

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.551 OF 2021

Akhlaque Ahmad Mohammad Mustafa]
R/o. H. No.504/B, Lane No.14,]
Nayapura, Malegaon, Tal. Malegon,]
District Nashik.]
[Presently in Nashik Central Jail.]] ... Applicant

Versus

The State of Maharashtra]
[Through Aayesha Nagar Police]
Station, Taluka Malegon, District]
Nashik.]] ... Respondent

...

Mr. M.N. Sandhyanshiv for the Applicant.

Mr. A.R. Kapadnis, A.P.P. for the State.

...

CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 04TH AUGUST, 2021.

PRONOUNCED ON : 25TH AUGUST, 2021.

ORDER:-

1. The Applicant seeks his release on bail under Section 167(2) of the Code of Criminal Procedure (“**Cr.P.C.**”) being

arraigned as an accused in C.R. No.36 of 2020 registered with Ayesha Nagar Police Station, Malegaon, District Nashik, invoking Sections 420, 465, 466, 468, 471 read with Section 34 of the IPC, Section 12(B) of the Passport Act, Rules 3 and 6 of the Passport (Entry into India) Rules, 1950, Section 3(1) of the Foreigners Order 1948 and Section 14(b) Report to Police Rules, 2001.

2. The Applicant has approached this court on rejection of his application filed under Section 167(2) of the Cr.P.C. by the Additional Chief Judicial Magistrate at Malegaon on 05/01/2021 and further order passed by the Sessions Court at Malegaon on 14/01/2021 in Criminal Revision Application No.1 of 2021, upholding the earlier order.

3. Since this is an Application seeking default bail, I need not go into the merits of the matter as the release is sought on the ground that on expiry of the mandatory period for filing charge-sheet in the C.R., in which the Applicant is arraigned as an accused, there is a default creating an indefeasible right in the Applicant to be released on bail on account the said default.

4. The bare necessary facts are that a complaint was registered with Ayesha Nagar Police Station, Malegaon, by one police constable accusing him of the abovementioned offences and the Applicant came to be arrested on 06/11/2020. The

Applicant preferred an Application, purportedly under Section 167(2) of the Cr.P.C., by submitting that the offence with which he is charged prescribe a punishment less than 10 years and, in the light of the proviso contained in Section 167(2) of the Cr.P.C., since the charge-sheet is not filed within the prescribed period, he is entitled to be released on bail, if he preferred to furnish the bail bond. Alleging that the prosecution has failed to submit the charge-sheet before the court as per law, he sought his release on default bail, subject to the terms and conditions being imposed by the court.

5. An Application was preferred by the Applicant on 05/01/2021 and, as the endorsement on the Application reflects, learned Judge passed the following order at 11.50 noon - “A.S. *to report as to whether charge-sheet is filed*”. There is a further endorsement on the application made by the Superintendent, Civil Court, Malegaon, reporting that “Today i.e. on 05/01/2021 till 12.00 O’ clock, charge-sheet is not filed. Say is submitted on behalf of the State and, which apparently is, after the aforesaid endorsement, wherein the Application is objected on the ground that the Application is not tenable at this stage. Today charge-sheet has been filed. Offences are serious in nature. Section 167(2) is not applicable. Charge-sheet has been filed within limitation period and, hence, the Application may kindly be rejected.”

6. The Additional Chief Judicial Magistrate passed an order on the said Application on 05/01/2021 recording that the accused was arrested on 06/11/2020 and produced before the Court on the same day and the Application under Section 167(2) is filed on 05/01/2021 at 10.30 a.m. and the charge-sheet is filed at 12.30 noon on the same day. On consideration of the rival contentions, the contention of learned counsel on behalf of the Applicant is that while computing the period of 60 days, the day on which the accused was produced before the court has to be included and, per contra, the submission of learned A.P.P. is that the Application is premature and by making reference to the precedents cited before him, the conclusion is recorded in paragraph No.7 to the following effect:

“7. In the present case, accused was arrested on 06.11.2020 and produced before the court on the same day. The period of 60 days ends on 06.01.2021. The accused has filed application for default bail on 05.01.2021 i.e. on the 60th day. The application is premature. Therefore, considering the ratio laid down by the Hon’ble Apex Court in Ravi Prakash v. State of Bihar, the application is premature. Hence, the application is rejected.”

