

C . R .

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN.V.

WEDNESDAY, THE 21ST DAY OF OCTOBER 2015/29TH ASWINA, 1937

CRL.A.No. 973 of 2015 ()

AGAINST THE ORDER IN CRMP 2383/2015 IN THE COURT OF SESSIONS,
PALAKKAD DATED 04-09-2015

CRIME NO.4/2015 OF AGALI POLICE STATION

APPELLANT(S)/PETITIONER/ACCUSED (UNDER CUSTODY):

UNNIKRISHNAN ALIAS SUNDARAN, AGED 44 YEARS
S/O. NARAYANAN, CHANGALEERI VEEDU, CHANGALEERI
KUMARAMPUTHUR, MANNARKKAD.

BY ADVS.SRI.K.S.MADHUSOODANAN
SRI.M.M.VINOD KUMAR
SRI.P.K.RAKESH KUMAR
SRI.K.S.MIZVER

RESPONDENT(S)/COMPLAINANT & FORMAL PARTY:

1. STATE OF KERALA
REP. BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

2. SUB INSPECTOR OF POLICE
AGALI POLICE STATION.

R1,R2 BY ADV. ADDL.DIRECTOR GENERAL OF PROSECUTION
SRI.K.I.ABDUL RASHEED

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 21-10-2015,
ALONG WITH CRL.A.1060/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

K.T.SANKARAN & RAJA VIJAYARAGHAVAN.V., JJ.

Crl.Appeal Nos.973 & 1060 of 2015

Dated this the 21st day of October, 2015

JUDGMENT

K.T.Sankaran, J.

These appeals are filed by accused No.4 in Crime No.4 of 2015 of Agali Police Station, challenging the common order in Crl.M.P.Nos.2383 and 2420 of 2015. Crl.M.P.No.2383 of 2015 was filed by accused No.4 for the grant of default bail under the proviso to Section 167(2) of the Code of Criminal Procedure. Crl.M.P.No.2420 of 2015 was filed by the investigating officer under Section 43-D(2) of the Unlawful Activities (Prevention) Act, 1967 for extension of the period for completing the investigation up to 180 days. The court below dismissed the application filed by the appellant and allowed the application filed by the investigating officer.

2. The appellant resides within the limits of Agali Police Station. The prosecution case is the following : Between 18 hours on 30.12.2014 and 20 hours on 1.1.2015, certain unknown culprits, who are suspected to be members of the banned terrorists organisation C.P.I. (Maoist), set fire to the forest camp shed at Anavayil Haveloc in Bhavani Range under Silent Valley Division. In addition to setting fire, one solar panel, batteries and a 500 litre tank were stolen away by those unknown persons. A loss to the tune of ₹3,69,622/- was caused to the Government by the acts of the accused. Accused Nos.1 to 3 used to visit the residence of the appellant and the appellant used to supply provisions to accused Nos.1 to 3. They showed to him a video clipping of setting fire to the camp shed and asked him whether he wanted the stolen properties. Accordingly, two batteries came into the possession of the appellant and they were recovered under Section 27 of the

Evidence Act based on the confession statement made by the accused. The offences alleged against the accused are under Sections 10(a)(i), 13(1)(a), 38(1) and 39(1)(a)(i) of the Unlawful Activities (Prevention) Act, Sections 436 and 379 of the Indian Penal Code and Section 3(1) read with Section 4 of the Prevention of Damage to Public Property Act.

3. Certain facts are not in dispute. The appellant was arrested on 8.5.2015. The period of 90 days from the date of arrest expired on 6.8.2015. The application for extension of time under Section 43-D(2) of the Unlawful Activities (Prevention) Act was filed by the investigating officer on 22.8.2015. The appellant filed application for the grant of default bail on 26.8.2015.

4. The learned counsel for the appellant submitted

that the application for extension of the period for completing the investigation was filed only by the investigating officer and no report of the Public Prosecutor was filed as mandated in sub-section (2) of Section 43-D of the Unlawful Activities (Prevention) Act. For the sake of convenience, sub-sections (1) and (2) of Section 43-D of the Unlawful Activities (Prevention) Act are extracted below :

“43-D. Modified application of certain provisions of the Code:- (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

(a) the references to “fifteen days”, “ninety days” and “sixty days” wherever they occur, shall be

construed as references to “thirty days” “ninety days” and “ninety days” respectively; and

(b) after the proviso, the following provisos shall be inserted namely:-

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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 ninety days, extend the said period up to one hundred and eighty days :

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.””

5. The learned Additional Director General of Prosecution submitted that though the application was signed

by the investigating officer, it was presented by the Public Prosecutor and therefore, there is sufficient compliance of sub-section (2) of Section 43-D of the Unlawful Activities (Prevention) Act.

6. Sub-section (2) of Section 43-D of the Unlawful Activities (Prevention) Act provides that Section 167 of the Code of Criminal Procedure shall apply in relation to a case involving an offence punishable under the Unlawful Activities (Prevention) Act subject to certain modifications in Section 167 of the CrI.P.C. One of the modifications is that after the proviso to sub-section (2) of Section 167 CrI.P.C., two other provisos were inserted. The first among the proviso sought to be inserted provides that if it is not possible to complete the investigation within the period of 90 days, the Court may extend the period up to 180 days, provided certain conditions

are satisfied. The conditions are :

(a) a report of the Public Prosecutor shall be filed from which the required satisfaction has to be drawn by the court.

(b) the report must indicate the progress of the investigation.

(c) the report must indicate specific reasons for the detention of the accused beyond the period of 90 days.

