

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 14.03.2019
CORAM
THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN
CRL.O.P.Nos.6816 & 6817 of 2019

Kweon Mihwa ... Petitioner in Crl.O.P.No.6816/2019
Moon Seonmi ... Petitioner in Crl.O.P.No.6817/2019

Vs.

The Senior Intelligence Officer
Directorate of Revenue Intelligence
T.Nagar
Chennai 600 017 ... Respondent in both Crl.O.Ps.

COMMON PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. to set aside the order of Hon'ble Principal Sessions Judge, Chennai in Crl.M.P.Nos.2961 & 2962 of 2019 dated 20.02.2019 and modify the condition imposed by the learned Additional Chief Metropolitan Magistrate E.O.II, Egmore in Crl.M.P.Nos.237 & 238 of 2019 dated 29.01.2019.

For Petitioners : Mr.F.Sajitha Parveen
For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

COMMON ORDER

These Criminal Original Petitions are filed to set aside the order of Hon'ble Principal Sessions Judge, Chennai in Crl.M.P.Nos.2961 & 2962 of 2019 dated 20.02.2019 and modify the condition imposed by the learned Additional Chief Metropolitan Magistrate E.O.II, Egmore in Crl.M.P.Nos.237 & 238 of 2019 dated 29.01.2019.

2.The case of the prosecution is that the petitioners are the Korean citizens. The petitioners are involved in smuggling of 6 Kg Gold. The contention of the petitioners are that the passports were seized by the respondent and the same was with the respondent for investigation. The petitioners have travelled in a tourist Visa.

3.The learned counsel appearing for the petitioners would submit that the petitioners were arrested and remanded to judicial custody on 30.11.2018 by the respondent police for the alleged offence u/s.135 of the Customs Act, 1962. Further he

would submit that, the petitioners were detained after the statutory period of 60 days and therefore, they have filed a petition for the grant of statutory bail under Section 167(2) Cr.P.C. The learned Additional Chief Metropolitan Magistrate (E.O.-II), Egmore was pleased to grant bail to the petitioners by an order dated 29.01.2019. However, while ordering bail to the petitioners, the learned Magistrate, imposed certain conditions as follows :-

"(i)The petitioners / accused should execute a bond for value of Rs.50,000/-.

(ii)The petitioners / accused should furnish two sureties each to the value of Rs.50,000/- showing property in their name in the satisfaction of the court.

(iii)The petitioners / accused should deposit her passport before the Court.

(iv)Further the petitioners / accused should appear before the respondent office daily at 10.30 a.m. and sign until further orders and shall appear before the Court on 08.02.2019 and on subsequent hearing dates".

The learned counsel for the petitioners would further submit that while the petitioners were enlarged on statutory bail under Section 167(2) Cr.P.C., no condition can be imposed and it is onerous and stringent. Therefore, he prays to modify the conditions imposed, while he was granted bail.

3.Per contra, the learned Additional Public Prosecutor would submit that the petitioners are involved in smuggling of 6 Kg. of Gold. Therefore, he vehemently opposed to modify the condition imposed by the Court below.

4.Heard Ms.F.Sajitha Farveen, learned Counsel appearing for the petitioners and Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the respondent.

5.On a perusal of the records, it is seen that the petitioners were arrested and remanded to judicial custody on 30.11.2018. Since the respondent did not file the charge sheet, the Court below enlarged the petitioners on statutory bail, as per the procedure contemplated under Section 167(2) Cr.P.C. while granting bail, the learned Magistrate imposed condition that the petitioners/ accused should furnish two sureties each to the value of Rs.50,000/- showing property in their names in the satisfaction of the court. It is relevant to read the Section 167(2) Cr.P.C. as follows :-

"Section 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, 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 subsection 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, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police "

From the above, the only condition can be imposed, while granting anticipatory bail under Section 167(2) Cr.P.C. is that the accused persons shall be released on bail if he is prepared to and does furnish bail. Apart from that no other requirement

is necessary for grant of statutory bail as per Section 167(2) Cr.P.C.

