

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH AT NAGPUR**

**CRIMINAL APPLICATION (BA) NO.867/2015**

Minarul Islam s/o Razman Mandal

..Versus..

State of Maharashtra, through Police Station Officer, Police Station, Nandanwan,  
Nagpur

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Office Notes, Office Memoranda of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
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Court's or Judge's orders

**CORAM : Z.A. HAQ, J.**

**DATE : 1.4.2016**

1. Heard Shri R.M. Patwardhan, advocate for the applicant and Shri N.B. Jawade, A.P.P. for the non-applicant.

The applicant is arrested in crime registered against him for the offence punishable under Sections 302, 307, 120-B and 34 of the Indian Penal Code and Sections 3, 25 and 27 of the Arms Act. The crime is registered on the complaint lodged on 25<sup>th</sup> February, 2014. The name of the applicant do not find place in the F.I.R. The charge-sheet was filed on 23<sup>rd</sup> May, 2014 against co-accused. Subsequently, the applicant is added as accused. The applicant was in jail in Behrampur, Distt. Murshidabad, West Bengal. The transfer of applicant was sought and he was brought to Nagpur and was shown arrested in the crime, on 20<sup>th</sup> June, 2014. The police

sought custody of the applicant, interrogated him and after the period of custody was over, the applicant was remanded to jail and then as the applicant was required in the matter at Behrampur he was shifted there. The prosecution filed supplementary charge-sheet on 26<sup>th</sup> September, 2014 showing the applicant as accused.

The applicant had filed an application before the Sessions Court, Nagpur in Sessions Trial No.313/2014 praying that he be granted bail. The application filed by the applicant was rejected by the Sessions Court. The applicant had approached this Court by filing Criminal Application (BA) No.914/2014 which was withdrawn by the applicant on 20<sup>th</sup> April, 2015 with liberty to move again in case of change of circumstances.

2. According to the applicant, after the disposal of the bail applications filed by him before the Sessions Court Nagpur and this Court, the advocate representing him noticed that after the applicant was sent back to Behrampur, the proceedings were taken up in his absence. According to applicant, after obtaining the required certified copies Miscellaneous Criminal Application No.2234/2015 was filed before the Sessions Court, Nagpur praying

for grant of bail on two grounds:

(i) *That the remand of the applicant is mechanically extended by the learned Magistrate in the absence of the applicant i.e. without producing the applicant before the Court.*

(ii) *That the charge-sheet, including the supplementary charge-sheet, is not given to the applicant as he is not produced before the Court and the order extending the remand is passed in the absence of the applicant and, therefore, it has to be treated that the detention of applicant is illegal and the applicant would be entitled for the benefit of Section 167(2) of the Criminal Procedure Code.*

3. Shri R.M. Patwardhan, advocate for the applicant has submitted that the applicant was brought from the jail at Behrampur to Nagpur on 20<sup>th</sup> June, 2014 and shown arrested in Crime No.70/2014, produced before the Magistrate and after completing the procedure he was sent back to Behrampur on 8<sup>th</sup> July, 2014 and since then he is not produced before the Magistrate. It is submitted that when the charge-sheet was filed on 26<sup>th</sup> May, 2014 the applicant was not shown as accused, he is added as accused subsequently, supplementary charge-sheet is filed on 26<sup>th</sup> September, 2014 after the applicant is sent back to Behrampur and the applicant is not given the copy of charge-sheet and the supplementary charge-sheet. It is submitted that the applicant is

not produced before the Magistrate after he is sent back to Behrampur in 2014 and the remand of the applicant is being extended in his absence. Relying on the provisions of Section 167(2) of the Criminal Procedure Code, it is submitted that the detention of the applicant is illegal and he is entitled to be released on bail. In support of the submission, reliance is placed on the order passed in the case of *Khimbhadhur Palshiram Thapa V/s. State of Maharashtra* reported in **1989(3) Crimes 543**, the order passed in the case of *A. Narayana Reddy and others V/s. State of Andhra Pradesh* reported in **1992 Cri. L.J. 630**. It is further submitted that the provisions of Section 207 and 209 of the Criminal Procedure Code are not complied and, therefore, the trial cannot proceed.

