

(1994) 04 PAT CK 0011

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 694 of 1993

Raju @ Rajaram Mandal

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-04-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157(2), 167, 167(1), 167(2), 57
Penal Code, 1860 (IPC) — Section 390, 391, 393, 395, 398

Citation : (1994) 2 PLJR 849

Hon'ble Judges : Pramod Kumar Sarin, J;Nagendra Rai, J

Bench : Division Bench

Advocate : Vyas Muni Singh and Rakesh Kumar Samrendra, for the Appellant;
D.N. Yadav, Subhash Pd. Singh and I.P. Mandal, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—The Petitioner has filed the present application challenging his detention in Gopalpur P.S. Case No. 92/93 u/s 398 of the Indian Penal Code on the ground that same is in contravention of the provisions contained in proviso (a)(ii) to Section 167(2) of the Code of Criminal Procedure (hereinafter referred to as the Code) according to which a Magistrate is not authorised to detain an accused in custody for more than sixty days during the period of investigation.

2. The necessary facts for the disposal of the present application are that one Umesh Rai of village Dharampur in the district of Samastipur lodged a Fardbeyan before the A.S.I., Gopalpur Police Station at Chapra National Highway-31 Road on 11-5-1993 at 11.30 a.m. alleging, inter alia, that he was a driver of truck, bearing No. B.P.L. 9411, and he was carrying bitter gourd (karela) from Mainaguri to Samastipur. Kamlu Rai, another driver, and a businessman were also in the Truck. When the truck reached west to Kataria Bridge in the night at 1 a.m., he noticed that a Truck loaded with coal crossed over the bamboos which were loaded on a bullock-cart standing across the road. When he wanted to cross his truck also, 10-15 miscreants appeared and wanted to stop the truck. Then he

wanted to pass away his truck speedily over the bamboos but the front axle of the truck broke down, as a result of which the truck fell into a nearby ditch. In the meantime, the police force came from Kursela Barrier and the miscreants managed to flee away. They could not succeed in removing the articles. He gave the description of the miscreants and claimed to have identified them.

3. On the basis of the said Fardbeyan Gopalpur Police registered Gopalpur P.S. Case No. 92/93 u/s 398 of the Indian Penal Code against unknown person. The Petitioner was arrested and was forwarded to the court of the Additional Chief Judicial Magistrate, Naugachhia on 4-6-93. On 14-6-93 a T.I. Parade was held in which the Petitioner was identified by two persons. On 17-6-93 the Petitioner filed an application before the Additional Chief Judicial Magistrate for bail which was rejected on the same date. Thereafter he filed an application for bail before the Addl. Sessions Judge Naugachhia in B.P. No. 108/93 which was rejected on 21-8-93.

4. The Police did not submit charge sheet in the case till 6-8-93. The Petitioner thereafter on the same date filed an application for bail on the ground that as the investigation has not been completed within sixty days and he has been made an accused in a case which is punishable with an imprisonment for a term less than 10 years, he is entitled to be released in terms of proviso (a)(ii) to Section 167(2) of the Code of Criminal Procedure. In other words, as the charge sheet has not been submitted within 60 days, he is entitled to be released on bail according to the said proviso. The said prayer was rejected by the Addl. Chief Judicial Magistrate, Naugachhia on 6-8-93, against the said order he moved the Addl. Sessions Judge, Naugachhia, in Bail Petition No. 148/93, which was rejected on 8-9-93. Thereafter the present writ application has been filed for the reliefs as prayed in the petition.

5. Learned Counsel for the Petitioner contended that in this case the Petitioner was taken into custody on 4-6-93 and upto 6-8-93 the police had not completed the investigation and as the offence alleged to have been committed is u/s 398 I.P.C. which provides minimum sentence of seven years imprisonment only, the Petitioner is entitled to be released on bail by virtue of the proviso (a)(ii) to Section 167(2) of the Code. According to him, the provision for detention for 90 days, as provided u/s 167(2) proviso (a)(i) of the Code shall not be applicable in this case, as the offence u/s 398 I.P.C. is not punishable with any of the punishment mentioned therein.

6. Learned Counsel appearing for the State on the other hand contended that Section 398 I.P.C. does not create a substantive offence, on the other hand, it only regulates the measure of punishment when the offender at the time of attempting to commit robbery or dacoity is armed with deadly weapon. The substantive offence is either to attempt to commit a robbery or dacoity and as in the present case the allegation is of attempt to commit dacoity, the offence committed by the Petitioner is u/s 395 I.P.C. which prescribes punishment of imprisonment for life, or with rigorous imprisonment for a term which may

extend to ten years; and, as such the proviso (a)(i) to Section 167(2) of the Code, which authorises detention for 90 days, will be applicable in this case.

