

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 933 OF 2014

Smt. Nasim Hazi Shaikh	...	Applicant
vs.		
Mohammed Imran Mohammed Jawwad Shaikh & Ors.	...	Respondents

Mr. M.K.Kocharekar, Advocate, for the applicant.

Ms. Naima Shaikh i/b. Mr. Khan Abdul Wahab for respondent Nos. 1 to 3.

Mr. A.S.Patil, APP, for the State..

CORAM: SMT.SADHANA S.JADHAV,J.

DATE : 24th August, 2015.

P.C.

Rule. Rule made returnable forthwith with consent of the parties.

2. The applicant herein happens to be the mother of Ayesha Imran Shaikh. The applicant is the mother-in-law of respondent No.1. The applicant herein is challenging the order passed by the Metropolitan Magistrate, 69th Court, Mazgaon, thereby enlarging respondents on bail under Section 167 sub-clause (2) of the Code of Criminal procedure.

3. That Ayesha got married to respondent No.1 – Imran Shaikh on 16.2.2013. On 21.3.2014, Ayesha was admitted in the hospital with history

of burn injuries. She had succumbed to the burn injuries. Her statement, which was recorded in the hospital, was treated as a dying declaration. On the basis of the statement of Ayesha, Crime No.109/2014 is registered against the accused at Nagpada Police Station punishable under Sections 302, 498A, 406, 324, 323, 506, 504 read with Section 34 of Indian Penal Code. The accused were arrested on 22.3.2014. The accused were produced before the Magistrate on the same day.

4. Till 21.6.2014, the investigating agency had not filed the charge-sheet under Section 173 of Cr.P.C. and, therefore, on 21.6.2014, the accused filed an application under Section 167(2) of Cr.P.C. and had demonstrated before the Court that they were arrested on 22.3.2014 and were produced before the Court for remand on the same day and that on 21.6.2014, they had completed 90 days in custody and that no charge sheet is filed. Hence, an indefeasible right to be enlarged on bail had accrued upon the accused. The accused had also shown their willingness to furnish surety. At about 11.30 a.m., the learned Court called for the report from the office. The prosecution had also filed the Say and had contended in their Say that the accused were arrested on 22.3.2014 and have completed 92 days, but the I.O. has not filed charge-sheet and, therefore, necessary orders be passed. The Judicial Clerk informed the Magistrate that the charge-sheet

was not filed and that the accused have completed 90 days in custody. After perusing the report and the Say of the prosecution, the learned Magistrate had enlarged the accused on bail. The applicant, who happens to be the original complainant, has filed this application seeking cancellation of the order.

5. It is contended that the applicant herein had filed several reports to the police station against the accused as they had threatened the applicant. That non-cognizable cases are registered and therefore, bail should be cancelled.

6. The learned counsel for the applicant submits that the record would indicate that the charge-sheet was filed on 21.6.2014 at 1.10 p.m.

7. Perused the papers of investigation. It is pertinent to note that the timing of filing of charge-sheet is not mentioned on the charge sheet itself, but it has been mentioned on the charge. In fact, there is no reason why timing of filing of charge sheet should find place on the draft charge filed by the Inspector of Police, Nagpada Police Station, Mumbai. In fact, after filing of the charge sheet, there is no scope for the Investigating Officer to file a draft charge showing the time of filing of charge sheet. This Court is of the prima facie opinion that the applicant, in all probabilities, has won over the Investigating Officer after filing of the

charge sheet. There is no reason for this Court to interfere with the order passed by the Metropolitan Magistrate. The learned Magistrate had passed the order after verifying the factual position that till the hearing of the application or passing of the order, no charge sheet was filed. In fact, an indefeasible right had accrued on the accused to be enlarged on bail.

8. The learned counsel for the applicant submits that although the accused had shown their willingness to furnish bail, the bail was not furnished till the filing of the charge-sheet and, therefore, the accused ought not to have been released on bail.

9. The learned counsel for the applicant has placed reliance upon an order passed by this Court (Coram: D.G.Karnik, J.) in the case of **Sunil D. Thaware vs. State of Maharashtra reported in 2010 ALL MR (Cri) 805**, wherein this Court had held:-

“if for any reason the accused is unable to furnish the bail as ordered by the Magistrate and in the meanwhile, the charge-sheet is filed by the Police, the indefeasible right which had accrued to the accused for being released on bail by virtue of S.167(2) of criminal P.C. would stand extinguished.”

In the present case, the accused were provisionally released on their depositing cash surety of Rs.20,000/- along with the detailed address and

time was granted to execute personal bond of Rs.15,000/- with one surety in the like amount. It therefore cannot be said that the right had stood extinguished on account of delay in furnishing bail bond.

10. In the case of **Uday Mohanlal Acharya vs. State of Maharashtra 2001 ALL MR (Cri) 713**, the Hon'ble Apex Court has held as follows :-

“We are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute Book.”

“Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution.”

“so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the off chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refused to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum.

The Hon'ble Apex Court has further held :-

“6. The expression ‘if not already availed of’ used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of is 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 has not furnished the same.”

11. In view of the Judgment of the Hon'ble Apex Court (cited supra), this Court is of the opinion that the contentions raised by the applicant cannot be accepted and hence the Application being sans merits stands dismissed.

(SMT.SADHANA S.JADHAV, J.)