

(1999) 07 BOM CK 0088

In the Bombay High Court

Case No : Criminal Application No. 712 of 1999

Vaijanath Patre

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-07-1999

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Criminal Procedure Code, 1973 (CrPC) — Section 167, 209, 309, 367, 437

Penal Code, 1860 (IPC) — Section 302, 34, 406, 452, 504

Citation : (2000) 5 BomCR 718 : (2000) 2 MhLj 35

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : S.B. Talekar, for the Appellant; K.B. Choudhary, Assistant Public Prosecutor, for the Respondent

Judgement

B.H. Marlapalle, J.—Rule. Taken up for final hearing forthwith.

2. Crime bearing No. 0065/98 came to be registered against the applicant for the offences punishable under sections 302, 452, 504, 506 r/w 34 of I.P.C. at Ardhapur Police Station, tq. and dist. Nanded. It was alleged that the applicant committed the murder of one Gajanan s/o Basappa Patre on 22-5-98. The applicant came to be arrested on 30-5-98 and Police Custody was obtained upto 4-6-98, on which date, he was ordered to be taken in Magisterial Custody Remand. His bail applications were rejected and on completion of investigation, the charge-sheet came to be filed in the Court of Judicial Magistrate, First Class at Nanded on 19-8-1998. By an order dt. 28-9-98, the learned Magistrate committed R.C.C. No. 596/98 u/s 209 of Cr.P.C. to the Court of Sessions for the trial of an offence punishable u/s 302, 452, 406 r/w 34 of I.P.C. and at present the case is pending in the Court of Sessions for trial. The bail application filed by the applicant even after the chargesheet was filed, has been rejected by this Court on 19-2-1999 in Criminal Application No. 45/99.

3. This is an application praying for being released on bail on the ground that the

applicant has been continued in jail illegally and without authority of law in as much as he was not produced before the learned Judicial Magistrate, First Class immediately after the expiry of the remand period and therefore, detention of the applicant in jail has become illegal. It is the contention of the applicant that the learned Judicial Magistrate, First Class had passed the order of remand when the applicant was not produced before him and no justification was either given before or recorded by the learned Judicial Magistrate, First Class, for the extended remand, order being passed in the absence of the accused. The learned Counsel for the applicant agreed that in a given case the Magistrate has the powers to pass the order of extending the custody, provided he is satisfied with such compelling circumstances beyond the control of the investigating agency and he records such satisfaction in the order of extension of remand. The learned Counsel, in support of his contention, has relied upon the following judgments :

(1) Ram Narayan Singh Vs. The State of Delhi and Others, .

(2) A. Narayan Reddy & others v. State of Andhra Pradesh, 1991(3) Cri 873.

4. The learned A.P.P for the respondent State has opposed the application by filing an affidavit in reply and he has relied upon the following two judgments in support of his contentions that the non-production of the accused, while passing the extension order of remand, itself, does not make the extension order illegal and the accused cannot be released on bail.

(1) Rahul Gupta Vs. State of M.P., ;

(2) Budha Mala Pavara & others v. State of Maharashtra, unreported judgment of Bombay High Court (Single Judge)

5. In the case of Rahul Gupta (supra), a learned Single Judge of the Madhya Pradesh High Court, inter alia, held that where the Magistrate is satisfied that the physical non-production of the accused was on account of reasons beyond the control of the authorities, he may expressly or impliedly waive production and if satisfied that remand needs to be extended, he may do so. The learned Judge also held that failure to make an endorsement of an extension in the order or if such an endorsement is made on the reverse side of the original warrant itself, is a curable irregularity and not incurable irregularity and an omission to mention the extension of remand in the order sheet may not amount to illegal detention, when there is an authorization in the warrant itself. The detention, therefore, would not be illegal in cases of such curable irregularities.

6. In the case of Budha Mala Pavara (supra), the accused could not be produced before the Magistrate for the extension of remand as no escort was made available and the learned Magistrate was satisfied with the explanation given by the police for not producing the accused on two different dates. This Court held that in such circumstances, it could not be said that the order of remand passed in the absence of the accused was illegal and therefore, the accused be released on bail.

