

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

&

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 1036 of 2015 (D)

APPELLANT/ACCUSED NO. 4:

ANTONY DAS, AGED 60 YEARS
S/O ANTONY, LANE NO. 9/1249, ANNA NAGAR
NADUMALAI ROAD, VALPARAI, COIMBATORE
TAMIL NADU.

BY ADVS. SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.M.R.SARIN PANICKER
SRI.M.R.SASITH PANICKER

RESPONDENT/COMPLAINANT / STATE:

STATE
REPRESENTED BY THE STANDING COUNSEL
NATIONAL INVESTIGATING AGENCY,
HIGH COURT OF KERALA
ERNAKULAM 682 031 (RC NO. 1/2014/NIA/KOC)

BY SPECIAL PUBLIC PROSECUTOR SRI.M.AJAY

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
12.11.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

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

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Dated this the 12th day of November, 2015

JUDGMENT

K.T.Sankaran, J.

The question involved in this Criminal Appeal is whether the statement in the final report under Section 173 of the Code of Criminal Procedure that “it is, further submitted that the investigation of the case is being continued and further evidence is also being collected against the accused arrested as well as absconders” would make the report other than a final report, enabling the accused to invoke the proviso to Section 167(2) of the Code of Criminal Procedure for default bail.

2. Antony Das, the appellant, is accused No.4 in S.C.No.4 of 2015 on the file of the Special Court for NIA Cases, Ernakulam. The crime was originally registered at Nedumbassery Police Station alleging offences punishable under Sections 489A, 489B and 489C read with Section 34 of the Indian Penal Code. The case was later

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transferred to the Crime Branch and they re-registered the case. Thereafter, Sections 16 and 18 of the Unlawful Activities (Prevention) Act (hereinafter referred to as 'the UAP Act') were also incorporated. The investigation was taken over by the National Investigation Agency ('NIA' for short). NIA filed a final report dated 23.7.2015, within the extended period under the proviso to Section 43D(2) of the UAP Act.

3. Before filing the final report, the appellant filed an application for bail, which was dismissed by the court below. The appellant challenged that order in Crl.A.No.402 of 2015. The final report was filed by the NIA before Crl.A.No.402 of 2015 was taken up for hearing. A contention was taken by the learned counsel for the appellant that the final report was not really a final report under Section 173(2) of the Code of Criminal Procedure and, therefore, the appellant was entitled to default bail. The contention put forward by the learned counsel for the appellant was objected to by the learned counsel for NIA on the ground that no specific ground was taken in Crl.A.No.402 of 2015 with respect to the same. A Division Bench of this Court (in which Justice K.T.Sankaran was a party) dismissed

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Crl.A.No.402 of 2015 on the merits. However, the contention raised by the learned counsel for the appellant with respect to the question whether the alleged final report filed by NIA is really a final report and whether the appellant is entitled to default bail was left open to be considered by the court below.

4. Thereafter, the appellant filed Crl.M.P.No.146 of 2015 before the court below raising the aforesaid contention. The court below rejected the contention raised by the appellant and dismissed the application filed by the appellant. It was held that the appellant cannot take shelter under paragraph 18.4 of the final report that “investigation of the case is being continued” and contend that he is entitled to default bail. The order dated 23.9.2015 in Crl.M.P.No.146 of 2015 is under challenge in this Criminal Appeal.

5. The final report filed in the case reveals that the prosecution case is the following: On 26.1.2013, the officers of the Customs Department, Cochin intercepted a passenger Abid Chullikulavan (accused No.1) at Nedumbassery International Airport when he was coming from Dubai and seized 1950 numbers of

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counterfeit Indian Currency Notes of the denomination of ₹500/- from him. The investigation revealed that Kunjumohammed @ Kunjuttu (accused No.6), who was undergoing sentence in Central Prison, Mumbai earlier, got acquaintance with K.M.Abdullah, who was a convict in a murder case. Through K.M.Abdullah, accused No.6 got acquaintance with Antony Das (appellant/accused No.4) and Mohammed Haneefa (accused No.2). They agreed to smuggle high quality of counterfeit Indian Currency Notes to India with the help of the other accused. The appellant procured genuine Indian Currency Notes to the tune of Rupees four lakhs for obtaining counterfeit Indian Currency Notes. The genuine Indian Currency Notes were used for procuring counterfeit Indian Currency Notes printed at Pakistan by the syndicate of Dawood Ibrahim, a notorious criminal. Abdul Salam (accused No.3) arranged Abid Chullikulavan (accused No.1) as carrier of the counterfeit Indian Currency Notes and he was directed to handover the fake Indian Currency Notes to one Abdul Kareem at the Airport and Abdul Kareem in turn was directed to handover the fake Indian Currency Notes to the appellant. When Abid Chullikulavan arrived at Nedumbassery Airport, he was intercepted as stated above.

