

GAHC040000682024



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

Case No. : Crl.Rev.P./3/2024

Nabam Anna Modi
Wife of Shri Philip Modi, resident of Rajiv Gandhi University Campus, PO Doimukh,
Papumpare District, AP

VERSUS

The State of AP and Anr
represented by the PP of AP 2:Kekyum Lombi
Age: 0
Occupation

Advocate for the Petitioner : Mr. T T Tara

Advocate for the Respondent : Mr. G. Tado, Addl. P P of AP

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of Judgment & Order : 01.02.2024

JUDGMENT & ORDER (ORAL)

Heard Mr. T. T. Tara, learned counsel for the petitioner. Also heard Mr. G. Tado, learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under Section 397 *read with* Sections 401 & 482 of the Code of Criminal Procedure, 1973 for quashing and setting aside of the impugned default bail rejection order dated 17.01.2024, passed by the learned Special Judge (POCSO), Yupia, in Bail Application No. 354/2023, and seeking grant of statutory bail under Section 167 (2) of the Cr.P.C. to the accused person, namely, Philip Modi, who has been arrested by the Itanagar Women Police on 25.09.2023 in connection with Itanagar Women P.S. Case No. 93/2023, under Section 376 of the Indian Penal Code *read with* Section 4 of the POCSO Act, 2012.

3. It is submitted by the learned counsel for the petitioner, Mr. T. T. Tara, that the petition under Section 439 Cr.P.C. *read with* Section 167 (2) (a) (i) of the Cr.P.C. seeking default bail was filed before the learned Special Judge (POCSO), Yupia on 26.12.2023 after expiry of the statutory period of 90 days on

24.12.2023. However, the petition for default bail could not be filed on 25.12.2023 because of holiday on the occasion of Christmas and immediately after the said holiday, the petition was filed on 26.12.2023 seeking default bail. But the petition was heard by the learned Court below only on 05.01.2024 and from the record, it is seen that the Charge-Sheet was filed on 03.01.2024. However, the learned Special Judge (POCSO), Yupia rejected his Bail Application No. 354/2023, vide order dated 17.01.2024, which was filed under Section 167 (2) of the Cr.P.C., with the observation that the Investigating Officer of the case has already submitted the Charge-Sheet before filing of the bail application and the accused has proposed to avail his indefeasible right of default bail only after filing of the Charge-Sheet. Further, the learned Court below failed to consider the fact that the bail application was filed on 26.12.2023 after expiry of the statutory period and the application was heard only on 05.01.2024 by the learned Special Judge (POCSO), Yupia and thereby failed to consider the fact that the bail application was filed 8 (eight) days prior to the filing of the Charge-Sheet on 03.01.2024.

4. It is further submitted that there was no Court proceeding of the learned Special Judge (POCSO) from 26.12.2023 to 02.01.2024 on the occasion of Winter Vacation. However, the Filing Section of the Office of learned Special Court (POCSO) cum Sessions Court was opened on 26.12.2023 & 27.12.2023. Further, the Presiding Officer cum Judge of the Special Court (POCSO) was on leave on 03.01.2024 & 04.01.2024 and the Court resumed functioning on 05.01.2024 and thus, the application for bail, filed on behalf of the accused, was listed only on 05.01.2024, though the bail application was filed on 26.12.2023.

The accused person availed and exercised his right of default bail provided under Section 167 (2) Cr.P.C. by filing bail application immediately after completion of 90 days on 26.12.2023 as no Charge-Sheet was filed within the statutory period of 90 days. The Investigating Officer of the case filed the Charge-Sheet only on 03.01.2024 and therefore, the order passed by the learned Special Judge (POCSO), Yupia, dated 17.01.2024, rejecting the bail application of the accused under Section 167 (2) Cr.P.C., is *prima facie* erred and the same is liable to be set aside and quashed for the interest of justice.

5. Further it is submitted that the provision of law has been misconstrued to an extent by the learned Court below that the Investigating Officer of the case is ought to file Charge-Sheet within a period of 90 days, which they have failed to file and as such, the accused person is entitled to release on bail being an indefeasible right of the accused under the provision of Section 167 (2) of the Cr.P.C.

