

# Prem Raj And Anr. vs The State Of Rajasthan on 11 December, 1975

**Equivalent citations: 1976CRILJ455, 1975()WLN692**

ORDER

P.D. Kudal, J.

1. This is an application for bail under Section 439, Criminal P.C. on behalf of the accused-applicants Prem Raj and Nand Lal.

2. An application for bail was moved on behalf of Prem Raj the learned Sessions Judge, Bikaner, who rejected the same on 10-11-75. The learned Sessions Judge observed that the eye-witnesses who were examined by the investigating agency, have named these persons as the assailants of the deceased Bansi Lai, though their names do not appear in the First Information Report. It was further observed that as the case was still under investigation, the enlargement of these applicants would hamper the investigation.

3. Initially, the police had registered a case under Section 307/324, I. P.C. against Shivji Lai and Gordhan. Later on as the victim Banshi Lai succumbed to his injuries, the offences were changed to under Sections 302, 307, 324, 148, 149 and 34, I. P.C. A cross case was also registered against the complainant party under Sections 452, 307 and 148, I. P. C, but they were enlarged on bail.

4. It was contended on behalf of the applicants that they were arrested on 30-9-1975, and the challan has been submitted against them on 1-12-1975. It was, therefore, contended that the period of 60 days, as envisaged in Section 167(2)(a), Criminal P.C. 1973, expired on 28th November, 1975, and that the detention of these persons beyond that period was illegal. It was, therefore contended that these applicants are now entitled to be released on bail as a matter of right, as the investigation was not completed within the stipulated period of 60 days. The learned Counsel for the applicants have submitted a certified copy of the challan filed by the investigating agency on 1-12-1975. Reliance was placed on *Khinvdan v. State of Rajasthan*, 1975 WLN 132 :1975 Cri LJ 1984 (Raj); *State of Rajasthan v. Bhanwaru Khan*, 1975 WLN 179 :1976 Cri LJ 194 (Raj) and *Natabar Parida v. State of Orissa*. Placing reliance on these authorities, the learned Counsel for the applicants contended that as the challan was not submitted within 60 days, the accused-applicants are entitled to bail as a matter of right.

5. On behalf of the State, it was contended that merely because 60 days have elapsed, the applicants did not get any right to walk out of the custody. The accused-applicants had to move an application for their enlargement on bail. It was further contended that before their application for bail could be disposed of, the investigation has been completed, and the investigating agency has already filed a

challan on 1-12-1975 before the competent Court. It was further contended that once the challan has been submitted, the enlargement of the accused-applicant on bail could be ordered only on the merits of the case, and not on the ground that because 60 days, as envisaged in Section 167(2)(a), Cri. P.C. have elapsed. Reliance was placed on *Heeraman v. State of U.P.*, 1975 Cri LJ 1508 (All). It was further contended that the order of remand passed on 25-11-1975 for a period of 15 days elapsed on 1-12-1975, when the challan was submitted before the Court, and as such, the prayer of the learned Counsel for the applicants that they be released under the provisions of Section 167(2)(a) does not deserve any merit. In short, the contention of the learned Counsel appearing on behalf of the State is that once the challan has now been submitted, the enlargement of the accused-applicants on bail, can only be ordered if the facts of the case so warrant, and not because of the provisions of Section 167(2)(a), Cri. P.C.

6. The respective contentions of the learned Counsel for the accused-applicants and the learned Public Prosecutor have been considered. The provisions of Section 167, Cri. P.C. provide that the Magistrate may authorise detention of the accused person, otherwise than in 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 section for a total period exceeding sixty days, and so on the expiry of the said period of sixty days, 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 section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that chapter.

7. At this stage, it would be advisable to refer to Section 309(2), Cri. P.C. 1973, which provides that if the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

8. In the case of *Khinvdan v. State of Rajasthan*, 1975 Cri LJ 1985 (Raj), it has been held that further detention of the accused in custody beyond the period of 60 days was illegal, and the accused was enlarged on bail. In that case, the petitioner was arrested on 2-12-1974. His request for being enlarged on bail was rejected on 23-1-1975. He again moved an application praying that as more than 60 days have elapsed since the day of his arrest, he is entitled to be released on bail under the proviso (a) to Sub-section (2) of Section 167, Criminal P.C. On 22-2-1975. the police again applied for further remand of the petitioner to the judicial custody, whereupon the learned Magistrate ordered that the remand may be extended upto 8-3-1975. On being moved, it was held by this Court that the learned Magistrate acted in excess of his jurisdiction and ordered the enlargement of the accused on bail.