7. In the case of Ramnarayan (supra) the Apex Court, inter alia, observed thus :

"It has been held by this Court that in habeas corpus proceedings, the Court is to have regard to the illegality or otherwise of the detention at the time of return and not with reference to the extension of the proceedings. The material date on the facts of this case is 10th March, when the affidavit on behalf of the Govt. was filed justifying the detention as a lawful one. But the position, as we have stated, is that on that day 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 on bail."

8. In the case of A. Narayan Reddy (supra), bail petitions u/s 437 and 439 of Cr.P.C. were filed and the question before the Division Bench of the Andhra Pradesh High Court for consideration was, whether the accused were entitled to be released on bail automatically when they were not produced before the Magistrate or the Sessions Judge, before remanding them to jail, when the case was adjourned. After examining the provisions of sections 367, 309, 487, and 489 of Cr.P.C. and earlier judgments of some High Courts, one of the Judges felt that an authoritative pronouncement on this question was necessary by a Division Bench and therefore, he directed the papers to be placed before the Hon'ble the Chief Justice for necessary directions, whereas, the another learned Single Judge observed in para No. 2 as under :

"We, therefore, make it clear that u/s 309(2) of Cr.P.C. non-production of the accused persons before the Court, after taking cognizance of an offence is not compulsory or mandatory, and when the Court after taking cognizance of an offence for commencement of trial finds it necessary to postpone the commencement of or adjourn the trial, it may do so and may, by a warrant, remand the accused, if in custody. We, however, hasten to add that if before taking cognizance of an offence, the accused continued to be in detention pursuant to the custody, the detention on the date when the Court took cognizance would not cure the illegal detention and the detained accused would be entitled to grant of bail on that count, as held by the Division Bench in the decision just referred to. We may also add, that it is open to the accused persons to move this Court, for bail, under Cr.P.C. or, under Article 226 of the Constitution of India, to secure his release, depending upon the facts of each case. The reference is accordingly answered."

9. The learned Counsel for the applicant, has heavily relied upon the observations quoted above in the judgment of the Andhra Pradesh High Court and urged before this Court that the facts and circumstances of the instant case are squarely covered under the said enunciations and it is imperative that the applicant is released on bail forthwith.

10. Along with the affidavit in reply filed by the Police Inspector from the concerned Police Station, details of remand orders have been set out. It is admitted that on 11-8-98 and 31-8-98, the accused could not be produced before the Magistrate when the extension order of remand was passed and the accused could not be produced because no escort was made available by the police. It is further stated that on subsequent dates, M.C.R. order was passed and the remand was extended upto 28-9-98. The accused was present before the Sessions Judge on 8-12-98. The following committal order was passed on 28-9-98 :

"ORDER"

"I. The case against the accused is committed u/s 209 Cr.P.C. to the Court of Sessions for trial of the offence punishable u/s 302, 452, 504 and 506 r/w 34 of I.P.C.

II. Issue committal warrant of the accused to produce them in the Court of Sessions, Nanded, as and when required,

III. The concerned P.S.O. is directed to produce the Muddemal property in the Court of Sessions at Nanded.

IV. Issue notice to the Public Prosecutor, Nanded, about this commitment."

11. The learned Counsel for the applicant contended that even in the committal order dt. 28-9-98, there is no mention that the M.C.R. was extended till the accused were produced before the Court of Sessions at Nanded. The learned Counsel for the applicant also referred to a communication issued by the Additional Sessions Judge, Nanded to the Superintendent of District Jail, Nanded, informing him that the applicant-accused were remanded to the jail with a direction to produce the accused before the Sessions Court at Nanded but till date the accused were not produced before the Sessions Court and the matter was fixed for framing the charges. The communication, therefore, directed to produce the accused on 8-12-98 before the Court of Additional Sessions Judge at Nanded.