6. The learned Court below also failed to appreciate the ratio laid down by the Hon'ble Apex Court in case of **M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence**, reported in **(2021) 2 SCC 485**, wherein it was held that "*the right to 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 high court.*"

7. The learned counsel for the petitioner further submitted that granting of default bail to the accused person became the matter of substantial fundamental right under Article 21 of the Constitution of India once the default bail application or either oral submission has been made before the Court. Thus, detention of the accused person without filing Charge-Sheet within the stipulated period of 90 days shall be amount to curtailing his personal liberty and cause irreparable damage to the accused person.

8. The learned counsel, Mr. Tara, further submitted that there is no possibility of absconding of the alleged accused person if he granted with the bail as he is a permanent resident of Village Bolung, P.O./P.S. Roing, District Lower Divang Valley, and has sufficient movable and immovable property in his permanent address. He is ready to furnish the bail bond/surety, if any, and will also appear before the Court as and when he is summoned by the learned Court below. More so, as the case has already been Charge-Sheeted, there is no question of hampering or tampering the evidence of the prosecution and considering all these aspects of the case, the accused should be released on bail.

9. In support of his submissions, the learned counsel for the petitioner further relied on 2 (two) decisions of the Hon'ble Apex reported in **(2003) 6 SCC 484 (Jigar @ Jimmy Pravinchandra Adatiya Vs. State of Gujarat); & (2021) 2 SCC 485 (M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence).**

10. In this context, Mr. G. Tado, learned Additional Public Prosecutor, has submitted that from the record of learned Court below, it reveals that the F.I.R. is received by the Sheristadar on 03.01.2024 and accordingly, the Special Case

was registered on 04.01.2024. However, he admitted that the petition for bail was filed on 26.12.2023, under Section 167 (2) Cr.P.C., for default bail and the same was put up before the learned Special Judge (POCSO), Yupia on 05.01.2024 and after hearing both sides, the matter was disposed of on 17.01.2024, whereby the learned Special Judge (POCSO), Yupia has rejected the application for bail. The learned Additional Public Prosecutor further submitted that the matter was put up before the learned Special Judge (POCSO), Yupia only on 05.01.2024 and the Charge-Sheet was already filed prior to 05.01.2024, i.e. on 03.01.2024, and thus, the indefeasible right of the accused on default bail under Section 167 (2) Cr.P.C. extinguished and therefore, the learned Court below committed no error or mistake while rejecting the prayer for default bail filed under the proviso of Section 167 (2) Cr.P.C. He further submits that once the Charge-Sheet has been filed, the accused has the option to pray for bail and which may be considered by the learned Special Judge (POCSO) on its merit. He further submitted that the learned Court below also did not commit any error or mistake by taking cognizance of the offence as the Charge-Sheet was already filed on 03.01.2024 before the petition was entertained by the learned Court below on 05.01.2024.

11. I have considered the submissions made by the learned counsels for both sides and also perused the case record and other relevant documents as well as the order passed by the learned Special Judge (POCSO), Yupia, in Bail Application No. 354/2023.

12. It is the admitted position that the statutory period of 90 days was expired on 24.12.2023 and the bail application was also filed on 26.12.2023 claiming the

indefeasible right of the accused under Section 167 (2) Cr.P.C. It also cannot be denied that on 25.12.2023, it was a holiday due to Christmas and for which, the petition was filed on 26.12.2023. But the petition was listed before the Special Court only on 05.01.2024 after the lapse of 10 days and the learned Special Judge (POCSO), Yupia was on leave on 03.01.2024 & 04.01.2024 and resumed his duty only on 05.01.2024. In the same time, it is seen that the Charge-Sheet was filed and received by the Office of the Special Court on 03.01.2024, i.e. after lapse of 8 days from filing of the bail petition claiming indefeasible right of default bail by the accused. It is observed by the learned Court below that when the petition for default bail was put up on 05.01.2024, the Charge-Sheet was already filed and hence, the learned Court below made an observation that the Investigating Officer has filed the Charge-Sheet before filing of the bail application and the accused has proposed to avail his indefeasible right of default bail only after filing of the Charge-Sheet and with that observation, the bail petition was rejected. The learned Court below also considered the view of the Hon'ble Apex Court in paragraph No. 25.3 of the judgment passed in the case of **M. Ravindran (supra)**, wherein, it has been held that if the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet is preferred before the Magistrate, the right of default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case.