9. In the case of *State of Rajasthan v. Bhanwaru Khan*, 1975 Cri LJ 194 (Raj), it was held that the provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P.C. are of a mandatory nature, meaning thereby that the contravention thereof renders illegal the detention of the accused under Section 167, Cri. P.C. beyond a total period of 60 days from the date of his arrest. In this case, the State applied for cancellation of ba ', but it was held that the order of grant of bail

was not erroneous, and that the application of the State was rejected.

10. In the case of *Natabar Parida v. State of Orissa*, 1975 Cri LJ 1212 (SC), it was held that the 'reasonable cause' occurring in Sub-section (1) (a) of Section 344 is nowhere to be found in Section 309 of the new Code. The explanation to Section 344 of the old Code has been retained as explanation (1) of Section 309 in the identical language. The law as engrafted and proviso (a) to Section 167(2) and Section 309 of the new Code confers power of remand to Jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation I in Section 309 is not quite clear. But then the command of the Legislature in proviso (1) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be decent to be so released under the provisions of Chapter XXXIII and for the purpose of that Chapter. That may, however, empower the Court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in Sub-section (5) of Section 237 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance of power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be 'paradise for the criminals' but surely it would not be so, as sometimes it is supposed to be, because of the Courts. It would be so under the command of the Legislature.

11. In the instant case, the learned Magistrate allowed remand on 25-11-1975, upto 9-12-75 and the period of 60 days expired on 28-11-1975. The order of remand beyond 28-11-1975 was, therefore, beyond the period of 60 days.

12. The learned Public Prosecutor has relied on *Heeraman v. State of U.P.*, 1975 Cri U 1508 (All) wherein it has been held that an accused is not to be allowed to walk out of the place of detention or of the jail after the expiry of sixty days automatically if no charge-sheet has been submitted within that period. If no charge-sheet has been submitted within sixty days, Section 167 only empowers an accused to claim bail as of right. But the detention of an accused will continue to be legal till he actually applies for bail or in other words he 'is prepared to and does furnish bail'. The Magistrate shall not authorise detention for more than sixty days provided the accused person applies for bail on the expiry of the said period and does furnish bail. Even if no charge-sheet was submitted within sixty days but was submitted before the accused applied for bail, it will not be open to the accused to claim that he is entitled to bail as of right by invoking Section 167(2)(a) because as soon as the charge-sheet was submitted, the period of remand pending investigation came to an end and provisions of Section 167(2)(a) would cease to apply to such a case and in such a case bail can be

granted only on merits.

12-A. As the application under Section 439, Criminal P.C. was submitted on 17-11-1975, the plea regarding the provisions of Section 167, Criminal P.C. was not incorporated. During the pendency of this application, the period of 60 days elapsed. As the provisions of Section 167, Criminal P.C. are mandatory in character, the learned Counsel for the accused-applicants was permitted to raise this plea.

13. Having given my most anxious consideration to the respective contentions of the learned Counsel for the accused-applicants, and the learned Public Prosecutor, I find myself in respectful agreement with the view taken in the case of *Khinmadan v. State of Rajasthan*, 1975 Cri LJ 1984 (Raj). This view further finds support from the decision of their Lordships of the Supreme Court reported in *Naitbar Parida v. State of Orissa*, 1975 Cri LJ 1212 (SC). The view taken in *Heeraman v. State of U.P.*, 1975 Cri LJ 1508 (All) is distinguishable as the report of the learned Magistrate showed that the charge-sheet was submitted within the period of 60 days. Even otherwise, the view taken in *Heeraman v. State of U.P.*, 1975 Cri LJ 1508 (All) is not in conformity with the view taken by their Lordships of the Supreme Court in *Natabar Parida v. State of Orissa*, 1975 Cri LJ 1212 (SC).

14. As the accused-applicants were detained exceeding the period of 60 days, they are entitled to be enlarged on bail. It is accordingly ordered that the accused-applicants shall be enlarged on bail, if they furnish personal bond of Rs. 10,000/- each with two sureties of Rs. 5,000/- each, to the satisfaction of the learned Sessions Judge, Bikaner to appear before him on 24th December, 1975, and on subsequent dates as may be directed by him to do so. Bail application allowed.