

**THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**BAIL APPLICATION NO.931 OF 2021**

Sainath Bapu Salgar, ]  
R/o. Udanwadi, Tal. Sangola, Dist. Solapur. ]  
[Presently lodged in Sangola Centre Prison, ]  
Solapur.] ] ... Applicant

Versus

1. The State of Maharashtra ]  
(For Sangola Police Station, Solapur.) ]  
  
2. XYZ ]  
R/at Sangola, Sangola, Dist. Solapur. ] ... Respondents

...

Mr. Harshad V. Bhadbhade for the Applicant.

Mr. Ajay Patil, A.P.P. for the State.

...

**CORAM : MRS. BHARATI DANGRE, J.**

**RESERVED ON : 19<sup>TH</sup> JULY, 2021.**

**PRONOUNCED ON : 04<sup>TH</sup> AUGUST, 2021.**

**ORDER:-**

1. The Applicant has approached this court seeking his release on bail in C.R. No.1128 of 2020, which arraign him as an accused

by invoking Sections 376, 363, 366-A of the Indian Penal Code (“**the IPC**”) and Sections 8, 9 and 12 of the Protection of Children from Sexual Offences Act, 2012 (“**the POCSO Act**”) registered with Sangola Police Station, Dist. Solapur. He also seeks the following relief:

*“(b) That this Hon’ble court be pleased to set aside the order dated 10.12.2020 passed by Ld. Sessions Court thereby vacating the order dated 11-12-2020 releasing the applicant herein on bail under the provisions of Section 167(2) and be further pleased to confirm the order dated 11-12-2020 thereby releasing the applicant herein bail on such term and conditions as this Hon’ble court deems fit and proper.”*

2. The CR in question came to be registered by the father of the victim girl, aged 13 years, 7 months and 5 days, on the date of the incident, alleging that the Applicant was working as a driver on a tractor of a person residing in the Complainant’s village and, that is how, he was acquainted with the Complainant. On 03/09/2020, he found his daughter (the victim) not present in the house, when the family awoke to the day. On enquiry with the persons in the neighbourhood, he was informed that his minor daughter was having an affair with the Applicant and they had eloped to get married and he was further informed that the marriage was performed and he was shown the photos in the mobile by some villagers. The Complainant thus alleged that the Applicant has kidnapped his daughter, knowing well that she is a minor and has

performed the marriage with her by enticing her away. The registration of the present CR is the result of the said complaint. In connection with the said CR, the Applicant came to be arrested on 10/09/2020 and produced before the Magistrate on 11/09/2020.

3. An application came to be filed before the Sessions Court, Pandarpur, by the Applicant invoking Section 167(2) of the Code of Criminal Procedure (“**the Cr.P.C.**”) on 11/12/2020 and it was presented in the Court at 11.20 a.m. The Applicant sought his release on default bail in the said CR, by taking into account the penalty prescribed for the offences with which he is accused of, the charge-sheet ought to have been filed within 90 days and the period of 90 days has come to an end, but the charge-sheet is not instituted, resulting in an indefeasible right accruing to him for being released on default bail.

4. Learned judge passed the following order on the said Application.

*“Call report of Supdt.  
Whether charge-sheet is filed?”*

5. On the very same day, learned Sessions Court passed the following order:

*“Heard, perused application and referring supt.*

*from which it reveals that accused Sainath arrested on 10/9/2020 and produced before court on 11/09/2020. Since then filing this application period of 90 days over and no chargesheet filed. Hence as per provision of sec. 167(2) CRPC accused is released on furnishing his PR of Rs. 25000/- with solvent surety of like amount. He shall not tamper the evidence and assist the I.O. he shall also comply with all mandatory condition of bail as contemplated in Criminal Manual (amendment) regarding bail. He shall not contact victim, complainant in any manner. Intimation be given for appropriate action.”*

6. Another order came to be passed by learned Sessions Court, which reads as under:

*“After allowing application, accused failed to comply. Meanwhile prosecution filed chargesheet which amount to waiver of the right. Hence as though accused released on Bail but as he failed to furnish bail before filing chargesheet, his right to release on bail u/s 167(2) stands forfeited and order stands vacated. Accused at liberty apply for regular bail u/s 439 CRPC. Note be taken.”*

7. The date of passing of the order is recorded as ‘10/12/2020’ and even the certified copy of the said order produced by learned counsel for the Applicant also mentions the same date i.e. ‘10/12/2020’. The Applicant, by the present Application has, therefore, made prayer (b), which is reproduced above.

