

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Crl.R.C.No.994 of 2016

Rizwan Shereff

... Petitioner/Accused

.. Vs ..

State, represented by
Sub-Inspector of Police,
CBCID Police Station,
Chennai.

(Crime No.1 of 2016)

... Respondent/Complainant

Prayer: Criminal Revision Case filed under Sections 397 and 401 of the Code of Criminal Procedure, praying to call for the records in FIR C.C.No.Nil of 2016 in CBCID X Crime No.1 of 2016 on the file of XI Metropolitan Magistrate Court, Saidapet, Chennai, dated 20.06.2016 and set aside the same as illegal.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.K.Venkatramani,
Additional Advocate General
assisted by
Mrs.M.F.Shabana,
Government Advocate, (Crl.Side)

ORDER

Criminal Revision Case is filed to call for the records in FIR C.C.No.Nil of 2016 in CBCID X Crime No.1 of 2016 on the file of XI Metropolitan Magistrate Court, Saidapet, Chennai, dated 20.06.2016 and set aside the same as illegal.

2. The learned counsel for the petitioner would mainly contend that the impugned order of return is unsustainable in the eye of law and the impugned order is violative of principles of natural justice and also violative of Section 167 of Cr.P.C. Hence, the learned counsel prayed that the order of the trial Court has to be set aside and the criminal revision case has to be allowed.

3. This Court heard the submissions made by Mr.K.Venkatramani, learned Additional Advocate General assisted by Mrs.M.F.Shabana, learned Government Advocate (Crl.Side) and also perused the records.

4. In this case, admittedly, a case was registered by CBCID CCW Wing against the revision petitioner for the offence under Section 489(A) IPC and he was arrested and remanded to judicial custody by the learned XI Metropolitan Magistrate, Saidapet, Chennai. Thereafter, Section 15(1)(a)(iii a) r/w.16 (1)(b) of Unlawful Activities (Prevention) Act, 1967 was also added. In this case, after the initial remand period of 15 days, the Investigating Officer filed an application for extension of period from 16.06.2016 to 15.07.2016, to complete the investigation. The learned XI Metropolitan Magistrate, Saidapet, Chennai, also passed an order on 15.06.2016 and extended for a period of 30 days from 16.06.2016 to 15.07.2016. On a perusal of the order of the trial Court, it is seen that before extending the remand period, the accused was not directed to be produced before the trial Court. The trial Court heard the arguments of the prosecution alone and the accused was not heard at the time of extending the remand period. If there is any violation on the part of the learned Magistrate in not hearing the accused, it will be against the principles of natural justice.

5. In support of his contentions, the learned counsel for the petitioner has relied on a judgment of this Court passed on 20.01.2016 in Crl.R.C.Nos.1222 of 2015 and 19 of 2016, wherein, at paragraph Nos.2, 5, 10 and 11, this Court has held as follows:-

"2. A case in Crime No.145 of 2014 on the file of Aliyar Police Station was registered on information that a person had gone missing. Thereafter, the same was altered to one u/s.13 (2), 18-B, 39 of Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as Act). petitioner and one another were arrested on 12.06.2015 and remanded to judicial custody on the same day. Contending that the final report had not been filed within 90 days of the arrest which period stood completed on 10.09.2015, petitioner sought relief u/s.167(2) Cr.P.C. Amidst other reasons, the Court below in dismissing such petition under orders in Crl.M.P.No.2629 of 2015 dated 29.09.2015 informed that Section 43-D(2)(b) of the Act permits extension of detention of the accused, pending filing of a charge sheet, upto to 180 days and that such extension had been granted by it in the

5. Learned counsel for petitioner placed reliance on the decision in *Hitendra Vishnu Thakur v. State of Maharashtra* [1994 SCC (4) 602], wherein in dealing with *pari materia* provision under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), it had been observed thus:

23. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 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 promptitude 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 investigating 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 addition 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 falls 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. 43 of 1993 (Amendment Act) (sic) would apply to the pending cases i.e. the cases which were pending investigation on the date when the amendment came into force and in which the charge-sheet or challan had not been filed till 22-5-1993."

10. This Court has considered the rival submissions.

11. This Court has called for and perused the records. This Court finds that the order extending the period of detention was passed on 09.09.2015. Therefore, the contention on behalf of the State that petitioner/accused as also other accused were produced before Court on 10.09.2015 for the purpose of extension of remand and hence, it was to be construed that they had notice of the petition seeking extension of period for completion of investigation being considered, totally is misplaced. This Court has reproduced hereinabove the order of the Court below dated 09.09.2015. Records do not inform that notice was issued to petitioner/accused or that they were before it when the order of 09.09.2015 came to be passed. Under a communication dated 04.09.2015, the respondent has addressed the Public Prosecutor of the District Sessions Court, Coimbatore, on the issue of need for extending the period of detention of the accused. Based thereupon, the Public Prosecutor has moved the petition in CrI.M.P.No.2579 of 2015 u/s.167(2) Cr.P.C. r/w. Section 43-D(2)(b) of the Unlawful Activities (Prevention) Act, 1967. A comparative reading of the petition in CrI.M.P.No.2579 of 2015 and the communication of the respondent to the Public Prosecutor dated 04.09.2015 reveals that except for the opening paragraph informing basic particulars of the case, CrI.M.P.No.2579 of 2015 is a verbatim reproduction of the communication

of the respondent dated 04.09.2015. Therefore, the requirement placed upon the Public Prosecutor to independently apply his mind in moving a petition seeking extension of the detention of the accused has not been met."

