

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.40157 of 2016

Arising Out of PS.Case No. -86 Year- 2016 Thana -GHANSHYAMPUR District- DARBHANGA

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Hari Bans Yadav @ Haribans Yadav son of Late Ghutar Yadav, resident of village-
Kasraur, P.S.- Ghanshyampur, District- Darbhanga.

.... Petitioner/s

Versus

The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Manish Kumar No.13, Advocate

: Mr. Rohit Kumar, Advocate

For the Opposite Party/s : Mr. Dr. Mayanand Jha, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 18-10-2016

The petitioner has invoked the inherent power of this Court under Section 482 of the Code of Criminal Procedure (for short 'CrPC') for quashing the order dated 5.8.2016 passed by the learned Special Judge/Sessions Judge, Darbhanga, Bihar, in connection with Ghanshyampur P.S. Case No.86 of 2016 dated 31.5.2016 giving rise to G.O. Case No.7 of 2016 registered under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') by which the application filed for bail under Section 167(2)(a)(ii) CrPC has been rejected.



2. The prosecution case in brief is that one Pankaj Kumar Panth, S.H.O., Ghanshyampur, Darbhanga received a secret information at about 4.30 a.m. on 31.5.2016 that two persons on a motorcycle carrying Ganja are likely to go to Nima from Kasraur. For verification of such information and necessary action, after giving information to the superior officer, the police party proceeded towards the place of occurrence where after some time the Circle Officer, Ghanshyampur also reached as a Magistrate. It is alleged that on seeing the police party, two persons riding on a motorcycle tried to flee away. After chase, one of them, the pillion rider was apprehended, but the other one who was driving the motorcycle managed to escape. The petitioner was the person apprehended and he also disclosed the name of the other accused, who had managed to flee away. It is alleged that the police recovered 12.5 Kg. Ganja from a bag found being carried by the petitioner.

3. On the basis of the aforesaid self statement of the S.H.O., Ghanshyampur, Ghanshyampur P.S. Case No.86 of 2016 was registered on 31st May, 2016 at 9.30 a.m. under Sections 20 and 22 of the NDPS Act against the petitioner and one Sudama Sahani. A seizure list was also prepared in respect of recovery of the alleged illicit Ganja. It is an admitted position that on 31st May, 2016 itself the petitioner was produced before the court and was remanded to judicial

custody.

4. Mr. Manish Kumar, learned counsel for the petitioner has submitted that the period of sixty days in detention of the petitioner in connection with the aforesaid case expired on 31st July, 2016 and on expiry of period of sixty days the petitioner filed an application making prayer to release him on bail on 5th August, 2016 in the court of Special Judge/Sessions Judge, Darbhanga under Section 167(2)(a)(ii) of the CrPC, but the learned Special Judge rejected the application taking into consideration the submissions made by the learned counsel for the State that in the case in hand in view of Section 36A(4) of the NDPS Act, the petitioner would not be entitled to be released under proviso (i) of clause (a) to Section 167(2) CrPC as he has not been in custody for a period of “ninety days”.

5. Learned counsel for the petitioner has submitted that the allegation against the petitioner is of recovery of 12.5 Kg. Ganja and in terms of Section 20(b)(ii)(B) of the NDPS Act the maximum punishment which can be awarded against him for the offence would be ten years. He has submitted that for contravention in relation to the offence defined under Section 22 of the NDPS Act involving “lesser than commercial quantity”, but greater than “small quantity” of Ganja the maximum punishment which can be awarded is ten years and there would be no application of Section 36A(4) of the NDPS Act,

which deals with the offences punishable under Sections 19, 24 and 27A of the NDPS Act.

6. Per contra, Dr. Mayanand Jha, learned counsel for the State has submitted that on completion of investigation the police have already submitted charge-sheet against the petitioner vide charge-sheet no.155 of 2016 on 31st August, 2016 and once the charge-sheet is submitted an accused cannot be granted bail in terms of proviso (ii) of clause (a) to Section 167(2) CrPC. However, he has conceded that the charge-sheet against the petitioner relates to recovery of 12.5 Kg. Ganja and the said recovery does not attract ingredients of the offences punishable under Section 19 or 24 or 27A of the NDPS Act.

7. I have heard learned counsel for the parties and perused the records. I find substance in the arguments of the learned counsel for the petitioner. The alleged offence relates to recovery of 12.5 Kg. Ganja from the possession of the petitioner. The maximum punishment prescribed under Section 20(b)(ii)(B) of the NDPS Act in case of recovery of illicit contraband involving “less than commercial quantity”, but “greater than small quantity” is ten years. In case of Ganja, the commercial quantity is 20 Kg. The alleged recovery from the possession is certainly “more than small quantity”, but “less than commercial quantity”.

8. The primary question which arises for consideration in this case is whether the petitioner is entitled for bail on default under proviso (a)(ii) to Section 167(2) of the CrPC, which reads as under:-

167(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, for 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 so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise 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 clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

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

institution.”

