

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Revision No.571 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- PURNIA

Sakin Mahto @ Saken Mahto S/o Chandradeo Mahto, Resident of Village-Harbhanga Beldari Tola, P.S.- Sarsi, District- Purnea.

.... Petitioner

Versus

The State of Bihar

.... Respondent

Appearance :

For the Petitioner/s : Mr. Vikram Deo Singh, Advocate
Mr. Bijendra Kumar Singh, Advocate

For the Respondent/s : None

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 27-09-2016

In the present application preferred under Section 397 and 401 of the Code of Criminal Procedure (for short 'Cr.P.C.'), the petitioner has challenged the order dated 30.04.2016 passed by the learned Judicial Magistrate-1st Class, Purnea in connection with Sarsi P.S. Case No. 06 of 2016 by which the application filed on behalf of the petitioner on 30.04.2016 in terms of Section 167(2) of the Cr.P.C. has been rejected.

2. The petitioner has been made accused in Sarsi P.S. Case No. 06 of 2016 registered under Section 304-B read with 34 of the Indian Penal Code.



3. It is contended by the learned counsel for the petitioner that the petitioner had surrendered on 30th January, 2016 before the Jurisdictional Magistrate. After completing the period of 90 days in custody, the petitioner filed an application under the provision of Section 167(2) of the Cr.P.C. for grant of bail on 30.04.2016, as the Investigating Officer had failed to submit the police report within the statutory period of 90 days.

4. It is submitted by the learned counsel for the petitioner that on 30.04.2016, the learned Jurisdictional Magistrate called for a report from the G.R. Clerk whether the charge-sheet had been filed in the case or not. The G.R. Clerk reported on the same day at about 10:45 a.m. that charge-sheet has not been submitted till 10:45 a.m. Subsequently, the G.R. Clerk orally reported to the court that the investigating officer has filed the charge-sheet along with the case diary in the office after submission of his report.

5. It is contended that from perusal of the report submitted under Section 173(2) of the Cr.P.C., it would be apparent that the court below had seen the charge-sheet at 12:45 p.m. on 30.04.2016.

6. Learned counsel for the petitioner has submitted that the order impugned has been passed by the learned Jurisdictional Magistrate taking into consideration the gravity of the

offence and subsequent filing of the police report, which is not permissible under law. He has submitted that once an indefeasible right has been created in the accused, the same could not have been taken away by filing a report later on.

7. Despite repeated calls, no body has appeared on behalf of the State.

8. I have heard learned counsel for the petitioner and perused the record.

9. I find force in the submissions made by the learned counsel for the petitioner. It would be evident from perusal of the impugned order dated 30.04.2016 passed by the learned Judicial Magistrate that on 30.04.2016 till 10:45 a.m. the police report under Section 173 of the Cr.P.C. and the case diary was not filed by the Investigating Officer in the court. The petitioner had already filed his application for grant of bail under the statutory provision of Section 167(2) of the Cr.P.C. before the court prior to 10:45 a.m.

10. Section 167(2) of the Cr.P.C. under Chapter XII, which is relevant for understanding the issue involved in this case, reads as under:-

“167. Procedure when investigation cannot be completed in twenty-four hours.-

(1) xxxx xxxx xxxx



(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that—

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail,

and every person released on bail under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, nor specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

Explanation I.-For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused persons may be proved by his signature on the order authorizing detention.

Provided further that in case of a woman under the eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.”



11. From a perusal of Section 167(2) Cr.P.C., it would be clear that the Magistrate has the power to detain an accused for a period of 60 days or 90 days, as the case may be, and beyond the prescribed period, the Magistrate has no power to extend the detention unless charge-sheet is filed. The power to authorize detention by the Magistrate extinguishes on 60th or 90th day, as the case may be, and the law provides that on expiry of such period, the accused person shall be released on bail, if he is prepared to and does furnish bail.

12. In **Sanjay Dutt vs. State through C.B.I., Bombay [(1994) 5 SCC 410]**, the Constitution Bench of the Supreme Court observed in paragraph 48 as under:-

“48. The indefeasible right accruing to the accused in such situation is enforceable only prior to filing of the *challan* and it does not survive or remain enforceable on the *challan* being filed, if already not availed of.”

