
(2011) 12 BOM CK 0014

In the Bombay High Court

Case No : Criminal Writ Petition No. 3651 of 2011

Sonu Madanlal Yogi

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 309
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2012) BomCR(Cri) 402

Hon'ble Judges : Khanwilkar A.M., J;Ketkar R.G., J

Bench : Division Bench

Advocate : Ghanashyam Upadhyay instructed by Law Juris, for the Appellant;
J.P. Yagnik, Assistant Public Prosecutor, for State, Ashok Bodhare, Police
Inspector, Kurla Police Station, Mumbai, present, for the Respondent

Judgement

1. Heard learned Counsel for the parties. Rule. Rules is made returnable forthwith. This petition under Article 226 of the Constitution of India is filed for issuance of writ of Habeas Corpus thereby directing production of the petitioner before the Court and after examining legality, validity and propriety of the continued detention of the petitioner, which according to the petitioner is illegal, issue directions to the respondents to release the petitioner forthwith.

2. The background in which this petition is filed is that the petitioner was arrested in connection with the offence punishable under sections 363, 366, 376 of the Indian Penal Code. The petitioner was sent to judicial custody pursuant to the remand orders passed from time to time. The last remand order passed in the case of the petitioner is dated 11.11.2011. On that date, the charge-sheet was filed before the concerned Magistrate by the Investigating Officer. As a result, the concerned Magistrate while extending the remand period of sending the petitioner to judicial custody till 25.11.2011, committed the matter to the Sessions Court.

3. On 25.11.2011 the matter appeared before the Sessions Court, when following order came to be passed.

This case transferred from C.C.& S.C., Mumbai and assigned to this Court. Matter is taking on today's Board first time. A.P.P. Shri. Bendkoli for the State present. Accused not produced from J/C. None appear for accused. Adjourned for to 14/12/11

4. On bare perusal of the above order it is noticed that the petitioner was not produced from judicial custody. No application for extending remand period was made by the prosecution, although the State was represented by the learned A.P.P. The Court simpliciter adjourned the matter to 14.12.2011. In this backdrop, the petitioner has approached this Court by way of present writ petition filed on 1.12.2011 making grievance that on and from 25.11.2011 the continued detention of the petitioner is illegal and therefore the respondents be directed to release the petitioner forthwith.

5. Although this petition was filed on 1.12.2011 and was taken on board on 2.12.2011 upon production, and it appeared before the Court on 5.12.2011, 9.12.2011 and 12.12.2011, till today, the respondents are not in a position to produce any valid remand order passed against the petitioner for continued detention of the petitioner in connection with the alleged offence. The only argument canvassed by the learned A.P.P. is that the order dated 25.11.2011 passed by the Sessions Court may be construed to mean that the petitioner could be continued in judicial custody upto 14.12.2011. He further submits that in view of section 309 of the Criminal Procedure Code, a formal remand order was not necessary and non-mentioning of this fact in the order dated 25.11.2011 cannot enure to the benefit of the petitioner.

6. Pursuant to the direction given yesterday the respondents have produced the accused before the Court from Thane Central Prison. It is an undisputed fact that no formal remand order is operating against the petitioner to continue his detention in judicial custody on and from 25.11.2011. The last remand order was passed on 11.11.2011 which was in force only till 25.11.2011. In the absence of any valid remand order, it is well established position that the Court in a habeas corpus petition will be obliged to issue directions to the State Authorities to release the petitioner who has been detained illegally. It will be useful to refer to the exposition of the Constitutional Bench of the Apex Court in the case of (Ram Narayan Singh Vs. State of Delhi)¹, 1953 DGLS (soft) 26 : AIR 1953 S.C. 277. In Paragraph 4 the Court observed thus:-

In a question of habeas corpus, when the lawfulness or otherwise of the custody of the persons concerned is in question, it is obvious that those documents, if genuine would be of vital importance, but they were not produced notwithstanding the clear directions contained in our order of 10th March. The Court records produced before us do not contain any order of remand made on 9th March. As we have already observed, we have the order of the trying

Magistrate merely adjourning the case to 11th. The Solicitor General appearing on behalf of the Government, explains that these slips of paper, which would be of crucial importance to the case, were with a Police Officer who was present in Court yesterday, but after the Court rose in the evening the latter thought that their production might be of some importance and therefore they were filed before the Registrar at 5.20 p.m. We cannot take notice of documents produced in such circumstances, and we are not satisfied that there was any order of remand committing the accused to further custody till 11th March. It has been held by this Court that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. The material date on the facts of the case is 10th March, when the affidavit on behalf of the Government was filed justifying the detention as a lawful one. But the position, as we have stated, is that on that date there was no order remanding the four persons to custody. This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are, therefore, entitled to be released, and they are set at liberty forthwith.

