

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

Crl. Misc. M 4434 of 2020 (O&M)
Date of decision: February 18, 2020

Balkar Singh

...Petitioner

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. P.S. Ahluwalia, Advocate,
for the petitioner.

Mr. Sidakmeet Singh Sandhu, AAG, Punjab.

Mr. Deepak Singh Saini, Advocate,
for the complainant.

JAISHREE THAKUR, J.

1. The petitioner herein seeks setting aside of the order dated 7.12.2019 (Annexure P/2), whereby the application filed by him under Section 167 (2) of the Code of Criminal Procedure (hereinafter referred to as '**the Code**') for grant of bail in case FIR No. 151 dated 13.8.2019 registered at Police Station Sadar Patiala, District Patiala for an offence under Section 306 IPC has been dismissed, as well as for setting aside the order dated 20.1.2020, whereby the revision so filed by the petitioner has been dismissed by the Additional Sessions Judge, Patiala.

2. In brief, the facts are that an FIR No. 151 dated 13.8.2019 came to be lodged at the instance of one Bhupinder Singh son of Sukhdev Singh, under Section 306 IPC, wherein it was alleged that the sister of the complainant, namely Kamaljit Kaur was married to one Ravinder Singh in February 2010 and has a son aged about 8 years out of this wedlock. It was

alleged that complainant's husband, namely Ravinder Singh, his mother Gurmeet Kaur, uncle (chacha) Balkar Singh, aunt (chachi) Jaswinder Kaur and uncle's son Gurtej Singh had been harassing his sister for dowry. On 27.8.2019 it would have been the birthday of complainant's nephew (Bhanja) and all the aforesaid persons were forcing his sister to bring money from the complainant to celebrate the birthday. On 12.8.2019, the complainant's sister phoned up on the mobile of her uncle (taya) Gurmail Singh and informed that her mother-in-law Gurmeet Kaur, uncle's son Gurtej Singh and uncle Balkar Singh are fighting with her on the issue of bringing money to celebrate the birthday. It was alleged that husband of the deceased and aunty Jaswinder Kaur were also helping them over the said issue. She stated that she is very upset and in case the issue is not resolved they would kill her or compel her to die. The complainant's uncle (taya) asked her to not worry and told her that everything will be OK. On 13.8.2019, the complainant's uncle called up his sister on phone, which was attended by Ravinder Singh, who said that he will make him speak with her after some time, but he did not make him speak to his sister and at around 9.45 a.m. Ravinder Singh informed the complainant that Kamaljit Kaur has committed suicide. It was alleged that complainant's sister died because she was being harassed by her husband and his other aforesaid family members.

3. After investigation, challan under Section 173 of the Code was presented against Ravinder Singh and his mother Gurmeet Kaur. Since Jaswinder Kaur (chachi) had given an application dated 1.10.2019 to the Senior Superintendent of Police, Patiala stating that she, her husband Balkar Singh and son Gurtej Singh are innocent and an inquiry was being

conducted by the Deputy Superintendent of Police, Rural, Patiala, it was stipulated that a supplementary challan under Section 173 (8) of the Code will be presented on receipt of viscera report and upon obtaining opinion from the doctor.

4. An inquiry was conducted into the application dated 1.10.2019 by Sh. Ajay Pal Singh DSP, who held Jaswinder Kaur, Balkar Singh and Gurtej Singh as innocent. This report was accepted by the S.S.P. Patiala, on 5.11.2019. It would be relevant to mention here that Jaswinder Kaur was on bail while Gurtej Singh had not been arrested.

5. Based upon the inquiry, the SHO, Police Station Sadar Patiala, moved an application dated 19.11.2019 before the Additional Session Judge Patiala, the court seized of the case, whereby he had sought discharge of Balkar Singh, who was in custody. Notice of the application was given to the complainant which was dismissed vide an order dated 7.12.2019. The Sessions Court held that a prima facie case under Section 306 IPC is made out against husband Ravinder Singh and his mother Gurmeet Kaur. However, with regard to discharge from custody of Balkar Singh, it was observed that the Sessions Judge has the jurisdiction to summon the persons named in column No.2 of the police report without recording evidence, (while placing reliance upon a judgment rendered in **Dharam Pal and others Vs State of Haryana and another 2013 (3) (RCR) (Crl.) 787**), and further held that the Investigating Officer for the reasons best known to him did not refer the names of Jaswinder Kaur, Balkar Singh and Gurtej Singh in column No.2 of the report filed under Section 173 of the Code . Therefore, the trial court treated all the three accused, namely Balkar Singh, his wife

Jaswinder Kaur and son Gurtej Singh as persons mentioned in column No. 2 of the report under Section 173 of the Code. Consequently, the Court invoked the provisions of Section 193 of the Code and dismissed the application for discharge filed by the SHO.

6. On 6.12.2019, the petitioner filed an application for bail under Section 167 (2) of the Code stating that he was arrested on 14.8.2019 and since then he is in custody for a period exceeding 90 days and as no report under Section 173 (2) of the Code qua him had been filed in the Court within the statutory period of 90 days, therefore, a right stands vested in him and as such he is entitled to default bail in terms of Section 167 (2) of the Code. The Judicial Magistrate Ist Class, Patiala, dismissed the application, while observing that by order dated 7.12.2019, the application moved by the investigating agency for discharge of the petitioner has been dismissed by the trial court and also cognizance has been taken under Section 193 of the Code to summon the petitioner to face trial. Aggrieved against the order dated 7.12.2019 passed by the Judicial Magistrate Ist Class, Patiala, the petitioner filed a revision before the Additional Sessions Judge, Patiala, who also dismissed the revision. Hence the instant petition.

