

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 3090 OF 2018

Sumail Khalil Khan @ Sameer

... Applicant

Vs.

The State of Maharashtra

... Respondent

...

Mr. Amin Solkar a/w Ms. Misbah Solkar & Ms. Rahila Memon for the applicant.

Mr. S.R. Agarkar, APP for the Respondent-State.

Mr. Nilesh Dhonde, PSI, Sakinaka Police Station is present.

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CORAM : PRAKASH D. NAIK, J.

DATE : 15th JANUARY, 2019.

P.C.

1. This is an application for bail in CR No. 585 of 2018 registered with Sakinaka Police Station for the offences punishable under Section 406, 409, 420, 120B of Indian Penal Code and Section 3 and 4 of MPID Act. The applicant was arrested on 7th September, 2018 . He was produced for remand on 8th September, 2018 and he was remanded to police custody and since 17th September, 2018 he is in judicial custody. Chargesheet was filed on 6th December, 2018.

2. Applicant is seeking bail under Section 167(2) of Code of Criminal Procedure.

3. Mr. Solkar representing applicant submitted that the chargesheet was not filed within statutory period as enumerated

under Section 167(2) of Code of Criminal Procedure and hence applicant was entitled for bail. It is submitted that applicant had preferred an application for bail on 61st day of remand which was rejected on 13th November, 2018. It is submitted that the case of the applicant would be covered second proviso Section 167(2) of Code of Criminal Procedure and the chargesheet ought to have been filed within 60 days and since the default on the part of the investigating agency in filing the chargesheet within 60 days, the applicant is entitled for bail. It is submitted that in the present case the chargesheet was filed on 6th December, 2018 which is 61st day from the date of first remand of the applicant. It is submitted that considering the punishment provided for the offence punishable under Section 409 of Indian Penal Code, chargesheet ought to have been filed within 60 days. It is submitted that punishment provided under Section 409 of Indian Penal Code includes imprisonment for life or with imprisonment of either description for a term which may extend to 10 years. Thus Court could impose punishment which is less than 10 years. It is submitted that ordinarily the maximum period of detention during course of investigation (without chargesheet) would be 60 days in terms of clause (ii) of proviso (a) to Section 167(2) of Code of

Criminal Procedure. Learned counsel for the applicant submits that considering the punishment provided, the Court can impose the punishment which is lesser than 10 years and in that event the chargesheet will be required to be filed within 60 days and not 90 days. It is submitted that Sessions Court has committed error in rejecting the application for bail preferred by the applicant by observing that period of 90 days is available to the investigating agency to file chargesheet in the present case.

4. Learned counsel for the applicant relied upon the decision of the Supreme Court in the case of *Rakesh Kumar Paul V. State of Assam*¹. It is submitted that the Court had adjudicated the issue relating to the period available for filing of chargesheet in respect to punishment which extent to period of 10 years. It is submitted that meaning of expression punishment for imprisonment for not less than 10 years was being interpreted. It is submitted that the ratio laid down in the said decision is applicable to the present case since one of the punishment provided under Section 409 of Indian Penal Code also includes either description which may extend to 10 years, the punishment which can be imposed can also be less than 10 years and therefore, the prosecuting agency ought

1. AIR 2017 SCC 3948

to have been filed chargesheet within 60 days.

5. Learned APP submitted that the applicant is being prosecuted for the offence punishable under Section 406, 409, 420, 120(B) as well as under the provisions of Section 3 and 4 of MPID Act. It is submitted that Section 409 provides for a punishment of imprisonment for life or imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine. It is therefore submitted that in the present case, chargesheet could be filed within a period of 90 days and within the statutory period the chargesheet has been filed and therefore applicant is not entitled for bail on the ground of default in filing of chargesheet. It is submitted that in paragraph 27 of the decision relied by the learned advocate for the applicant, the Apex Court has considered the issue and observed that in the event of punishment of offence punishable with sentence of death or imprisonment of life, the chargesheet could be filed within a period of 90 days. He further submitted that the learned Sessions Judge has rightly rejected the application for bail and there is no reason to defer with the view expressed by the said Court.

