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of Assistant Engineer (Electrical) in the Final Select List dated 10.10.2003.

The parties are directed to bear their own costs.

Sri B.S. Patil, the learned Counsel, is permitted to file vakalath for Respondent No.1 within three weeks.

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S.B. MAJAGE, J

Ameer vs State of Karnataka, by Vijayapura Town Police*

CRIMINAL PROCEDURE CODE, 1973 (CENTRAL ACT NO. 2 OF 1974) – SECTION 167, 2(a)(i) & (ii) – Procedure when investigation cannot be completed – Right of accused to be released on bail – Rejection of bail application – Accused charged under Section 366(A) – Later Sections 342 & 376 added – Accused in judicial custody beyond 60 days – Accused sought for release on bail, since charge sheet not submitted within 60 days. Application for bail moved under Section 437 read with Section 167 (2)(a)(ii) – Application rejected since offence under Section 376 is punishable with imprisonment for life or imprisonment with ten years and fine – Period of detention permissible under Section 167(2)(a)(ii). Difference between Section 167(2)(a)(i) and Section 167(2)(a)(ii) stated. HELD – The punishment provided for the offence under Section 376 of I.P.C. may be for life i.e., may extend to life, but it may be less than that though not less than 7 years' imprisonment. Hence. Section 162(2)(a)(ii) of Cr.P.C. comes into play and not Section 167(2)(a)(i) of Cr.P.C. When, the period of 60

* Cr.P.No. 1330/2004 dated 30th July 2004

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days provided to file charge-sheet against accused expires, an indefensible right accrues to an accused to get himself released on bail, but subject to the terms and conditions to be imported by the Trial Court and such right cannot be scuttled down in any manner by the Court. (Para 11)

HELD:

When an offence is punishable with imprisonment for a period of not less than 10 years, i.e., if the punishment provided for the offence is imprisonment for 10 years or more i.e., if the minimum period of imprisonment is 10 years, then Section 167 (2)(a)(i) of Cr.P.C. applies on the other hand, if the punishment is for a period of less than 10 years or when it may extend to 10 years, then Section 167 (2)(a)(ii) of Cr.P.C. applies. Similarly, if the punishment is imprisonment for life, Section 167 (2)(a)(i) of Cr.P.C. applies, but when the imprisonment may extend to life, Section 167(2)(a)(ii) of Cr.P.C. applies. (Para 8)

This is because, in such a case, where the imprisonment may extend to life, the Court may impose lesser punishment for life or ever lesser than that also, as the punishment need not be imprisonment for life only. This the difference between Section 167(2)(a)(i) and Section 167(2)(a)(ii). (Para 7)

Petition allowed, imposed Orders set-aside with direction to release the petitioner – accused from custody, on such terms and conditions to be imposed.

CASES REFERRED:

AT PARAS

1. 2001 SAR (Cri) 487 -
Rajiv Choudhari vs State(NCT) Delhi (Ref) 6
2. 1997(4) Crimes 464 - *Babu vs State of Karnataka* (do) 6
3. 2002 Cri.L.J. 2507 -
Sunil Kumar vs State of Jharkhand (do) 6

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4. 1999 Cri.L.J. 3258 -
*Mohammed Arif Din Mohd. Shaikh vs
State of Maharashtra* (do) 7
5. 2001Cri.L.J.1352 - *Dilip Ojha vs State of Bihar* (do) 7

Sri S. Shankarappa & Assts., Advocates for Petitioner
Sri H.S. Chandramouli, S.P.P. for Respondent

ORDER

Majage, J

The only short point that arises for consideration in this matter is, “whether the period of 90 days provided under Section 167(2)(a)(i) of Cr.P.C. applies when investigation relates to an offence punishable under Section 376 of I.P.C.?”.

2. In the case on hand, at first instance, F.I.R. came to be issued for an offence punishable under Section 366 (A) against the petitioner – accused. However, later on, Sections 342 and 376 of I.P.C. also came to be added on the request made. The petitioner was arrested on 14.12.2003. However, charge-sheet was not filed within 60 days from that date. So, an application under Section 437 read with Section 167 (2) (a)(ii) of Cr.P.C. was filed by the petitioner–accused before the learned Magistrate to release him on bail on the ground that charge-sheet has not been filed within a period of 60 days provided under Section 167 (2)(a)(ii) of Cr.P.C. But, the learned Magistrate rejected that application holding that since one of the offences alleged against the petitioner–accused is punishable under Section 376 of I.P.C., the prosecution gets 90 day’s period to file charge – sheet. Challenging that order, the petitioner approached the Court of Session in CrI.R.P.No. 21/2004, but he was unsuccessful in that. Hence, he is before this Court now under Section 482 of Cr.P.C. Heard the learned Counsel for petitioner – accused and also the learned State Public Prosecutor, and perused the records carefully.

3. It was vehemently argued for the petitioner that in view of the fact that Section 376 of I.P.C. is punishable with imprisonment of either description for a term which shall not be less than seven years but

which may be for life or for a term which may extend to ten years, Section 167 (2)(a)(i) of Cr.P.C. is not attracted and as such, within the period of 60 days only, charge-sheet was required to be filed, and since the same was not filed within that period, the petitioner – accused was entitled to be released on bail, but the learned Magistrate has wrongly rejected his request, which has been wrongly confirmed by the Sessions Court. On the other hand, it was submitted by the learned S.P.P. that for the said offence, since the punishment may extend to imprisonment for life also, which is certainly a period for more than 10 years, Section 167(2)(a)(i) of Cr.P.C. applies and not Section 167(2)(a)(ii) of Cr.P.C. and consequently, he supported the impugned orders.

