or 437 of the Code or u/s 167(2) of the Code and thereafter, the execution of bond by accused and sureties is made by a separate process as enshrined in Section 441 of the Code. If once bail is granted under any of these provisions, unless the same is cancelled in the manner known to law, it will remain in force for ever. The second process viz., execution of bond by accused and the sureties can be made at any time subsequently. If the accused, after having got released from prison, fails to

comply with the bond executed u/s 441 of the Code, then, the bond executed by him and the sureties alone shall stand automatically cancelled u/s 446A of the Code, unless sufficient cause is shown for such non compliance. In this context, the cancellation of bond u/s 446A of the Code should not be confused with cancellation of bail, as both are two different judicial processes. This would clearly indicate that there can be no time limit for the accused and for the sureties to execute the bonds in terms of the order of bail granted by the Court.

8. At this juncture, it should be mentioned that a Constitution Bench of the Hon"ble Supreme Court in Sanjay Dutt Vs. State through C.B.I., Bombay, has laid down the law in unequivocal terms that the right to compulsive bail u/s 167(2) of the Code is an indefeasible right and such right does not survive or remain enforceable on the challan being filed, if already not availed of (emphasis supplied). The term "already not availed of came to be considered by a Full Bench of the Hon"ble Supreme Court in Uday Mohanlal Acharya Vs. State of Maharashtra, , wherein the Hon"ble Supreme Court in conclusion Clause (6) of para 8 has held as follows:

8. ...The expression "if not already availed of used by this Court in Sanjay Dutt Vs. State through C.B.I., Bombay, must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to Sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the applications and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration, a charge sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail.

9. A close reading of the above judgment of the Hon"ble Supreme Court in Sanjay Dutt's case and Uday Mohan Lal Acharya's case cited supra would make things beyond any pale of doubt that the right to be released on bail u/s 167(2) of the Code is indefeasible and if once such right is exercised by the accused, and consequently an order is passed, the same shall survive irrespective of the fact that final report is submitted subsequently.

10. In Raghubir Singh and Others Vs. State of Bihar, , the Hon"ble Supreme

Court has, in no uncertain terms, laid down the law that bond could be executed at any time by the accused. In para 20, the Hon''ble Supreme Court has held as follows:

What is of importance is that there is no limit of time within which the bond may be executed after the order for release on bail is made. Very often accused persons find it difficult to furnish bail soon after the making of an order for release on bail. This frequently happens because of the poverty of the accused persons. It also happens frequently that for various reasons the sureties produced on behalf of accused persons may not be acceptable to the Court and fresh sureties will have to be produced in such an event. The accused persons are not to be deprived of the benefit of the order for release on bail in their favour because of their inability to furnish bail straightway....The argument of the learned Counsel for the State of Bihar was that the order for release on bail stood extinguished on the remand of the accused to custody u/s 309(2) of the Code of Criminal Procedure. There is no substance whatever in this submission. Section 309(2) merely enables the Court to "remand the accused if in custody". It does not empower the Court to remand the accused if he is on bail. It does not enable the court to "cancel bail" as it were. That can only be done u/s 437(5) and Section 439(2). When an accused person is granted bail, whether under proviso to Section 167(2) or under the provisions of Chapter XXXIII the only way the bail may be cancelled is to proceed u/s 437(5) or Section 439(2).

11. From the above, it should be safely concluded that an order made u/s 167(2) of the Code granting bail to an accused shall hold good, until it is cancelled, and the accused is entitled to produce sureties and execute bond in terms of the order of bail at any time irrespective of the fact whether the case is at the stage of committal or at the stage of trial before the Court of Session.

12. In the instant case, bail was granted by the learned Magistrate on condition to execute bond by the accused and the sureties only to the satisfaction of the Magistrate. So, the accused was right in producing the sureties before the Magistrate.

13. In view of the above, the order of the learned Judicial Magistrate No. I, Hosur declining to accept the sureties, is liable to be set aside.

14. In the result, the petition is allowed, the impugned order of the learned Magistrate is set aside; and the learned Judicial Magistrate No. I, Hosur is directed to entertain the sureties produced by the Petitioner in pursuance of the order made earlier under proviso to Section 167(2) of Cr. P. C.