

(2008) 04 GUJ CK 0027
In the Gujarat High Court

Case No : Criminal Revision Application No. 260 of 2008

State of Gujarat

APPELLANT

Vs

Jethisinh Kulubava Padhiyar

RESPONDENT

Date of Decision : 30-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 57
Dowry Prohibition Act, 1961 — Section 2
Penal Code, 1860 (IPC) — Section 114, 120B, 304B, 386, 406

Citation : (2008) 04 GUJ CK 0027

Hon'ble Judges : D.N. Patel, J

Bench : Single Bench

Advocate : Mita Panchal, APP No. 1, for the Appellant; BB Naik, for the Respondent

Judgement

D.N. Patel, J.

Rule. Learned Counsel Mr. B.B. Naik waives service of notice of Rule on behalf of the respondent.

1. This Criminal Revision Application has been preferred by the State of Gujarat against the judgment and order dated 25th July, 2007 passed by learned Additional Sessions Judge, Fast Track Court No. 8, Vadodara in Criminal Revision Application No. 189 of 2007, whereby bail has been granted to the respondent in connection with the offence registered with Karjan Police Station bearing C.R. No. I 42 of 2007, for the offence punishable under Sections 406, 420, 417, 408, 409, 465, 467, 468, 471, 120(B) and 114 of the Indian Penal Code, mainly for the reason that charge-sheet/ challan has not been filed by the police within a period of sixty days and, therefore, bail has been granted to the respondent-accused, u/s 167(2) of the Code of Criminal Procedure, 1973. Against this judgment and award dated 25th July, 2007, the State has preferred this Criminal Revision Application for cancellation of bail.

2. Learned Additional Public Prosecutor on behalf of the applicant-State

submitted that:

=> against the respondent-accused an offence bearing C.R. No. I- 42 of 2007 was registered on 19th February,2007 at Karjan Police Station, for the offences punishable under Sections 406, 420, 417, 408, 409, 465, 467, 468, 471, 120(B) and 114 of the Indian Penal Code;

=> Thereafter, respondent was arrested on 10th May,2007;

=> Allegation against the respondent is that an amount of Rs. 53,47,847/- has been misappropriated of the Baroda Central Co-Operative Bank Ltd.;

=> Investigation was carried out and the charge-sheet was filed on 10th May,2007;

=> It appears from the facts of the case that the respondent applied for bail u/s 167(2) of the Code of Criminal Procedure, 1973, before the Trial Court on 13th July,2007;

=> The charge-sheet was filed on 63rd day and, therefore, it was contended by the respondent before the Trial Court that as the charge-sheet is not filed within sixty days, the respondent is entitled to be enlarged on bail u/s 167(2) of the Code of Criminal Procedure, 1973;

=> The Trial Court has dismissed this application vide order dated 18th July,2007;

=> Against dismissal of this application, Criminal Revision Application No. 189 of 2007 was preferred by the respondent before learned Additional Sessions Judge, Vadodara and it is submitted that the offence is punishable under Sections 467 and 409, the sentence, can be awarded for less than 10 years also and, therefore, sixty days is the prescribed period for filing of charge-sheet/challan, u/s 167 of the Code of Criminal Procedure, 1973. Charge-sheet is not filed within sixty days and, therefore, the respondent is entitled to be enlarged on bail.

=> Learned Additional Sessions Judge, Vadodara has therefore, granted bail to the respondent, interpreting the judgment delivered by the Hon''ble Supreme Court and the provisions of the Code of Criminal Procedure, 1973, and observed that charge-sheet/ challan ought to have been filed within a period of sixty days and the same has not been filed within prescribed period and, therefore, bail was granted to the respondent.

=> Learned Additional Public Prosecutor for the applicant-State argued out the case in detail and has relied upon the judgment delivered by the Hon''ble Supreme Court in the case of Bhupinder Singh and Others Vs. Jarnail Singh and Another, especially in paras 8, 11 to 14 and has pointed out that in the facts of the present case, if the maximum sentence awardable is life imprisonment, the Court has to look into the maximum sentence and maximum period of ninety days is prescribed for filing of the charge-sheet/challan and not sixty days. This is an error apparent on the face of the judgment delivered by the Learned

Additional Sessions Judge, Vadodara and, therefore, the order passed by the learned Additional Sessions Judge, Vadodara, deserves to be quashed and set aside.

