

(2000) 02 PAT CK 0082

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 574 with No's. 668 and 701 of 1999

Sunil Singh @ Captain Sunil and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-02-2000

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 309(2), 439

Penal Code, 1860 (IPC) — Section 120, 302, 307, 339, 359

Citation : (2001) CriLJ 3681 : (2000) 2 PLJR 488

Hon'ble Judges : Bisheshwar Prasad Singh, J; Ashok Kumar Ganguly, J

Bench : Division Bench

Advocate : Rana Pratap Singh, Ajay Kumar and Thakur Bimal Kumar, for the Appellant; Rakesh Kumar, S.D. Yadav and Anil Kumar Verma, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Singh, J.—The petitioners in these three writ petitions are the co-accused in connection with Gardanibagh (Shastri-nagar) P.S. Case No. 336/98. In the said case the Chief Judicial Magistrate took cognizance of offences under Sections. 302, 307, 379, 359, 339 and 120B of the Indian Penal Code as also u/s 27 of the Arms Act, After taking cognizance the case records were transferred to the Court of Sri B.K. Tiwary, Judicial Magistrate, 1st Class, Patna for commitment. In these writ petitions the prayer of the petitioners is that this Court should direct their release on the ground that in the absence of any valid order of remand their detention in judicial custody was illegal. It is their case that for months together they have never been produced before the concerned Magistrate, nor has any valid order of remand been passed authorising their detention in jail in judicial custody.

2. The representative facts may be taken from Cr. W.J.C. No. 574/99, Petitioner Sunil Singh alias Captain Sunil was initially arrested in connection with

Gardanibagh P.S. Case No. 47 of 1999 and under the orders of the Chief Judicial Magistrate, Patna, he was remanded to judicial custody and lodged in Beur Central Jail. Subsequently, he was also remanded in other cases including Gardanibagh (Shastrinagar) P.S. case No. 336/98. Apart from the aforesaid case, the petitioner had been granted bail in the remaining cases. Chargesheet was submitted in Gardanibagh (Shastrinagar) P.S. Case No. 336/98 on 4-10-98 and the learned Chief Judicial Magistrate took cognizance of various offences under the Indian Penal Code and transferred the case to the Court of Sri B.K. Tiwary, Judicial Magistrate, for commitment of the case to the Court of Session. It is not disputed that an order of remand was passed on 19-3-99.

Later the Central Bureau of Investigation took up investigation of the case on 9-4-99 and on 13-4-99 a file was opened and the case was renumbered as R.C. Case No. 4(s) 99. On 17-11-99 the record of the case was transferred to the Court of Special Judicial Magistrate, C.B.I., Patna, since the case was being investigated by the C.B.I.

3. The petitioner was not produced before the Court of Sri. B.K. Tiwary, Judicial Magistrate, Patna on 20-9-99, but a custody warrant was produced showing that the petitioner is sick. According to the petitioner, after 20-9-99 no order of remand was ever passed, neither was the petitioner produced before the learned Magistrate on any day thereafter. He, however, continued to languish in detention without a valid order of remand.

4. These writ petitions came up before this Court on 21-12-99. On that day even counsel for the C.B.I. made a grievance that despite the requests made to the Jail Superintendent, Beur Jail, the petitioner was not produced before the concerned Magistrate.

5. The question which arose for consideration before this Court was whether the petitioners have been duly remanded in the case and their detention was justified by law. Rather than itself examining the records of the three cases, this Court remanded the matter to the Court of Special Judicial Magistrate, C.B.I. Patna, directing him to examine the records of the cases and if he found that the petitioners were being detained in jail custody without their being a valid order of remand, he shall consider their cases for release on bail in accordance with the provisions of the Criminal Procedure Code. The parties were directed to produce the Court's order before the Special Judicial Magistrate, so that the matter may be disposed of forthwith after notice to counsel for the C.B.I.

