

CRR-414-2021(O&M)

[1]

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

Criminal Revision No.414 of 2021(O&M)

Date of Decision: June 03, 2021

Sajan

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

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Present: - Mr.Rishu Mahajan, Advocate
for the petitioner.

Ms.Sameena Dhir, DAG, Punjab.

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HARINDER SINGH SIDHU, J.

In this petition, the petitioner has challenged the order dated 22.01.2021 passed by Additional Sessions Judge, Amritsar, whereby his application seeking bail under Section 167(2) Cr.P.C has been dismissed.

The petitioner is an accused in case FIR No.101 dated 27.05.2020 under Sections 21, 27-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station Chattiwind, Amritsar. He was arrested on 27.05.2020. He was produced before the Court on 28.05.2020. The challan under Section 173 Cr. P.C. was not filed within the stipulated 180 days. An application seeking extension of time for filing the report under Section 173 Cr. P.C was filed on 07.12.2020. However, before any decision was taken on that application, the petitioner filed the application under Section 167(2) Cr.P.C. seeking bail on 18.01.2021. Both the applications were disposed of vide separate orders dated 22.01.2021. The

application seeking extension of time for filing the report under Section 173 Cr.P.C. was allowed. The application of the petitioner seeking default bail under Section 167(2) was dismissed.

The Ld. Court has dismissed the application under Section 167(2) holding that before the filing of the application by the accused the prosecution had already filed the application seeking extension of time. By separate order of the same date that application had been allowed.

Impugning the aforesaid order, Ld. Counsel for the petitioner has contended that the petitioner was arrested on 27.05.2020. As the investigation had not been completed within maximum period of 180 days as specified under Section 36A of the NDPS Act the petitioner was entitled to default bail under Section 167(2) CrPC. He argued that the mere fact that the prosecution had filed the application seeking extension of time to complete the investigation before the petitioner filed the application under Section 167(2), could not defeat the indefeasible right that had accrued to him as admittedly no order extending the time had been passed before he filed the application.

Ld. State counsel on the other hand has supported the impugned order. He argued that before filing of application under Section 167(2) CrPC by the petitioner, the application of the prosecution for extension of time to complete the investigation had been filed which was pending and notice had already been issued to the accused – petitioner. Both the applications were decided on the same date. The application of the prosecution was allowed and the application under Section 167(2) was rightly dismissed.

The sole question that arises for consideration is that if the application filed by the prosecution seeking extension in time to complete investigation filed prior in point of time is pending when the application under Section 167(2) is filed by the accused can the accused claim an indefeasible right to be released ?

On a reading of the decision of Hon'ble Supreme Court in ***M. Ravindran v. Directorate of Revenue Intelligence, (2021) 2 SCC 485***, the answer to this question has to be in the negative.

In this case Hon'ble Supreme Court has considered various questions concerning the right under Section 167(2) Cr.P.C. It has also referred to the relevant previous decisions on the subject.

It was held that if the charge-sheet is not filed within the stipulated period, the accused is not automatically entitled to be released on bail. The accused has to exercise/ `avail of' his right under Section 167(2). And if the charge-sheet is filed before the accused `avails of' his right under Section 167(2) the the right gets extinguished.

The relevant observations are as under:

“VI. Other relevant precedents pertaining to the right under Section 167(2)

21. We are fortified in our aforementioned conclusions by the three-Judge Bench decision of this Court in *Mohd. Iqbal Madar Sheikh v. State of Maharashtra*. In that case, though the charge-sheet was submitted after expiry of the statutory period under Section 20(4)(bb) of the TADA Act, it was admitted that no prior application for bail had been filed by the appellants. Hence the Court held, relying upon *Sanjay Dutt*, that the right to bail could not be exercised once the charge-sheet has been submitted and cognizance has been taken. However, at the same time, the three-

Judge Bench also expressed with consternation that courts cannot engage in practices such as keeping the applications for bail pending till the time charge-sheets are submitted, so that the statutory right which has accrued to the accused is defeated. If the court deliberately does not decide the bail application but adjourns the case by granting time to the prosecution, it would be in violation of the legislative mandate. It may be pertinent to note that the three-Judge Bench in Mohd. Iqbal Madar Sheikh had also been part of the Constitution Bench in Sanjay Dutt.

21.1. *Similarly, in Bipin Shantilal Panchal, it was admitted that the accused had not filed an application for bail at the time the right under Section 167(2) CrPC had accrued to him. The charge-sheet had already been filed by the time the accused sought to avail of his right. Incidentally, the same three-Judge Bench which had delivered the opinion in Mohd. Iqbal Madar Sheikh, and which was part of the original Constitution Bench in Sanjay Dutt, rendered judgment as follows: (Bipin Shantilal Panchal case, SCC pp. 719-20, para 4)*

“4. ... But it is an admitted position that the charge-sheet has been filed on 23-5-1994 and now the appellant is in custody on the basis of orders of remand passed under the other provisions of the Code. Whether the accused who was entitled to be released on bail under proviso to sub-section (2) of Section 167 of the Code, not having made an application when such right had accrued, can exercise that right at a later stage of the proceeding, has been examined by a Constitution Bench of this Court in Sanjay Dutt v. State...

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Therefore, 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, as pointed out in Aslam Babalal Desai v. State of Maharashtra.”

(emphasis supplied)

21.2. *The above mentioned discussion clearly corroborates our view, and the view taken by the majority in Uday Mohanlal Acharya, that the decision in Sanjay Dutt only lays down as a precautionary principle that the accused must apply for default bail the moment the right under Section 167(2) accrues to him. If he fails to do so, he cannot claim the right at a subsequent stage of the proceedings after the prosecution has filed a charge-sheet. The words “not having made an application when such right had accrued, can exercise that right at a later stage” clearly indicate that the accused is deemed to have exercised his right to bail once he makes an application for the same.”*

It was also clarified that where the prosecutor has filed the application for extension of time prior to the application for default bail by the accused, both the applications ought to be decided together.

“20.1. The observations made in Hitendra Vishnu Thakur and Sanjay Dutt 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.”

Finally, it was concluded as under:

“25. Therefore, in conclusion:

25.1. *Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have “availed of” or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigating agency.*

25.2. *The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the 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.*

25.3. *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 CrPC.

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

In para 25.3 of the judgment it has been clearly held that 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 filed 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.

In the present case before the petitioner-accused filed his application for default bail, the prosecution had already filed application seeking extension of time. The Ld. Additional Sessions Judge, decided both applications on the same day. The application of the prosecution was allowed. Consequently, the application of the petitioner was dismissed.

On the law as laid down by the Hon'ble Court in the decision (supra) the order cannot be faulted.

Accordingly there is no merit in this petition.

Dismissed.

June 03, 2021

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(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No