

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1290 OF 2020

Dattatraya s/o Ankush Pathade

Age: 31 years, Occu.: Agri.,

R/o At Post Adhalgaon, Tq. Shrigonda,

Dist. Ahmednagar

... Petitioner

Versus

The State of Maharashtra

Through Investigation Officer,

Shrigonda Police Station,

Tq. Shrigonda, Dist. Ahmednagar

... Respondent

WITH

CRIMINAL WRIT PETITION NO.1084 OF 2020

Sonali Satish Wakade

Age: 24 years, Occu.: Household

R/o At Post Adhalgaon, Tq. Shrigonda,

Dist. Ahmednagar

... Petitioner

Versus

The State of Maharashtra

Through Investigation Officer,

Shrigonda Police Station,

Tq. Shrigonda, Dist. Ahmednagar

... Respondent

.....

Mr. R. R. Karpe, Advocate for petitioner in both petitions.

Mr. A. M. Phule, APP for respondent – State in both petitions.

Mr. V. P. Latange, Advocate for informant.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 28th October, 2020

PRONOUNCED ON : 3rd November, 2020

COMMON JUDGMENT :

. Since the point raised in both the writ petitions is same, they are proposed to be disposed of by this common judgment. Both the petitioners are original accused persons arrested in connection with Crime No.416 of 2020 registered with Shrigonda Police Station for the offences punishable under Sections 302, 109, 120(B) read with Section 34 of Indian Penal Code. The petitioner in Writ Petition No.1084 of 2020 was arrested on 05-05-2020 and was produced before the learned Judicial Magistrate First Class, Shrigonda on the same day, whereas the petitioner in Writ Petition No.1290 of 2020 came to be arrested on 04-05-2020 and was produced before the learned Judicial Magistrate First Class, Shrigonda on 05-05-2020. It appears that they were initially remanded to police custody and then to judicial custody. Both of them had filed application for bail under Section 167(2) of the Code of Criminal Procedure on 04-08-2020 and 05-08-2020 respectively. After hearing both sides, by a common order, the learned Judicial Magistrate First Class, (Court No.1), Shrigonda, rejected both the applications on 06-08-2020. Both the petitioners had challenged the respective orders in respect of their applications by filing Criminal Revision Application Nos.11 of 2020 and 10 of 2020 respectively. Both the Criminal Revision Applications were decided by a common judgment by learned Additional Sessions Judge, Shrigonda on 04-09-2020 and thereby those Criminal Revision Applications came to be rejected. Hence, both of them are before this

Court.

2. The factual matrix are almost similar and as aforesaid, in order to avoid the repetition, it is to be noted that both the accused – applicants were arrested in the same Crime and according to the petitioner in Writ Petition No.1084 of 2020, she had filed the application for default bail on 91st day, whereas according to the petitioner in Writ Petition No.1290 of 2020, he had filed the application on 93rd day. They have given the calculation in respect of those days in their respective applications. It was contended by both of them that taking into consideration the offence under which they have been arrested, the charge sheet ought to have been filed within 90 days and when the said charge sheet is not filed, they claimed that they have indefeasible right to be released on bail under Section 167(2) of the Code of Criminal Procedure i.e. default bail.

3. In both matters, the prosecution contended that the charge sheet was already filed on 31-07-2020, however, it has been numbered on 05-08-2020 as R.C.C. No.453 of 2020. Therefore, according to the prosecution, the charge sheet is filed within 90 days i.e. to be precised on 88th day and, therefore, there is no indefeasible right to the applicants - accused as contemplated under Section 167(2) of the Code of Criminal Procedure.

4. It appears that the learned Magistrate, after the application was filed, had called the say of Assistant Superintendent attached to his Court regarding whether the charge sheet has been filed or not and the remark has been given that the charge sheet was filed on 31-07-2020 and the numbering has been done only on 05-08-2020 in view of the pandemic situation. It was submitted that in view of the Standard Operating Procedure that was issued by this Court and the circular issued by the learned Principal District Judge, so also the arrangement that was made by the Principal Judge at Shrigonda Court, the physical filing of the charge sheet was accepted, however, it was kept in isolation and, therefore, the number has been given subsequently, but the filing is accepted by the Court on 31-07-2020 itself.

5. Taking into consideration the say filed by the prosecution as well as the endorsements and the Standard Operating Procedure circular in view of the pandemic situation, it was held by the learned Judicial Magistrate First Class that the charge sheet has been filed within 90 days and, therefore, there is no indefeasible right to the accused persons.