7. The question is whether the application filed by the investigating officer for extension of time would be a substitute for the report of the Public Prosecutor. The proviso does not contemplate any application to be filed by the investigating officer. It also does not contemplate the satisfaction of the Court to be drawn from the report or application submitted by the investigating officer. The Court has to arrive at the required satisfaction only from the report of the Public Prosecutor. What

the report should contain is also indicated in the proviso. It is true that the Public Prosecutor may get the necessary details from the investigating officer. On getting the necessary details, the Public Prosecutor has to apply his mind and submit the report before the Court to enable the Court to apply its mind independently as to whether the case is a fit one where extension of the period beyond 90 days should be granted. The exercise contemplated under the proviso sought to be inserted in Section 167(2) consists of two elements:

(i) The satisfaction to be arrived at by the Public Prosecutor on the necessity of requesting for extension of time.

(ii) The satisfaction to be arrived at by the Court that extension is required.

The satisfaction shall be arrived at by the Court on the basis of the material supplied in the report submitted by the Public Prosecutor. The proviso does not contemplate a communication

between the investigating officer and the Court in this matter. The legislature was quite aware of the distinction between the report of the Public Prosecutor and an affidavit to be filed by the investigating officer. The second among the provisos sought to be added in Section 167(2) CrI.P.C. as provided in Section 43-D(2) provides that an affidavit by the police officer making the investigation shall be filed to found the request for police custody. The distinction between the report of the Public Prosecutor and an affidavit of the investigating officer is clear from two provisos sought to be inserted in Section 167(2) CrI.P.C., by sub-section (2) of Section 43-D of the Unlawful Activities (Prevention) Act.

8. The above view is fortified by the decision of the Supreme Court in **Hitendra Vishnu Thakur and others v. State of Maharashtra and others (AIR 1994 Supreme Court**

2623), wherein the Supreme Court dealt with a similar provision under Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, which reads as follows :

“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.....”

Interpreting the above provision, the Supreme Court held thus :

“22. We may, at this stage, also on a plain reading of Cl. (bb) of sub-sec. (4) of S. 20 point out that the legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The legislature did not purposely leave it to an Investigating Officer to make an application for seeking extension of time from the Court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to

allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The legislature expects that the investigation must be completed with utmost promptitudes but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigation agency before submitting a report to the Court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been

unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the Court under clause (bb) to seek extension of time. Thus for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it, that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "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" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an

accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the Court "shall" release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the

consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20, as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi, that even if the public prosecutor 'presents' the request of the investigating officer to the Court or 'forwards' the request of the investigating officer to the Court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction, when we are dealing with the liberty of a citizen. The Courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without adding or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the

investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since, the law requires him to submit the report as envisaged by the section; he must act in the manner as provided by the Section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension would not be of much consequence, so long as it demonstrates on the face of it, that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction would not render his report as the one envisaged, by clause (bb)

and it would not be a proper report to seek extension of time. In the absence of an appropriate report, the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the Court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.

.....

28. In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the Court for grant of bail on grounds of the 'default' of the prosecution and the Court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both

the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the Court. However, no extension shall be granted by the Court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the Court does not grant an extension on the report of the public prosecutor made under clause (bb), the Court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the Court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the Court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the Court. Moreover, no extension under clause (bb) can be granted by the

Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb), which must be strictly construed.”

9. The decision in *Hitendra Vishnu Thakur* (AIR 1994 Supreme Court 2623) was followed by the Supreme Court in ***Sanjay Kumar Kedia @ Sanjay Kedia v. Intelligence Officer, Narcotic Control Bureau and another* (2009 (17) SCC 631) = 2010 KHC 312.**

10. In ***Appukuttan v. State of Kerala* (2013 KHC 3669 : 2013 (4) KLT 213)**, a learned Single Judge of this Court considered the proviso to Section 36(A)(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 which contain similar words and held :

“6. Proviso is explicit and very clear. It does not speak about an application by the investigating

officer but speaks about a report by the Public Prosecutor concerned. There is an ocean of difference between an application by the investigating officer and a report by Assistant Public Prosecutor concerned. The proviso is careful enough to indicate that the report of the Public Prosecutor so filed seeking extension of time should indicate the progress of the investigation and also should specify the reason for further detention. It leaves one in no doubt that it implies application of mind by the learned Public Prosecutor and an assessment by him of the investigation so far done and the necessity for the extension of time.”

11. The submission made by the learned Additional Director General of Prosecution that the application signed by the investigating officer and presented by the Public Prosecutor should be treated as a sufficient compliance of the aforesaid statutory provision is unsustainable. A similar contention was repelled in *Hitendra Vishnu Thakur and others v. State of Maharashtra and others* (AIR 1994 Supreme Court 2623).

12. In the present case, the appellant has acquired an indefeasible right to get default bail since no report was filed by the Public Prosecutor seeking to extend the time for completing the investigation. We are of the view that the court below was not justified in allowing Crl.M.P.No.2420 of 2015 filed by the investigating officer and in rejecting Crl.M.P.No.2383 of 2015 filed by the appellant. The order passed by the court below is set aside and accordingly, Crl.M.P.No.2420 of 2015 would stand dismissed and Crl.M.P.No.2383 of 2015 filed by the accused would stand allowed. The appellant shall be released on bail on the following conditions :

- (i) The appellant shall execute a bond for ₹25,000/- (Rupees Twenty Five Thousand only) with two solvent sureties each for the like sum to the satisfaction of the Court of Session, Palakkad.
- (ii) The appellant shall not leave the State of Kerala

without getting permission from the court below.

- (iii) The appellant shall report before the investigating officer between 9 A.M. and 11 A.M. on alternate Mondays until the investigation is over.

The Crl.Appeals are allowed as above.

**K.T.SANKARAN
JUDGE**

**RAJA VIJAYARAGHAVAN.V.
JUDGE**

csi