4. To appreciate the rival contentions, it is but necessary to extract the provision contained in Section 167(2) of Cr.P.C.. It is as under:

“167. Procedure when investigation cannot be completed in twenty-four hours – (1).....

(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 think fit, for 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;

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(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 so released under the provisions of Chapter XXXIII for the purpose of that Chapter;

(b) xxx xxx xxx ”

5. At that stage, it may be noted that both sides agree that the words “ shall not be less than 7 years” and “may extend to 10 years” can not be equated or read as imprisonment for a term of “ not less than 10 years”. But, the dispute is, whether the words ‘imprisonment may be for life’ employed in Section 376 of I.P.C. can be read as imprisonment for life found in Section 167 (2)(a)(i) of Cr.P.C. or not.

6. When the words “ imprisonment for a term which may extend to 10 years” cannot be taken or read as “imprisonment for a term of not less than 10 years”, on the same analogy, the words “ imprisonment for a term which may be for life” cannot be read or taken as “imprisonment for life” also. In this connection, reference can be had to the decision of the Supreme Court in the case of RAJIV CHOUDHARI vs STATE (NCT) DELHI¹ relied on for the petitioner – accused in support of his arguments, besides a decision of this Court in the case of BABU vs STATE OF KARNATAKA², and a decision of Jarkhand High Court in the case of SUNIL KUMAR vs STATE OF JHARKHAND³ relied on for the petitioner.

7. However, the learned S.P.P. has relied on a decision of Bombay High Court in the case of MOHAMMED ARIF DIN MOHD. SHAIKH vs STATE OF MAHARASHTRA⁴, and a decision of Patna High Court in the case of DILIP OJHA vs STATE OF BIHAR⁵ in support of his argument that, where the punishment may extend to imprisonment for life, Section 167(2)(a)(i) of Cr.P.C. applies and not Section 167(2)(A)(ii) of Cr.P.C.

1. 2001 SAR (Cri) 487
4. 1999 Cri.L.J. 3258

2. 1997(4) Crimes 464

3. 2002 Cri.L.J. 2507
5. 2001Cri.L.J.1352

8. But, on careful consideration of the provisions and on going through the decisions relied on for and against, what could be culled out is when an offence is punishable with imprisonment for a period of not less than 10 years, i.e., if the punishment provided for the offence is imprisonment for 10 years or more i.e. if the minimum period of imprisonment is 10 years, then Section 167 (2)(a)(i) of Cr.P.C. applies. On the other hand, if the punishment is for a period of less than 10 years or when it may extend to 10 years, then Section 167(2)(a)(ii) of Cr.P.C. applies. Similarly, if the punishment is imprisonment for life, Section 167(2)(a)(i) of Cr.P.C. applies, but when the imprisonment may extend to life, Section 167(2)(a)(ii) of Cr.P.C. applies.

9. This is because, in such a case, where the imprisonment may extend to life, the Court may impose imprisonment for life or even lesser than that also, as the punishment need not be imprisonment for life only. This is the difference between Section 167(2)(a)(i) and Section 167(2)(a)(ii) of Cr.P.C.

10. In the case on hand, the punishment provided for the offence under Section 376 of I.P.C. may be for life i.e., may extend to life, but it may be less than that though not less than 7 years' imprisonment. In other words, the punishment of imprisonment could be 7 years or more, and may extend to life but it need not be 10 years or more than 10 years' imprisonment. So, Section 167(2)(a)(ii) of Cr.P.C. comes into play and not Section 167 (2)(a)(i) of Cr.P.C. In the above view, the conclusion arrived at by the learned Magistrate that the prosecution had 90 days' period to file charge – sheet in such a case, cannot be said to be correct and so also, the view taken by the learned Sessions Judge, confirming the order of the learned Magistrate.

11. It need not be said, when the period of 60 days provided to file charge-sheet against accused expires, an indefeasible right accrues to an accused to get himself released on bail but, of course, on the terms and conditions to be imposed by the Trial Court and such a right cannot be scuttled down in any manner by the Court. However, in the case on hand, though the petitioner – accused had rightly applied for his release on bail after expiry of 60 day's period from the date of his arrest when charge-sheet was not filed, it was the bounden duty

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of the learned Magistrate to release him on bail on terms and conditions to be imposed, and not to reject the request made. Since that was not done by the learned Magistrate, his order requires to be quashed. So also the order, upholding such an order, passed by the learned Sessions Judge.

12. In the result, the petition is allowed under Section 482 Cr.P.C. and the impugned orders are set aside and a direction is given to the learned Magistrate at Devanahalli to release the petitioner – accused from custody in Crime No. 180/2003 of Vijayapura Police Station (C.C.No. 107/2004) on such terms and conditions to be imposed by her.

Inform the same to the concerned Court.

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MOHAN SHANTHANA GOUDAR, J

Tulsamma vs Jagannath and Others*

(A) CRIMINAL PROCEDURE CODE, 1973 – SECTION 200 – Maintainability of 2nd Complaint – On same facts – Complaint dismissed for non-prosecution on 4.12.2000 – Application for recalling the order of dismissal for default also dismissed – One more private complaint subsequently filed alleging the same offences as alleged in the first complaint – Trial Court by order dated 3.12.03 dismissed the said second complaint as not maintainable in view of the order of dismissal of earlier complaint, for non-prosecution whether order of dismissal of complaint either on merits or for non-prosecution, a bar for entertaining second complaint on the same facts. HELD– It will not be a bar but such second complaint will be entertained only in exceptional circumstances i.e when there is a manifest error or manifest miscarriage of

* CrI.R.P.No.329/2004 dated 2nd August 2004