

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.36 of 2022

(In the matter of an application under Section 401 read with
Section 397 of the Criminal Procedure Code.)

Biswambara Kanhar and others ***Petitioners***

-versus-

State of Odisha ***Opposite Party***

Appeared in this case:-

For Petitioner : Mr. Amitav Tripathy, S. L.
Pattnaik, M. Pagal and
A.R. Behera

For Opp. Parties : Mr. P.C. Das,
Learned Addl. Standing Counsel

Appeared in this case:-

CORAM:
JUSTICE A.K. MOHAPATRA

JUDGMENT

Date of hearing : 24.02.2022 / date of judgment :20.05.2022

A.K. Mohapatra, J.

1. The present criminal revision petition is directed against the order dated **12.01.2022** passed by the learned Special Judge, Phulbani in C.T. Case No.19 of 2021 arising out of Phiringia P.S. Case No.23 of 2021

thereby rejecting the prayer for default bail of the petitioners under the provisions of Section 167(2) of the Cr.P.C.

2. The prosecution story, as unfolded from the F.I.R. bereft of unnecessary details, is that the present petitioners along with others were arrested in the above noted P.S. case for the offence under Section 20(b)(ii)(C) of the N.D.P.S. Act and as such, they are in judicial custody since **21.12.2021**. It is alleged that on **20.02.2021** at about 4.10 A.M., IIC Phiringia Police Station received credible information that many persons are in possession of contraband Ganja i.e. flowering and fruiting tops of cannabis plants in 23 numbers of plastic bags are waiting in a lonely place i.e. beside the road at village Melupada under a mango tree and in front of the house of one Ratnakar Kanhar for transportation. As per the direction of IIC, Phiringia Police Station, S.I. of police along with other police party members proceeded to the spot and found that four persons were sitting on the plastic bags and some of them were standing nearby. On seeing the police party, the accused persons tried to flee away from the spot. However, the police team caught hold of four accused persons at the spot. On being asked, they disclosed their names which also includes the present petitioner and further upon search it was found that plastic bags were containing 11 quintals of contraband ganja. The

contraband articles were seized from the spot and the accused persons were arrested and forwarded in the present case.

3. In view of the provisions contained in Section 167(2) as well as in Section 36-A(4) of the N.D.P.S. Act, charge-sheet should have been filed within 180 days from the date of remand of the present petitioners as the offence alleged involves more than commercial quantity of contraband substances. Therefore, taking into consideration the aforesaid 180 days period, the charge-sheet should have been filed on or before **20.08.2021**. Further, it is made clear that in the event charge-sheet is not filed within the aforesaid 180 days period, then the Investigating Officer should have approached the Special court by filing an application for extension of the period for filing the final form in the matter and in such eventuality the Special court under the proviso of Section 36-A(4) of the NDPS Act is competent to extend the period for filing final form up to one year on the report of the Public Prosecutor intimating the progress of the investigation and by assigning specific reasons for detaining all the accused beyond the period of 180 days.

4. Heard Mr. A. Tripathy, learned counsel for the petitioners as well as Mr. P.C. Das, learned Additional Standing Counsel for the State. Perused the case diary as well as materials available on record.

5. It is submitted by Mr. Tripathy, learned counsel for the petitioners, that the petitioners were arrested and remanded to judicial custody on **21.02.2021** and that the charge-sheet should have been filed within 180 days i.e. on or before **20.08.2021**. It is further submitted that the Investigating Officer has failed to file the charge-sheet within the aforesaid stipulated period of time. Further no application as provided in the proviso to Section 36 A (4) of the N.D.P.S. Act was presented to the said court for extension of time to file charge-sheet. He further submits that on **23.08.2021**, learned Special Judge, Phulbani on production of the accused remanded them to judicial custody till **06.09.2021** awaiting final form.

6. It is further contended by learned counsel for the petitioners that an application under Section 167(2), Cr.P.C. was presented before the learned Special Judge, Phulbani for release of the accused persons on default bail and a copy of such application has been filed along with the present Criminal revision Petition and marked as under Annexure-3.

