

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
(Heard through VC)**

**CRM-M-16418 of 2021 (O&M)
Date of Decision: 10.8.2021**

Gurmej Singh

...Petitioner

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Amtiaz Sandhu, Advocate
for the petitioner.

Ms. Rashmi Attri, AAG, Punjab.

JAISHREE THAKUR, J.

1. This is a petition that has been filed under Section 167 (2) of the Code of Criminal Procedure for grant of regular bail to the petitioner in case FIR No. 84 dated 28.4.2017, under Section 376-D, 120-B/323/457 IPC and Sections 3,4,6 of the Protection of Children from Sexual Offences Act, 2012 registered at Police Station Sadar Ferozepur.

2. The aforesaid FIR came to be registered at the instance of the prosecutrix, who alleged that on 27.4.2017, in the afternoon, her mother had gone to the house of her uncle Balwinder Kumar Sharma for some work and she and her younger brother, who is about 12 years old, after having their dinner went to sleep in their house. At about 11.30 p.m., the petitioner, who belong to the village of the prosecutrix, climbed the wall of the house of the prosecutrix and put his hand on her face and dragged her through the stairs to the roof of the house, where Balkar Singh, Meetu and Shingara Singh were already present. Thereafter, Balkar Singh caught her by her arms,

Meetu covered her mouth with his hands and slapped her and Gurmej Singh forcibly removed her clothes (*salwar*) without her consent and raped her. On this, she shouted loudly which attracted her neighbour, namely Shinder Kaur and her husband Gurmeet Singh, to the spot and on seeking them, all the accused fled from the spot.

3. Co-accused Balkar Singh and Shingara Singh were arrested and after investigation, challan was presented against them under Section 173 of the Code of Criminal Procedure on 29.8.2017. However, the petitioner and co-accused Meetu @ Gurmit Singh were not arrested and eventually they were declared proclaimed offenders on 18.12.2020. As a result of which, the challan was not presented qua these two accused.

4. Learned counsel for the petitioner would contend that the petitioner himself surrendered on 18.12.2020 and challan had not been presented against him till the date of filing the application for default bail i.e on the 23.3.2021. Therefore, since the statutory period of 90 days for filing the challan has already expired, he is entitled to default bail in terms of Section 167 (2) of the Code of Criminal Procedure. It is also contended that co-accused against whom the challan was presented have already been acquitted by the trial court as a result of the compromise arrived at between them and the complainant. It is also submitted that the petitioner was placed in column No.2 and since he was not challaned, therefore, he is entitled to default bail.

5. Per contra, learned counsel for the respondent—State, opposes the bail on the ground that the allegations made against the petitioner are of serious nature and as such he does not deserves the concession of bail.

6. I have heard learned counsel for the parties and have gone

through the paper book.

7. In a case referred to as **Uday Mohan Lal Acharya Vs. State of Maharashtra (2001) 5 SCC 453**, the Supreme Court, while dealing with Section 167 (2) Cr.P.C, held as under:

“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]*”.*

8. Further, in a similar case of **Rakesh Kumar Paul Vs. State of Assam (2017) 15 SCC 67**, the accused therein had applied for default bail on the 11.1.2017 which was dismissed even though the charge sheet was filed only on the 24.1.2017. The Supreme Court held:

“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.”

9. In the present case, the application for default bail had been filed on the 23.3.2021, on which date there was no challan presented under Section 173 Cr.P.C against the petitioner, who was in custody for a period of 94 days having been arrested on 18.12.2020. The court below has erred in denying default bail on the ground that evidence had already been collected and a challan presented against the other co accused and, therefore, since evidence was available, there was no ground to allow default bail. However, the court has failed to note that the challan presented against the co-accused on 29.8.2017 clearly stated that “*accused Gurmej Singh and Gurmeet Singh @ Meetu are yet to be arrested against whom P.O. proceedings are going on, who will soon be arrested and a separate challan would be prepared and presented against them.*”

10. Therefore, as held by a catena of judgements, an indefeasible 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. 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.

11. Consequently, the present petition is allowed. The petitioner is directed to be enlarged on bail on furnishing his personal bonds and two sureties to the satisfaction of the concerned CJM/Duty Magistrate.

10.8.2021
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned :	Yes
Whether Reportable :	No