12. The R. & P. of R.C.C. No. 596/98, as produced by the learned A.P.P., indicates one more irregularity viz. the order of extending the remand, passed from time to time, in the absence of the accused on the dates when the accused was not produced before the learned Magistrate, does not specify as to whether the learned Magistrate was satisfied of the reasons given for failure to produce the accused before the Court on the respective dates. It is, therefore, required to be considered whether in the given facts and circumstances of this case, the applicant is entitled for being released on bail by this Court, at this stage.

13. Section 167(2)(b) of Cr.P.C. states that no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him. This Court in the case of Baburao Raghu Patil and others Vs. The State of Maharashtra, , has, inter alia, held that the right granted to the accused

for being released on bail under proviso (a) to sub-section (2) of section 167 of the Cr.P.C. is not an absolute or indefeasible right, which cannot be diverted or obliterated by filing of a chargesheet and such a right may be lost on filing of the chargesheet. It was further held that merely because the chargesheet was filed after the statutory period mentioned in the proviso (a) to sub-section (2) of section 167 of Cr.P.C. the accused does not continue to enjoy the right of being released on bail under the said provision and there was no order releasing him on bail prior to the chargesheet being filed, by relying upon the earlier judgments in the case of *Shravan w/o Waman Nade v. State of Maharashtra*, 1976 Mah.L.J. 654 and in *Abdul Wahid Bahadur Ali Shaikh Vs. State of Maharashtra*, .

14. Sections 167, 209 and 309 of Cr.P.C. are independent of each other and they must be so read and applied. Section 167 is in Chapter XII, which deals with "Information to the Police and their powers to investigate", section 209 is part of Chapter XV regarding "Complaints to Magistrates" and section 309 falls in Chapter XXIV which deals with "General provisions as to enquiries and trials". If the charge-sheet is not filed within the prescribed time limit, as set out in section 167(2)(a) of Cr.P.C. from the date of the arrest of the accused, the accused would be entitled to bail. The provisions of section 167 cast a duty on the Investigating Officer to complete the investigation and file a chargesheet within the specified time limit and during such period, the Magistrate is authorized to extend the remand order. The provisions of section 167 of Cr.P.C. cease to be applicable once the chargesheet has been filed within the prescribed period. If the chargesheet is not filed within the period set out, the accused will be entitled for being released on bail and his detention beyond such period in such a condition would be illegal, without the authority of law and in violation of the provisions of Article 21 of the Constitution of India. Section 167 of Cr.P.C. in short, gives powers to detain the accused for the purposes of investigation and such detention should be either in police custody or Magisterial Custody and such accused can be continued in custody by following due procedure. On the expiry of the period of 60 days or 90 days, from the date of first arrest, Magistrate has no power to remand the applicant accused further in custody if the chargesheet is not filed.

15. Section 209 of Cr.P.C. mandates the Magistrate to pass an order of committal if the offence levelled against the accused is not triable by him and is exclusively triable by the Sessions Court or by any other Court. The said section makes it obligatory on the part of the Magistrate to remand the accused to the custody on committing the case to the Court of Sessions. Though the Magistrate is required to specifically state in the order of committal that the accused is remanded to the custody during and until conclusion of the trial, absence of such a specific order would amount to a mere irregularity and even if such an irregularity is there it does not, per se, mean that the detention of the accused in custody would be illegal. There may be an order remanding the accused to the custody or there may not be one such order as the provision of section 209 of Cr.P.C. lay down that the accused must be remanded to the custody during and until conclusion of

the trial, subject to the provisions relating to bail provided under the Code. If the accused is not on bail and if the Magistrate has no authority to release him on bail, the Magistrate has no option but to remand the accused to the custody on committing the case to the Court of Sessions. If the order of committal passed by the learned Magistrate does not specifically indicate that the accused be taken in custody and is remanded to the custody until he is presented before the Court of Sessions and it only indicates that the authority is directed to produce the accused before the Sessions Court, it implies that the accused is remanded to the custody during and until completion of the trial, subject, however, to his right to apply for bail, provided under the Code. Such an error of not passing a specific order to continue the accused in custody till he is produced before the trial Court does not make the detention of the accused illegal during the period of the trial.