6. The learned Additional Sessions Judge further added that there were two public holidays on account of 'Bakri Eid and Sunday' on 01-08-2020 and 02-08-2020 and, therefore, the charge sheet was not numbered. What has been done by the Nazar/Assistant Superintendent was the ministerial act, which

was required to be done after the charge sheet was filed in the Court on 31-07-2020 and he did not accept the contention by the present petitioners that the charge sheet was not presented physically before the Magistrate, till the applications were filed by the petitioners for default bail. For these reasons, the revisions have also been dismissed.

7. Heard learned Advocate Mr. R. R. Karpe for both the petitioners, learned APP Mr. A. M. Phule for respondents – State, who was then assisted by learned Advocate Mr. V. P. Latange for the original informant.

8. It has been vehemently submitted on behalf of the petitioners that both the Courts below have taken a wrong view that the charge sheet was filed within 90 days. He submitted that pandemic situation will not give rise for departure in the procedure or will not extend the period of limitation to file the charge sheet. When such specific point was raised before the Hon'ble Apex Court recently during pandemic; the Apex Court in *S. Kasi Vs. State (2020 (3) MLJ (Cri) 229)* held that the view taken by the Madurai Bench, that the lockdown announced by the Government is akin to proclamation of emergency and, therefore, it amounts to extension of the limitation, was not upheld in view of the decision in *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, (1976) 2 SCC 521* and, thereafter, the Apex Court had allowed the default bail. He further relied on the decision of the Division Bench of this Court in *Shaikh*

Moin Shaikh Mehmood Vs. State of Maharashtra, (Criminal Appeal No.502 of 2020 decided on 24-09-2020), wherein on the similar point which was before the Hon'ble Apex Court in ***S Kasi's*** case (Supra), it was held that the Special Judge under MCOC Act was wrong in rejecting default bail and the pandemic situation would not have prevailed upon him to extend the period for filing charge sheet. The learned Advocate Mr. Karpe further submitted that the learned Additional Sessions Judge went wrong in giving concession in respect of public holiday. It was further submitted that what has been received by the police was a pencil entry regarding filing of charge sheet, which is nothing but an afterthought creation, just to deprive the petitioners from default bail. The learned Magistrate failed even not to decide the applications immediately on the same day. Both the Courts erred in holding that the acceptance of charge sheet by Nazar/ Assistant Superintendent of the Court was the sufficient compliance and it was not necessary that the Magistrate should make an endorsement regarding the filing. Both the Courts further erred in contending that the delay in ministerial acts will not give advantage to the petitioners. When the indefeasible right had accrued to the petitioners and when the charge sheet ought to have been filed on or before 03-08-2020, but the charge sheet was filed and registered on 05-08-2020, then both the Courts, in fact, ought to have taken a view that the said right was available and the petitioners ought to have been released on default bail. The learned Advocate for the petitioners, therefore,

prayed for setting aside both the orders and releasing the petitioners on default bail.

9. Per contra, learned APP instructed by learned Advocate for the informant strongly supported the reasons given by both the Courts below. It was submitted that after the application was filed for default bail, the learned Magistrate definitely was duty bound to take remark from the Assistant Superintendent of the Court, who is appointed to receive the charge sheets on behalf of the Magistrate, complete the act of its registration as per the rules laid down in Criminal Manual and then place it before the Magistrate for taking cognizance under Section 204 of the Code of Criminal Procedure. This Court has issued Standard Operating Procedure in view of the pandemic situation. When the Courts were doing their duties in shifts, that too with the limited man power, it would have taken some delay in completing the ministerial act. Apart from Standard Operating Procedure issued by this Court, further circulars have been issued by the respective Principal District Judge's as to how the filing is to be accepted and, therefore, no fault can be found. When the charge sheet was filed on 31-07-2020 physically by the Court orderly by taking it from the police station and an entry in respect of filing of charge sheet was taken in the station diary by the concerned Investigating Officer on 31-07-2020, then there is no reason to disbelieve the same. As per the Standard Operating Procedure and the circular, the physical acceptance of charge sheet was completed and then the

charge sheet was kept in isolation. This has been done to protect the spread of corona virus amongst the Court staff. The ministerial act of giving number to the said charge sheet cannot give any advantage to the petitioners. They had no infeasible right to get bail under Section 167(2) of the Code of Criminal Procedure on 04-08-2020 and 05-08-2020 respectively. The applications and the revision petitions have been rightly dismissed.