6. Pursuant to the aforesaid order of this Court the learned Magistrate examined the records of the three cases. The petitioners also filed bail petitions before him for their being admitted to bail in the absence of valid orders of remand.

7. By his order dated 22-12-99 the learned Special Judicial Magistrate held that on 4-1-99 only petitioner Ram Niranjana Choudhary was produced before the Court of Sri. B.K. Tiwary, Judicial Magistrate, 1st Class. On 5-3-99 the accused in custody had not been produced. On 1-4-99 petitioner Sunil Singh alias Captain

Sunil had been produced before the Judicial Magistrate, but petitioner Ram Niranjana Choudhary was not produced from the jail custody. On 3-6-99 none of the petitioners were produced from jail before the Court of Sri. B.K. Tiwary. That continued till 17-11-99 as would be evident from the records. On 17-11-99 the records of the case were transferred to the Court of Special Judicial Magistrate, C.B.I., Patna. He, therefore, recorded a finding that Ram Niranjana Choudhary was remanded on 4-1-99 and thereafter no order of remand was passed, and he was not produced before the concerned Magistrate. So far as others are concerned, it appears that till the case records were sent to the Court of Special Judicial Magistrate, C.B.I. they were also not being produced before the concerned Magistrate nor was there any order of remand.

From the order of the learned Special Judicial Magistrate, C.B.I. it appears that after the case was transferred to his Court no petition was filed either by the defence counsel or by the C.B.I. for the production of the accused before him. It, therefore, appears that even before him the petitioners were not produced after the case records were transferred to his Court. It appears that a show cause notice had been issued by the Court of Special Judicial Magistrate, C.B.I. on 20-12-99 calling upon the Jail Superintendent to explain why the accused persons had not been produced in his Court. On 21-12-99 the Superintendent of Beur Central Jail had reported that all the prisoners in the jail were on hunger strike and as such they could not be produced in his Court. However, having regard to the serious nature of the offences alleged against the petitioners the learned Special Judicial Magistrate, C.B.I. rejected their bail petitions.

8. The matter again came up before this Court on 12-1-2000. It was argued before this Court that in view of the clear findings recorded by the Special Judicial Magistrate, C.B.I. that the petitioners had not been remanded to jail custody in accordance with law and had never been produced before the Court for several months, their detention in custody was illegal. Even the Government Advocate was not in a position to support the detention of the petitioners in the absence of valid order of remand. However, this Court took notice of the practice followed in the State of producing custody warrants before the Magistrate and getting endorsements on those warrants without producing the prisoner. This Court, therefore, by its order dated 12-1-2000 directed that the petitioners be released on bail on their furnishing bail bonds and sureties to the satisfaction of the Special Judicial Magistrate, C.B.I., Patna. This, however, was subject to the condition that if they had been remanded on the basis of custody warrants, such remand would be deemed to be a valid remand. The Superintendent of jail concerned was directed to produce before the Magistrate the custody warrants if any.

9. On 13-1-2000 the custody warrants were produced from the Central Jail, Beur, and the Special Judicial Magistrate, C.B.I. perused the custody warrants and the case records. He recorded the following findings:

Re: (a) Sunil Singh alias Captain Sunil

He was remanded on 19-3-99 by the Court of Judicial Magistrate, 1st Class, Patna, and was directed to be produced on 1-4-99, 13-4-99, 24-4-99 and 6-5-99. He was, however, not produced before the Court, and was shown to be sick on 6-5-99. On successive dates i.e., on 17-6-99, 14-7-99, 24-7-99, 10-8-99, 24-8-99, 6-9-99 and 20-9-99 he was not produced before the Court as he was shown to be sick. However, the learned Special Judicial Magistrate, C.B.I. Patna, declined to grant him bail because it appeared to him from the custody warrant produced before him that the aforesaid petitioner could not be produced on the ground that he was sick. The learned Magistrate concluded by observing :

I am not convinced to grant him bail by furnishing any bail bond because the condition imposed by the lordship of the Hon'ble Justice for granting bail in favour of the petitioner is not convincing to me.