7. On perusal of the petition under Annexure-3, it is seen that the said application was presented by the Advocate for the petitioners in court below on **23.08.2021**. The **order no.19** dated **23.08.2021** is quoted herein below :-

“Order No.19 dated 23.8.2021

Accused persons who are in custody are produced from custody. Co-accused persons are absent. N.B.W./A issued against them not yet executed. Issue reminder. Put up on 06.09.2021 for awaiting final form.

Accused U.T.Ps be produced on the date fixed.

(Dictated)

Special Judge, Phulbani.

Which clearly reveals that the case was adjourned to **06.09.2021** awaiting final form. Thereafter in the **order no.20** dated **23.08.2021**, learned court below has passed an order acknowledging receipt of charge-sheet dated **30.07.2021**.

8. Again on the very same day, another order has been passed acknowledging the filing of a petition under Section 167(2), Cr.P.C. at the behest of the present petitioner for their release on default bail, the said order dated **23.08.2021** reads as follows:-

Later

“20. 23.08.2021 The record is put up on receipt of C.s. No.91 dated 30.07.2021 under Section 20(b)(ii)(C)/29 of NDPS Act from the Investigating Officer of Phiringia Police Station against the Accused **1. Biswambara Kanhar**, aged about 45 years, S/o. Late Rusi Kanhar. **2. Srimanta Kanhar**, aged about 23 years, S/o. Krupanidhi Kanhar, **3. Deepak Kanhar**, aged about 22 years, S/o. Tileswar Kanhar, **4. Ratnakar Kanhar**, aged about 28 years, S/o. Tari Kanhar Sl. No.1 to 4 are of vill-Melupada (Sripalla), PS- Phiringia, Dist-Kandhamal, **5. Nameswar Kanhar**, aged about 55 years, S/o. Bisi Kanhar, **6. Kantheswar Kanhar**, aged about 40 years, S/o. Gume Kanhar, and **7. Naresh Kanhar**, aged about 27 years,

S/o. late Situ Kanhar Sl. No.5 to 7 are of vill-Meulipada, PS-Phiringia, Dist-Kandhamal.

Perused the FIR, Charge Sheet, 161 Statement, Case Diary and other connected documents available in case record. As prima facie case is well made out from the same, cognizance of the offences punishable u/s 20(b)(ii)(C)/29 of NDPS Act is taken.

Accused Biswambara Kanhar, Srimanta Kanhar, Deepak Kanhar, and Ratnakar Kanhar are in jail custody. Put up on the date fixed i.e. 06.09.2021 for production of the accused persons namely Nameswar Kanhar, Kantheswar Kanhar, and Naresh Kanhar.

(Dictated)

Special Judge, Phulbani

Later

23.8.21 The record is put up on the strength of a petition filed U/s 167(2) CrPC praying to release the accused on default bail on failure of submission of charge sheet in stipulated time. Perused the case record and it is found that the charge sheet has already been received on today and cognizance was taken U/s 20(b)(ii)(C)/29 NDPS Act against the accused persons. Hence the petition filed U/s 167(2) CrPC is rejected being devoid of any merit. Put up on the date fixed.

(Dictated)

Special Judge, Phulbani”

9. Learned counsel for the petitioners submits that after expiry of statutory period of 180 days and in the absence of extension of time to submit the final form an indefeasible right to go on default bail has accrued in favour of the petitioner. He further submits that the court was duty bound to intimate the petitioner that such right has accrued in favour of the petitioner to go on defaulting bail as has been mandated by this

Court in the case of *Lamodar Bag vrs. State of Orissa* : reported in **(2018) 71 OCR 31**. However, the said procedure had not been followed in the present case. He further submits that after expiry of 180 days on **20.08.2021**, learned counsel for the petitioners filed an application under Section 167(2), Cr.P.C. for their release on default bail i.e. on **23.08.2021**. It is further submitted by learned counsel for the petitioners that upon getting information that application has been filed under Section 167(2), Cr.P.C. by the petitioners to release them on default bail, the Investigating Officer filed the charge-sheet after filing of the petition by the petitioners. It is further alleged by learned counsel for the petitioners that even charge-sheet has been antedated before filing the same in the court of the learned Special Judge, Phulbani.

