

GAHC010197222023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Bail Appln./3112/2023

ABHINAV KUMAR AND ANR
S/O PRADEEP KUMAR
R/O WARD NO. 07,
VILL- MATHAR, P.O. MATHAR
RAHIMPUR, P.S. MUFFASIL
DIST. KHAGARIA, BIHAR

2: PASHUPATI MANDAL
S/O MUSO MANDAL
R/O WARD NO. 07

VILL- MATHAR
P.O. MATHAR
RAHIMUR
P.S. MUFFASIL
DIST. KHAGARIA BIHAR

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. D BORA

Advocate for the Respondent : MR. B SHARMA(ADDL.PP, ASSAM)

B E F O R E
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

22.12.2023

1. Heard Mr. N. Mahajan, learned counsel appearing for the petitioners as well as Mr.

B. Sarma, learned Additional Public Prosecutor for the State respondent.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C for short), is preferred by the petitioners, namely, Abhinav Kumar and Pashupati Mandal, as they are behind bars since 22.02.2023 in connection with Special (Nar) Case No. 78 (BGN)/2023 arising out of Bongaigaon GRPS Case No. 16/2023, registered under Section 20(b)(ii)(C)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. The FIR unfolds that on 21.02.2023 at about 5.30 A.M., on a tip of, the police party proceeded to Barpeta railway station, as they had received a secret information that a huge consignment of drugs was being transported through the coach number B-5 of Anand Vihar terminal Tejas Rajani Express approaching from Barpeta side. The police party boarded the train at 09:30 a.m. at Barpeta Road railway station and conducted the search operation. Four suspected passengers were noticed carrying five bags. They were trying to evade the search conducted by the police team, but they were apprehended before they could escape and their belongings were searched thoroughly.

4. The contraband was recovered from the possession of the present petitioners and the other accused named in the FIR. The suspected ganja weighed approximately 21.764 Kgs. An FIR was lodged and investigation commenced. Charge-sheet was laid being C.S. No. 12/2023 dated 30.06.2023 against all the accused named in the FIR, under Section 20 (b)(ii)(B)/29 of the NDPS Act. It is submitted that charge was framed under

Section 20(b)(ii)(C)/29 of the Act erroneously by the trial Court because charge-sheet was laid under Section 20 (b)(ii)(B)/29 of the NDPS Act. The personal liberty of the petitioners is curtailed and they are facing incarceration due to erroneous framing of charge. The amount of ganja seized from the petitioner No. 1 is 10.654 kg and from the petitioner No. 2 is 4.110 kg.

5. The mandatory period of detention of the petitioners would be 60 days and they have been languishing in the jail since 22.02.2023. The petitioners were not aware that charge-sheet was laid for intermediate quantity and they have preferred bail before this Court and vide order dated 08.08.2023, a Coordinate Bench of this Court in Bail Appln. No. 2312/2023 passed the order that charge-sheet No. 12/2023 dated 30.06.2023 in connection with Bongaigaon GRPS Case No. 16/2023 has been laid. The bail application was dismissed with a direction to the petitioners to apply for regular bail.

6. It is submitted that as the petitioners were allegedly found in possession of intermediate quantity of drugs, the rigorous of Section 37 of the NDPS Act will not be applicable in the petitioners' case. It is submitted that petitioners are entitled to default bail as their Bail Appln. No. 2312/2023 was dismissed under the assumption that charge-sheet may have been submitted under Section 20(b)(ii)(C)/29 of the NDPS Act under which sections, the petitioners were earlier booked.

7. Meanwhile the charge was framed against the petitioners on 14.08.2023 under Section 20(b)(ii)(C)/29 of the NDPS Act. It is submitted that when charge sheet was

forwarded, the petitioners were not aware that charge sheet was submitted under Section 20(b)(ii)(B)/29 of the NDPS Act and thus the petitioners' right to default bail has been infringed. At the time when the petitioners had applied for bail before the Coordinate Bench of this Court (Annexure-1), the petitioners were not privy to the incident that the charge sheet was laid against them under Sections 20(b)(ii)(B)/29 of the NDPS Act. They had accepted the order dated 08.08.2023 in Bail Application No. 2312/2023 and thereafter, they approached the trial Court as charge sheet has been laid against them on 06.07.2023.

8. The petitioners have submitted that the petitioners are entitled to default bail as the statutory period of sixty days have already elapsed on 14.08.2023 when the petitioners had applied for bail before the Coordinate Bench of this Court. It is also submitted that the petitioners were not aware that charge sheet was filed under Section 20(b)(ii)(B)/29 of the NDPS Act. They were under the presumption that as this case was registered under Sections 20(b)(ii)(B)/29 of the NDPS Act, the charge sheet has been laid under the aforesaid Sections of law. When the charge sheet was laid under Sections 20(b)(ii)(C)/29 of the NDPS Act, the petitioners are entitled to default bail and the petitioners had already filed bail application registered as BA No. 2312/2023.

9. The petitioners have prayed for bail as per Section 167(2) of the Cr.P.C.

10. The learned Additional Public Prosecutor Mr. B. Sarma has prayed dismissal of the petition. It is submitted that the Bail Application No. 2312/2022 is not a petition with

prayer for default bail.

11. It is true that the petitioners were booked under Sections 20(b)(ii)(B)/29 of the NDPS Act and at that juncture they were not aware that charge sheet has been laid under Sections 20(b)(ii)(C)/29 of the NDPS Act. As per law the petitioners have to move for default bail and in that case their prayer for default bail can be considered even after charge sheet has been filed. At this juncture when charge has been framed under Sections 20(b)(ii)(C)/29 of the NDPS Act, the petitioners are not entitled to default bail as the trial has progressed on the charges being so framed.