We have failed to appreciate the import of this observation in the order of the learned Magistrate. Apart from bad English, it appears that the Magistrate has commented on the order of the High Court by observing that the condition imposed by the High Court for grant of bail to the petitioner was not convincing. This Court had only directed him to examine the record as well as the custody warrant if produced, with a view to find out whether the petitioner was detained in custody pursuant to a valid order of remand. It is well-settled that the detention of an accused in jail in judicial custody can only be justified on the basis of an order of remand passed by the competent Court. We fail to understand what was so unconvincing in the order of the High Court.

Re : (b) Ram Niranjana Choudhary

10. He was firstly remanded on 13-7-98 and was required to be produced before the Court on 27-7-98. He, however, refused to appear before the Magistrate without proper arrangement of escort party. On 26-9-98 he was produced before the Chief Judicial Magistrate. On 12-9-98 the petitioner refused to appear before the Court, but he was produced on the next date i.e. on 25-11-98. He was again produced on 9-12-98, 22-12-98 and 4-1-99. The next date fixed for his production was 18-1-99. However, after 4-1-99 the said Ram Niranjana Choudhary was never produced before the Court as was evident from the custody warrant.

Re : (c) Sunil Kumar Singh

11. He was produced before the Judicial Magistrate on 2-9-98 and the next date for production was 16-9-98. The learned Magistrate found that there was no endorsement in the custody warrant for the production of this petitioner who was in jail custody.

12. Despite the findings recorded by him regarding non-production of the petitioners before the concerned Court, the Special Judicial Magistrate, C.B.I. refused to admit them to bail observing that the intention of the petitioners from the very beginning was not bona fide. They had avoided production before the

Court on the ground that they were sick or on the ground that adequate security had not been arranged. Thus, they had voluntarily not appeared before the Court and their detention was, therefore, not illegal. According to the learned Magistrate, the petitioners were avoiding production before the Court with a view to get themselves released on bail on the ground of non-production. The learned Special Judicial Magistrate, C.B.I. rejected all the bail applications filed before him. On the basis of the finding recorded by the Special Judicial Magistrate, C.B.I. it may be concluded that petitioner Sunil Singh alias Captain Sunil was not produced before the concerned Magistrate after 20th September, 1999. In fact, there is no endorsement even on the custody warrant bearing any date after 20th September, 1999. It, therefore, follows that in any event after 20th September, 1999 petitioner Sunil Singh alias Captain Sunil was never produced before the Court concerned nor was there any order of remand for his detention even on the custody warrant. Similarly, petitioner Ram Niranjana Choudhary was last produced before the Court on 4-1-99 and there is no endorsement on the custody warrant after 18-1-99. Petitioner Sunil Kumar Singh was also last produced before the Court on 2-9-98 and was not produced on 16-9-98 which was the next date fixed for his production.

13. The facts as they appear from the records are indeed distressing. The petitioners have not been produced before the concerned Court for months together. In the case of Sunil Singh alias Captain Sunil the custody warrant shows that he was not being produced on successive dates on the pretext that he was sick. We fail to understand why the learned Magistrate acted in such a mechanical manner and countenanced the non-production of the accused for months together. The fact that the accused was not being produced on successive dates on the ground that he was sick should have aroused his suspicion. He was also not oblivious of the fact that even other accused in the case were not being produced and there was apparently no good reason for not producing them before the Court. We have serious doubts as to whether Sunil Singh alias Captain Sunil was really sick, so that he could not be produced before the Court. The Magistrate should have at least insisted upon the production of some material, such as the jail doctor's report, to satisfy himself that the cause given for non-production of the accused was true and bona fide. The learned Magistrate, in my opinion, has erred in assuming that the accused was sick or that he deliberately was not appearing before the Court. There is material on record to indicate that all the prisoners of Beur Central Jail protested and went on hunger strike since they were not regularly produced before the concerned Courts.