9. From a bare perusal of Section 167(2) of the CrPC, it would be evident that the Magistrate would not be authorized to detain an accused beyond 90 days where the investigation relates to the offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. However, clause (ii) of proviso (a) to Section 167(2) CrPC clearly states that where investigation relates to any other offence, the court will have no power to detain the accused beyond sixty days if an accused is prepared to furnish bail and the investigation is not completed.

10. It is an admitted position that on 5.8.2016, when the petitioner has filed application for bail and had offered to furnish sureties to the satisfaction of the court, he had remained in custody for more than sixty days and till then the police had not completed its investigation. His application for bail was rejected by the court on an erroneous ground that he had not remained in custody for “ninety days”.

11. Apparently, the order passed was wholly illegal. The subsequent filing of the charge-sheet by the police on 31st August, 2016 would be of no consequence in view of the ratio laid down by the Constitution Bench of the Supreme Court in the matter of **Sanjay**

Dutt vs. State through C.B.I., Bombay since reported in (1994)5 SCC 410; two three-Judge Bench decisions of the Supreme Court in the matter of **Uday Mohanlal Acharya vs. State of Maharashtra** since reported in (2001)5 SCC 453 and in the matter of **Syed Md. Ahmad Kazmi vs. State (Govt. of NCT of Delhi) and Ors.** since reported in (2012)12 SCC 1.

12. This Court has followed the above decisions of the Supreme Court after making an elaborate discussions in respect of the ratio laid down by the Supreme Court in the matter of **Vikram Pal vs. State of Bihar** since reported in 2016(1) PLJR 321.

13. In **Sanjay Dutt (supra)**, the Constitution Bench of the Supreme Court while dealing with Section 167(2) CrPC 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.”

14. 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.

15. In *Uday Mohanlal Acharya* (Supra), 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 CrPC 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. vs. 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].....”

16. Thereafter 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 sub-section (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.” (Emphasis supplied)

17. 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.

18. 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 Sanjay Dutt's case (Supra).

19. In **Syed Mohd. Kazmi** (Supra), a three-Judge Bench of the Supreme Court has held in paragraph 25 as under :-

“25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for



grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt vs. State, (1994)5 SCC 410 and the other cases cited by the learned Additional Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.”

20. Thereafter, the Court opined in paragraph 26 as

under :-

“26. The circumstances, in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.”

21. On a careful reading of the law laid down by three-Judge Bench of the Supreme Court in *Uday Mohanlal Acharya's* case (Supra), which has been followed further by three-Judge Bench in *Syed Mohd. Kazmi's* case (Supra) and recently in *Union of India Vs. Nirala Yadav* case (Supra), there remains no dispute regarding expression 'if not already availed of' referred to in the Constitution Bench judgment of the Supreme Court in *Sanjay Dutt's* case (Supra). It would be evident that if an accused before filing of charge sheet has applied for bail and has offered to comply with the terms and conditions of bail as directed by the court, then it will be deemed that he has 'availed of' his indefeasible right to be released on bail under the proviso (a)(ii) to Section 167(2) Cr.P.C. and it will remain enforceable even upon filing of the charge sheet. It is well settled that if charge sheet is filed during consideration of bail application then it will not defeat the right of the accused to be released on bail under

proviso (a)(ii) to Section 167(2) Cr. P.C.

22. The view if the charge-sheet is filed prior to the actual furnishing of bail bond then there is no question of indefeasible right, howsoever valuable and indefeasible it may be, after filing of the charge sheet was minority view expressed in paragraphs 29 and 30 in *Uday Mohanlal Acharya's* case (Supra). There is no quarrel with respect to the proposition that as long as the majority view occupies the field it is a binding precedent. In that view of the matter, I am of the opinion that the reliance placed upon the case laws by the counsel for the State are those which have followed the minority view expressed in *Uday Mohanlal Acharya's* case (Supra).

23. Coming back to the facts of the present case, there is no dispute regarding dates and event of facts which took place. The petitioner was arrested on 31st May, 2016 at 9.30 a.m. and on the same day he was produced before the court and was remanded to judicial custody. The statutory period of sixty days of detention applicable in the case of the petitioner expired on 31st July, 2016. He filed an application for bail under proviso (a)(ii) to Section 167(2) of the CrPC on 5th August, 2016. His application was rejected by the court on the same day on erroneous ground. The police submitted charge-sheet on 31st August, 2016. It would be evident from the aforesaid discussions that such furnishing of charge-sheet, would not defeat the indefeasible

right of the petitioner to be released on bail.

24. In view of the discussions made above, I am of the considered opinion that the learned Special Judge/Sessions Judge, Darbhanga, Bihar has failed to appreciate the law in correct perspective while passing the impugned order dated 31st May, 2016.

25. Accordingly, the impugned order dated 31st May, 2016 passed in Ghanshyampur P.S. Case No.86 of 2016 is set aside. The petitioner is directed to be released on bail on furnishing bail bond and sureties to the satisfaction of the court.

26. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

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