

(2004) 09 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : B.A. No. 91 / 2003

Shafait Ali and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 09-09-2004

Acts Referred:

Arms Act, 1959 — Section 25, 3, 7
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2)
Explosives Act, 1884 — Section 4, 5
Ranbir Penal Code, 1989 — Section 120, 120B, 121A, 302, 307

Citation : (2004) 3 JKJ 431

Hon'ble Judges : Sudesh Kumar Gupta, J

Bench : Single Bench

Advocate : P.N. Bhat, for the Appellant; B. S. Salathia, Sr. Addl. AG., for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gupta, J.—The petitioners, Shafait Ali and Shahid Hussain, involved in case registered under F.I.R. No.14/2001 of Police Station

Basohli for offences under sections 302, 307, 396, 397, 120B, 121A, 341, 120 RPC, 3/25, 7/25 Arms Act and 4/5 Explosive Act and facing trial

before the learned Sessions Judge, Kathua, have initiated this application for their release on bail under proviso to section 167 of the Code of

Criminal Procedure.

2. The petitioners further stated that even if the prosecution story with regard to the date of arrest of the accused on 04/04/2001 is taken as

correct, even then from 04/04/2001 to 02/06/2001 when the petitioners were placed under detention, the prosecution failed to present the challan

within sixty days. According to the petitioners, the period calculated from

04/04/2001 when the accused- petitioners are stated to have been arrested till their detention on 02/06/2001, if calculated, it comes to sixty days. That the prosecution having not produced the challan within the stipulated period, as provided under the proviso to section 167 of the Code of Criminal Procedure, it gives an indefeasible right for being released on bail.

3. The spinal question that arises for consideration in this application is when can accused be said to be entitled to bail, as an indefeasible right of his being released on compulsory bail under proviso (a) to section 167(2) of the Cr.P.C.? For facility of reference, proviso (a) to section 167(2) of the Cr.P.C. is reproduced hereunder:-

(a) the Magistrate may authorize detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this section for a total period exceeding sixty days and on the expiry of the said period of sixty days the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIX for the purpose of that Chapter.

4. A plain reading of the aforesaid provision makes it clearly manifest that right of compulsory bail can be availed by the accused person in custody only when the challan is not filed within the period of sixty days from the date of arrest of the accused.

5. Respondents in their objections have taken a specific stand that the petitioners are not entitled to avail the benefit of section 167(2) Cr.P.C. after the challan is presented in the court of law.

6. I have heard learned counsel for the parties and also perused the relevant provisions of law touching the matter in controversy.

7. Indubitably, the right of the accused for compulsory bail under proviso (a) to section 167(2) Cr.P.C. is absolute. It is not the discretion of the

Court but the command of the legislature. Where the investigating agency does not file the challan within the period provided under the provisions

of section 167(2) of the Cr.P.C., the accused in custody shall be released on bail. In that case, merits of the case are not to be examined. Accused

is entitled to grant of bail in such cases, irrespective of the nature of the offence, after the expiry of period prescribed by section 167(2) of the

Cr.P.C., i.e. sixty days.

8. Adverting to the averments in the petition, the relevant portion from para 4 is extracted below:-

Let us take for the sake of arguments though not admitting the date of arrest of the accused as 04-04-2001 still the accused are entitled to the

benefit of section 167(2) for grant of the bail. The plea taken by the prosecution before the District Judge was that the accused were placed under

detention on 02-06-2001 and thereafter the accused can not be given benefit of the aforesaid section. Even if the prosecution story is taken as

correct still from 04-04-2001 to 02-06-2001, the prosecution has failed to file the challan within 60 days as the calculation from 04-04-2001 to

02-06-2001 comes to 60 days and admittedly the prosecution has not produced the challan during this period.

9. Assuming but not admitting that the aforesaid averments are correct and the challan has not been presented within sixty days, yet the case of the

petitioners does not fall within the ambit of proviso to section 167(2) of the Cr.P.C., so as to entitle them for compulsory bail. Proviso (a) to

section 167(2) clearly envisages the custody/arrest of the petitioners for a period exceeding sixty days.

10. Mr. P. N. Bhat, learned counsel appearing for the petitioners, when taken through the recitals in the application of the petitioners for bail, in

which he has worked out sixty days period from 04/04/2001 to 02/06/2001, the date of arrest of the accused and the date when they were placed

under preventive detention, he candidly conceded that no indefeasible right of being released on bail u/s 167(2) of the Code has accrued to the

petitioners.

11. It may further be pointed out that the right of compulsory bail survives even after the filing of challan only in case where it was availed of

before filing thereof. It further follows that when the application has been made to avail the indefeasible right before filing of the challan and during

the currency of the application challan is filed or in case of rejection of application and during the pendency of the application before the higher

forum, the challan is presented, even then the petitioners have the right to be

released on bail under proviso (a) to section 167(2). Therefore, the contention of Mr. B. S. Salathia, learned Sr. Addl.AG appearing for the State, that the application of the petitioners for compulsory bail after the presentation of the challan cannot be entertained u/s 167(2) Cr.P.C., is devoid of legal force and bereft of any substance.

12. It may also be pointed out that the period of preventive detention of the accused has to be excluded from the period of limitation prescribed u/s

167(2) Cr.P.C. In this case, the petitioners even if admitted to remain in custody for sixty days, even then they are not entitled to avail the right of

compulsory bail u/s 167(2) Cr.P.C. which envisages the period exceeding sixty days.

13. For what has been stated and discussed above, the prayer of the petitioners for their release on compulsory bail u/s 167(2) Cr.P.C. cannot be

accepted. Therefore, their petition being without any merit, is, accordingly, dismissed.