13. So, basically, it is seen that the petition for default bail was rejected by the learned Special Judge (POCSO), Yupia with the observation that the petition for bail was filed after the filing of the Charge-Sheet on 03.01.2024 and thus, the

indefeasible right of the accused of default bail got extinguished.

14. From the case law relied by the learned counsel for the petitioner in **Jigar @ Jimmy Pravinchandra Adatiya (supra)**, it is seen that the entire judgment is basically on the extension of time of the investigation. However, from the case law referred by the learned counsel for the petitioner in regards to the case of **M. Ravindran (supra)**, it is seen that the Hon'ble Apex Court has expressed the view that if the accused applies for bail under Section 167 (2) Cr.P.C. on expiry of the stipulated period or the extended period, as the case may be, Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor. For ready reference, paragraph Nos. 25.1 & 25.2 of the said judgment is quoted herein below:

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 chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

15. But the learned Court below, while dealing with the bail application, had given emphasis on the paragraph No. 25.3 of the above referred judgment wherein it has been held that if the accused fails to apply for default bail when the right accrues to him and if the Charge-Sheet is filed subsequently before the Magistrate, the right of default bail would be extinguished. But, here in the instant case, it is seen that the bail application was filed soon after the expiry of 90 days on 26.12.2023. However, it could not be filed on the very next date, i.e. on 25.12.2023, as it was a declared holiday for Christmas and from the Office Note as well as from the LCR, it is very much evident that the Charge-Sheet was filed on 03.01.2024 and it was placed before the learned Special Judge only on 05.01.2024 and the petition for bail was also listed before the learned Special Judge (POCSO), Yupia on 05.01.2024. Thus, it is seen that the bail application was put up before the learned Special Judge (POCSO), Yupia after 10 days of filing of the bail application and within that period, the Charge-Sheet was also filed on 03.01.2024, which was subsequent to the bail application filed by the accused seeking default bail and claiming his indefeasible right.

16. Further, from the record, it reveals that the learned Special Judge (POCSO), Yupia was on leave on 03.01.2024 & 04.01.2024 and in his absence, the record was not put up before any other Officer who was entrusted with the charge of Special Judge (POCSO), Yupia in spite of the fact that the bail petition etc. are considered to be urgent nature of application. In the same time, it is also seen that the Office of the Special Court was opened on 26.12.2023 & 27.12.2023 when the application for bail was registered, but due to absence of the learned Special Judge (POCSO), Yupia, the application has to be put up only

on 05.01.2024 subsequent to the filing of the Charge-Sheet on 03.01.2024. But the fact remains same that the accused filed the application under the proviso of Section 167 (2) Cr.P.C. and thus, it can be deemed to have "availed of" or enforced his right to be released on default bail, accruing after the expiry of stipulated time for investigation. The indefeasible right of the accused cannot be considered to be extinguished only for the fact that it was put up before the Officer after the filing of the Charge-Sheet. The accused applied for his default bail soon after the expiry of the statutory period and thus, he availed of the right accrued to him under Section 167 (2) Cr.P.C.

17. But, from the discussion made above, it is seen that it is the fault of the Office as well as the concerned Officer as the matter was put up before the learned Special Judge (POCSO), Yupia only on 05.01.2024 after filing of the Charge-Sheet on 03.01.2024. It is also surprising that no Officer was engaged as In-Charge of Special Judge (POCSO) during the Winter Vacation as well as on 03.01.2024 & 04.01.2024 even to look after the urgent matter like bail applications. And for that reason, the indefeasible right of the accused cannot be extinguished and the prosecution cannot be allowed to trifle with the individual liberty if it does not take its task seriously and does not complete the investigation within the stipulated time.