8. The Applicant, therefore, approached the Sessions Court seeking his release on bail on merits and the Additional Sessions Judge, Pandharpur, by order dated 18/01/2021 has rejected his application on merits by recording that the Application preferred by him under Section 167(2) of the Cr.P.C. was allowed, but he could not furnish bail bond and in the meanwhile, the police filed the charge-sheet. On merits of the matter, recording that the victim was minor and he committed rape on her repeatedly prior to and even after the so-called marriage, which is serious and, if he is released on bail, he will tamper with the evidence and since, there are allegations to show that the victim is involved in him, there is a threat to her life.

9. Learned counsel for the Applicant has advanced his argument on the aspect of Section 167(2) of the Cr.P.C. and would submit that he came to be released on bail by the Sessions Court by order dated 11/12/2020, but when the concerned police station immediately on the same day, filed the charge-sheet, it prompted the Sessions Court to re-call its earlier order, forfeiting his right to be released on bail under Section 167(2) of the Cr.P.C. and liberty was granted to apply for regular bail. Pertinent to note that though the order records that it is passed on 10/12/2020, it appears to be an error as it is an order, which is passed subsequent to the order dated 11/12/2020.

10. Learned counsel has placed reliance on the judgments of the Apex Court, which deal with the indefeasible right under Section 167(2) of the Cr.P.C. when the charge-sheet is not filed within the stipulated time. Reliance is placed on the following judgments in *Raghubir v. State of Bihar* reported in (1986) 4 SCC 481, *Uday Mohanlal Acharya v. State of Maharashtra* reported in (2001) 5 SCC 453, *Mohd. Iqbal v. State of Maharashtra*, reported in (1996) 1 SCC 722 and *Achpal @ Ramswaroop & Anr. v. State of Rajasthan* reported in (2019) 14 SCC 599. In the light of the above authoritative pronouncements, Mr. Bhadbhade, learned counsel for the Applicant would argue that by the order dated 10/12/2020, the Magistrate has observed that the accused has failed to comply with the bail conditions and, therefore, the same amounts to waiver of right and this is against the law laid down by the Apex Court. Merely because the accused has not furnished the bail bond and, before that, the charge-sheet is filed, the right to be released on default bail, cannot be forfeited, particularly when the Applicant has made an application, which was allowed and in the meantime, if the charge-sheet is filed, the indefeasible right vested in him, cannot be taken away, is his precise submission.

11. In *Reghubir's case (supra)* , the Apex Court has held as under:

*“The result of our discussion and the case-law in this :*

*An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing to the charge-sheet or by remand to custody under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed.”*

12. In case of **Union of India v. Nirala Yadav** reported in **(2014) 9 SCC 457**, the indefeasible right available under proviso to Section 167(2) came to be again elaborated and it is reiterated that the Accused has an indefeasible right to be released on bail under

Section 167(2) once the statutory period has expired, without charge-sheet having been filed, and the court must dispose of the bail application of the accused under Section 167(2) on the same day itself. It has also been held that if the case is adjourned for granting time to the prosecution not advertent to the Application filed on behalf of the accused, it would be a violation of the legislative mandate. When the charge-sheet is not filed and right under Section 167(2) has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. Once the accused has availed his liberty by filing an application on the ground that the charge-sheet has not yet been filed and an indefeasible right has accrued in him and he is prepared to furnish the bail bond, the court is obliged to proceed with the application.

13. In case of *Uday Mohanlal Acharya (supra)*, the Apex Court has clarified the meaning of the term '*availed of*' and it has been held that once an Application has been filed, the Court must decide the same immediately and if the accused, who has been granted bail is unable to furnish bail bonds/surety immediately and in the meantime, challan i.e. the report under Section 173 of the Cr.P.C. is filed after the conclusion of the investigation, the right accrued under Section 167(2) of the Cr.P.C. would not stand defeated. The Apex Court has explained the concluding principles in the following manner:

“13. ....

