

(2010) 02 GAU CK 0015
In the Gauhati High Court
Case No : BA No. 19 (AP) of 2010

Tonya Ori

APPELLANT

Vs

State of Arunachal Pradesh

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 167(2)
Penal Code, 1860 (IPC) — Section 302, 34, 341, 392

Citation : (2006) 1 GLT 254

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : K. Ete, for the Appellant; N. Lowang, for the Respondent

Final Decision : Allowed

Judgement

U.B. Saha, J.—The instant application is filed by Sri Tonya Ori, father of the accused Niyali Ori, for granting bail to the accused, who was arrested on 22.10.2009 in connection with Gensi PS case No. 09/09 under Sections 392/302/341/34 IPC read with Section 25/27 of the Arms Act.

2. The prosecution case in short is that one Md. Tahir Khan lodged an FIR before the O/C, Basar Police Station alleging, inter alia, that on 16.10.2009 at around 22:30 his., two unidentified persons covering their faces with clothes and armed with sophisticated weapons stopped a vehicle namely, Tata Mobile No. AS 22B-0224 on BRTF road near Ganesh Mandir, Garu, which was coming from Likabali. They dragged out the driver of the said Tata Mobile and shot him on his forehead at point blank range killing him on the spot. They also looted away Rs. 400/-from the informant and also beat him up causing injury. The said information of Md. Tahir Khan was registered as P.S. Case No. 09/09. The police after investigation arrested the present accused along with the two other main accused persons.

3. Heard Mr. K. Ete, learned Counsel for the Petitioner as well as Mr. N. Lowang,

learned pp for the State.

4. Mr. K. Ete, learned Counsel for the Petitioner submits that the accused is in custody for more than 90 days and in view of the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure he acquires an indefeasible right to be released on bail on his furnishing a surety as this Court thinks fit and proper; even if the charge sheet is not filed and admittedly, in this case, the investigating authority failed to file the charge sheet within a period of 90 days as is required under law. He also contended that even if the entire prosecution story is believed then also the accused is in no way involved with the alleged killing of the driver of the said vehicle as he only allowed the main accused persons to stay in his house without knowing the facts relating to the alleged crime. He also contended that there is no possibility of absconsion or tampering the witnesses, if any, by the present accused person. More so, the father of the present accused, applicant of the instant petition is the village head (Gaon Bura) of Bogdo village. He finally contended that the approach of the Court in the matter of bail should not be that the accused should be detained by way of punishment but to see whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence. In support of his aforesaid submission he referred to a decision of Bhagirathsinh Judeja Vs. State of Gujarat, wherein the Apex Court discussed what should be the approach of the Court while hearing a bail application. He also referred to the decision of this Court in the case of Thangnam Khongsai and Another Vs. Union of India (UOI) and Another, wherein this Court relying on the decision of the Apex Court in the case of Uday Mohanlal Acharya Vs. State of Maharashtra, noted that when an accused acquires indefeasible right, under the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure, to be enlarged on bail, such a right can be defeated only if the accused, on becoming so entitled, fails to offer surety for being enlarged on bail and before such right is exercised by the accused, the prosecution agency submits charge sheet against him. This Court also noted that the learned Sessions Judge, in that case committed serious error in law in not allowing the accused to go on bail.

5. Mr. N. Lowang, learned PP while resisting the contentions of Mr. Ete contended that the present accused person had earlier also moved an application for bail being No. BA 164 (AP)/2009 which was rejected on 27.11.2009 after perusing the case diary. He further contended that it would not be proper for this Court to grant bail to the present accused only on the ground that the accused is in custody for more than 90 days.

6. In Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, the Apex Court while discussing about the proviso of Sub-section (2) of Section 167 of Code of Criminal Procedure held, inter alia, that an order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to

bail u/s 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.

7. In *Santosh Nandi and Another Vs. State of Tripura*, this Court stated that there is no doubt that the Court should not go into detailed examination of the evidences and elaborate documentation on the merit of the case but, the Court should be satisfied as to whether there is a prima facie case while passing the order on bail applications and the Court is also required to exercise its jurisdiction judiciously, not for withholding the bail application for the purpose of imposing punishment when the accused has root in the society and there is no possibility of absconding and tampering the witnesses. More so, in *Uday Mohanlal Acharya (supra)* the Apex Court taking note of proviso to Sub-section (2) of Section 167 of Code of Criminal Procedure laid down as follows:

1. Under Sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid Sub-section (2) of Section 167, the Magistrate may authorize detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right occurs in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the

part of the investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorized and therefore, if during that period the investigating is complete and charge-sheet is filled then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of used by this Court in Sanjay Dutt Vs. State through C.B.I., Bombay, must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail and the accused has not furnished the same.

8. There is no doubt that the nature of allegation made in the FIR and the materials available in the case diary are serious in nature but mere heinousness of an offence cannot be the ground for refusal of bail when otherwise the accused is entitled to bail due to his detention in the custody for more than the statutory period. More so, the Court is not supposed to examine the evidences in detail at bail stage and is also debarred from discussing about the merits of the case.

9. It is the admitted position that in the instant case the present accused person was arrested on 22.10.2009 and the charge sheet has not yet been filed by the investigating authority. Therefore, the present accused has acquired an indefeasible right under proviso to Sub-section (2) of Section 167 of Code of Criminal Procedure to go on bail and he is willing to offer surety therefor. Such a view is fortified by the decision of the Apex Court in Uday Mohanlal Acharya (supra). However, an application for bail of an accused can be rejected on special circumstances even if he has accrued a right under proviso to Sub-section (2) of Section 167 of Code of Criminal Procedure and from the record it appears that if he is released on bail he would tamper the evidences and evade the trial.

10. Considering the entire facts and circumstances and keeping in mind the interest of justice, it is hereby directed that the accused above named be allowed to go on bail on furnishing a bond of Rs. 25,000/- with two local sureties, each of the like amount, subject to the satisfaction of the Judicial Magistrate, First Class, Basar on further condition that the accused above named shall not leave the territorial jurisdiction of the Deputy Commissioner, West Siang District without prior permission of the learned Judicial Magistrate, First Class, Basar and shall appear before the Court of Judicial Magistrate, First Class, Basar as and when

required.

11. With the aforesaid observation and direction, the instant bail application is allowed.