7. Mr. Preetinder Ahluwalia, learned counsel for the petitioner, submits that once the investigating agency had not filed the charge-sheet against the petitioner within the custody period of 90 days, an indefeasible right had accrued in his favour for grant of default bail in terms of Section 167 (2) of the Code. It is submitted that an application for discharge was filed on the 6.12.2019 on which day no Challan had been presented against him under Section 173 of the Code nor was there an order under Section 193

of the Code, therefore the Court was duty bound to have decided the said application on the day it was filed itself instead of deferring the matter for another day. He places reliance upon **Uday Mohanlal Acharya Versus State of Maharashtra (2001) 5 SCC 453** and **Union of India through C.B.I. Versus Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav 2014 (4) CCR 153: 2014 (9) SCC 457.**

8. Per contra, learned counsels for both the State and the complainant argue that once cognizance had been taken under Section 193 of the Code, the question of default bail would not arise.

9. I have heard learned counsel for the parties and have also perused the documents annexed with the petition.

10. In view of the submissions made by the learned counsel for the parties, the moot question that arises for consideration in the instant petition is, whether the petitioner was entitled to “default bail” in terms of Section 167 (2) of the Code, once the challan was not presented against him within the statutory period of 90 days or could an indefeasible right that had been accrued in favour of the petitioner (under Section 167 (2) of the Code) be frustrated either by the prosecution or the Court merely because cognizance had been taken by the Sessions Court under Section 193 of the Code?

11. In a judgment referred to as **Uday Mohan Lal Acharya Versus State of Maharashtra (2001) 5 SCC 453**, the Supreme Court, while dealing with Section 167(2) of the Code of Criminal Procedure was held:

“In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an

application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. 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. On the aforesaid premises, we would record our conclusions as follows:

- 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 [(1994) 5 SCC 410: 1994 SCC*

(Cri) 1433] 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.

With the aforesaid interpretation of the expression “availed of” if the charge-sheet is filed subsequent to the availing of the 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 the 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. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with

the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra [(1996) 1 SCC 722 : 1996 SCC (Cri) 202]”.

12. The Supreme Court in **Union of India through the CBI vs Nirala Yadav @ Raja Ram Yadav 2014 (4) CCR 153** was seized of the question, whether the High Court of Judicature at Patna was justified in enlarging the accused on the ground that he was entitled to the benefit under the proviso appended to Section 167 (2) of the Code. In that case, the investigating agency had filed an application for extension of time to file the charge sheet and opposed the grant of default bail. It was held that the indefeasible right available to the accused cannot be extinguished if there is default on the part of the investigation agency in the completion of investigation within the prescribed time. While dealing with various case laws, it was held that if the charge sheet is not filed within 90 days and an application is preferred for bail under section 167(2) of the Code, the Magistrate is obliged to deal with it on the same day. An adjournment would be misconceived.

13. Further, in a similar case of **Rakesh Kumar Paul vs State of Assam (2017) 15 SCC 67**, the accused had applied for default bail in the High Court on 11.1.2017 which was dismissed even though the statutory period of 60 days for filing a charge-sheet had expired and in fact the charge sheet was filed only on the 24.1.2017. The Supreme Court held:

“45. On 11-1-2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of “default bail” since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him

(it was filed only on 24-1-2017) and the petitioner had orally applied for “default bail”. Under these circumstances, the only course open to the High Court on 11-1-2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him “default bail” on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to “default bail” but must apply for regular bail — the “default bail” chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of “default bail”. It would have been another matter altogether if the petitioner had not applied for “default bail” for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for “default bail” during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017. On the contrary, he had availed of his right to “default bail” which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had

satisfied all the requirements of obtaining “default bail” which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.”

14. In the present case, the application for default bail had been filed on 6.12.2019, on which date there was no charge sheet against the petitioner who was in custody for a period of 114 days having been arrested on 14.8.2019. The day the prosecution filed the application for discharge from custody on 19.11.2019, no charge sheet had been filed against him and in fact the Report dated 12.10.2019 under Section 173 of the Code had clearly stated that a supplementary challan would be prepared and presented to court under Section 173 (8) of the Code on receipt of the viscera report and the opinion of the doctor. The revisional court has erred on facts in holding that *“This right to the accused would have accrued in case the prosecution had not presented the challan in the aforementioned FIR on 4.11.2019.”*

15. Therefore, as held by a catena of judgments, a right accrues to the accused in custody to grant of default bail in case the charge sheet is not filed within the specified time as has been done in the present case. As has been held *“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.”

16. In view of the above settled position of law, it is held that petitioner was entitled to default bail in terms of Section 167 (2) of the Code since the challan was not presented again him within the statutory period of 90 days and cognizance by the Sessions Court under Section 193 of the Code was inconsequential.

17. Consequently, the present petition is allowed. Let the petitioner be enlarged on bail on his furnishing personal bonds and two sureties to the satisfaction of trial Court/Duty Magistrate, concerned. However, it is made clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to file an application for grant of regular bail which should be considered on its own merit.

February 18, 2020
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	Yes