

HON'BLE SMT. JUSTICE LALITHA KANNEGANTI

CRIMINAL PETITION No. 8327 of 2021

O R D E R:

This petition is filed under Sections 437 and 439 of Code of the Criminal Procedure, 1973 (for short 'Cr.P.C.') seeking regular bail to the petitioner/A-2 in connection with Crime No.254 of 2021 of Pet Basheerabad Police Station, Cyberabad, for the offences punishable under Section 8(c) r/w 22(c), 21, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "**NDPS Act**").

2. The case of prosecution is that on 14.03.2021 on receipt of credible information about illegal possession of Alprazolam Narcotic Drug, the respondent police went to an open space near culvert, Pipeline road via Deevan Dhaba to Jeedimetla and found A-1 and A-2 and after giving notice under Section 50 of the NDPS Act, A-1 voluntarily confessed that he got raw material from Narmada Chemical Pharma Company and he had been allegedly running the said business for the past five years with the help of A-4 and 140 kgs of Alprazolam Narcotic drug was recovered from A-1 and A-2. Basing on the said report, present crime was registered and sent the petitioner to the judicial custody on the same day.

3. Heard the learned counsel for the petitioner and learned Assistant Public Prosecutor for the respondent-State and perused the record.

4. Learned counsel appearing on behalf of the petitioner submits that an application was filed under Section 167(2) Cr.P.C. seeking default bail. It is further submitted that the offence took place on

14.03.2021 and the petitioner was arrested on 15.03.2021. On 18.09.2021, the petitioner moved an application for default bail but the same was dismissed on the ground that the investigation was already completed and charge sheet was filed well within the prescribed period under Section 36-A (4) of the NDPS Act and the petitioner is not entitled for statutory bail.

5. Learned counsel relied on the judgment of the Apex Court in **M.Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence**¹, wherein the Hon'ble Apex Court observed as under.

“The observations made in Hitendra Vishnu Thakur (supra) and Sanjay Dutt (supra) to the effect that the application for default bail and any application for extension of time made by the Public Prosecutor must be considered together are, in our opinion, only applicable in situations where the Public Prosecutor files a report seeking extension of time prior to the filing of the application for default bail by the Accused. In such a situation, notwithstanding the fact that the period for completion of investigation has expired, both applications would have to be considered together. However, where the Accused has already applied for default bail, the Prosecutor cannot defeat the enforcement of his indefeasible right by subsequently filing a final report, additional complaint or report seeking extension of time.

Therefore, applying the aforementioned principles, the Appellant-Accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order, i.e. at 10.30 a.m. on 01.02.2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints

¹ (2021)2 SCC 485

merely to circumvent the application for default bail is, in our view, an improper strategy.”

He also relied on another judgment of the Apex Court in **Achpal v. State of Rajasthan**², wherein the Hon’ble Apex Court observed as under.

“In the present case, as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the Magistrate concerned to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 5.7.2018, such filing not being in terms of the order passed by the High Court on 3.7.2018, the papers were returned to the investigating officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 3.7.2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the Magistrate concerned. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the Magistrate concerned and they could not be simply remanded to custody de hors such consideration. In our considered view the submission advanced by Mr Dave, learned advocate therefore has to be accepted.”

It is submitted that even till now, the charge sheet is not filed and since more than 250 days the petitioner is languishing in jail. As such, they are entitled for default bail.

² (2019)14 SCC 599

6. On the other hand, learned Prosecutor relied on the order passed by this Court reported in **Venkatarayanakota Krishnappa Raghavendra and Ors. v. The State of A.P.**³ and submits that in the said case, the Division Bench of this Court has observed that once a charge sheet is filed containing all particulars mentioned in sub-section (2) of Section 173 Cr.P.C. and does not contain some of the documents required to be filed under Section 173(5) Cr.P.C, he submits that certain documents are not within the control of the investigating agency and they are not filed along with the charge sheet and every part of the investigation is completed and the charge sheet contains all the reasons and the accused is not entitled for the benefit under Section 167(2) Cr.P.C. He also relied on another order reported in **Puligada Pitcheswara Rao and Ors. v. State of Andhra Pradesh**⁴ wherein this Court observed in similar lines and as such the petitioner is not entitled for default bail. He submits that if the petitioner is seeking bail on merits, he can seek regular bail if default bail is not granted.

7. In this case within 180 days i.e. on 161st day, the charge sheet is filed and the same was returned on 163rd day as the inventory was not completed. It is submitted that even till now, the inventory is not completed and the charge sheet is not filed. As per the guidelines issued by the Apex Court immediately after seizure of the contraband, prosecution has to complete the inventory as early as possible. Surprisingly, in this case, they have completed the entire investigation and are ready to file charge sheet but could not complete the inventory. It cannot be said that it is purely a technical defect for which the charge

³ 2009(2)ALT(CrI.)191

⁴ 2010(1) ALD (CrI.) 270

sheet is returned. The judgment relied on by the learned Public Prosecutor in **Venkatarayanakota Krishnappa Raghavendra** (3 supra) has no application to the facts of this case. This Court is of the view that as on 180th day, inventory is not completed and it cannot be termed as a technical reason.

8. Section 36A of the NDPS Act reads thus:

“36A. Offences triable by Special Courts: (1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--*

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under subsection (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central

Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27 A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily."

Section 167 (2) of Cr.P.C reads thus:

"(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, authorize 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) ¹ the Magistrate may authorize 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

authorize 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;]

(b) no Magistrate shall authorize 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 authorize detention in the custody of the police. ¹

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;]. ²

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 authorizing detention.”

9. The Hon’ble Apex Court in the case of **Uday Mohanlal Acharya v.State of Maharashtra**⁵ has observed that personal liberty is one of 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 authorize the detention of the accused in custody up to a maximum period as indicated in the proviso to sub Section (2) of Section 167 of Cr.P.C, 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 inconformity with the provisions of the

⁵ (2001)5 SCC 453

Criminal Procedure Code, and as such, it could be violative of Article 21 of the Constitution of India and the Hon'ble Apex Court in recent judgment in ***S.Kasi v. State***⁶ wherein it was observed that the indefeasible right to default bail under Section 167 (2) Cr.P.C. is an integral part of the right to personal liberty under Article 21 of the Constitution, 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. Additionally, it is well settled that in case of any ambiguity in the construction of a penal statute, the Courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedure providing for the curtailment of the liberty of the accused.

10. In view of the foregoing reasons as there is no charge sheet on file within the statutory period of 180 days, the petitioner is entitled for statutory bail, which is an indefeasible right of the accused as laid down by the Hon'ble Apex Court in catena of cases.

11. The petitioner/A-2 shall be enlarged on bail in connection with Crime No.254 of 2021, Pet Basheerabad Police Station, Cyberabad, on his executing a personal bond for a sum of Rs.50,000/- (Rupees fifty thousand only) with two sureties for a like sum each to the satisfaction

⁶ 2020 SCC OnLine SC 529

of the Additional XXII Metropolitan Magistrate at Medchal, Ranga Reddy District.

12. The Criminal Petition is, accordingly, allowed.
Miscellaneous applications, if any, pending shall stand closed.

LALITHA KANNEGANTI, J

24th November 2021
RRB