6. As stated above, the applicant was arrested on 7th September, 2018. He was produced for remand on 8th September,

2018. Chargesheet has been filed on 6th December, 2018. It is undisputed that the chargesheet is filed within a period of 90 days. The question which falls for consideration is whether in the present case on account of fling of chargesheet beyond 60 days but within 90 days, the applicant is entitled for bail in accordance with Section 167(2) of Code of Criminal Procedure. The applicant is being prosecuted for various offences including offence under Section 409 of Indian Penal Code.

7. Section 409 of Indian Penal Code reads as follows:

“409. Criminal breach of trust by public servant, or by banker, merchant or agent – Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

8. Thus, the punishment for the aforesaid offence could be imprisonment for life or imprisonment which may extend to ten years.

9. The Hon'ble Supreme Court while dealing with the case of **Rakesh Kumar Paul Vs. State of Assam** (supra) has dealt with the situation where the punishment provided for the offence under

Section 13(1) of Prevention of Corruption Act being punishable with imprisonment for a term which shall not be less than four years but which may extend to ten years and fine. The Apex Court has relied upon the expression by the said Court in the earlier decision in the case of Rajeev Chaudhary Vs. State (NCT) of Delhi².

10. In paragraph 27 of the decision in the case of Rakesh Kumar Paul Vs. State of Assam (supra), the Apex Court has observed as follows:

“27. It is true that an offence punishable with a sentence of death or imprisonment for life or imprisonment for a term that may extend to 10 years is a serious offence entailing intensive and perhaps extensive investigation. It would therefore appear that given the seriousness of the offence, the extended period of 90 days should be available to the investigating officer in such cases. In other words, the period of investigation should be relatable to the gravity of the offence – understandably so. This could be contrasted with an offence where the maximum punishment under the IPC or any other penal statute is (say) 7 years, the offence being not serious or grave enough to warrant an extended period of 90 days of investigation. This is certainly a possible view and indeed the Cr.P.C. makes a distinction in the period of investigation for the purposes of 'default bail' depending on the gravity of the offence. Nevertheless, to avoid any uncertainty or ambiguity in interpretation, the law was enacted with two compartments. Offences punishable with imprisonment of not less than ten years have been kept in one compartment equating them with offences punishable with death or imprisonment for life. This category of offences undoubtedly calls for deeper investigation since the minimum punishment is pretty stiff. All other offences have been placed in a separate compartment, since they provide for a lesser minimum sentence,

2. (2001) 5 SCC 34

even though the maximum punishment would be more than ten years imprisonment. While such offences might also require deeper investigation (since the maximum is quite high) they have been kept in a different compartment because of the lower minimum imposable by the sentencing court, and thereby reducing the period of incarceration during investigations which must be concluded expeditiously. The cut-off, whether one likes it or not, is based on the wisdom of the Legislature and must be respected.”

13. In another decision of the Hon'ble Supreme Court delivered in the case of **Bhupinder Singh and Ors Vs. Jarnail Singh and another³**. The Court considered similar issue relating to offence punishable under Section 304 of Indian Penal Code. In paragraph 11 of the said decision it was observed as follows :

“11. A bare reading of Section 304-B IPC shows that whoever commits “dowry death” in terms of Section 304-B IPC shall be punished with imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life. In other words, the minimum sentence is 7 years but in a given case sentence of imprisonment for life can be awarded. Put differently, sentence of imprisonment for life can be awarded in respect of an offence punishable under Section 304- IPC. The proviso to sub-section (2) of Section 167 consists of three parts. The first part relates to power of the Magistrate to authorise detention of the accused person. This parts consists of two sub-parts. In positive terms, it prescribes that no Magistrate shall authorise detention of the accused in custody, under this paragraph (meaning sub-section (2)(a)] for a total period exceeding (i) 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years and (ii) 60 days where the investigation relates to any other offences. The period of 90 days is applicable to cases where the investigation relates to the three categories of offences which are punishable with (i) death, (ii)

