

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

**Crl. Rev. No.2763 of 2015
Date of decision : 31.03.2016**

Puneet Kumar

.....Petitioner(s)

Versus

State of Punjab

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

**Present: Mr. Jagjit Gill, Advocate
for the petitioner.**

Mr. VPS Sidhu, AAG, Punjab.

**Mr. Navratan Singh, Advocate for
Mr. Navkiran Singh, Advocate
for the complainant.**

ANITA CHAUDHRY, J.

This revision is directed against the order dated 21.07.2015, passed by Rajwinder Kaur, Additional Sessions Judge, Bathinda who allowed the revision filed by the State. It had set aside the order of the Magistrate, who had allowed bail to the petitioner under Section 167(2) Cr.P.C.

The backdrop is necessary. A complaint was lodged by the victim and FIR No. 116 was registered on 10.10.2013, under Sections 376, 506, 120-B IPC at Police Station Cantt. Bathinda. The petitioner was arrested on 12.11.2013. He moved an application seeking bail under Section 167(2) Cr.P.C. The Magistrate, vide its order dated 21.01.2014 allowed bail as the period of 60 days had

expired. The challan had not been presented by then.

A revision was filed by the State assailing the order. They raised the plea that the offence under Section 376 IPC was punishable with imprisonment which could go up to life imprisonment, therefore, the Court had passed a wrong order. The Revisional Court allowed the revision and directed the accused to surrender within 7 days.

Aggrieved with the order, this petition by the accused.

I have heard the counsels of both the sides.

It was urged on behalf of the petitioner that the charge-sheet should have been presented within 60 days and the petitioner was entitled to bail under Section 167(a)(ii) Cr.P.C. and it was not the case of the prosecution that the challan has been presented nor the case fell under Section 376(2)(g) IPC. It was urged that once the bail has been allowed, it cannot be cancelled subsequently and bail can be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or Section 439(1) Cr.P.C. It was urged that even otherwise an incomplete challan had been presented and the report of FSL had not been filed. Reliance was placed upon ***Ramesh Vs. State Rep. By Inspector of Police 2007(1) Crimes 266, Ameer Vs. State of Karnataka 2005(1) RCR (Criminal) 107, Sandeep Kumar Vs. State of Uttarakhand 2013(1) U.D. 535, Aslam Babalal Desai Vs. State of Maharashtra 1993 AIR (SC)1, Shailesh Kishore Sinha Bipin Bihari Sinha Vs. State of Jharkhand 2013(4) JLJR 249 and Ravinder @ Binder Vs. State of Haryana 2015(4) RCR (Crl.) 441.***

On the other hand, it was urged that the Indian Penal Code had been amended w.e.f. 03.02.2013 and the minimum imprisonment is 7 years but it may extend to imprisonment of life but this case would fall under Section 376(2)(n) IPC as the allegations against the petitioner were that he had repeated the act on the same woman and the imprisonment prescribed is 7 years which may extend to imprisonment for life along with fine and the period for filing the challan is 90 days and not 60 days and the petitioner was not entitled to bail and if the Court had wrongly invoked the provisions, those can be corrected and the Revisional Court had rightly allowed the revision.

The question raised by the petitioner is whether the case would be covered under Clause (a)(i) of the Proviso to Section 167 Cr.P.C. or under Clause (a)(ii).

There is no difficulty with the settled position that non-completion of investigation within the period prescribed under [Section 167](#) CrPC gives an accused an "indefeasible right" to be released on bail. But, how long does this right ensure benefit to the accused? ***In Sanjay Dutt v. State through CBI, Bombay (II): (1994) 5 SCC 410***, the Supreme Court held that (page 442):

"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 challan is filed because [Section 167](#) CrPC ceases to apply."

Considering this very passage, the Supreme Court, in the subsequent case of [Bipin Shantilal Panchal \(Dr\) v. State of Gujarat: \(1996\) 1 SCC 718](#), observed:

"Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in [Aslam Babalal Desai v. State of Maharashtra](#)".

It would be necessary to refer to the relevant portions of Section 167 and 376 IPC, which read as under:-

"167. Procedure when investigation cannot be completed in twenty-four hours."