10. At the outset, it can be stated that the facts before this Court are totally different than the facts which were before the Apex Court in ***S. Kasi's*** case (Supra) or in ***Shaikh Moin Shaikh Mehmood's*** case (Supra) before the Division Bench of this Court. Here, the police had not knocked the doors of Magistrate for extension of period for filing charge sheet. It is certain in the mind of Investigating Officer, Magistrate, Revisional Court and even this Court, that the charge sheet in the present case should have been filed within 90 days in view of Section 167(2) of the Code of Criminal Procedure. It is further not in dispute that the charge sheet is filed. The dispute is regarding the date of filing of charge sheet. Therefore, the ratio that was laid down in ***S. Kasi's*** case (Supra) or ***Shaikh Moin Shaikh Mehmood's*** case (Supra) will not be applicable here. We are not required to deal with any such situation, which can be equated to the situation in emergency. That period of 90 days could not have been extended by anybody and nobody had come to the Court of Magistrate for its extension. We should deal with the facts involved in this case first and then go to the law

applicable. When the application for default bail was filed by the petitioners respectively on 04-08-2020 and 05-08-2020, the endorsement has been called from the Assistant Superintendent of the Court regarding whether the charge sheet has been filed or not. He has given his remarks on 05-08-2020 stating that the charge sheet has been filed on 31-07-2020 and it has been numbered on 05-08-2020 as R.C.C. No.453 of 2020. In support of the contention that the charge sheet was presented by the Investigating officer on 31-07-2020, the police authorities have the acknowledgment which appears to have been given in pencil by the Court staff, statement of court orderly who had physically handed over the said charge sheet and further a true copy of the case diary entry dated 31-07-2020 with true copy of the station diary entry. Now, as regards the late registration of the charge sheet is concerned, it has been stated that it was in view of the Standard Operating Procedure and the circulars as well as the arrangement that has been made locally to accept the physical filing. Definitely, that arrangement was required to be made in view of the pandemic situation, especially that the documents were also required to be kept in isolation in view of the then understanding that the corona virus gets spread even through the documents. Chapter - III of Criminal Manual deals with enquiry and trial by Magistrate. Paragraph No.1 of the said Chapter deals with examination of complaints/charge sheet. Thus, after the filing of the charge sheet/complaint, it will have to be examined. If any objection is there, it has to be raised and either

after the removal of those objections or subject to further order passed by the Court, the number would be assigned to the case. Though the Code of Criminal Procedure contemplates the presentation of the complaint or the charge sheet before the Magistrate, it will have to be inferred that it is through its officers and not to the Magistrate personally. Giving number to the case would come subsequently after the scrutiny of the complaint/charge sheet. The said scrutiny has to be through the person appointed and empowered by the High Court in that respect. Both the Courts have correctly observed that filing of charge sheet and registration of the same are two different stages. It would be necessary to reproduce Section 167(2) of the Code of Criminal Procedure for the sake of convenience, which runs as under :-

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

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, 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 paragraph (b), the production of the accused person may be proved by his signature on the order authorising”

11. Thus, it can be seen that the abovesaid provision prescribes, regarding authorization of detention by the Magistrate for a period of 60 days or 90 days as the case may be and not beyond that, if the charge sheet is not filed

within the said period. Therefore, filing of charge sheet with the Court would be sufficient compliance and it is not necessary that it should be stretched to the point of registration of the charge sheet. The evidence with the investigation regarding the acknowledgment, statement of the Court orderly and the station diary entry, are sufficient to infer that the charge sheet was filed with the Magistrate's Court on 31-07-2020, which was within the period of 90 days from the production of the accused before the Court. Pronouncement of one of the recent decision by the three Judge Bench of the Apex Court in ***M. Ravindran Vs. The Intelligence Officer Directorate of Revenue Intelligence, Criminal Appeal No.699 of 2020 (arising out of SLP (Cri.) No.2333 of 2020)*** is necessary. In this case, almost entire law on the point of default bail has been summarized and reiterated. Hon'ble Apex Court has all the way used the word 'charge sheet filed in Court' and not 'charge sheet presented before Magistrate'. At the cost of repetition, it is required to be stated that though the law requires that the presentation should be before the Magistrate, yet, it is through the staff and not to the presiding officer personally. Hon'ble Apex Court in the abovesaid case had taken note of the decision in ***Uday Mohanlal Acharya Vs. State of Maharashtra, (2001 (5) SCC 453)***, wherein the expression 'if not already availed of' used by the Apex Court in ***Sanjay Dutt's*** case was considered and it has been held that :

“Based on the abovementioned principles, the majority opinion held that the accused is deemed to have exercised his right to default bail under Section 167(2) Cr.PC., the moment he files the application for

bail and offers to abide by the terms and conditions of bail. The prosecution cannot frustrate the object of Section 167(2) Cr.P.C. by subsequently filing a charge sheet or additional complaint while the bail application is pending consideration or final disposal before a Magistrate or a higher forum”.