7. A revision was preferred before the Additional District and Sessions Judge, Malegaon by the Applicant assailing the said order and the revision came to be rejected with the following observations:

“08] In view of submissions made by the both parties, I perused the documents on record. It appears that the judgment was Kapil Wadhavan was also placed before the Ld. Magistrate and after considering the said judgment along with the judgment of the Hon’ble Apex Court in Raviprakash, Ld. Magistrate has rejected the application. I also perused the copy of judgment of Kapil Wadhavan. In Second Para of Para 28, the Hon’ble High Court has observed as under.

“A a corollary to the aforesaid discussion, the impugned order passed by the Sessions Judge, excluding the first day of remand while computing the period of 60 days cannot be sustained and is liable to be set aside and the filing of the charge-sheet by the Directorate of Enforcement on 13th July 2020, being after of 60 days, by excluding the day of remand i.e. 14th May, 2020, make the applicants entitled for default bail. They deserve to be released on bail in light of the right conferred u/s. 167(2)(a)(ii), if they are prepared to and furnish the bail”.

09] Perused case law of Rakesh Kumar Poul (supra), in a whole judgment there was no whisper about inclusion and exclusion of the first day of remand. The said judgment is completely on the base of determine the cases to which period of limitation of 60 days is applied. Thus, in the case of Rakesh Poul, there was no ratio of the Hon’ble Apex Court stating that the first day of remand is to be excluded.”

8. In the wake of the rejection of his Application, the Applicant is before this court. The dates, which are relevant for adjudication of the Application seeking default bail are not in dispute. Before the learned Magistrate, the decision dated 02/08/2020 of the Bombay High Court in the case of **Kapil Wadhwan v. State of Maharashtra in Criminal Bail Application No.400 of 2020** and the decision in the case of **Ramesh Madhukar Thombare v. State of Maharashtra**, reported in **1999(5) Bom. C.R. 355** were cited on behalf of the Applicant. Learned A.P.P. has placed reliance of the Apex Court judgment in the case of **Ravi Prakash v. State of Bihar in Criminal Appeal No.325 of 2015 dated 20/02/2015**. The Magistrate relied upon the decision in the case of **Ravi Prakash (supra)**, which held that while computing the period of 90 days, the day on which the accused was remanded to the judicial custody should be excluded and the day on which the Challan is to be filed should be included. The aforesaid decision was the genesis of the decision of the Additional Judicial Magistrate, which is upheld by the Sessions Court at Malegon.

9. The decision of the Bombay High Court in **Kapil Wadhwan (supra)** takes a view that the first day of remand cannot be excluded in computing the period of 60 days and the decision of the Sessions Judge excluding the first day of the

remand was set aside and the filing of the charge-sheet by the Enforcement Directorate on 13/07/2020 being after 60 days, by exclusion of the day of remand i.e. 14/05/2020, made the Applicant entitled for being released on default bail.

10. The said decision came to be delivered by formulating a precise question to the following effect:

“Whether in computing the period of 90 days or 60 days, as contemplated in Section 167(2)(a) of the Cr.P.C., the day of remand is to be included or excluded?”

11. Reliance was placed on the decision of the Apex Court in case of **Chaganti Satyanarayan & Ors. v. State of Andhra Pradesh** reported in **(1986) 3 SCC 141** followed by a decision in the case of **CBI v. Anupam Kulkarni** reported in **(1992) 3 SCC 141** and a further decision in the case of **Pragyna Singh Thakur v. State of Maharashtra** reported in **(2011) 10 SCC 445**. Reliance was also placed on the decision of learned Single Judge of this court in the case of **Deepak Satyavan Kudalkar v. State of Maharashtra in LDVC Bail Application No.197 of 2020**. The Enforcement Directorate, Government of India, through its learned counsel has relied upon the decisions of the Apex Court in the case of **State of Madhya Pradesh v. Rustam & Ors.** Reported in **(1995) Supp. 3 SCC 221** and **Ravi Prakash Singh @ Arvind Singh v. State of Bihar** reported in **(2015) 8 SCC**

340. On consideration of the ratio flowing from the aforesaid decisions, the day of remand was held to be included in the period of 60 days or 90 days for determining the limitation prescribed for filing of the charge-sheet and any default to adhere to the period, conferred an indefeasible right on the accused to be released on bail.

