

(2014) 01 BOM CK 0177

In the Bombay High Court

Case No : Criminal Writ Petition No. 17 of 2014

Shakil Khan Yasin Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167 167(2)
Penal Code, 1860 (IPC) — Section 306 34 379 386

Citation : (2014) ALLMR(Cri) 929 : (2014) 2 BomCR(Cri) 91

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : P.B. Pawar, for the Appellant; P.P. More, APP, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—Rule. By consent, Rule made returnable forthwith. By consent, heard finally. By the present Writ Petition, the petitioner is questioning the legality and correctness of the judgment and order passed by the Additional Sessions Judge, Dhule in Criminal Misc. Application No. 101/2013, whereby he cancelled the bail granted to the petitioner by the Judicial Magistrate, First Class, Dhule and directed the petitioner to be arrested and taken in custody. The bail that was granted to the petitioner by the learned Magistrate was under clause (a) of the first proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure (hereinafter referred to as "the Code"), which is popularly termed as "default bail".

2. The petitioner was arrested on 25.09.2013 in the course of investigation into C.R. No. 153/2013 registered at Deopur Police Station with respect to the offence punishable u/s 306 of the Indian Penal Code (IPC) read with section 34 of IPC. He was produced before the Magistrate on 26.09.2013 and thereafter was being remanded into police custody from time to time. On 25.11.2013, the petitioner made an application stating that he had been remanded in custody for a period of 60 days already, and that, the investigation had not been completed; and that,

therefore, he should be released in accordance with sub-clause (ii) of clause (a) of the first proviso to sub-section (2) of Section 167 of the Code. The Magistrate held that the petitioner was entitled to be released on bail in accordance with the aforesaid provisions and directed his release on bail.

Being aggrieved by the order passed by the Magistrate, the State filed an application before the Additional Sessions Judge, which as aforesaid, was allowed by him, cancelling the bail granted to the petitioner and directing his fresh arrest and detention in custody.

3. According to the learned Magistrate, the petitioner's case was covered by sub-clause (ii) of clause (a) of the first proviso to sub-section (2) of section 167 of the Code. According to the learned Additional Sessions Judge, the petitioner's case was covered by sub-clause (i) of the said clause.

4. Section 306 of IPC provides that a person committing the offence thereunder "shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." Thus the offence described in section 306 of IPC is punishable with a term of imprisonment upto 10 years. In other words, the imprisonment, that can be awarded to the offender, would be for a term of maximum 10 years.

5. The first proviso to section 167(2) of the Code puts restrictions on the period for which detention of an accused person in custody pending investigation can be authorized. It provides that " no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding:

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years". (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail...

6. The question would be about the interpretation of the phrase "imprisonment for a term of not less than 10 years" occurring in sub-clause (i) of clause (a). In other words, where the investigation relates to an offence for which punishment for a term of imprisonment upto the period of 10 years can be awarded, whether sub-clause (i), or sub-clause (ii) would be applicable, is the question. Whether an offence for which a maximum term of imprisonment of 10 years can be awarded would be an offence punishable with imprisonment for a "term of not less than 10 years" within the meaning of the said sub-clause (i), is the question.

7. This issue no longer res integra. It has already been answered by the Apex Court of India in the case of Rajeev Chaudhary Vs. State (N.C.T.) of Delhi, . In that case, the appellant before the Supreme Court was accused of having committed an offence punishable u/s 386 of IPC (and other offences providing for lesser punishment). Section 386 lays down that the offender "shall be punished with imprisonment of either description for a term which may extend to

10 years." In that case, the appellant before the Supreme Court was released by the Magistrate on bail holding that the charge-sheet had not been submitted within 60 days. The learned Additional Sessions Judge, when the matter was brought before him by way of an application for revision, held that since the sentence could be "upto 10 years", sub-clause (i) of clause (a) of the first proviso to section 167(2) would be applicable. He set aside the order passed by the Magistrate releasing the accused on bail. When this order passed by the Additional Sessions Judge was challenged before the High Court, the High Court held that "the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more." When the matter was brought before the Supreme Court of India, Their Lordships held that the expression "not less than" as appearing in clause (i) would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Their Lordships categorically held that cases of offences for which punishment could be imprisonment for less than 10 years would be governed by clause (ii) of section 167.

8. Similar view was taken in the case of Nijamuddin Mohammad Bashir Khan and Another Vs. State of Maharashtra, by a Division bench of this Court by referring to several decisions on this aspect including the decision of the Apex Court in the case of Rajeev Chaudhary (supra).

9. A perusal of the aforesaid decisions leaves no manner of doubt as to how the phrase "offence punishable with.....imprisonment for not less than 10 years" appearing in sub-clause (i) of clause (a) of the first proviso to section 167(2) is to be interpreted. The different interpretations of this phrase arise on account of the fact that an offence is usually said to be "punishable" with a certain term of imprisonment, by referring to the maximum term of imprisonment, that can be awarded for such offence. For instance, the offence of theft is said to be "punishable" with imprisonment for three years, which is the maximum imprisonment, that can be awarded for the said offence u/s 379 of IPC. Therefore, there is tendency of interpreting the phrase "offence punishable with imprisonment for not less than 10 years" in a manner so as to cover an offence for which imprisonment for a maximum term of 10 years can be awarded. However, in view of the interpretation of the said term, as done by Their Lordships of the Apex Court in the case of Rajeev Chaudhary (supra) in the context of sub-clause (i) of clause (a) of first proviso to section 167 of the Code, it is clear that only the offences which are punishable with death, or imprisonment for life, or imprisonment for a term of " minimum 10 years " would be governed by sub-clause (i) of clause (a). The offence u/s 306 is punishable with a maximum term of 10 years. The punishment for lesser term can certainly be awarded for the said offence. Therefore, in cases relating to the investigation into an offence punishable u/s 306 of IPC sub-clause (ii) of clause (a) would be applicable; and consequently, the maximum period during which the detention of

offender can be authorized, pending investigation, would be 60 days (and not 90 days). The learned Magistrate was, therefore, right in releasing the petitioner on bail.

10. It is surprising that inspite of the clear legal position and the clarity in the well reasoned order passed by the Magistrate, the Additional Sessions Judge set it aside and cancelled the bail granted to the petitioner. Infact, the impugned order makes a curious reading. The learned Additional Sessions Judge had understood the question needing determination properly and had referred to the decision in the case of Rajeev Chaudhary (supra). He reproduced the observations made by Their Lordships of Supreme Court of India in para no. 6 of the said reported judgment. The learned Additional Sessions Judge then observed that the decision was applicable to the case before him and further observed that it could not be said that minimum sentence would be 10 years or more. He also observed that the imprisonment could vary from "minimum to maximum 10 years", and that, it could not be said that "the imprisonment prescribed is not less than 10 years". Strangely, thereafter he observed that therefore, the Magistrate could detain the accused upto 90 days and not 60 days.

11. Either the learned Additional Sessions Judge has inserted the observations made by Their Lordships of Supreme Court of India in para no. 6 of the judgment in the case of Rajeev Chaudhary (supra) to be reproduced in his order without reading the same, or he has not understood the same inspite of reading it.

12. Any way, the impugned order is clearly contrary to law. The same, therefore, needs to be set aside by exercising the constitutional jurisdiction of this Court.

13. The Petition is allowed.

The order dated 26.12.2013 passed by the Additional Sessions Judge, Dhule is quashed and set aside.

Consequently, the order dated 25.11.2013 passed by the Judicial Magistrate, First Class, Dhule is restored.

14. The Petition is allowed in the aforesaid terms. Rule made absolute accordingly.