(1) * * * (2) * * * 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;

(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 purposes of that Chapter;

Section 376 in The Indian Penal Code-

376. (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer, commits rape—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

It is immediately clear that pending investigation the Magistrate can authorise detention for a period of 90 days, if the offence is punishable with death, imprisonment for life or

imprisonment for a term not less than 10 years. The counsel for the petitioner urged that there is a minimum sentence provided which is 7 years, therefore, according to him in the present case, it would be Proviso (a)(ii) to Section 167(2) Cr.P.C., which would be applicable and not Proviso (a)(i) to Section 167 Cr.P.C. and consequently the period applicable would be 60 days and not 90 days.

A similar issue arose before the Delhi High Court in ***Om Parkash Vs. State* 121 (2005) DLT 686**, decided on 22 June, 2005 and it was held as under:-

“Ultimately, the Supreme Court, after reference to its earlier decisions including that of a larger bench of three Hon'ble judges in [Subhash Chand v. State of Haryana](#): (1988) 1 SCC 717, was of the view that "punishable" carries the meaning "liable to be punished". In Sube Singh (supra), the Supreme Court was required to determine whether the offence of murder [[section 302 IPC](#)] could be classified as an offence "punishable" with death. The wording of [section 302 IPC](#) is -- "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine" In Sube Singh (supra) it was held that the offence of murder was one which was "punishable" with death although the actual sentence awarded may be life imprisonment. It is clear that the word "punishable" means "liable to be punished".

2.2.5 Viewed in the light of this meaning of the word "punishable", it is clear that proviso (a)(i) to [section 167](#) refers to any offence which carries with it the liability (or, shall I say, possibility) of punishment with: (i) death or (ii) life imprisonment or (iii) imprisonment for a term of not less than ten years. If the possibility of any one or more of these eventualities attaches to an offence then it would be an offence referred to in proviso (a)(i) to [section 167 CrPC](#). So, the crucial questions to ask in the context of the case at hand are:-

(a) Is the offence under [section 376 IPC](#) liable to be

punished with death?

(b) Is the offence under [section 376\(2\)\(g\)](#) IPC liable to be punished with imprisonment for life?

(c) Is the offence under [section 376](#) IPC liable to be punished with imprisonment for a term of not less than ten years?

If the answer to any one of the three questions is "yes", then, the offence under [section 376](#) IPC would be one which is referred to in proviso (a)(i) to [section 167](#) CrPC. Leaving aside the proviso to [section 376\(2\)](#) IPC for the time being, the punishment prescribed for an offence under [section 376\(2\)\(g\)](#) IPC is "rigorous imprisonment for a term which shall not be less than ten years but which may be for life". In other words, the offence cannot be punished with death. But, it can be punished with life imprisonment or imprisonment for a term not less than ten years. Clearly, the answers to the three questions would be "" (a) No, (b) Yes and (c) Yes. Therefore, proviso (a)(i) to [section 167](#) CrPC would be applicable. Does the situation alter if we bring in the proviso to [section 376\(2\)](#) IPC into play? Not at all. All that the proviso does is to enable the awarding of a sentence of imprisonment of less than ten years under special circumstances. The liability or possibility of life imprisonment or imprisonment for a term not less than ten years still exists under normal circumstances. The normal sentence is "rigorous imprisonment for a term which shall not be less than ten years but which may be for life". This is the legislative mandate with regard to sentence. And, the proviso would come into play only under special circumstances. The Supreme Court in the case of [State of Karnataka v. Krishnappa](#): (2000) 4 SCC 75, considering this proviso in respect of the offence under [section 376\(2\)\(e\)](#) IPC, had this to say:

"12. A perusal of the above provision shows that the legislative mandate is to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but it may extend to life and also to fine. The proviso to [Section 376\(2\)](#) IPC, of course, lays down that the court may, for adequate and special reasons to

be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years"(tm) RI though in exceptional cases "for special and adequate reasons" sentence of less than 10 years" RI can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application."