12. The said decision was assailed before the Hon'ble Apex Court in Criminal Appeal No.701-702 of 2020 by the Enforcement Directorate, Government of India. On 23/02/2021, the Hon'ble Apex Court by referring to the core issue for consideration whether while computing the period of 60 days or 90 days as contemplated in Section 167(2)(a)(ii) of the Cr.P.C, the day of remand is to be included or excluded, for considering a claim for default bail, observed as under:

“4. The moot question has been considered by this Court in various matters, but there is divergence of opinion on how the period available for completing the investigation is to be computed. Some judgements have favoured the exclusion of date of remand, while few other cases have taken a contrary view.

5. The appellants rely inter alia on the line of reasoning in State of M.P. Vs. Rustom & Ors.¹, Ravi Prakash Singh Vs. State of Bihar² and M. Ravindran Vs. Intelligence Officer, Director of Revenue Intelligence where it was held that the date of remand is to be excluded for computing the permitted period for completion of

investigation.

6. On the other hand, the Respondents seek to rely inter alia on Chaganti Satyanarayan Vs. State of Andhra Pradesh, CBI Vs. Anupam J Kulkarni, State Vs. Mohd. Ashraft Bhat, State of Maharashtra Vs. Bharati Chandmal Varma, and Pragyna Singh Thakur Vs. State of Maharashtra to contend that the date of remand must be included for computing the available period for investigation for determining entitlement to default bail.”

13. In view of the conflicting proposition of law in grant of default bail, Their Lordships observed that in **Chaganti Satyanarayan (supra)**, the Court examined the legislative intent for expeditious conclusion of investigation and the consequences of the failure of the prosecution to conclude investigation within the permitted period. However, the ratio in **Chaganti Satyanarayan (supra)** was not brought to the notice of the Three Judges Bench in **M. Ravindran v. Intelligence Officer, Director of Revenue Intelligence** reported in **(2020) SCC OnLine SC 867** and the Court took a contrary view in declaring that the date of remand is to be excluded for computing the period of investigation. Since the earlier position of law was not considered and the latest decision in **M. Ravindran (supra)** is of Three Judges' Bench, Their Lordships deem it appropriate to refer the issue to a Bench of appropriate strength to settle the law. While making the reference, Their Lordships of the Apex

Court also directed that unless the issue is appropriately determined, the courts across the country may take decision on the issue depending upon which judgment is brought to the Court's notice or on the Courts own understanding of the law, covering default bail under Section 167(2)(a)(ii) of the Cr.P.C.

14. The position of law *qua* the issue as regards whether the day of remand is to be included or excluded, while computing the period of 60 days or 90 days while seeking default bail is thus pending consideration of the larger Bench in terms of the Reference Order dated 23/02/2021.

15. Section 167 of the Cr.P.C. sets out the procedure when the investigation cannot be completed in 24 hours and, the relevant portion of the said Section, reads as under:

“167. Procedure when investigation cannot be completed in twenty-four hours. - (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is wellfounded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to

such Magistrate.

(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, for 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 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 so released under the

provisions of Chapter XXXIII for the purposes of that Chapter;]”

16. Section 57 of the Cr.P.C. puts an embargo of the power of the Police Officer to detain in custody a person arrested without warrant and Section 57 of the Cr.P.C., which reads as under:

“57. Person arrested not to be detained more than twenty-four hours. - No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section [167](#), exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court”.