12. The learned counsel for the petitioners and the learned Additional Public Prosecutor have relied on several decisions of the Hon'ble Supreme Court.

13. The learned counsel for the petitioners has relied on the decision of Hon'ble the Supreme Court in *M. Ravidran Vs. Intelligence Officer, Directorate of Revenue Intelligence* reported in (2021) 2 SCC 485 wherein it has been held that:-

“The majority opinion in Uday Mohanlal Acharya² clarified this ambiguity by holding that the expression “if not already availed of” used by this Court in Sanjay Dutt must be understood to mean “when the accused files an application and is prepared to offer bail on being directed”. In that case, it has to be held that the accused has enforced his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the

accused is yet to furnish the same.

14. The learned counsel for the petitioners has further relied on the decision of Hon'ble the Supreme Court in ***Bikramjit Singh Vs. State of Punjab*** reported in (2020) 10 SCC 616 wherein it has been observed that:-

“The second vexed question which arises on the facts of this case is the question of grant of default bail. It has already been seen that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code. The extent of this indefeasible right has been the subject-matter of a number of judgments. A beginning may be made with the judgment in Hitendra Vishnu Thakur v. State of Maharashtra [Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087] , which spoke of “default bail” under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as “TADA”) read with Section 167 of the Code as follows: (SCC pp. 625-28, paras 19-21)

“19. Section 20(4) of TADA makes Section 167CrPC applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein. ...while clause (b) provided that reference in sub-section (2) of Section 167 to “15 days”, “90 days” and “60 days” wherever they occur shall be construed as reference to “60 days”, “one year” and “one year” respectively. This section was amended in 1993 by Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of “one year” and “one year” in clause (b) was reduced to “180 days” and “180 days” respectively, by modification of sub-section (2) of Section 167. After clause (b) of sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads:

‘20. (4)(bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:

“Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of

the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and.”

20. ... Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub-section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure. ...Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4) (b) of TADA, therefore, creates an indefeasible right in an accused person on account of the "default" by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub-section (4) of Section 20 read with the proviso to sub-section (2) of Section 167CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173CrPC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section

20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (*Hussainara Khatoon case [Hussainara Khatoon (4) v. State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40]*). This legal position has been very ably stated in *Aslam Babalal Desai v. State of Maharashtra [Aslam Babalal Desai v. State of Maharashtra, (1992) 4 SCC 272 : 1992 SCC (Cri) 870]* where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in *Rajnikant Jivanlal v. Narcotics Control Bureau [Rajnikant Jivanlal v. Narcotics Control Bureau, (1989) 3 SCC 532 : 1989 SCC (Cri) 612]* wherein it was held that: (SCC p. 288, para 9)

‘9. ... "13. ... The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.” (SCC p. 536, para 13)’

21. Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4)TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the "default" of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the Public Prosecutor who may either show that the prosecution has obtained the order for extension for

completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of "default". The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the "default" clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's "default". ... No other condition like the gravity of the case, seriousness of the offence or character of the offender, etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20TADA on account of the "default" of the prosecution."

15. Relying on the decision of Hon'ble the Supreme Court the learned counsel for the petitioners has submitted that the petitioners' indefeasible right to default bail after the expiry of the statutory period cannot be infringed when the petitioners have already filed an application for bail before the charge sheet was laid against them.

16. On the contrary the learned Additional Public Prosecutor Mr. B. Sarma has relied on the decision of Hon'ble the Supreme Court in ***M. Ravindran's case (supra)*** wherein it has been observed that:-

25.1. Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt

action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2. *The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court."*

17. I have considered the submissions at the Bar with circumspection.

18. The prosecution has admitted that the prosecution was not aware that charge sheet was laid against the petitioner under Sections 20 (b) (ii) (B) of the NDPS Act, so as to inform the petitioners about their indefeasible right to bail. The peculiar facts and circumstances of this case is unique. Therefore, the ratio of the decisions relied upon by the learned counsel for the petitioners in ***Bikramjit Singh's case (supra)*** and ***M. Ravindran's case (supra)***, is not applicable to this case. The petitioners indeed had a right to default bail as per Section 167 (2) of the CrPC, on 08.08.2023, when the order was passed in connection with Bail Application No. 2312/2023 and even after, till the charge was framed vide order dated 14.08.2023, passed by the learned trial Court in connection with Special (Nar) Case No. 78 (BGN)/2023. Now that charge has been framed under Section 20 (b) (ii) (C)/29 of the NDPS Act, the petitioner's right to default bail as per Section 167(2) CrPC, has extinguished as charge has been framed for offence under commercial quantity and the petitioner is facing trial for the aforesaid Sections of law and the embargo under Section 37 of the NDPS Act comes into play at this juncture.

19. It is true that the petitioners' indefeasible right to default bail after expiry of the statutory period cannot be infringed when the petitioners have already filed an application for bail before charge sheet was laid against them. However, at this juncture, their indefeasible right to default bail has been extinguished, when charge under Section 20 (b) (ii) (C) of the NDPS Act has been framed and the earlier petition with prayer for bail cannot be considered at this stage when the case is pending for evidence.

20. At this stage, the petitioners can apply for bail on the merits of the case.

21. In the wake of my foregoing discussions, the petition with prayer for default bail is rejected.

22. Bail Application stands disposed of.

JUDGE

Comparing Assistant