16. Sub-section (1) of section 309 provides for expeditious conduct of the trials, whereas, sub-section (2) of the said section provides for the postponement of the commencement of the trial or the adjournments in the enquiry or trial, and while doing so, the Court is empowered to remand the accused in custody. The wording appearing in section 309(2) viz., "...may by warrant remand the accused if in custody..." are in contradistinction with the words appearing in section 167(2) viz. "...whereas, the detention of the accused in such custody as challenged, Magistrate thinks fit...". Section 167(2) confers discretion either to grant P.C.R. or judicial custody. Once the committal order has been passed and the accused is remanded to the custody or the authority has been asked to take the accused in custody and produce before the trial Court, the provisions of section 309 will come into play, which deal with the custody of the accused during the enquiries or trial and there is no discretion left but to grant judicial custody.

17. Though in the instant case, the order of remand passed by the learned Magistrate while exercising his power u/s 167(2) did not specify that the accused be taken into custody and retain in custody till he is produced before the Sessions Court on a given date, that itself would not entitle the accused to seek bail on account of breach of procedure as laid down in section 167 of Cr.P.C. Once the chargesheet is filed, the accused is entitled to take up the plea that either no case is made out against him or that the prosecution erroneously believes that it is a Sessions Court triable case. To argue that in such circumstances, there is right to release on bail in default, dehors the merits of the case would be tantamount to drafting provisions of section 167(2) into section 309 of Cr.P.C. A Division Bench of this Court in the case of Abdul Wahed (supra) held that the power to release on bail where default has taken place, must be exercised only before the chargesheet is filed and once that stage has passed, any application for bail will have to be purely on merits.

18 The judgment of the Supreme Court in the case of Ramnarayan Singh (supra) does not come to the rescue of the present applicant. In the said case, the offence was triable by the Magistrate only and trying Magistrate only passed an

order adjourning the matter till 11th March, 1953 without passing the order regarding remand of the accused to be in custody. The learned Magistrate could have released the accused on bail even after adjourning the matter to some other day because the matter was triable by the Magistrate himself. So far as the reliance on the case of A. Narayan Reddy (supra) decided by the Andhra Pradesh High Court is concerned, the judgments of our High Court viz. Abdul Wahed v. State of Maharashtra and others, as referred to hereinabove, clearly lay down that once the committal order is passed u/s 209 and the provisions of section 309 of the Cr.P.C. have come into play, no bail can be granted for the default on the part of the Magistrate while exercising his powers u/s 167 of the said Code and such an application for bail can be considered only on its own merits and not otherwise. This principle has been retired by the Apex Court in the case of Dr. Bipin Shantilal Panchal Vs. State of Gujarat, and Mohamed Iqbal Madar Sheikh and Others Vs. State of Maharashtra, . While following the ratio laid down by the Constitution Bench, in the case of Sanjay Dutt Vs. State through C.B.I., Bombay, , the Apex Court held that if the right to claim for bail on default of the provisions of section 167(2) of Cr.P.C. is not exercised before the chargesheet is filed, the accused are deemed to have forfeited their right to be released on bail under proviso (a) to section 167(2), as they are in custody on the basis of the orders of remand passed under other provisions of the Code and the bail applications will have to be, therefore, considered only on merits u/s 439 of Cr.P.C.

19. The contention of the applicant in the facts and circumstances of the present case, therefore, must fail and notwithstanding the fact that there may be some errors committed by the learned Magistrate, while passing the committal order u/s 209 more particularly regarding extending the remand of the accused, it is not permissible for the applicant to claim bail on account of such default. So far as the bail on merit is concerned, this Court has rejected his bail application on merits on earlier occasion and there is no change in circumstances as at present. This application has been presented only on the ground that the learned Magistrate had committed errors in exercising his jurisdiction under sections 167 and 209 of Cr.P.C. and therefore, he be released on bail. The contentions are devoid of merits, for the reasons set out in the foregoing paragraphs and the claim of the applicant, therefore, must fail.

20. In the result, the bail application hereby stands rejected and Rule is discharged. The trial is expedited.

21. Application rejected.