10. Learned Special Judge, Phulbani by order dated **23.08.2021** rejected the application of the petitioners under Section 167(2), Cr.P.C. in an illegal and arbitrary manner. Learned counsel for the petitioners further contends that if the **charge-sheet No.9** dated **30.07.2021** was in fact filed prior to filing of the petition under Section 167(2), Cr.P.C. and was available in court record on the date when the petitioners application under Section 167(2), Cr.P.C. was being considered, then the Special Court would have certainly recorded such fact in its **order No.19** dated **23.08.2021**. However, on perusal of the **order No.19** dated **23.08.2021**,

which has been quoted herein above, reveals that the case was adjourned to **06.09.2021** awaiting final form. Therefore, learned counsel for the petitioners submits that by the time application under Section 167(2), Cr.P.C. was presented to the court, final form had not been submitted and the same was not available on record. However, upon getting information from the court, the Investigating Officer has subsequently filed the charge-sheet to deny the petitioners of their indefeasible right to go on default bail.

11. Mr. Tripathy, learned counsel for the petitioners further contends that earlier the petitioners had approached this Court by filing **Criminal Revision No.320 of 2021** challenging the order dated **23.08.2021**, this Court vide order dated **13.12.2021** was pleased to set aside the order dated **23.08.2021** passed by the learned court below and further remanded the matter back to the court of learned Special Judge, Phulbani in order to consider the matter afresh after taking into consideration the contention raised on behalf of the petitioners i.e. the period of 180 days was already over on **20.08.2021** and therefore, the petitioners should have been enlarged on default bail on that day itself. He further submits that pursuant to order dated **13.12.2021** the petitioners filed an application before the learned Judge, Special court, Phulbani which was rejected vide order dated **12.01.2022**.

12. Learned counsel for the petitioners submits that Article 21 of the Constitution of India provides that no person shall be deprived of his right to life and liberty which is one of most valuable rights of every citizen of this Country guaranteed under the Constitution of India. Further such right cannot be curtailed save and except by authority of law and by following the procedure prescribed by law. In the said context, he further submits that there is no provision in Cr.P.C. that mandates to detain an accused after 180 days in custody within which period the final form has not been submitted by the Investigating officer. Therefore, the detention of the petitioner after **20.08.2021** is highly illegal, arbitrary and contrary to the spirit of the law as envisaged in Article-21 of the Constitution of India and the said conduct of the learned court below seriously affects the fundamental right of the citizens like the present petitioners. Further, referring to the judgment of constitution bench of the Supreme Court of India in *Menaka Gandhi's Case* reported in **(1978) 1 SCC 2417**, he further submits that the indefeasible right of the accused to go on default bail which has been preserved and protected under Section 167(2), Cr.P.C. is an extension of their fundamental rights guaranteed in Article 21 of the Constitution of India and further he submits that the provisions contained in Section 167(2), Cr.P.C. is nothing but legislative expression of the constitutional safeguard that no person shall be

detained except in accordance with rule of law as has been guaranteed in Article 21 of the Constitution of India.

13. Referring to the judgments of Hon'ble Supreme court of India in the case of ***Rakesh Kumar Paul vrs. State of Assam*** : reported in (2017) **15 SCC 67** and ***Lambodar Bag vrs. State of Odisha*** : reported in (2018) **71 OCR 31**, Mr. Tripathy, learned counsel for the petitioners submits that it is the duty and responsibility of the court to apprise the petitioners of their indefeasible right of being enlarged on bail for non-submission of final form within the statutorily prescribed period and further extension thereof under the provision of Section 36 A (4) of the N.D.P.S. Act. He further contends that in the present case it is an admitted fact that no application whatsoever was presented under the proviso to Section 36-A(4) of the N.D.P.S. Act to the Special Judge, Special Court, Phulbani ignoring the legal requirement of extension of time to submit the final form. Therefore, the indefeasible right of the petitioners to be enlarged on bail had been crystallized w.e.f. **20.08.2021**. He further contends that although the court was under a illegal obligation in view of the judgment of Hon'ble Supreme Court in the case of ***Rakesh Kumar Paul*** (supra) and this Court in the case of ***Lambodar Bag*** (supra), learned Special Judge, Special court, Phulbani while passing the order dated **23.08.2021** did not bother to inform the petitioners of their indefeasible right to go on