6.The learned Counsel also relied upon the order in CrI.O.P.No.18056 of 2006 dated 29.09.2000 reported in MANU/TN/0913/ 2000 in the matter of Baskar and others Vs. State and others the following paragraphs :-

"14. The failure to file charge sheet or final report before the period prescribed under Section 167(2) Code of Criminal Procedure will automatically result in releasing the accused on bail subject to only two conditions that there is an application for bail from the person in custody and he must be in a position to offer adequate sureties. The bail cannot be denied to him on an other ground less on the ground that on merits the petitioners do not deserve to be released on bail. The provision 167(2) Code of Criminal Prodecure has been introduced in the code with a view to avoid unnecessary detention of persons or the accused in prison under judicial custody. Legislature in its wisdom has thought that the prosecution must be compelled to come out with a final report or charge sheet with expiry of 60 days or 90 days depending upon the gravity of the offence and intended period on punishment and in case the prosecution takes more time than that the legislature wanted to mitigate, the rigor of the remand by making release on bail compulsorily after the expiry of the said period. The rulings made by the Supreme Court has further clarified this position by stating that a person in judicial custody must exercise the option of coming out of bail by making an application on expiry of the period before laying of charge sheet and he cannot come leisurely to the Court after the charge sheet has been filed even though the charge sheet is filed after expiry of the prescribed period in 167(2) Code of Criminal Procedure. Neither the Legislature nor the Apex Court in any of the ruling have stated that any exemption can be made in such a case where application is filed in accordance with Section 167(2). So once the bail application is filed after expiry of the prescribed period and before challan is

filed, the Court has no business to look into the gravity of the crime committed to justify the judicial custody beyond the prescribed period under Section 167(2) Code of Criminal Procedure.

15. It is not as if the difficulty of prosecution agency in certain cases to file final report within the period because of the voluminous evidence or records or difficulty in gathering evidence in case of complicated matters has been overlooked. Neither the Act nor the Apex Court had held that no charge sheet can be laid after expiry of prescribed period. In fact the Supreme Court has pointed out in those rulings that even if the accused has been released on bail by having recourse to 167(2) and the charge sheet is subsequently laid after expiry of the prescribed period the prosecution can ask for cancellation of bail on merits and this cancellation also cannot be automatically given to the prosecution if a petition for that is filed after filing the charge sheet. The Court is not expected to oblige the prosecution by keeping an application filed under Section 167(2) Code of Criminal Procedure Pending which has been filed after expiry of the period and giving opportunity to the prosecution to file charge sheet in the meantime and thereafter disposing the application holding that charge sheet has been already filed even though after expiry of the period."

Further he relied upon the judgment reported in 2006(2) MWN (Cr.) 414 in the matter of K.S.J.Kumar Vs. State rep by the Inspector of Police, in which this Court held as follows :-

"9. A perusal of the impugned order clearly shows that the learned Magistrate mainly proceeded with the case on merits of the case while dismissing the petitioner filed by the petitioner mainly invoking the provision under Section 167(2) Cr.P.C. The learned Magistrate is not at all discussed the right of the petitioner accrued due to the non filing of the charge sheet within 90 days as stipulated. As a matter of fact, the learned counsel for the petitioner also placed reliance on a decision of this Court in Nagarajan, etc. & others V. State of

Tamil Nadu, 2002 (2) L.W. (Crl.) 545 wherein this Court has 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.

10. In the decision cited supra, this Court has taken into consideration of the decision rendered by the Honourable Supreme Court in respect of the right of the accused under Section 167(2) Cr.P.C., elaborately. In spite of the above said reliance placed before the learned Magistrate, the learned Magistrate simply brushed aside the same with a single line that the petitioner is not entitled for the benefit of the decision rendered by this Court as cited supra. It is very unfortunate that the learned Magistrate has not even considered the submission regarding the non-filing of the charge sheet within the time stipulated and without giving any finding regarding such submission, proceeded mainly on the basis of the merits of the case.

11. The submission of the learned Government Advocate (Criminal side) makes its crystal clear that the investigation agency has filed the charge sheet only on 19.09.2006. Earlier submission of the learned Government Advocate (Criminal Side) that the draft charge sheet was filed on 10.07.2006 and the same was returned for corrections, would not amount to filing of a charge sheet as it is rightly held by this Court in the decision cited supra and filing a defective charge sheet and returning the same to rectify the defect amounts to non-filing of charge sheet.