4. Shri N.B. Jawade, learned A.P.P. has submitted that the claim of the applicant relying on Section 167(2) of the Criminal Procedure Code is misconceived. The learned A.P.P. has submitted that though the right conferred by Section 167(2) of the Criminal Procedure Code is indefeasible, as the applicant failed to exercise the right before charge-sheet is filed on 26<sup>th</sup> September, 2014, the right as per Section 167(2) of the Code of Criminal

Procedure is extinguished. In support of the submission, learned A.P.P. has referred to the following judgments:

- (i) *Judgment given in the case of Sanjay Dutt V/s. State through C.B.I., Bombay (II) reported in (1994) 5 SCC 410 and*
- (ii) *Judgment given in the case of Uday Mohanlal Acharya V/s. State of Maharashtra reported in (2001) 5 SCC 453.*

Countering the submissions made on behalf of the applicant that detention of the applicant is illegal as the remand is extended without producing him before the Magistrate, the learned A.P.P. has submitted that as the applicant is in jail at Behrampur, Distt. Murshidabad, West Bengal in connection some other crime, it is not necessary that he should be produced before the learned Magistrate at Nagpur at the time of extension of remand. To support this submission, learned A.P.P. has relied on the judgment given in the case of *Raj Narain V/s. Superintendent, Central jail, New Delhi* reported in **1970(2) SCC 750**.

5. Though the applicant claims that the supplementary charge-sheet is filed within 90 days of the arrest of applicant in the crime, the non-applicant disputes this position. According to the non-applicant the period of 90 days after the arrest of the applicant in

the crime ended on 16<sup>th</sup> September, 2014 and according to the note of the Investigating Officer, the charge-sheet was sent to be filed in the Court of Magistrate on 15<sup>th</sup> September, 2014. However, according to the record, the charge-sheet is taken by the learned Magistrate on the record on 26<sup>th</sup> September, 2014.

6. In the judgment given in the case of *Sanjay Dutt V/s. State through C.B.I., Bombay (II)* (cited supra) the point is dealt with in paragraph No.48 and 53(2)(b) as follows:

*“48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filled because Section 167 Cr. P.C. ceases to apply.....*

53. ....

(1) ....

(2)(a) .....

(2)(b) *The “indefeasible right” of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage.”*

In the case of *Uday Mohanlal Acharya V/s. State of Maharashtra* (cited supra) the point is dealt with in paragraph No.13 as follows:

13. ....When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal procedure Code authorising detention of an accused in custody after the

*expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But 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 the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency.....*

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 unauthorized, 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."*

Considering the proposition of law laid down in the judgment given in the case *Sanjay Dutt V/s. State through C.B.I., Bombay (II)*

(cited supra) and the judgment given in the case of *Uday Mohanlal Acharya V/s. State of Maharashtra* (cited supra), the dispute relating to the fact as to whether the charge-sheet is filed within 90 days of the arrest of the applicant or not, will not have any bearing on the point as it is not the case of the applicant that he exercised his right as per Section 167(2) of the Criminal Procedure Code before 26<sup>th</sup> September, 2014 on which date the charge-sheet is taken on the record by the Magistrate. The application seeking bail is filed on or about 11<sup>th</sup> September, 2015. The point raised on behalf of the applicant has to be answered against him in view of law laid down in the judgment given in the case of *Sanjay Dutt V/s. State through C.B.I., Bombay (II)* (cited supra) and the judgment given in the case of *Uday Mohanlal Acharya V/s. State of Maharashtra* (cited supra).

The applicant having not exercised the right under Section 167(2) of the Criminal Procedure Code before the filing of the charge-sheet, he cannot claim the benefit as per Section 167(2) of the Criminal Procedure Code.

The orders relied upon by the learned advocate for the applicant do not assist the applicant.

7. The submission made on behalf of the applicant that as the remand of the applicant is being extended without producing him before the Magistrate has to be answered against the applicant in view of the proposition laid down in the judgment given in the case of *Raj Narain V/s. Superintendent, Central jail, New Delhi* (Cited supra).

On merits, I am not convinced that the applicant should be released on bail. Moreover, this Court while disposing of earlier application filed by the applicant granted him liberty to move application if there is change in the circumstances. I find that there is no change in the circumstances.

In view of the above, the application is **dismissed**.

**CRIMINAL APPLICATION (APPP) NO.1301/2015**

In view of disposal of main application, this application does not survive and is **disposed of** accordingly.

**JUDGE**