default bail. On the contrary, an order was passed mechanically on **23.08.2021** simply posting the matter on **06.09.2021** awaiting the final form. A bare scrutiny of entire order-sheet does not reveal that the learned Special Judge, Special court, Phulbani at any point of time on **23.08.2021** informed the accused petitioners of their indefeasible right to go on default bail as has been provided under Section 167(2), Cr.P.C. He further submits that although this Court in the earlier round of litigation directed the learned Special Judge, Special court, Phulbani to consider and deal with the issue in a particular manner, however, the learned court below did not deal with the same in the manner as has been directed by this court in the earlier round of litigation while setting aside order dtd.23.08.2021 and thereafter again passed an order in a callous and mechanical manner thereby rejecting the application of the petitioners.

14. Learned counsel for the State, on the other hand, submits that it is admitted case of the parties that the statutory period of 180 days completed on **19.03.2021** and in such view of the matter, the petitioners were supposed to file the application under Section 167(2), Cr.P.C. on that day itself. He further submits that the petitioners did not choose to file the application under Section 167(2), Cr.P.C. on **19.08.2021** rather filed it on **23.08.2021** at their own risk. It is further submitted by learned counsel for the State relying upon the judgment of the Hon'ble Supreme

Court in *M. Ravidran vrs. Intelligence Officer, Directorate of Revenue Intelligence* : reported in *(2021) 2 SCC 485* that where the accused has failed to apply for default bail when the right had accrued in their favour and subsequently charge-sheet, additional complaint or report seeking extension of time is filed before the Magistrate, the right to default bail gets automatically extinguished. Therefore, the Magistrate would be at liberty to take cognizance of the case or grant further time to completion of investigation as the case may be and the accused shall not be released on bail under the provision of section 167 (2) Cr.P.C.

15. Learned counsel for the State advanced his argument by presuming the fact that the charge-sheet had been filed prior to presentation of the petition under Section 167(2), Cr.P.C., therefore, the right of the accused petitioners gets automatically extinguished prior to filing of the petition under section 167 (2) of the Cr.P.C. However, this Court upon hearing learned counsel for the State is of the opinion that the arguments advanced on behalf of the State was not at all convincing. Further, learned counsel for the State has also relied upon the judgment of the Hon'ble Supreme Court in *M. Ravidran's case (Supra)* reported in *(2021) 2 SCC 485* and submits that the learned court below has adopted an illegal and wrong procedure for rejecting the application under Section 167(2), Cr.P.C. filed by the present petitioners.

16. In ***M. Ravindran's Case (supra)***, the Hon'ble Supreme court had an occasion to consider the indefeasible right accrued in favour of the accused petitioners on non-filing of final form within the stipulated period and further they have discussed the role of the Magistrate in such eventuality. In paragraph 18.10 of the said judgment, the Hon'ble Supreme Court has observed as follows:-

"18.10. We agree with the view expressed in ***Rakesh Kumar Paul*** that as cautionary measure, the counsel for the accused as well as Magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights. Such knowledge sharing by Magistrate will thwart and any dilatory tactics by prosecution and also ensure that the obligations spelled out under Section 21 of the Constitution and the Statement of Objects and Reasons of the Cr.P.C. are upheld."

The above noted judgments of the Hon'ble Supreme court in ***M. Ravindran's case*** and ***Rakesh Kumar Paul's case (supra)*** have also been followed by this Court in the case of ***Rajendar Kakodiya @ Rajendra Kanokodia and another vrs. State of Odisha*** in BLAPL No.1197 of 2021 disposed of by order dated 18.10.2021. In the said judgment, this Court has observed that a duty and responsibility is cast upon the Court to appraise the accused petitioners of their indefeasible right to go on default bail by furnishing bail bond on account of non-submission of

final form within the statutory and further failure to get the said period extended as provided in the NDPS Act upon non-completion of investigation and non-submission of any application by the Investigating Officer with the report of the Public Prosecutor.

In the present case, it is crystal clear, on perusal of the records, that the trial court has failed in its duty bestowed upon it by virtue of the aforesaid judgment of the Hon'ble Supreme Court as well as of this court. Therefore, the learned Special Judge, Special Court has committed an illegality by not informing the petitioners of their valuable right to go on default bail either on 20.08.2021 or 23.08.2021.