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6. The appellant was arrested on 26.1.2015 and he was remanded to judicial custody on 27.1.2015. The NIA filed application for extension of the period of investigation under the proviso to Section 43D(2)(b) of the UAP Act on 22.4.2015. That application was allowed by the court below on 11.5.2015, the operative portion of which reads as follows:

“In the result, the petition is allowed and the period of detention of the respondent is extended for a period of 90 days from 27.4.2015 under Section 43D(2) (b) of UAP Act. The Petition is disposed of accordingly.”

7. In paragraph 18.4 of the final report filed by the NIA, it is stated thus:

“18.4 It is, further submitted that the investigation of the case is being continued and further evidence is also being collected against the accused arrested as well as absconders.”

8. Sri.S.Rajeev, the learned counsel appearing for the appellant, raised two contentions: (1) That investigation of the case is not completed as is evident from paragraph 18.4 of the charge

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sheet and, therefore, the appellant is entitled to default bail under the proviso to Section 167(2) of the Code of Criminal Procedure, the period of 180 days having expired in the meanwhile. (2) The application filed by the NIA for extension of the period of 90 days to 180 days, though filed on 22.4.2015, that is before the expiry of the period of 90 days, the application was allowed only on 11.5.2015. By that time, the period of 90 days was over and, therefore, the appellant is entitled to default bail.

9. Sri.Ajay, the learned Special Public Prosecutor for NIA, submitted that the charge sheet filed by the NIA clearly shows that the investigation was completed with respect to the offences alleged against the appellant and paragraph 18.4 would only show that some additional materials are being collected. He submitted that paragraphs 18.2 and 18.3 of the charge sheet make the position clear. For the sake of convenience, paragraphs 18.2 and 18.3 of the charge sheet are extracted below:

“18.2 Sanction for prosecution under section 45(2) of UA(P) Act, 1967 has been obtained from Govt. of India as per order No.11011/07/2014 IS-IV dated 20th July, 2015 of Ministry of Home Affairs.

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18.3 It is, therefore, prayed that in the light of averments herein, documents and other material filed with this report u/s 173 Cr.P.C., this Hon'ble Court may kindly take cognizance of offences against the accused mentioned in column No.11 as per para 18.1.”

10. Sri.Ajay also submitted that in the Memorandum of Appeal, no contention was raised by the appellant with respect to the extension of time for completing the investigation. He submitted that a similar contention was raised in Crl.A.No.402 of 2015, as is clear from the counter affidavit filed by the NIA in that case. However, this Court was not inclined to accept that contention and no reference has been made to the same in the judgment dated 12th August, 2015 in Crl.A.No.402 of 2015. Sri.Ajay submitted that the said contention should be treated as not pressed in the earlier round of litigation.

11. The learned counsel for the appellant relied on the decision in **Furtado v. C.B.I. (1996 (2) KLT 1)**. In that case, the offences alleged were under the Foreigners Act, Territorial Water

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Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, Official Secrets Act and the Indian Penal Code. The investigating officer filed a 'charge report' in respect of some of the offences. Investigation continued in respect of the other offences.

In that context, the Division Bench in Furtado's case held thus:

“10. The investigation under S.167 of the Code can be one involving one or more offences against the accused persons. The investigation of a case cannot be split up in such a way to file piece-meal reports before Court. S.173 of the Code does not stipulate a piece-meal investigation and filing of incomplete charge sheet before Court. It contemplates filing of a charge/ refer report after completion of the entire investigation of the case in respect of all offences and where several offences are involved in a case, a charge report could be laid before court only after the investigation is over and formation of an opinion regarding all the offences alleged against the accused.”

12. In the present case, there is no splitting of the investigation and piece-meal reports in respect of different offences. We are of the view that the decision in Furtado's case is not applicable to the facts of the present case.