18. In this context, a judgment of the Hon'ble Supreme Court can be relied on which was reported in **(2023) 4 SCC 253 (State through Central Bureau of Investigation Vs. T. Gangi Reddy @ Yerra Gangi Reddy)**, wherein in paragraph No. 16 of the judgment, it has been held as under:

"16. While considering the issue involved, some observations made by this Court in the case of *Aslam Babalal Desai* (supra) and *Abdul Basit Alias Raju and Ors.* (supra) are required to be referred to. Speaking for the Bench, Justice A.M. Ahmadi (as he then was) has observed in paragraphs 14 and 15 as under:-

"14. We sum up as under:

The provisions of the Code, in particular *Sections 57* and *167*, manifest the legislative anxiety that once a person's liberty has been interfered with by the police arresting him without a court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to *Section 167(2)* of the Code. It must be realised that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed, the accused would be entitled to be released on bail and the order passed to that effect under *Section 167(2)* would be an order under *Section 437(1)* or (2) or *Section 439(1)* of the Code. Since *Section 167* does not empower cancellation of the bail, the power to cancel the bail can only be traced to *Section 437(5)* or *Section 439(2)* of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under *Section 437(1)* or (2) or *Section 439(1)* of the Code. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to *Section 167(2)* of the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by *Sections 57* and *167(2)* of the Code. We are, therefore, of the view that once an accused is released on bail under *Section 167(2)* he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime. The ratio of *Rajnikant* case [(1989) 3 SCC 532] to the extent it is inconsistent herewith does not, with respect, state the law correctly.

15. Even where two views are possible, this being a matter belonging to the field of criminal justice involving the liberty of an individual, the provision must be construed strictly in favour of individual liberty since even the law expects early completion of the investigation. The delay in completion of the investigation can be on pain of the accused being released on bail. The prosecution cannot be allowed to trifle with individual liberty if it does not take its task seriously and does not complete it within the time allowed by law. It

would also result in avoidable difficulty to the accused if the latter is asked to secure a surety and a few days later be placed behind the bars at the sweet will of the prosecution on production of a charge-sheet. We are, therefore, of the view that unless there are strong grounds for cancellation of the bail, the bail once granted cannot be cancelled on mere production of the charge-sheet. The view we are taking is consistent with this Court's view in the case of Bashir [(1977) 4 SCC 410] and Raghubir [(1986) 4 SCC 481] but if any ambiguity has arisen on account of certain observations in Rajnikant case [(1989) 3 SCC 532] our endeavour is to clear the same and set the controversy at rest.'

19. In view of the detail discussion made above and also considering the view of the Hon'ble Apex Court as well as considering the personal liberty guaranteed under Article 21 of the Constitution of India, it is of the considered opinion that the accused cannot be deprived of his indefeasible right only for the fact that his application was put up before the learned Special Judge (POCSO), Yupia after 8 days, i.e. on 05.01.2024, after filing of the Charge-Sheet on 03.01.2024, where the statutory period of 90 days lapsed on 24.12.2023.

20. Accordingly, it felt necessary to make interference and hence, the impugned default bail rejection order dated 17.01.2024, passed by the learned Special Judge (POCSO), Yupia, in Bail Application No. 354/2023, is hereby set aside and quashed. Further, the accused, namely, Shri Philip Modi, shall be released on bail on furnishing a bod of Rs. 20,000/- (Rupees twenty thousand) only with one surety of like amount to the satisfaction of the learned Special Judge (POCSO), Yupia, subject to the following conditions:

- (i) that the accused shall appear before the Court as and when the date is fixed and shall fully cooperate with the Special Court for early conclusion of the trial;

- (ii) that the accused shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; and
- (iii) that the accused shall not leave the jurisdiction of the learned Special Judge(POCSO), Yupia, without prior permission.

In terms of above, this criminal revision petition stands disposed of.

JUDGE

Comparing Assistant