17. Similar view has also been taken by this court in the case of ***Laxmidhar Behera vrs. State of Odisha*** : reported **2021(I) OLR 810** and in **CRLMC No.1838 of 2021** disposed of on **10.11.2021** (in the matter of ***Biraj Sardar vrs. State of Odisha***).

18. In ***M. Ravidran's case (supra)***, the Hon'ble Apex Court was approached to decide the validity of grant of default bail under Section 167(2), Cr.P.C. involving an offence under the N.D.P.S. Act. In the said case, the appellant was arrested and remanded to judicial custody on **04.02.2018**. On **01.02.2019**, the appellant filed an application for bail under Section 167(2), Cr.P.C. on the ground of non-submission of final form within the statutory period. The trial court in the said case after

considering the facts of that case, granted bail to the appellant which was subsequently set aside by the Madras High Court. Challenging the judgment of the Madras High Court, the appellant approached the Hon'ble Supreme Court of India. The issue that was raised by the appellant was whether the trial court was justified in granting bail on an application filed on 01.02.2019 at 10.30 A.M. before the trial court whereas on the very same day at about 4.20 P.M. an additional complaint was filed against the appellant and whether the decision of the Madras High Court in setting aside the order of the trial court is justified in law. The Hon'ble Supreme Court analyzing the law contained in Section 167(2), Cr.P.C. finally came to hold that the trial court was right in its approach in enlarging the petitioner on default bail and the High Court of Madras had committed an error by setting aside the order of the trial court. In the said judgment Hon'ble the Apex Court has also interpreted the word **“availed of”** to mean that the accused has availed the indefeasible right to go on default bail by filing the application under section 167 (2) Cr.P.C. It was further held that the filing of additional complaint by the prosecution, after the accused has availed the right to be released on bail, should not in any manner deter the court enforcing the indefeasible right as the charge-sheet has not been filed before the expiry of statutory period. The view expressed by the Hon'ble Supreme Court in

M. Ravidran's case (supra) has also been followed in the latest judgment of the Hon'ble Supreme court of India in ***Serious Fraud Investigation Officer vrs. Rahul Modi and others*** : reported in 2022 SCC online S.C.153.

19. Moreover, referring to the judgment in **Sanjay Dutt's case** : reported in (1994) 5 SCC 410, the Hon'ble Supreme Court of India in **M. Ravidran's case (supra)** has further observed and clarified that once the charge-sheet is filed, the waiver of the right by the accused to go on default bail becomes final and the provisions of section 167(2), Cr.P.C. is no more applicable. However, the judgment of the Constitution Bench in **Sanjay Dutt's case** cannot be interpreted in a manner so as to give effect to the provision of 167 (2) Cr.P.C. to mean that even where the accused has promptly exercised his right under Section 167(2), Cr.P.C. and indicated his willingness to furnish bail bond he can be denied bail on account of delay in deciding his application or erroneous rejection of the same. Nor he can be kept detained in custody on account of subterfuge of the prosecution in filing a police report of additional complaint on the day when the bail application is filed. In the instant case, the prosecution has used the subsequent filing of charge-sheet as subterfuge to deny the petitioner of his right to go on default bail, which has been statutorily provided under Section 167(2), Cr.P.C. and the same is nothing but

extension of the fundamental right guaranteed under Article 21 of the Constitution of India.

20. In view of the above analysis of the factual position as well as analysis of relevant legal provisions and various judgments on the applicability of Section 167(2), Cr.P.C. to the facts of the present case, this Court is of the considered view that the learned court below has not acted in a manner as has been prescribed under Section 167(2), Cr.P.C. Further keeping in view the position of law as has been analyzed and clarified by a catena of decisions of the Hon'ble Supreme court of India as well as of this Court, this Court has no hesitation in setting aside the impugned order dtd. 12.01.2022 passed by the learned Special Judge, Phulbani in C.T. Case No.19 of 2021 and as such the present criminal revision is hereby allowed.

21. Learned court below is further directed to release the petitioners on default bail subject to petitioners furnishing bail bonds and further subject to such terms and conditions as would be deemed fit and proper in the facts and circumstances of the present case.

22. With the aforesaid observation, the CRLREV is allowed.

(A.K. Mohapatra)
Judge

Jagabandhu.P.A.