1.           xxx                   xxx                   xxx

2.           xxx                   xxx                   xxx

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 furnish 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 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 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.*

*4. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be authorised, and, therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.*

*5. The expression ‘if not already availed of’ used by this Court in Sanjay Dutt’s case (supra) 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 paragraph (a) of 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.”*

14. The latest decision of the Apex Court has clarified the position further. In the case of **M. Ravindran v. Directorate of Revenue Intelligence** reported in **(2021) 2 SCC 485**, it has been reiterated by the Apex Court that the indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21 of the Constitution and the safeguard of ‘default bail’ contained in the proviso of Section 167(2) is

intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law. The three Judges' Bench of the Apex Court threw light on the accused's right to default bail and as to whether it gets extinguished by subsequent filing of an additional complaint. The following observations of Their Lordships need a reproduction.

*“18.5 Having considered both opinions, we have arrived at the conclusion that the majority opinion in Uday Mohanlal Acharya (supra) is the correct interpretation of the decision rendered by the Constitution Bench in Sanjay Dutt (supra). The decision in Sanjay Dutt merely casts a positive corresponding obligation upon the accused to promptly apply for default bail as soon as the prescribed period of investigation expires. As the decision in Hitendra Vishnu Thakur (supra) expressly cautions, the Court cannot suo motu grant bail without considering whether the accused is ready to furnish bail or not. This is an in-built safeguard within Section 167(2) to ensure that the accused is not automatically released from custody without obtaining the satisfaction of the Court that he is able to guarantee his presence for further investigation, or for trial, as the case may be. Further, as the majority opinion in Rakesh Kumar Paul (supra) pointed out, there could be rare occasions where the accused voluntarily forfeits his right to bail on account of threat to his personal security outside of remand or for some other reasons. The decision in Sanjay Dutt clarifies that once a chargesheet is filed, such waiver of the right by the accused becomes final and Section 167(2) ceases to apply.*

*18.6 However, the Constitution Bench decision in Sanjay Dutt cannot be interpreted so as to mean that even where the accused has promptly exercised his right under Section 167(2) and indicated his willingness to furnish bail, he can be denied bail on account of delay in deciding his application or erroneous rejection of the same. Nor can he be kept detained in custody on account of subterfuge of the prosecution in filing a police report or additional complaint on the same day that the bail application is filed.*

*18.7 The arguments of the State that the expression “availed of” would only mean actual release after furnishing the necessary bail would cause grave injustice to the accused and would defeat the very purpose of the Proviso to Section 167(2), CrPC. If the arguments of Mr. Lekhi are accepted, there will be many instances where the Public Prosecutor might prolong the hearing of the application for bail so as to facilitate the State to file an additional complaint or investigation report before the Court during the interregnum. In some cases, the Court may also delay the process for one reason or the other. In such an event, the indefeasible right of the accused to get the order of bail in his favour would be defeated. This could not have been the intention of the legislature. If such a practice is permitted, the same would amount to deeming illegal custody as legal. After the expiry of the stipulated period, the Court has no further jurisdiction to remand the accused to custody. The prosecution would not be allowed to take advantage of its own default of not filing the investigation report/complaint against the appellant within the stipulated period.*

*19. It is true that Explanation I to Section 167(2), CrPC provides that the accused shall be detained in*

*custody so long as he does not furnish bail. However, as mentioned supra, the majority opinion in Uday Mohanlal Acharya expressly clarified that Explanation I to Section 167(2) applies only to those situations where the accused has availed of his right to default bail and undertaken to furnish bail as directed by the Court, but has subsequently failed to comply with the terms and conditions of the bail order within the time prescribed by the Court. We find ourselves in agreement with the view of the majority. In such a scenario, if the prosecution subsequently files a chargesheet, it can be said that the accused has forfeited his right to bail under Section 167(2), CrPC. Explanation I is only a safeguard to ensure that the accused is not immediately released from custody without complying with the bail order.*

*19.1 However, the expression 'the accused does furnish bail' in Section 167(2) and Explanation I thereto cannot be interpreted to mean that if the accused, in spite of being ready and willing, could not furnish bail on account of the pendency of the bail application before the Magistrate, or because the challenge to the rejection of his bail application was pending before a higher forum, his continued detention in custody is authorized. If such an interpretation is accepted, the application of the Proviso to Section 167(2) would be narrowly confined only to those cases where the Magistrate is able to instantaneously decide the bail application as soon as it is preferred before the Court, which may sometimes not be logistically possible given the pendency of the docket across courts or for other reasons. Moreover, the application for bail has to be decided only after notice to the public prosecutor. Such a strict interpretation of the Proviso would defeat the rights of the accused. Hence his right to be released on bail cannot be defeated merely because the prosecution files the chargesheet prior to furnishing of bail and fulfil the conditions of bail of*