14. I have, therefore, no hesitation in coming to the conclusion that the detention of the petitioners in jail custody without valid orders of remand was clearly illegal. See *Khatris and Others Vs. State of Bihar and Others*, . The question is as to whether we shall be justified in ordering their release today in view of the subsequent events that have taken place. It is not disputed that the petitioners were produced before the Special Judge, C.B.I., Patna on 27-1-2000, and they

have now been remanded to jail custody. The petitioners have filed a supplementary affidavit challenging the aforesaid order of remand and have prayed for amendment of the writ petition seeking quashing of the aforesaid order of remand dated 27-1-2000.

15. It was submitted before us that once a right had accrued to the petitioners of being released on bail, their subsequent remand would not defeat that right. Counsel cited before us a few decisions of the Supreme Court in support of this proposition, but we find that those were cases in which an order admitting the accused to bail was passed u/s 167(2) of the Code of Criminal Procedure and those orders were sought to be nullified after chargesheet was filed in the case. In those circumstances, the Court held that once an accused is admitted to bail u/s 167(2) of the Code of Criminal Procedure, that order granting bail is as good as an order passed u/s 439 of the Code of Criminal Procedure and can be cancelled on the same grounds on which an order granting regular bail may be cancelled. The mere filing of a chargesheet in the case would be no ground for cancellation of bail already granted See *Aslam Babalal Desai Vs. State of Maharashtra*, . In the instant case we are concerned with the detention in purported judicial custody and the same is challenged on the ground that there is no order of remand justifying such detention. We have no doubt that in the absence of a valid order of remand such detention in jail was not justified and this Court may have been justified in ordering their release holding that the detention was illegal, in the absence of an order of remand. In the instant case we find that as of today there is an order of remand dated 27-1-2000. The detention of the petitioners, therefore, Under such order of remand cannot be termed as illegal and, therefore, we shall not be justified in directing their release on the ground that their detention in the past was illegal. The illegality of the detention has to be established on the date on which the Court passes the order. The detention which may have been illegal at its inception in the absence of a valid order of remand, may be legalised by passing of a valid order of remand subsequently. This view gains support from the principle enunciated by the Supreme Court in *Sanjay Dutt Vs. State through C.B.I., Bombay*, wherein it was observed at page 500-501 of Cri LJ :

...The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment the challan is filed because Section 167, Cr. P.C. ceases to apply....

If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. See *Naranjan Singh Nathawan Vs. The State of Punjab*, , *Ram Narayan Singh Vs. The State of Delhi and Others*, and *A.K. Gopalan Vs. The Government of India*, .

16. Counsel for the petitioners submitted that though there was no challenge to the validity of Section 309(2) of the Code of Criminal Procedure, he was entitled to contend that the power much be exercised u/s 309(2) of the Code of Criminal Procedure consistent with the rights safeguarded by Article 21 of the Constitution of India and, therefore, it must be shown that there were reasonable grounds to remand the accused to custody. The submission urged on behalf of the petitioners is not without substance, but I find that the petitioners in the instant case are involved in a serious case of murder. The Chief Judicial Magistrate has taken cognizance and commitment proceeding is pending before the Court of Special Magistrate, C.B.I., Patna. Since the trial of the petitioners will commence after they are committed to the Court of Session, there is nothing unreasonable in their being remanded to judicial custody pending the trial. In these circumstances, the petitioners, is so advised, may pray for grant of bail u/s 439 of the Code of Criminal Procedure. Nothing said in this order should be considered to be an expression of opinion on the merit of the case against the petitioners since the observations have been made only for the purpose of disposal of these writ petitions.

17. In the facts and circumstances therefore no relief can be granted to the petitioners. These writ petitions are, accordingly, dismissed.

A.K. Ganguly, J.

18. I agree.