Thus, the offence under [section 376\(2\)\(g\)](#) IPC continues to be an offence "punishable" with life imprisonment or imprisonment for a term of not less than ten years (i.e., term of ten years or more). At this stage the proviso does not come into play at all. Consequently, the charge-sheet is required to be filed within ninety (90) days and not sixty (60) days as claimed by the petitioner. It must be noted that this conclusion has been arrived at without considering the question of a sentence of less than ten years under the proviso and as to what impact that would have on the expression "imprisonment for a term of not less than ten years". The interpretation of this expression has become quite complicated as will become apparent from what is stated hereinbelow and is not being conclusively dealt with by me as it is not necessary for a decision in this case.

After the amendment in Section 376 IPC, the punishment under Section 376 IPC is for a term which is not less than 7 years but which may extend to life imprisonment along with fine. Where minimum and maximum sentences are prescribed,

both are imposable depending on the facts of each case. It is for the Court after recording conviction which has to impose the sentence and it cannot be said that only minimum sentence can be imposed and not the maximum sentence. Section 304-B IPC provides for a sentence in a term which shall not be less than 7 years but which may extend to for imprisonment for life. This Court in **Kuldeep Singh Vs. State of Punjab 2005(3) RCR (Criminal) 958** had held that in a case registered under Section 304-B IPC the period for filing of challan would be 90 days.

The Bombay High Court in **State of Maharashtra Vs. Ketan Sheth Kantibhai Sheth and another 2003(3) RCR (Crl.) 210** observed as under:-

"16. Coming to first principles, it can be seen that a longer maximum permissible custody of 90 days was provided for by the Legislature in [Section 167\(a\)\(i\)](#) in the case of more serious offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. The meaning of the words, "term not less than 10 years" as already been construed by the Apex Court so as to mean "10 years or more". If an offence is punishable with imprisonment for life, it necessarily means that the offence is punishable for a period which is 10 years or more. The fact that there is an alternate provision of punishment for a term which may extend to 10 years, does not make the offence one in which a punishment of 10 years or more cannot be granted, when punishment of imprisonment of life contemplated is one of the mode of the punishment by the Section itself. The argument that it is not the maximum punishment which must be taken into consideration but it is the minimum term of punishment which can be imposed, which needs to be taken into consideration for deciding as to whether the offence is one contemplated under Section 167(a)(i) has no

merits. Once the offence is one in which a sentence of imprisonment for 10 years or more can be imposed, then the fact that in a given case the power of the Magistrate extends to imposing punishment less than 10 years, loses its significance.”

The maximum sentence that can be awarded under Section 376 IPC is imprisonment for life. In the present case, the allegations are under Section 376(2)(n) IPC and it would be punishable with imprisonment which shall not be less than 10 years and which may extend to imprisonment for life. Therefore, the challan could be filed within 90 days. The Illaqa Magistrate had wrongly allowed bail after 60 days. The Court had to see the maximum awardable punishment and not the minimum awardable punishment.

The next question that arises is whether bail wrongly allowed under Section 167(2) Cr.P.C. can be cancelled. The counsel for the petitioner had referred to ***Aslam Babalal Desai Vs. State of Maharashtra 1993 AIR (SC)1, Shailesh Kishore Sinha Bipin Bihari Sinha Vs. State of Jharkhand 2013(4) JLJR 249, Guria, Swayam Sevi Sansthan Vs. State of U.P. & Ors. 2009(15) SCC 75, Manjit Prakash & Ors. Vs. Shobha Devi & Anr. 2009(13) SCC 785, Rajesh Kumar Vs. Nihal Chand and another 2007(2) RCR (Crl.) 422 and Devinder Singh Vs. Harbans Singh 1999(3) RCR (Criminal) 325.*** But the questions raised therein were different. The Court was considering the order granting bail invoking the default clause. In the present case, the issue is whether a bail wrongly allowed to the petitioner can be cancelled.

Since the bail had wrongly been allowed, the Revisional Court had rightly remedied the error and had allowed the revision filed by the1 prosecution. I see no infirmity in the order. There is no merit in the revision. The petition is dismissed.

The petitioner would surrender before the trial Court within a week.

31.03.2016
sunil

(ANITA CHAUDHRY)
JUDGE