3. Learned Counsel for the respondent has relied upon the decisions delivered by the Hon'ble Supreme Court reported in *Rajeev Chaudhary Vs. State (N.C.T.) of Delhi*, and *Uday Mohanlal Acharya Vs. State of Maharashtra*, and has submitted that if the sentence can be awarded less than 10 years, then minimum sentence is to be seen and not the maximum sentence. If the sentence can be awarded from one year to life imprisonment, the Court has to see the fact that if the one year sentence is awarded, the charge-sheet ought to have been filed within a period of sixty days and, therefore, the interpretation of the learned Additional Sessions Judge, Vadodara, is absolutely true and correct and, therefore, this Criminal Revision Application preferred by the State deserves to be dismissed.

4. Having heard the learned Counsel for both the side and looking to the facts and circumstances of the case, judgment and award dated 25th July, 2007 passed by learned Additional Sessions Judge, Fast Track Court No. 8, Vadodara in Criminal Revision Application No. 189 of 2007, deserves to be quashed and set aside, for the following facts and reasons:

(i) The offence bearing C.R. No. I- 42 of 2007 was registered against the respondent-accused on 19th February, 2007 at Karjan Police Station, for the offences punishable under Sections 406, 420, 417, 408, 409, 465, 467, 468, 471, 120(B) and 114 of the Indian Penal Code.

(ii) It appears from the facts of the case that the respondent-accused was arrested on 10th May, 2007. Charge-sheet was filed before the concerned Trial Judge on 10th May, 2007.

(iii) It appears that the charge levelled against the respondent-accused is punishable under Sections 406, 420, 417, 408, 409, 465, 467, 468, 471, 120(B) and 114 of the Indian Penal Code. Thus, respondent-accused can be punished upto life imprisonment, if the offence under Sections 409 or 467 is proved against him.

Section Offence Punishment 467 Forgery of a valuable security, Imprisonment for life, or will or authority to make or imprisonment for 10 years transfer any valuable security, and fine. or to receive any money, etc. 409 Criminal breach of trust by Imprisonment for life, or public servant or by banker, imprisonment for 10 years merchant or agent, etc. and fine. For grant or refusal of bail u/s 167(2) of the Code of Criminal Procedure, 1973, the Court has to draw its attention not upon minimum sentence, but, always upon maximum sentence awardable, if the offence is proved. If the offence is punishable with death, imprisonment for life or imprisonment for a term ten years or more, and if the charge-sheet is filed within 90 days from the date, on which, an accused was taken in judicial custody, then, accused is not entitled to grant bail u/s 167(2) of the Code of Criminal Procedure, 1973 (which is popularly known as "default

bail"). This aspect of the matter has not been properly appreciated by the learned Additional Sessions Judge, Vadodara. This is an error apparent on the face of the record, looking to Section 167 of the Code of Criminal Procedure, 1973, which reads as under:

167. 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 no 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, 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 released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

It appears from the aforesaid section that if the maximum sentence awarded is

10 years or more, charge-sheet/ challan can be filed within a period of ninety days and in other cases, the said period is sixty days and if the charge-sheet is not filed within aforesaid time, the accused is entitled to get bail u/s 167(2) of the Code of Criminal Procedure, 1973. Now, while arriving at a conclusion Whether sixty days period is prescribed or ninety days period is prescribed, the Court has to look at maximum sentence awardable. Thus, the Court has to see the maximum awardable punishment and not the minimum awardable punishment. In view of the allegation levelled against the respondent-accused in the present case, is for the offence punishable u/s 409 and 467 of the Indian Penal Code, over and above, allegations under other provisions of the Indian Penal Code. The maximum awardable sentence under Sections 409 and 467 of the Indian Penal Code, is life imprisonment and, therefore, the period prescribed for filing of the charge-sheet/challan is always ninety days, and, hence, in this case, as the charge sheet was filed on 63rd day, as per Section 167(2) of the Code of Criminal procedure, 1973, accused ought not to have been enlarged on bail by Learned Additional Sessions Court.