12. It is also relevant to be noted that the petitioner is incarcerated from 18.04.2006 and now the investigation is over and the charge sheet has been filed in the case. As already stated that in view of the non-filing of the charge sheet within the time stip', the petitioner is having indefeasible right till the charge sheet is

filed. This right also exercised by the petitioner within the stipulated time as the petitioner filed a petition for bail on 24.08.2006 after the expiry of 90 days.

13. Therefore, this Court has no hesitation to release the petitioner on statutory bail under Section 167(2) Cr.P.C. on condition to reside at Madurai and to report before the learned Judicial Magistrate No.I, Madurai once in fifteen days till the date of committal of the case."

7. In the case on hand, admittedly, the charge sheet has not been filed by the respondent police. Therefore the petitioners are entitled to be released on statutory bail under Section 167 (2) Cr.P.C. When it being so, the right to be released under Section 167(2) Cr.P.C. is an indefeasible right and such a right cannot be extinguished by imposition of onerous conditions.

8. In view of the above, the condition imposed by the learned Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Chennai in CrI.M.P.Nos.237 & 238 of 2019 on 29.01.2019 is modified to the effect that the petitioners / accused shall furnish two sureties each to the value of Rs.10,000/- each to the satisfaction of the court instead of furnishing two sureties each to the value of Rs.50,000/- showing property in their names.

9. Accordingly, these petitions are modified. The other conditions shall remain intact.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते Sub Assistant Registrar

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To

1. The Senior Intelligence Officer
Directorate of Revenue Intelligence
T.Nagar
Chennai 600 017

2. The Additional Chief Metropolitan Magistrate
E.O.II, Egmore

3. The Principal Sessions Judge

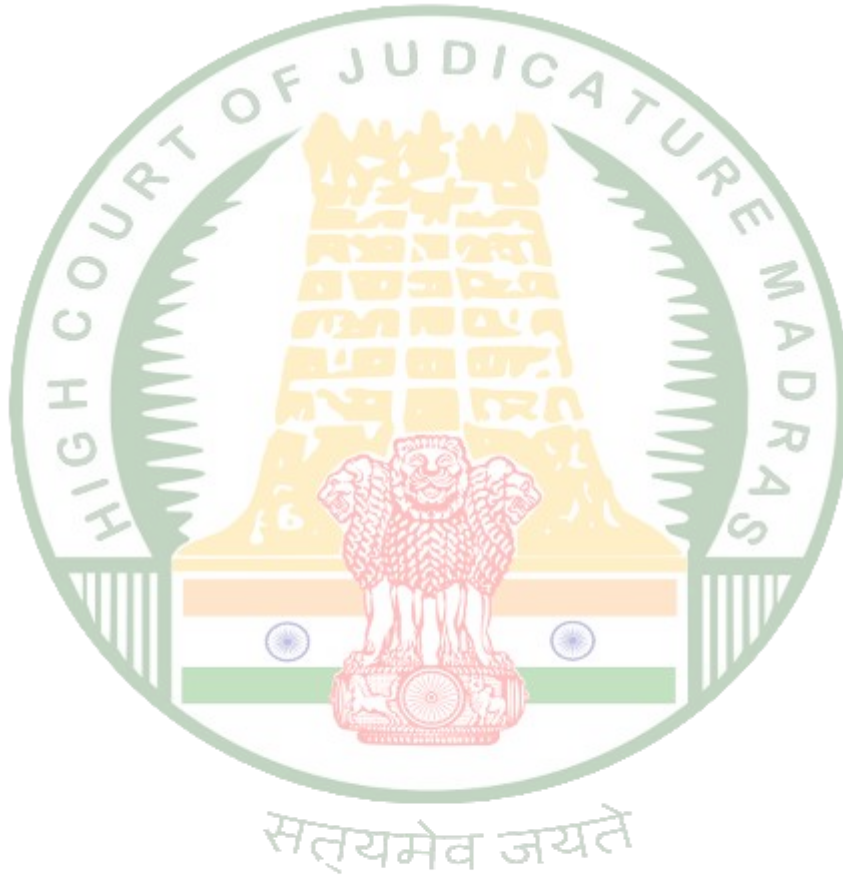
Chennai.

4.The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.F.Sajitha Parveen , Advocate, S.R.No.24274
+1cc to Mr.F.Sajitha Parveen, Advocate Sr.24273 [15/03/2019]

CRL.O.P.Nos.6816 & 6817 of 2019

SPD
SSM(14/03/2019)



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