3. (2006) 6 SCC 277

imprisonment for life, or (iii) imprisonment for a term of not less than ten years. The question is whether Section 304-B is an offence “punishable” with imprisonment for life. Strong reliance was placed by Mr. D.K. Garg, learned counsel appearing for the appellant on *Rajeev Choudhary V. State (NCT) of Delhi*. A reference is also made to the decisions of the Jharkhand, the Delhi and the Karnataka High Courts where the ratio in *Rajeev Chaudhary* case has been made applicable to cases involving offence punishable under Section 304-B IPC. The Jharkhand High Court's decision is *Sunil Kumar V. state of Jharkhand*. Contrary views appear to have been taken by the Rajasthan and the Himachal Pradesh High Courts in *Keshav Dev V. State of Rajasthan* and *State of H.P. V. Lal Singh*. The Punjab and Haryana High Court appears to have taken a somewhat different view in two different cases. In *Kuldeep Singh V. State of Punjab* it was held that the period is 90 days, as has been held in the case at hand. But a different view (though in relation to some other offences) was taken in *Abdul Hamid (Crl. Misc. No. 40599 M of 2005 disposed of on 21-9-2005)*. A bare reading of *Rajeev Chaudhary* case shows that the same related to an offence punishable under Section 386 IPC and the sentence in respect of the said offence is not less than 10 years. This Court held that the expression “not less than” means that the imprisonment should be 10 years or more to attract 90 days' period. In that context it was said that for the purpose of clause (i) of proviso (a) of Section 167(2) Cr.P.C. the imprisonment should be for a clear period of 10 years or more. The position is different in respect of the offence punishable under Section 304-B IPC. In the case of Section 304-B the range varies between 7 years and imprisonment for life. What should be the adequate punishment in a given case has to be decided by the Court on the basis of the facts and circumstances involved in the particular case. The stage of imposing a sentence comes only after recording the order of conviction of the accused person. The significant word in the proviso is “punishable”. The word “punishable” as used in statutes which declare that certain offences are punishable in a certain way means liable to be punished in the way designated. It is ordinarily defined as deserving of or capable or liable to punishment, capable of being punished by law or right, may be punished or liable to be punished, and not must be punished.”

11. In the case of *Rajeev Choudhary -Vs- State (NCT) of Delhi*

(supra), the Apex Court has dealt with the situation where the accused was prosecuted for an offence punishable under Section 386 of Indian Penal Code which was punishable with imprisonment which may extend to ten years.

12. In paragraph 6 of the aforesaid decision it is observed as follows :

“it is apparent that pending investigation relating to an offence punishable with imprisonment for a term “not less than 10 years”, the Magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For rest of the offences, the period prescribed is 60 days. Hence, in cases where offence is punishable with imprisonment for 10 years or more, the accused could be detained upto period of 90 days. It was further observed that expression “not less than” would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extent to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also, if we consider clause (i) of proviso (a) to Section 167(2), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under section 386 IPC, imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.”

13. In the light of observations made in all the aforesaid decisions, it can be seen that in the present case, the applicant is

prosecuted for the offence punishable under Section 409 of Indian Penal Code where the punishment provided with imprisonment for life or imprisonment which may extend to 10 years. There is distinction in factual matrix of Rakesh Paul (supra), Rajiv Choudhary (supra) cases. For the offence under Section 409 of Indian Penal Code, punishment could also be imprisonment for life. At this stage, it is not possible to infer as to what punishment would be imposed by the trial Court, if the applicant is convicted for the said offence. Considering the ratio laid down in the aforesaid decisions, it is thus clear that the period which was available to the prosecuting agency to complete the investigation was 90 days and not 60 days. Since the chargesheet has been filed within stipulated time, the applicant is not entitled for bail under Section 167(2) of Code of Criminal Procedure and hence, this application is devoid of merit and deserves to be rejected.

ORDER

Criminal Bail Application No. 3090 of 2018 is rejected.

(PRAKASH D. NAIK, J.)