(iv) Learned Additional Public Prosecutor for the State submitted that as per the decision rendered by the Hon"ble Supreme Court in the case of Bhupinder Singh and Others Vs. Jarnail Singh and Another, , especially in para 11 and 14, the Court has to see not the minimum punishment but the maximum punishment, if the offence is proved against him. Paras 8, 11, 12, 13 and 14 thereof, read as under:

8. Section 304B, I.P.C. and Section 167(2)(a), Cr.P.C. read as follows:

304B (IPC) : Dowry death

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death," and such husband or relative shall be deemed to have caused her death.

Explanation.- For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

167, Cr.P.C.: Procedure when investigation cannot be completed in twenty four hours.-

(2) ...

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 released under the provisions of Chapter XXXIII for the purposes of this Chapter.

11. A bare reading of Section 304B, I.P.C. shows that whoever commits "dowry death" in terms of Section 304B, IPC shall be punished with an imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life. In other words, the minimum sentence is 7 years but in a given case sentence of imprisonment for life can be awarded. Put differently, sentence of imprisonment for life can be awarded in respect of an offence punishable u/s 304B, IPC. Proviso to Sub-section (2) of Section 167 consists of three parts. The first part relates to power of Magistrate to authorise detention of the accused person. This part consists of two sub-parts. In positive terms it prescribes that no Magistrate shall authorise detention of the accused in custody, under this paragraph (meaning Sub-section (2)(a)) for a total period exceeding (i) 90 days where the investigation relates to an offence punishable under death, imprisonment for life or imprisonment for a term of not less than 10 years (ii) 60 days where the investigation relates to any other offences. The period of 90 days is applicable to cases where the investigation relates to the three categories of offences which are punishable with (i) death, (ii) imprisonment for life; or (iii) imprisonment for a term of not less than ten years. The question is whether Section 304B is an offence "punishable" with imprisonment for life. Strong reliance was placed by Mr. D. K. Garg, learned Counsel appearing for the appellant on the decision in *Rajeev Chaudhary Vs. State (N.C.T.) of Delhi*, . A reference is also made to the decisions of the Jharkhand, Delhi and Karnataka High Courts where the ratio in *Rajiv Chaudhary's* case (supra) has been made applicable to cases involving offence punishable u/s 304B, IPC. The Jharkhand High Court's decision is *Sunil Kumar v. State of Jharkhand* and Ors. 2003 (2) RCR (Cri) 135 . Contrary view appears to have been taken by the Rajasthan and the Himachal Pradesh High Courts in *Keshav Dev and Others Vs. The State of Rajasthan*, and *State of H.P. Vs. Lal Singh*, The Punjab and Haryana High Court appears to have taken somewhat different view in two different cases. In *Kuldeep Singh v. State of Punjab*, RCR (Criminal) 599 it was held that the period is 90 days, as has been held in the case at hand. But a different view (though in

relation to some other offences) was taken in Abdul Hamid and Anr. (Cri. Misc. No. 40599 M of 2005 disposed of on 21st September, 2005). A bare reading of Rajiv Chaudhary's case (supra) shows that the same related to an offence punishable u/s 386, IPC and the sentence in respect of the said offence is not less than 10 years. This Court held that the expression "not less than" means that the imprisonment should be 10 years or more to attract 90 days period. In that context it was said that for the purpose of Clause (i) of proviso (a) of Section 167(2), Cr. P.C. the imprisonment should be for a clear period of 10 years or more. The position is different in respect of the offence punishable u/s 304B, IPC. In case of Section 304B the range varies between 7 years and imprisonment for life. What should be the adequate punishment in a given case has to be decided by the Court on the basis of the facts and circumstances involved in the particular case. The stage of imposing a sentence comes only after recording the order of conviction of the accused person. The significant word in the proviso is "punishable". The word "punishable" as used in statutes which declare that certain offences are punishable in a certain way means liable to be punished in the way designated. It is ordinarily defined as deserving of or capable or liable to punishment, capable of being punished by law or right, may be punished or liable to be punished, and not must be punished.