17. Construing the said two provisions, the Hon’ble Apex Court in the case of **Chaganti Satyanarayana (supra)**, has clearly interpreted its purport in the following words:

“On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police officer should do when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised. The terms of sub-section (1) of Section 167 have to be read in conjunction with

Section 57. Section 57 interdicts a police officer from keeping in custody a person without warrant for a longer period than 24 hours without production before a Magistrate, subject to the exception that the time taken for performing the journey from the place of arrest to the Magistrate's Court can be excluded from the prescribed period of 24 hours. Since sub-section (1) provides that if that investigation cannot be completed within the period of 24 hours fixed by Section 57 the accused has to be forwarded to the Magistrate along with the entries in the Diary, it follows that a police officer is entitled to keep an arrested person in custody for a maximum period of 24 hours for purposes of investigation. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become execisable only after an accused is produced before him in terms of sub-section (1) of Section 167.”

18. The earlier period when the accused is in custody of the police officer in exercise of his power under Section 57 of the Cr.P.C. has been held as not constituting the detention, pursuant to authorization issued by the Magistrate. The powers of the remand given to the Magistrate becomes exercisable only after an accused is produced before him in terms of Section 167(1) of the Cr.P.C. Construing proviso (a) either in conjunction with sub-section (2) of Section 167 or as an independent paragraph, it is clear that the total period of 90 days under clause (i) and the

total period of 60 days under clause (ii) has to be calculated only from the date of remand and not from the date of arrest. The ratio of **Chaganti Satyanarayana (supra)** is enunciated in paragraph 25 of the judgment.

19. The earlier decisions cited before the Apex Court have been exhaustively dealt with, including the decision in the case of **Mohd. Shafi v. State** reported in **1997 Cr. L.J. 1309** and duly considered and put to rest by the following observations.

“31. Some of the decisions cited on either side have been rendered prior to the amendment of proviso (a) by Act 45 of 1978 and some have been rendered after the amendment. Mr. Ram Reddy sought to make a distinction of the earlier decisions by contending that they ceased to have relevance because of the amendment to proviso (a) making it an independent paragraph all by itself. Since we have held that in whichever way proviso (a) is construed i.e. with reference to Section 167(2) or without reference to it the periods of 90 days and 60 days prescribed by the Legislature can be reckoned only from the date of remand the distinction sought to be made between the decisions rendered prior to Amendment Act 45 of 1978 and subsequent to it does not have much of significance.”

20. The position of law flowing from **Chaganti Satyanarayana (supra)** clearly leads to a conclusion that the Magistrate can authorize the detention of the accused for a

maximum period of 15 days from the date of remand and place the accused either in police custody or in judicial custody during the period of 15 days' remand. However, if an accused is remanded to police custody, the maximum period during which he can be placed in police custody is only 15 days. Beyond that period, no Magistrate can authorize the detention of the accused in police custody, which can be granted pursuant to a single order of remand or more than one order, when the remand is restricted on each occasion to a lesser number of days. The historical background of the proviso to Section 167(2) was also highlighted in **Chaganti Satyanarayana (supra)** and the underlying object considered while interpreting the proviso to Section 167(2) being to safeguard the liberty of the citizens but also to safeguard the interests of the State or in other words the public. This decision is followed in **Anupam Kulkarni (supra)**, where it has been held that Section 167 is supplementary to Section 57 of the Cr.P.C. and expects the investigation to be completed in the first instance within 24 hours and, if not, the arrested person should be brought by the police before a Magistrate as provided under Section 167. While doing so, the police should transmit a copy of the entries in the diary relating to the case so as to afford an opportunity to the Magistrate to arrive at a decision whether the accused should be detained in the custody further or not. It is open to the Magistrate to release him on bail, if an application is made in that behalf and if he is satisfied that there are no grounds to remand him to custody, but

if he is satisfied that further remand is necessary then he should act in terms of Section 167. The Judicial Magistrate can authorize detention of the accused either in police or judicial custody from time to time, but the total period of detention shall not exceed 15 days in the whole and the custody can be altered from judicial custody to police custody or vice-versa. After the expiry of the first period of fifteen days, the accused could only be in judicial custody or any other custody as ordered by the Magistrate but not in police custody. In Anupam Kulkarni (supra), it has been held that the police custody even if necessary, can be ordered only during the first period of 15 days. If further interrogation is necessary even after the expiry of the period of first fifteen days, there is no bar for interrogating the accused, who is transmitted to judicial custody for a period of 90 days or 60 days. I am unable to accept this contention. There cannot be any detention in police custody after expiry of first 15 days even in a case where the offence is serious in nature. The power of the Magistrate to authorize detention, however, is limited by prescription of period of 90 days or 60 days and if the investigation is not completed within the said period, the accused has to be released on bail in terms of proviso to Section 167(2) of the Cr.P.C. Paragraph 13 of the judgment in Anupam Kulkarni (supra) clarifies the position of law in the following words:

“After the expiry of the first period of fifteen days the further remand during the period of

investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.”