7. Reliance can also be placed on another Constitution Bench decision of the Apex Court in the case of (Madhu Limaye & anr. Vs. Ved Murti and ors) 2, 1970 DGLS (soft) 456 : 1970(3) S.C.C. 739. It is not necessary to multiply the authorities on the above proposition.

8. We shall now advert to the arguments of the learned A.P.P. According to him no formal remand order was necessary in the fact situation of the present case. This argument deserves to be stated to be rejected. Reliance on section 309 of the Cr.P.C. is completely misplaced. Sub-section (2) of section 309 which has been pressed into service by the learned A.P.P. comes into play only after the concerned Court takes cognizance of the offence. As of now, it is an admitted position that the cognizance of the offence has not been taken by the concerned Court. The matter appeared before the concerned Court on 25.11.2011, but was simplicitor adjourned to 14.12.2011. In spite of filing of the present petition by the petitioner on 1.12.2011, till date no remedial measures/steps have been taken either by the Investigating Officer or any other State Authorities for appropriate orders for continuing the petitioner in judicial custody.

9. As a result we will have no option but to allow this petition and direct the petitioner to be released forthwith. The learned A.P.P. was at pains to rely on the decision of the Apex Court in the case of (Lakshmanrao Vs. Judicial Magistrate, First Class, Parvatipuram & ors.)3, 1970 DGLS (soft) 465 : 1970(3) S.C.C. 501. The three Judges Bench of the Supreme Court which decided this case was dealing with the challenge to the remand order passed by the concerned Court. The Court opined that the power conferred being judicial the absence of an express, precise standard for determination of the question would not render the

section unconstitutional. The Court further observed that the detention pursuant to an order of remand which appropriately falls within the terms of section 344 of the old Code (equivalent provision in new Code, section 309) is accordingly not open to challenge in Habeas Corpus.

10. In the present case, as aforesaid, it is an admitted position that the remand order against the petitioner operated till 25.11.2011 and not thereafter. It necessarily follows that the petitioner is kept in detention illegally. As a result, petition succeeds in terms of prayer Clause (a) which reads thus:-

(a) That this Hon"ble Court be pleased to issue a writ Habeas Corpus thereby directing the production of petitioner before this Hon"ble Court and after examining the legality, validity and propriety of the detention of the petitioner, which is illegal, may be further pleased to direct his release from illegal detention forthwith.

11. Petition is made absolute in terms of above-quoted prayer Clause (a), while making it clear that the direction in this habeas corpus petition is passed to release the petitioner provided he is not required in any other case.

12. At this stage, the learned A.P.P. submits that the petitioner be released provided the petitioner is put to some terms as he is accused in a serious offence under sections 363, 366, 376 of the Indian Penal Code. We have no difficulty in accepting this submission of the learned A.P.P.

13. The petitioner shall be released on bail in connection with C.R. No. 177 of 2011, viz. Sessions Case No. 795 of 2011 pending in the Sessions Court at Sewree, provided he is not required in any other criminal case, on furnishing a bond in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand) and two sureties in the like amount. Further the petitioner shall not enter the jurisdiction of Kurla Police Station during the pendency of the criminal case pending against him. Besides, the petitioner shall furnish his latest residential address to the Investigating Officer which will be a condition for his release on bail. The petitioner shall keep the Investigating Officer informed about the change of his address, if any. The petitioner shall make himself available for trial of the pending criminal case and shall not leave Mumbai City without taking prior permission of the concerned Court.

14. On complying with the above conditions, the petitioner will be entitled to avail of the bail in terms of this order during the pendency of the aforesaid criminal case.

15. While parting, we would place on record that the Secretary, Home Department, Government of Maharashtra, will take notice of the inaction of the Investigating Officer in not moving the concerned Court for appropriate orders for continuing the petitioner in a judicial custody and more particularly in spite of being put to notice on account of filing of the present petition on 1.12.2011, which has resulted in passing of the order in favour of the petitioner although he

is involved in a serious offence.

16. Copy of this order be forwarded to the Secretary, Home Department, Government of Maharashtra forthwith for information and necessary action.

17. At this stage, Counsel for the petitioner submits that the petitioner be initially released on cash bail. We are not inclined to agree to this request. The same is rejected. Counsel for the petitioner now submits that such a condition cannot be imposed in a habeas corpus petition. Considering the seriousness of the offence in which petitioner has been named as accused, in the interest of justice we deem it appropriate to impose the above condition. Petitioner be taken back to Thane Central Prison and will be entitled to be released on bail subject to compliance of the aforesaid conditions, provided he is not required in any other criminal case.