12. In Bouviers Law Dictionary meaning of the word "punishable", has been given as "liable to punishment". In "Words and Phrases" (Permanent Edition) following meaning is given:

The word "punishable" in a statute stating that a crime is punishable by a designated penalty or term of years in the State prison limits the penalty or term of years to the amount or term of years stated in the statute.

"Corpus Juris Secundum" gives the meaning as:

Deserving of or liable to, punishment; capable of being punished by law or right; said of persons or offences. The meaning of the term is not "must be punished" but "may be punished" or "liable to be punished."

13. While dealing with a case relating to Punjab Borstal Act, 1926, this Court held that a person convicted u/s 302, IPC and sentenced to life imprisonment is not entitled to benefit of Section 5 of the said Act as offence of murder is punishable with death. (See Sube Singh and Others Vs. State of Haryana and Others,

14. Where minimum and maximum sentences are prescribed both are imposable depending on the facts of the cases. It is for the Court, after recording conviction, to impose appropriate sentence. It cannot, therefore, be accepted that only the minimum sentence is imposable and not the maximum sentence. Merely because minimum sentence is provided that does not mean that the sentence imposable is only the minimum sentence. The High Court's view in the impugned order that permissible period of filing of challan is 90 days is the correct view. Contrary view expressed by Jharkhand, Delhi and Karnataka High

Courts is not correct. Himachal Pradesh, Rajasthan and Punjab and Haryana High Courts taking the view 90 days is the period have expressed the correct view. Therefore, on that ground alone the appeal fails. But since another point urged for consideration which as noted above arises in many cases, we are considering that matter. In *Tara Singh Vs. The State*, four-Judge Bench of this Court inter alia had examined the effect of supplementary report. The contents of the report as required to be given u/s 173(1)(a) of Criminal Procedure Code, 1898 (in short the "old Code") were examined. In para 14 it was noted as follows:

When the police drew up their challan of the 2nd October, 1949, and submitted it to the Court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and the drawing of a sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore the mere fact that a second challan was put in on the 5th October would not necessarily vitiate the first. All that Section 173(1)(a) requires is that as soon as the police investigation under Chapter XIV of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form:

Setting forth the names of the parties, the nature of the information and the names of the person who appear to be acquainted with the circumstances of the case.

All that appears to have been done in the report of the 2nd October which the police called their incomplete challan. The witnesses named in the second challan of the 5th October were not witnesses who were "acquainted with the circumstances of the case." They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were "acquainted with the circumstances of the case." Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind which Section 173(1)(a) of the Code contemplates. There is no force in this argument and we hold that the Magistrate took proper cognizance of the matter.

In view of the aforesaid decision rendered by the Hon"ble Supreme Court, where for any proved offence, punishment can be extended upto life imprisonment or for imprisonment of ten years or more, in such circumstance, period for filing charge sheet/ challan is ninety days. The word "punishable" is interpreted in the aforesaid paras and pointed out that if the maximum sentence can be awarded is 10 years or more, then, charge-sheet/ challan can be filed within a period of ninety days, as per Section 167 of the Code of Criminal Procedure, 1973.

(v) Learned Counsel for the respondent-accused has relied upon the decision delivered by the Hon"ble Supreme Court reported in *Uday Mohanlal Acharya Vs. State of Maharashtra*, Looking to the facts and circumstances of the case, the said judgment is not applicable in the facts of the present case. No contradictory