6. This criminal revision case is preferred by the present revision petitioner only questioning the order of the learned Magistrate in returning the bail application filed by the present petitioner under Section 167(2) of Cr.P.C. which reads as follows:-

"As per Section 43 D of the Unlawful Activities (Prevention) Act, 1967, the period of investigation has been extended for 30 days from 16.06.2016 to 15.07.2016, vide order passed by this Court in Cr.M.P.No.1946 of 2016. Thus, how this petition is maintainable U/s. 167 Cr.P.C. at this stage?

Hence, this petition U/S. 167(2)(a)(ii) Cr.P.C. is returned."

7. Further, the learned Magistrate has not passed any final order and only returned the bail application filed by the petitioner. The present petitioner has not challenged the above mentioned extension of remand order passed by the learned Magistrate. In view of the above, the above citation relied on by the learned counsel for the petitioner is not applicable to the order under challenge in this case.

8. In this case, Mr.K.Venkatramani, learned Additional Advocate General assisted by Mrs.M.F.Shabana, learned Government Advocate (Crl.Side) produced a judgment of this Court in Crl.O.P.Nos.1977 and 6974 of 2015 decided on 06.05.2015 and in the said judgment, at paragraph Nos.10 to 12, this Court has held as follows:-

10. Per contra, learned counsel appearing for the accused submitted that on the date of grant of bail, no final report is pending before the learned Magistrate because the final report was already returned to comply with certain defects. Therefore, the defective final report filed by the investigating officer on 24.11.2014 would not amount to filing of final report. The final report was resubmitted along with chemical report only on 3.3.2015. In the meantime, the statutory period of 90 days had expired. Hence, the learned Magistrate has granted bail on 19.1.2015. Therefore, no infirmity could be found in the order passed by the learned Magistrate. In support of his contention, learned counsel appearing for the accused has relied upon the judgment reported in 2004-2-L.W.(Crl.) 545 - Nagrajan, etc. & others v. State of Tamil Nadu,

wherein it has been held that filing of a defective charge sheet and returning the same to rectify the defect, amounts to non-filing of charge sheet and will not defeat the right of the accused to be released on bail after expiry of 90 days. For the same proposition, learned counsel appearing for the accused has also relied upon another judgment reported in 2006 (2) MNW (Cr.) 414 - K.S.J.Kumar v. State, represented by Inspector of Police, Eppothumvandran Police Station, Tuticorin District.

11. On the other hand, learned Government Advocate (Crl.Side) submitted that the final report filed by the investigating officer on 24.11.2014 was returned only for the purpose of obtaining chemical report and therefore, it cannot be said that it is a defective final report. Hence, granting bail under Section 167(2) Cr.P.C. does not arise in this case. In support of his contention, learned Government Advocate (Crl.Side) has relied upon the decisions reported in (2006) 6 Supreme Court Cases 277 - Bhupinder Singh and others v. Jarnail Singh and another and CDJ 2015 SC 040 -Narendra Kumar Amin v. CBI & others.

12. In view of the above submissions made by the learned counsel appearing for the accused and the learned counsel appearing for the de facto complainant and the learned Government Advocate (Crl. Side), the question that falls for consideration is, whether the bail granted by the learned Judicial Magistrate, Ambattur, Chennai under Section 167(2) Cr.P.C. is legally sustainable or not ?

9. The above citation produced on the side of the learned Additional Advocate General is squarely applicable to the facts of the present case. In this case, on a perusal of the order of the trial Court, it is seen that the learned Magistrate extended the remand period from 16.06.2016 to 15.07.2016 which was not challenged by the present petitioner.

10. In this case, it is useful to extract the relevant para in the Government Order in G.O.(4D) No.46, Home (Pol.VII) Department, dated 10.09.2016, which reads as follows:-

"AND WHEREAS, the Public Prosecutor, Madras High Court has opined that this case is a fit case to accord sanction under section 45(1) (ii) of the said Unlawful Activities (Prevention) Act 1967 to prosecute the accused Abdul Ismail (A-1), aged 25, Son of Asim Basha, Riswan Sheriff (A-2), aged 28,

Son of Syed Dasdakar, Mohammed Rafiq (A-3), aged 26, Sone of Abdul Jaffer, Jaffer Sadiq @ Sidhiq (A-4), aged 32, Son of Mohammed Yusuf, Ganesa @ Ganesan (A-5), aged 27, Son of Subramanian, Syed Ibrahim (A-6) aged, 30, Son of Saleem, Masood @ Masood Sheik (A-7) (Absconding) Son of Sowkath for the offences punishable under sections 15(1)(a) (ia) r/w. 16(1) (b) and 18 of the Unlawful Activities (Prevention) Act, 1967.