13. The aforesaid observation of the Supreme Court clearly means that ordinarily the indefeasible right accruing to the accused will not survive or remain enforceable on the charge-sheet being filed but if the indefeasible right has been “availed of” prior to filing of charge-sheet then the said right will survive or remain enforceable even upon filing of the charge-sheet. Therefore,

what is of significance is whether the accused has “availed of” the indefeasible right accruing to him by filing bail application and offering to furnish the bail as directed by the court, prior to the filing of the charge-sheet.

14. In **Uday Mohanlal Acharya v. State of Maharashtra [(2001) 5 SCC 453]**, a three-Judge Bench of the Supreme Court while interpreting the expression “.... Indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of” as has been held by the Constitution Bench in **Sanjay Dutt’s** case (supra), observed in paragraph 13 as under :-

“13. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression “if already not availed of”? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of



bail. To interpret the expression “availed of” to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression “availed of” is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the



prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression “if not availed of” in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in *State of M.P. v. Rustam* setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression “if already not availed of”, used by the Constitution Bench in *Sanjay Dutt [(1994)5 SCC 410].....”*

15. Thereafter, in **Uday Mohanlal Acharya** case (supra), the Supreme Court culled out six conclusions, which are as under :-

“1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the

accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid subsection (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the



Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of *Explanation I* and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression “if not already availed of” used by this Court in *Sanjay Dutt* case 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 para (a) of the 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 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 has not furnished the same.”

16. Elaborating and explaining the aforesaid conclusions, the Supreme Court further held that if the charge-sheet is filed subsequent to the availing of indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail.

17. Taking into consideration the aforesaid



interpretation of the expression “availed of”, it can be safely contended that the moment an accused files an application for being released on bail and offers to abide by the terms and conditions of bail, he will be deemed to have “availed of” his indefeasible right and then in that case his right to be released on bail will remain enforceable even upon filing of the charge-sheet as held in **Uday Mohanlal Acharya’s** case (supra).

18. Coming back to the facts of the present case, there is no dispute regarding date and events which took place.

19. As noted above, it would be evident from perusal of the impugned order that the petitioner had surrendered on 30.04.2016 and, since then, he was in custody. The statutory period of detention of the petitioner for a total period of 90 days expired on 29.04.2016. The petitioner filed an application for being released on bail on default under Section 167(2) of the Cr.P.C. on 30.04.2016 and offered to furnish bond and sureties to the satisfaction of the court. When the court called for a report from G.R. Clerk, he reported that till 10:45 a.m., the charge-sheet (report under Section 173 of the Cr.P.C.) was not filed by the Investigating Officer in the court. However, subsequently, on the same day, i.e., 30.04.2016 at about 12:45 p.m., the G.R. Clerk reported that charge-sheet along with case diary has been filed by the Investigating Officer of the



case in the court after submission of his report and the Magistrate had seen the copy of the police report at 12:45 p.m. When the court came in possession of the charge-sheet, it rejected the application for bail of the petitioner on the ground of gravity of the offence and also subsequent filing of the charge-sheet in the court.

20. In view of the law laid down by the Supreme Court in the matters of **Sanjay Dutt** (supra) and **Uday Mohanlal Acharya** (supra), this Court is of the opinion that the impugned order dated 30.04.2016 passed by the learned Judicial Magistrate-1st Class, Purnea in connection with Sarsi P.S. Case No. 06 of 2016 cannot be sustained.

21. As a matter of fact, on 30.04.2016 i.e. after expiry of 90 days in custody, the petitioner has already filed his application for bail in the court at 10:30 a.m. and had offered to furnish surety and bail bond and at 10:45 a.m., the G.R. Clerk had reported that the charge-sheet was not filed and, at that stage, it will be presumed that the petitioner had “availed of” his indefeasible right to be released on bail and the same could not have been taken away even upon filing of the charge-sheet subsequently on the same day.

22. Accordingly, the aforesaid impugned order dated 30.04.2016 passed by the learned Judicial Magistrate-1st Class,

Purnea is set aside. The petitioner is directed to be released on bail on furnishing bail bond of Rs. 10,000/- (rupees ten thousand) with two sureties of the like amount each to the satisfaction of the learned Judicial Magistrate-1st Class, Purnea in connection with Sarsi P.S. Case No. 06 of 2016.

23. The revision application stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	-----
Uploading Date	01.10.2016
Transmission Date	01.10.2016