
(2013) 02 KL CK 0072
In the High Court Of Kerala
Case No : B.A. No. 1501 of 2013

Shinu, N.K.

APPELLANT

Vs

Sub Inspector of Police and Another

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 167

Citation : (2013) CriLJ 2810 : (2013) 2 ILR (Ker) 70 : (2013) 1 KHC 728 :
(2013) 2 KLJ 328

Hon'ble Judges : P.S. Gopinathan, J

Bench : Single Bench

Advocate : Cibi Thomas, for the Appellant; T.Y. Lalisa, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.S. Gopinathan, J.—The petitioner is the 2nd accused in Crime No. 420/2012 of Karikkottakkary Police Station for offence u/s 55(a) of the Abkari Act. The petitioner was arrested on 21-12-2012 with 85 bottles of Indian Made Foreign Liquor having capacity of 180 ml. each and 70 bottles containing 375 ml. each. Ever since he is in judicial custody. His application for bail was rejected by the Judicial Magistrate of the 1st Class, Mattannur on 19-2-2013 though the petitioner had been in custody for 60 days, as on 19-2-2013 and that the final report was not filed. The reason stated by the learned Magistrate is that the word "shall" used in Section 167 of Cr.P.C. is only directory and not mandatory. A reading of Section 167 Cr.P.C. would be relevant.

Procedure when investigation cannot be completed in twenty-four hours.--(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four 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 diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, 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:

Provided that,

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the 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 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 if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(Rest omitted as not relevant)

2. Going by proviso to Clause (ii) above, I find that no Magistrate can authorise detention of the accused in custody exceeding the period mentioned under Clauses (i) and (ii), if the investigation could not be completed within the time-limit prescribed thereunder. The order of the learned Magistrate declining to release the petitioner is absolutely not correct.

3. Suffice to state that the learned Magistrate had omitted to read the above provision and the precedents on the point. As early as in *Sanjay Dutt Vs. State through C.B.I., Bombay*, the Apex Court has held that after the expiry of the period prescribed under proviso to sub-section (2) of Section 167 of Cr.P.C., the detention of the accused in custody beyond the period prescribed therein is illegal and violative of Article 21 of the Constitution of India. That was reiterated by the Apex Court in the decision *Uday Mohanlal Acharya Vs. State of Maharashtra*. At para 8 in page 1921 it is held as follows:

In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute Book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished object of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions thereof, as stipulated under Art. 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody upto a maximum period as indicated in the proviso to sub-section (2) of S. 167, any further detention beyond the period without filing of challan by the Investigating Agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Art. 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of S. 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail, and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the oft chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum.

The same view was adopted by this Court in Kunhanandan Vs. State of Kerala, . In the light of the statutory provision and the above decisions, I find that the order declining to release the petitioner by the learned Magistrate is against the law and precedents. I find that the petitioner is entitled to an order of release.

In the result, this petition is allowed and there would be an order directing the Judicial Magistrate of the First Class, Mattannur to release the petitioner on bail

on executing a bond for Rs. 15,000 (Rupees fifteen thousand only) with two solvent sureties each for the like amount to her satisfaction on condition that the petitioner shall appear before the Court on all posting dates and a copy of this order shall be forwarded to the Judicial Magistrate of the First Class, Mattannur for compliance and nature guidance.