7. Section 57 of the Code provides that a police officer shall not detain in custody a person arrested without warrant for more than 24 hours, unless there is a special order of a Magistrate u/s 167 of the Code Sub-section (1) of Section 167 of the Code provides that when a person is arrested and detained in custody and it appears that the investigation cannot be completed within a period of 24 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 dm hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. Sub-section (2) provides that a Magistrate to whom an accused person is forwarded, whether he has jurisdiction to try the case or not, authorise the detention of the accused in such custody as the Magistrate thinks fit, from time to time, 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. Proviso (a) to Clause (2) empowers the Magistrate to detain the accused person in custody other than the police custody beyond the period of fifteen days on his being satisfied that adequate grounds exist for detention, but in no case the detention of accused person in custody shall exceed 90 days, where the investigation relates to an offence punishable with death or imprisonment for life or an imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence. On expiry of 90 days and 60 days, as the case may be, the accused shall be released on bail and his release on bail shall be deemed to be a release under the provisions of Chapter XXXIII of the Code. Thus, it is evident that during investigation the Magistrate can authorise detention of the accused in custody other than the polite custody beyond the period of 15 days if he is satisfied that there is adequate ground for such detention, but that detention cannot exceed to 90 days if the investigation relates to an offence punishable with death or imprisonment for life or rigorous, imprisonment for a term not less than ten years or sixty days where the investigation relates to any other offence. In other words, if the investigation is not completed within 90 days or 60 days, as the case may be, the Magistrate is bound to release the accused on bail on furnishing bail bond to his satisfaction.

8. In this case, the question is as to whether the case of the Petitioner falls under proviso (a)(i) or a(ii) to Section 167(2) of the Code? In other words, whether the investigation in the case of the Petitioner related to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years or it related to any other offence where punishment provided Is below ten years.

9. According to the allegation, the Petitioner along with more than five persons attempted to commit robbery. Thus, the offence alleged against the Petitioner is a dacoity punishable u/s 395 I.P.C., as an attempt to commit robbery by more than five persons is also covered by the definition of dacoity, as defined u/s 390 I.P.C. In course of dacoity the allegation against the Petitioner is that he was armed with deadly weapon. The Petitioner has been made an accused u/s 398 I.P.C. which provides that if, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

10. According to the learned Counsel for the Petitioner, for determining the question as to whether Clause (i) or (ii) of proviso (a) to Section 167(2) of the Code will apply the minimum punishment provided for a particular offence will be decisive factor. According to him, as the minimum punishment provided for the offence Under Section 398 is only seven years, Clause (i) of proviso (a) to Sub-section (2) of Section 167 will not apply in this case, on the other hand, Clause (ii) of proviso (a) to Section 167(2) of the Code will apply, according to which the maximum period for detention of the accused person in custody during investigation shall be 60 days and as, admittedly, the investigation has not been completed within 60 days in this case, the Petitioner was entitled to be released on bail and the learned Addl. Chief Judicial Magistrate and the Addl. Sessions Judge have erred in rejecting the prayer of the Petitioner for bail. I find myself unable to agree with the aforesaid submission for the reasons stated hereinafter.

11. A bare reading of proviso (a) to Section 167(2) shows that if the investigation relates to an offence which is punishable with death or imprisonment of life or for imprisonment for a term of not less than ten years, the maximum period of detention during investigation is 90 days and in other cases it is 60 days. If the offence is punishable with ten years or more, proviso (a)(i) will apply. The minimum sentence prescribed for a particular offence is not at all relevant for deciding the question whether proviso (a)(i) or (a) (ii) to Section 167(2) of the Code will apply.

12. Section 398 I.P.C. is not a substantive offence. It only provides that if at the time of attempting to commit robbery or dacoity the offender is armed with deadly weapon then the minimum punishment shall not be less than seven years. The substantive offence is an attempt to commit robbery or dacoity. If the accused person was armed with a deadly weapon while attempting to commit a robbery then the substantive offence would be attempt to commit robbery, which is punishable u/s 393 I.P.C. If the allegation is that the accused person was armed with a deadly weapon at the time of attempting to commit dacoity then the substantive offence would be dacoity punishable u/s 395 of the Penal Code, as an attempt to commit dacoity is also included within the definition of the dacoity, which provides, inter alia, that if five or more persons conjointly attempt to commit a robbery then every person so attempting is said to commit dacoity. Section 398 only regulates the punishment when certain facts are found in

existence at the time of attempting to commit robbery or dacoity.

13. In the present case the allegation is that the Petitioner was armed with deadly weapon at the time of attempting to commit dacoity and as such the offence which the Petitioner is alleged to have committed is a dacoity as defined u/s 391 of the Penal Code punishable u/s 395 of the Penal Code which provides punishment to 10 year's imprisonment and more and as such proviso (a)(i) to Section 157(2) of the Code, is attracted and he can be detained for a maximum period of 90 days during investigation and not sixty days as contended by the counsel for the Petitioner. Learned Counsel for the Petitioner fairly stated that the charge sheet was submitted before expiry of 90 days of detention. Thus, it is clear that proviso (a)(ii) to Section 167(2) of the Code is not attracted in this case and the courts below rightly did not enlarge the Petitioner on bail.

14. In my view, there is no merit in this application, it is accordingly dismissed.

Pramod Kumar Sarin, J.

15. I agree.