AND WHEREAS, after perusing the case diaries, the relevant documents and also taking into consideration of the recommendation of Authority appointed under sub-section (2) of section 45 of the Unlawful Activities (Prevention) Act, 1967 (Central Act 37 of 1967), the State Government is of the view that there is sufficient material evidence available against the accused persons for their prosecution for the offences under Chapter IV of the Unlawful Activities (Prevention) Act, 1967 (Central Act 37 of 1967);

NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of section 45 of the Unlawful Activities (Prevention) Act, 1967 (Central Act 37 of 1967), the Governor of Tamil Nadu hereby accords sanction for the prosecution of the accused persons mentioned below for the offences punishable under Chapter IV of the said Unlawful Activities (Prevention) Act, 1967."

11. It is useful to extract sub-sections (1) and (2) of Section 43-D of the Unlawful Activities (Prevention) Act, 1967, which read as follows:-

"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 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".

12. In view of the above said Government Order passed by the Government, the Government granted sanction under sub-Section (1) of Section 45 of the Unlawful Activities (Prevention) Act, 1967 (Central Act 37 of 1967). In view of this, the remand period can be extended upto 180 days. In this case, it is not denied on the side of the petitioner that the remand period was extended from 16.06.2016 to 15.07.2016 by one month. Further, it is also admitted by the learned counsel for the petitioner that the present petitioner has not challenged the order of extension of remand. Hence, the bail petition filed under Section 167(2) of Cr.P.C. was rightly not taken on file by the learned Magistrate.

13. Hence, this Court is of the considered view that there is no infirmity or illegality in the order passed by the trial Court and this Court finds no reason to interfere with the order of the trial Court which does not warrant any interference by this Court and hence, the criminal revision case is liable to be dismissed.

14. In the result, this Criminal Revision Case is dismissed with liberty to the petitioner to approach the competent Court for filing bail application, if any, according to law.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

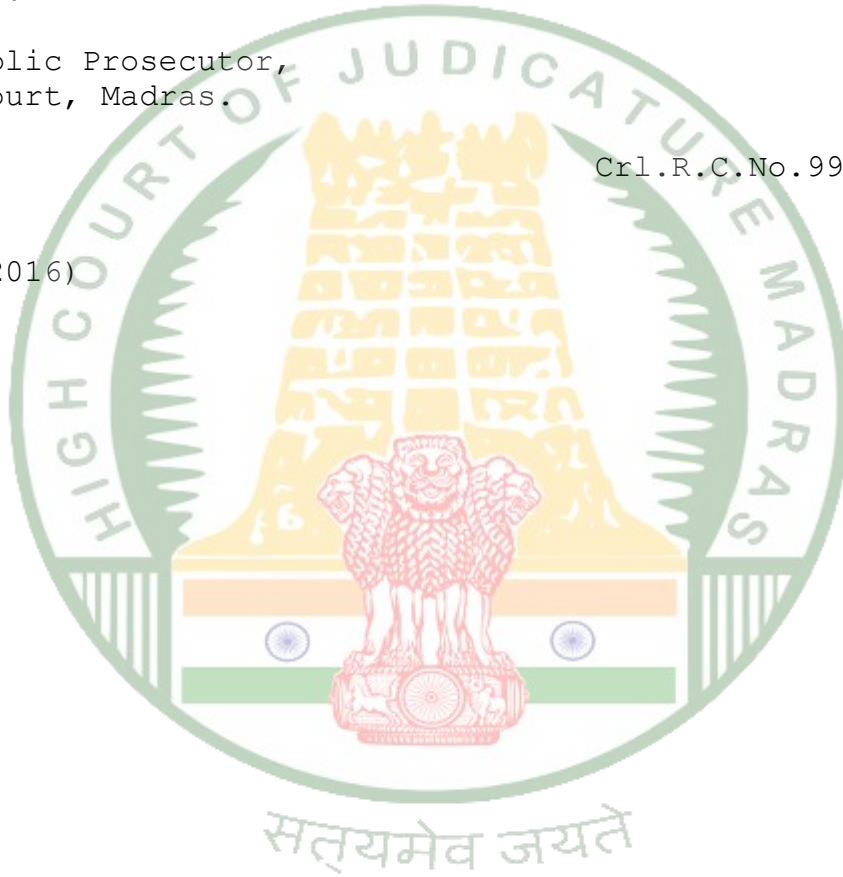
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To

1. The XI Metropolitan Magistrate, Saidapet, Chennai.
2. Do- Through The Chief Metropolitan Magistrate, Egmore, Chennai 08.
3. The Sub-Inspector of Police, CBCID Police Station, Chennai.
4. The Public Prosecutor, High Court, Madras.

Cr1.R.C.No.994 of 2016

MSM(CO)
CA(27/09/2016)



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