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13. In Dinesh Dalmia v. CBI [(2007) 8 SCC 770], charge sheet was filed within time, but further investigation was going on. Some of the relevant documents could not be filed along with the final report as they were sent for examination before the Government Examiner of questioned documents. However, cognizance was taken by the learned Magistrate on the charge sheet filed. On the expiry of 60 days from the date of arrest, the accused filed an application for statutory bail under the proviso to Section 167(2) of the Code of Criminal Procedure. At that juncture, the CBI sought for remand of the accused in judicial custody under sub-section (2) of Section 309 of the Code of Criminal Procedure. Police custody of the accused was granted by the learned Magistrate. On the ground that further investigation was pending, CBI could secure remand of the accused under Section 167(2) of the Code of Criminal Procedure from time to time. The application for statutory bail was dismissed by the Magistrate. The Sessions Court set aside that order. But, the High Court set aside the order of the Sessions Judge. The High Court held that since the cognizance was taken, remand of the accused was governed by Section 309

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Cr.P.C. and quoting of a wrong provision of law, namely Section 167, in the application for remand was not very material. The Supreme Court held that the accused was not entitled to statutory bail and it was held thus:

“25. Such a right of bail although is a valuable right but the same is a conditional one; the condition precedent being pendency of the investigation. Whether an investigation in fact has remained pending and the investigating officer has submitted the charge-sheet only with a view to curtail the right of the accused would essentially be a question of fact. Such a question strictly does not arise in this case inasmuch as, according to CBI, sufficient materials are already available for prosecution of the appellant. According to it, further investigation would be inter alia necessary on certain vital points including end use of the funds.

.....

39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub-section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a

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charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code.”

14. In **Kamalaksha v. S.I. of Police (2007 (1) KLT 299)**, final report unaccompanied by the certificate of chemical analysis was not accepted in an abkari case on the ground that the final report was incomplete. Deprecating that practice, a learned single Judge of this Court in Kamalaksha's case held thus:

“5. The report under S.173(2) Cr.P.C. is nothing more than an opinion of the police officer that as far as he is concerned, he has been able to collect evidence during his investigation about the commission of the offence by the accused who is being placed on trial. If the police report or charge sheet contains necessary details so as to enable the magistrate to take cognizance of the offence and proceed further, it cannot be said that there is failure of compliance of S.173(5) Cr.P.C. just because the scientific reports have not been produced along with the charge sheet filed by the police officer. In such a case it cannot be said that the charge sheet so produced is incomplete (vide *Swami Premananda @ Premkumar @ Ravi v. Inspector of*

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Police (XXXIX MLJ (Crl) 702). Even in a case where the investigating officer has chosen to term the police report as “incomplete”, the power of the Magistrate to take cognizance of the offence is not lost. If the police report and the materials produced along with it are sufficient to satisfy the Magistrate that he should take cognizance of the offence, then his power is not fettered by the label which the investigating agency chooses to give to the report submitted under S.173(2) Cr.P.C. (see *State of Maharashtra v. S.V.Dongre* (AIR 1995 SC 231))”

15. In a somewhat similar case where the final report filed by the NIA contained a paragraph stating that foreign bank transaction details are to be collected, call data records have to be further analysed and certain other records are to be collected and verified and hence, further investigation is inevitable, a Division Bench of this Court in **Abdul Azeez v. National Investigation Agency (2014 (3) KLT 156)**, rejected the contention raised by the accused that he is entitled to statutory bail. It was held that the indefeasible right under the proviso to Section 167(2) would be available only when the charge sheet is not filed and the investigation is kept pending. Once the charge sheet is filed, that right ceases. It was held that such a

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right does not revive only because a further investigation remains pending within the meaning of Section 173(8) of the Code of Criminal Procedure. *Furtado's case* was distinguished, on facts, by the Division Bench. The judgment of the Division Bench in **Abdul Azeez v. National Investigation Agency (2014 (3) KLT 156)** was taken up before the Supreme Court. The Supreme Court in **Abdul Azeez P.V. v. National Investigation Agency [(2014) 16 SCC 543]** dismissed the Special Leave Petition and held thus:

“4. Having gone through the charge-sheet, we are not persuaded to take a different view. The materials adverted to show that it was a final report on the facets investigated into by the investigating agency. Furthermore, the requisite sanctions as required under Sections 18 and 18-A of UAPA and so also under Section 7 of the Explosive Substances Act were also accorded by the authorities concerned. The charge-sheet so filed before the learned Special Court was complete in all respects so as to enable the learned Special Court to take cognizance in the matter. Merely because certain facets of the matter called for further investigation it does not deem such report anything other than a final report. In our opinion Section 167(2) CrPC stood fully complied with and as such the

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petitioners are not entitled to statutory bail under Section 167(2) CrPC.”