Further, after taking note of the decision in **Maneka Gandhi Vs. Union of India [(1978) 1 SCC 248]**, the Law Commission of India in Report No.14 on Reforms of the Judicial Administration and the present Code of Criminal Procedure, it has been observed that :-

“11.5 It was in this backdrop that Section 167(2) was enacted within the present-day CrPC, providing for time limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time limits to complete the investigation with the need to protect the civil liberties of the accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the Court takes cognizance of the case without any undue delay from the date of giving

information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.”

12. Reference has also been made then to the pronouncement in *S. Kasi's* case (Supra), wherein it was observed that the indefeasible right to default bail under Section 167(2) is an integral part of right to personal liberty under Article 21 of the Constitution of India and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasized that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge sheet. However, even at this stage and at the cost of repetition, it can be said that the situation in this case is different. Here, the charge sheet is already filed. The question is regarding its date. Further, other pronouncements have been considered and the conclusion that has been arrived at, in this case, by the Apex Court, is as follows :-

“18. Therefore, in conclusion :

18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have ‘availed of or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary

information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

18.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

18.3. However where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still released on bail under other provisions of the CrPC.

18.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid.”

13. Thus, taking into consideration the said law, there is no question of taking any other view that if the charge sheet is not filed within the prescribed

limitation, then definitely the accused persons will have the indefeasible right and it cannot be taken away by any pandemic situation.

14. As aforesaid, in this case, the charge sheet has been filed in the Court of Magistrate on 31-07-2020 which was 88th day and, therefore, none of the petitioners had that indefeasible right. Another aspect that is required to be noted is that the petitioner in Writ Petition No.1084 of 2020 has given the calculation of 91 days, which is as follows :-

“Chart demonstrating the completion of 90 days.

i. Date of production of applicant i.e. Sonali Wakade – 05-05-2020

<i>MONTHS-2020</i>	<i>NO. OF DAYS</i>
<i>MAY</i>	<i>26</i>
<i>JUNE</i>	<i>30</i>
<i>JULY</i>	<i>31</i>
<i>AUGUST</i>	<i>04</i>
<i>TOTAL</i>	<i>91 Days</i>

15. Thus, it is to be noted that the entire calculation has been started from the date of production of applicant in both the cases, but especially in respect of this petitioner, it has been made from 05-05-2020. In ***M. Ravindran*** (Supra), the note of the pronouncement in ***Ravi Prakash Singh @ Arvind Singh Vs. State of Bihar, [(2015) 8 SCC 340]*** was taken, which was inclusive of the earlier pronouncement in catena of judgments, wherein the ratio that has been laid down is, *“while computing the period under Section 167(2), the day on*

which accused was recommended to judicial custody has to be excluded and the day on which Challan/charge-sheet is filed in the Court has to be included.” This exclusion of accused sent to judicial custody has not been made by the applicant and if we exclude that, then it would be the 90th day even as per her own calculation and the calculation would be 90 days on which day she had filed application. Therefore, for giving calculation the applicant has not taken note of the said ratio.

16. This Court agrees with the submission by learned Advocate for the petitioner that the concession of holiday cannot be granted while computing the period of 60 days or 90 days. In ***Naresh @ Nana Vs. State of Maharashtra (1999 (3)Mh.L.J, 631)*** it has been held that “*there is no provision in Code of Criminal Procedure which indicate that if the last day happens to be holiday, or non working day of the Court, then charge sheet could be filed on the reopening day of the Court and the same should be treated to be within 90 days.*” Therefore, even if the charge sheet was presented on 90th or 60th day, as the case may be, which happens to be a holiday or non working day, then in that circumstance also, the Court is bound to accept it. In other words, presentation of such charge sheet cannot be refused.

17. Thus, in this case, when the charge sheet was filed on the 88th day, the applicants had no indefeasible right under Section 167(2) of the Code of

Criminal Procedure and, therefore, both the applications and the revisions were rightly rejected. No grounds are made to invoke the constitutional powers of this Court under Articles 226 and 227 of the Constitution of India to interfere with those orders and, therefore, both the writ petitions stand rejected.

[SMT. VIBHA KANKANWADI, J.]

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