

(1983) 02 BOM CK 0010

In the Bombay High Court

Case No : Criminal Application No. 107 of 1983

State of Maharashtra

APPELLANT

Vs

Khodya Alias Khodidas Sonabhai Chavan

RESPONDENT

Date of Decision : 28-02-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2)

Citation : (1983) 2 BomCR 100

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Judgement

1 to 34. xx xx xx xx

35. The logical deductions emerging out of the aforesaid discussion vis-a-vis the provisions contained in Sections 167(2), 209, 309 and 437 as also having reference to the various ratios of the judicial pronouncement which are elaborately discussed hereinabove, can be catalogued as :-

Non-filing of the charge-sheet within the stipulated period of 60 days or 90 days, as the case may be, accrues a right in favour of the accused for being entitled to be released on bail u/s 167(2) of the Code provided the accused is prepared and furnishes bail.

36. The said entitlement is irrespective of any other consideration.

37. The merits of the matter recedes in the background to which the learned Magistrate need not address himself, but has to restrict only to the two termini, the arrest of the accused, filing of the charge-sheet and the span of period involved in between.

38. This right of being entitled to bail is absolute only in that limited field, but the field and extent of such absoluteness cannot be expanded beyond a circuit and as such certain limitations are hedged in, which, however, would come on the forefront only after filing of the charge-sheet.

39. Section 167(2) is incorporated only as an enabling provision so that on the happening of that contingency and right being accrued in favour of the accused and the motion being made in that behalf, the Magistrate gets jurisdiction and authority to release the accused on bail. However, the main and more fundamental source of authority out of which this jurisdiction springs remains intact in the provisions contained in Chapter XXXIII, which includes Section 437(1).

40. In effect, therefore, the right of entitlement to bail which falls predominantly u/s 167(2) is distinct from the machinery or process of releasing on bail which essentially flows out of the principal provisions regarding bail as incorporated in Chap. XXXIII.

41. Reference to Chapter XXXIII in the provisions of Section 167(2) has its relevance and significance in this sense. The deeming fiction merely enables the learned Magistrate to uphold the validity of the right of the accused and to release him on bail.

42. The further consequence of this deeming fiction would be that the provisions contained in Section 437(1), (2) and (5) remain active and in force all throughout whereby all the considerations for release of the accused on bail under sub-section (1) with the prohibition from such a release as contemplated by the proviso thereto and also the necessity of cancellation of bail under sub-section (5) could remain in existence, and thus those cannot be allowed to be over-shadowed by the provisions of Section 167(2).

43. To put it in other form, reference in Section 167 in a generic term to Chapter XXXIII which pertains to the provisions of bail and allied provisions and not restricting the reference to S. 437(1) only is a strong pointer to justify the conclusion that along with provisions and power or granting bail, the other jurisdiction of cancellation of bail under subsection (5) ipso facto would be capable of being in operation.

44. The release of the accused on bail u/s 167(2) cannot necessarily be of a permanent duration, not only during the pendency of the committal proceeding but also thereafter even till the conclusion of the Sessions Trial in the Sessions Court. The situation, therefore, may get a different complexion after filing of the charge-sheet.

45. The facts and circumstances of a given case may create such a situation demanding placing of the accused in custody, which obviously can be done by virtue of the provisions of Section 437(5) in effect by cancellation of bail.

46. Permissibility to resort to this course in a given case would be implicit notwithstanding the accused having been released on bail u/s 167(2) on the earlier occasion.

47. This can be based on the satisfaction of the learned Magistrate about the existence of a non-bailable offence and necessity of taking the accused in

custody.

48. This stipulation u/s 437(5) may embrace variety of contingencies, one of which would be that the accused commits a lapse or breach of conditions of bail or tampers with evidence. However, the other would be dehors of these considerations, which would be with reference to Section 437(1) read along with its proviso under which the satisfaction about the offence being punishable with death or imprisonment for life and involvement of the accused therein would justify the detention of the accused in custody, which in turn would permit creating such detention by placing him in custody if already released on bail.

49. Consequently, it cannot be said to be impermissible to assess the situation, after filing of the charge-sheet and if the facts so demand and justify, squarely attracting the said two provisions of Section 437(1) with the proviso and S. 437(5), to take back the accused in custody notwithstanding he has been released on bail u/s 167(2) on the earlier occasion.

50. In that contingency it would be the merits of the matter that would be exclusively relevant which had then become patent though on the previous occasion when the accused was released u/s 167(2) the merits, though in existence, were in latent form. As such at such latter point of time, the learned Magistrate will have to address himself to the merits and not to the technical aspect as to the point of time when the charge-sheet is filed.

51. Similarly, the provisions of Section 209 regarding the commitment of the accused to the Court of Session cannot be allowed to have predominance over the provisions of Chapter XXXIII.

52. In that behalf it would be idle to make a distinction on the basic aspects in the provisions of Sections 167 and 209 vis-a-vis granting of bail in that it would not be permissible to conclude that by virtue of sub-clause (b) to Section 209, containing the user of the particular terminology vis-a-vis the provisions of Code relating to bail and not making reference to Chapter XXXIII in that context, a contrast is sought to be made in that terminology under Sections 167 and 209. In other words, it would be impermissible to hold that sub-clause (b) of Section 209 is broader in itself and would govern the case where the accused is already released on bail u/s 167(2) of the Code.

53. It would, therefore, be irrational to hold that once the accused is released on bail u/s 167(2) he will have to be continued to be on bail even on the eve of the commitment to the Court of Session whereby Section 209(b) would be controlled by Section 167(2).

54. Manifestly both the said provisions vis-a-vis this aspect would be on par and would equally be governed by the provisions in Chapter XXXIII contained in Section 437, more so as Section 167(2) is merely an enabling provision, which entitles the accused to ask for bail and invest authority in the Magistrate to grant bail though its implementation is basically under Chap. XXXIII.

55. In effect, therefore, sub-clause (b) of Section 209 would be controlled by Chapter XXXIII without any reference to Section 167(2).

56. The net result would be that if the facts and circumstances so demand about the commitment of the accused to the Court of Session as also non-granting of bail or cancellation of bail if already granted is well justified by Section 437(1) with the proviso and Section 437(5), then on the eve of commitment, the accused can be taken in custody which would be notwithstanding his having been already released on bail though not on merits but only u/s 167(2).

57. The ratio in Full Bench decision of Gujarat High Court in Babubhai Parshottamdas Patel Vs. State of Gujarat, which will have to be considered, with respect, with certain reservations and cannot be accepted wholesale for the reasons already assigned.

58. These deductions would be the harmonious blending of all the relevant provisions in the achievement of the legislative intent as also the object and scheme of the Code.

59. Rule made absolute.