21. My attention is invited to the Division Bench decision of this court in the case of **Nijamuddin Mohammad Bashir Khan v. State of Maharashtra** reported in **2006 (5) Mh.L.J. 690**. It

has taken a view that the right of the accused to be released on bail in default, on completion of investigation within the prescribed period, the computation of the statutory period of 60 days or 90 days must be started from the date of the first remand by the Magistrate. The Division Bench has relied upon the decision in the case of **Chaganti Satyanarayana (supra)** before reaching the said conclusion.

22. Another decision of the learned Single Judge in the case of **Deepak Satyavan Kudalkar (supra)** is also brought to my notice, which takes a similar view. I am party to the decision in the case of **Kapil Wadhawan (supra)**, wherein relying the ratio laid down in **Chaganti Satyanarayana (supra)**, the period of remand has been counted in calculating the outer limit of 60 days or 90 days for completion of investigation.

23. Other sets of decisions are also brought to my notice since the decision in case of **Ravi Prakash Singh (supra)** and **Rustam (supra)**, which have taken a view that date of remand is to be excluded for computing the period permitted for completion of investigation, did not consider the ratio laid down in **Chaganti Satyanarayana (supra)** and since I am of the considered opinion that the scheme of the Code of Cr.P.C. does not permit a face where the accused remains without being in custody, which would make his detention unauthorized, the exclusion of the date of remand would run contrary to the spirit of the Cr.P.C., which

controls the movement of the suspect when he is arrested and made an accused by making it imperative for the police officer to bring him before the nearest Magistrate within a period of 24 hours, who will then authorize the detention of the accused in such custody as the Magistrate may think fit for a term not exceeding 15 days in the whole and, thereafter, further authorize his detention otherwise than in police custody beyond the period of 15 days, but not exceeding the period of 90 days or 60 days as the case may be and, on expiry of the said period, the accused person is entitled to be released on bail, if he is prepared to and does furnish bail bond and such a release shall be deemed to be a release under Chapter XXXIII. The aforesaid understanding of the provisions to claim default bail, in my considered opinion, entitles the present Applicant to be released on bail by including the date of remand.

24. In the present case, the accused was arrested on 06/11/2020 and produced before the Court on the same day. The period of 60 days comes to an end on 04/01/2021 and on expiry of 60 days, the Applicant filed an Application under Section 167(2) of the Cr.P.C. for being released on default bail on 05/01/2021 and the charge-sheet came to be filed subsequent to the filing of the Applicant where the Applicant showed his preparation to furnish the bail. The subsequent filing of the charge-sheet on the 61st day will not deprive him of the right, which has already accrued to him when the charge-sheet was not

filed within 60 days on completion of investigation. The Applicant is, therefore, entitled to be released on bail, which is an indefeasible right, which vests in him on 05/01/2021 i.e. the 61st day when he was produced before the Court. The Applicant is, therefor, entield to be released on bail on default bail under Section 167(2) of the Cr.P.C. subject to the following condition.

ORDER

- (a) The Applicant - **Akhlaque Ahmad Mohammad Mustafa** shall be released on bail in C.R. No.36 of 2020 registered with the Aayesha Nagar Police Station, Malegaon District Nashik, on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.
- (b) The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer and the Applicant should not tamper with evidence.
- (c) The Applicant shall attend to the Aayesha Nagar Police Station, District Nashik as and when called by the Investigating Officer.

25. The Application is allowed in the aforestated terms.
26. All parties are directed to act on the downloaded copy of the order supplied by the Advocate under his seal and signature.

[SMT. BHARATI DANGRE, J.]