*furnishing bonds, etc., so long as he furnishes the bail within the time stipulated by the Court.”*

15. The position of law has thus been reiterated to the effect that if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand, if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet. Their Lordships have referred to the decision in the case of *Bikramjit Singh v. State of Punjab* reported in 2020 SCC OnLine SC 824 in para 22.4, to the following effect:

*16.3 Quite recently, in the case of Bikramjit Singh v. State of Punjab (Criminal Appeal No. 667 of 2020 dated 12<sup>th</sup> October, 2020), 2020 SCC OnLine SC 824, dealing with similar question which arose in an application for default bail under the UAPA, a three-Judge Bench of this Court, after considering the various judgments on the point, observed thus:*

*“A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes*

*complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.”*

*This decision in Bikramjit Singh ensures that the rigorous powers conferred under special statutes for curtailing liberty of the accused are not exercised in an arbitrary manner.”*

16. In the present case, the Applicant has exercised his option to obtain bail by filing an application at 11.20 a.m. on the 91<sup>st</sup> day of his arrest. After calling for the say of the other side, the Applicant is released on bail. By applying the aforesaid principles, he is deemed to have availed of his indefeasible right of bail, the moment he files an application for release on bail and offers to abide by the terms and conditions of bail. Considering that he is entitled to be released on bail, the Sessions Court released him on bail. The Investigating Agency, in order to defeat the indefeasible right of the accused to be released on bail, filed the charge-sheet subsequent to he availing the bail rendering his indefeasible right nugatory. Since the Applicant has filed an application for bail under the proviso to Section 167(2) of the Cr.P.C., he is deemed to have availed of or

enforced his right to be released on default bail accruing to him after expiry of the stipulated time for the investigation and he is entitled to be released on bail as held in the decision of M. Ravindran (supra) in paragraph 25.2, which reads as under:

*“15. 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 charge-sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.”*

It is further clarified in paragraph 25.3 of the said judgment to the following effect:

*“However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, 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 be released on bail under other provisions of the Cr.P.C.”*

17. While releasing the Applicant on bail by order dated 11/12/2020, no time limit is fixed to furnish the PR Bond and solvent surety. It is on the very same day before he could furnish

surety, the charge-sheet is sought to be filed by the prosecution and the court recalled its earlier order holding that his right to be released on bail under Section 167(2) of the Cr.P.C. stands forfeited. This is in utter derogation/violation of the authoritative pronouncements of the Apex Court. It was not open for the learned Sessions Judge to extinguish the right of an accused, which the law has conferred on him. The law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right, which has already accrued to the accused. The prosecution has defaulted in presenting the charge-sheet within the stipulated period permitted by the Cr.P.C. and, once the Applicant avails his right accrued to him, it cannot be frustrated by subsequently filing the charge-sheet and the Sessions Court forfeiting the right, which has already accrued to him..

18. Without touching the merits of the matter, in my considered opinion, the Applicant has been robbed of his indefeasible right, which he has availed of, by the impugned order, it is liable to be quashed and set aside. The Applicant is entitled to be released on default bail since it is after availing the said right, the charge-sheet has been filed and the subsequent events of the prosecution instituting the charge-sheet cannot deprive him of his indefeasible right and his right does not get extinguished since after few hours, the charge-sheet is instituted. Resultantly, the order passed by the learned Sessions Judge, recalling its earlier order erroneously, dated

10/12/2021 is set aside. The Applicant is entitled to be released on bail on the following conditions:

**ORDER**

- (a) The Applicant – **Sainath Bapu Salgar**, shall be released on bail in C.R. No.1128 of 2020 registered with Sangola Police Station, District Solapur on executing P.R. bond to the extent of Rs.25,000/- and furnishing 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 and shall not tamper with prosecution evidence.
- (c) The Applicant shall attend the trial regularly unless exempted by the Trial Court.

19. The Application is allowed in the aforestated terms.

20. 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.]**