16. In the present case, the charge sheet filed by the NIA is complete for the purpose of taking cognizance of the case. The materials produced along with the final report indicate that the investigating officer was able to collect evidence with respect to the commission of offence by the accused. Even without a paragraph like 18.4 in the charge sheet, further investigation under Section 173 (8) could be made by the NIA. Further investigation can be made even after cognizance of the offence is taken. However, after taking cognizance of the offence, the Court cannot suo motu pass an order for further investigation and such an order can be passed only on the application made by the investigating officer. By filing charge sheet, the investigating officer is not precluded from making further investigation in terms of Section 173(8) of the Code of Criminal Procedure. As held in **Dinesh Dalmia v. CBI [(2007) 8 SCC 770]**, whether an investigation has, in fact, remained pending and the investigating officer has submitted the charge sheet only with a view to curtail the right of the accused, would be a question of fact. On a

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perusal of the charge sheet filed in the present case, we do not think that the charge sheet was filed only to curtail the right of the accused to get default bail. All the relevant materials for the purpose of taking cognizance of the offence and for conducting trial are available in the charge sheet. The question whether the investigating officer would be able to collect some other materials also in future is not a test to determine whether the final report filed in the case is complete in itself. An additional material may be helpful to the prosecution. The Court may, in appropriate cases, even permit further investigation to be made after taking cognizance of the offence. The question whether a Court would be able to take cognizance of the offence on the basis of the charge sheet filed by the investigating officer is the material aspect to be considered. As stated above, on a perusal of the final report, it cannot be said that it was filed by the NIA only to defeat the rights of the appellant to get default bail under the proviso to Section 167(2) of the Code of Criminal Procedure. There was no splitting of the investigation and there was no splitting of the final report.

17. The final report also indicates that the requisite sanction

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was accorded by the Central Government under Section 196 of the Code of Criminal Procedure and Section 45(1) of the UAP Act for prosecuting the accused under Section 120B read with Sections 489B and 489C of the Indian Penal Code and Sections 16 and 18 of the UAP Act.

18. On the basis of the facts of the case and in the light of the principles laid down in the decisions mentioned above, we are not inclined to accept the contention put forward by the learned counsel for the appellant on the first point and it is, accordingly, rejected.

19. The next contention raised by the learned counsel for the appellant is that the application filed by the NIA for extension of the period for completing the investigation invoking the proviso to Section 43D(2)(b) was allowed after the expiry of the period of 90 days and, therefore, the appellant is entitled to default bail. It cannot be disputed that Court has ample power under the proviso to Section 43D(2)(b) of the UAP Act to extend the period for completing the investigation. For extension of the period, the Public Prosecutor has to submit a report indicating the progress of the investigation and the

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specific reasons for the detention of the accused beyond the period of 90 days. The Court must be satisfied on the basis of the report submitted by the Public Prosecutor that extension of the period is necessary. In the case on hand, the NIA filed the application for extension on 22.4.2015, before the expiry of 90 days from the date of remand of the appellant. Meanwhile, an application was filed by the appellant for default bail. It appears from the records that the application for extending the remand as also the application for default bail could not be heard before the expiry of 90 days, since, the applicant had sought time for filing objection to the application seeking extension and also for hearing the matter. An application filed by the accused for release on bail and also a prayer for extension of time to complete the investigation filed by the Prosecutor are to be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. This has been held so in **Sanjay Dutt v. State [(1994) 5 SCC 410]**. The application for extension of the period for completing the investigation was allowed on 11.5.2015 with effect

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from 27.4.2015. If the application for extension is allowed at a later point of time, it would relate back to the period of expiry of ninety days so that continuity is maintained. By allowing the application, that purpose would be achieved and the investigating agency would get a period of 180 days for completing the investigation. It is not the date of allowing the application for extension which is relevant. We are of the view that the appellant would not be entitled to get default bail on the ground that the application for extension of the period for completing the investigation was not considered before the expiry of ninety days. The application for extension could be filed even on the 90th day. Necessarily, the Court would be able to dispose of the application only thereafter. The accused should also be heard in the matter of granting extension of the period. In all such cases, the Court may not be able to dispose of the application within ninety days and it is not a requirement under the proviso to Section 43D(2)(b) of the UAP Act that the application for extension should be allowed before the expiry of the original period of ninety days. We are not inclined to accept the contention put forward by the appellant on this aspect as well.

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20. The question whether the appellant is entitled to get bail on the merits of the case was considered by the Court below in the application filed earlier and it was confirmed by this Court in Crl.A.No.402 of 2015 and therefore, that aspect need not be considered in this appeal.

For the aforesaid reasons, the Criminal Appeal is dismissed.

K.T.SANKARAN
Judge

RAJA VIJAYARAGHAVAN V.
Judge

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