view has been taken as suggested by the counsel for the respondent. On the contrary, looking to the facts of the aforesaid decision reported in Uday Mohanlal Acharya Vs. State of Maharashtra, whole case is pertains to the question Whether bail u/s 167(2) of the Code of Criminal Procedure can be granted, if during the hearing of the bail application, charge-sheet/ challan is filed. It has been held by Hon''ble Supreme Court that once charge-sheet/ challan is filed during the course of hearing of the bail application preferred u/s 167(2) of the Code of Criminal Procedure, no bail can be granted u/s 167(2) of the Code of Criminal Procedure, 1973, but it ought to be considered u/s 439 of the Code of Criminal Procedure, 1973. Thus, once the charge-sheet is filed, whole case of bail of the accused is shifted from Section 167(2) to Section 439 of the Code of Criminal Procedure. In the facts of the present case, we are concerned with the fact that Whether ninety days period is prescribed or sixty days period is prescribed, for filing of charge-sheet, when maximum punishment awardable is life imprisonment or when it is 10 years or more and, therefore, decision reported in Uday Mohanlal Acharya Vs. State of Maharashtra, relied by the learned Counsel for the respondent, is not applicable in the facts of the present case.

5. Learned Counsel for the respondent has relied upon the decision rendered by the Hon''ble Supreme Court in the case of Rajeev Chaudhary Vs. State (N.C.T.) of Delhi, This judgment is not helpful to the respondent. On the contrary, it goes against the respondent. Paras 3 and 6 of the aforesaid judgment, read as under:

3. Appellant was arrested in connection with an offence punishable under Sections 386, 506 and 120B of the I.P.C. He was produced before the Metropolitan Magistrate, Delhi on 31-10-1998 and was released on bail by Order dated 2-1-1999 by the Metropolitan Magistrate on the grounds that charge-sheet was not submitted within 60 days as provided u/s 167(2) of the Criminal Procedure Code, 1973. That order was challenged before the Sessions Judge. New Delhi by filing Criminal Revision No. 22 of 1999. By judgment and Order dated 18-8-1999, the Additional Sessions Judge, New Delhi allowed the said revision application. The learned Additional Sessions Judge held that for an offence u/s 386, I.P.C. period of sentence could be up to 10 years RI. Hence, Clause (i) of the Proviso (a) to Section 167(2) would be applicable. He, therefore, set aside the order passed by the Metropolitan Magistrate releasing the accused on bail. That order was challenged before the High Court by the accused. The High Court referred to its earlier decisions and held that expression "an offence punishable with imprisonment for a term of not less than 10 years" in Clause (i) of the proviso to Section 167 would mean an offence punishable with imprisonment for a specified period which period would not be less than 10 years or in other words would be at least ten years. The words "not less than" qualify the period. These words put emphasis on the period of ten years and mean period must be clear ten years. It was further held that on a plain reading of Clause (i) of Proviso (a) to Sub-section (2) of Section 167, Cr. P.C. there seemed to be no doubt that offences punishable with death, imprisonment for life or

imprisonment for a term of ten years or more would fall under Clause (i) and offences which are punishable with imprisonment for less than ten years would fall under Clause (ii). Hence, the High Court set aside the order passed by the Additional Sessions Judge. That order is challenged in this appeal.

6. From the relevant part of the aforesaid sections, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term "not less than 10 years", the Magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For rest of the offences, period prescribed is 60 days. Hence in case, where offence is punishable with imprisonment for 10 years or more, accused could be detained up to a period of 90 days. In this context, 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. u/s 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider Clause (i) of Proviso (a) to Section 167(2) it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. u/s 386 of the I.P.C. imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.

In view of the aforesaid decision, para-3 gives the facts and para-6 declares the law. Looking to para-6 of the aforesaid decision, it has been held by Hon'ble Supreme Court that if any offence proved against the accused is punishable for 10 years or more, charge-sheet can be filed within 90 days as maximum sentence is to be seen and, therefore, in such type of cases, period of filing of charge-sheet/challan is ninety days and not sixty days. In view of the aforesaid para, this judgment is against the respondent.

6. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, judgment and award dated 25th July, 2007 passed by learned Additional Sessions Judge, Fast Track Court No. 8, Vadodara in Criminal Revision Application No. 189 of 2007, is hereby quashed and set aside. Bail granted to the respondent is hereby cancelled. The respondent is hereby directed to surrender to the judicial custody on or before 30th May, 2008. Rule made absolute.