

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.354 of 2021

(In the matter of an Application under Section 401 of Cr.P.C.)

Atmaprakash and another ***Petitioners***

-versus-

The State of Orissa ***Opposite Party***

Appeared in this case:-

For Petitioners : Mr. R.L. Pattnaik,
Mr. E. Dash and
Mr. M. Nandi

For Opposite Party : Mr. P.C. Das,
Addl. Standing Counsel for State

CORAM:
JUSTICE A.K. MOHAPATRA

J U D G M E N T

Date of Hearing : 16.02.2022 | Date of Judgment : 22.04.2022

A.K. Mohapatra, J.

1. The present criminal revision filed under Section 401 Cr.P.C. is directed against the order dated 31.08.2021, passed by the learned Sessions Judge-cum-Special Judge, Malkangiri in T.R. Case No.103 of 2020 registered under Sections 20(b)(ii)C/27-A/29 of the N.D.P.S. Act, which arises out of Mathili P.S. Case No.130 of 2020 registered on 14.09.2020. In the impugned order dated

31.08.2021, learned Special Judge, Malkangiri has refused to grant default bail under Section 167(2) of the Criminal Procedure Code.

2. The factual backdrop of the case in gist is that one Raghunath Majhi, IIC of Mathili Police Station has drawn a plain paper FIR on 14.09.2020 inter alia alleging that while he was performing the patrolling duty at NH-326 with his team near Forest Check Gate, Govindapally at about 8.45 P.M. they saw one two wheeler and one four wheeler vehicle came back to back towards them in high speed from Govindapally side. On seeing the police team, the head lights of the vehicles were switched off at a little distance. On suspicious, the police team proceeded towards the vehicles. On seeing the police team, the occupant of both the vehicles started running towards the jungle area. However, the police team managed to catch hold of two of them and the others managed to escape into the jungle by taking advantage of the darkness of the night. The two persons who were apprehended at the spot when asked about their fleeing from the spot, they could not give any satisfactory answer. Later on, they both confessed that they were carrying ganja inside the car as well as in the motorcycle without any valid license or documents for such illegal possession and transportation. On further interrogation, one of them disclosed

his name was Atmaprakash (Petitioner No.1) and the other person was Kuldeep Rabat @ Kumar (Petitioner No.2). Further, on search of the vehicle, it was dictated by the police that they were illegally transporting contraband ganja in three packets. The total weight of which was about 60 kgs. 950 gms. They further disclosed that they were inside the car and Atmaprakash was driven the said car and Kuldeep Kumar was seated on the side of the driver in the front seat and Vinod who is the associate of Sankar Hindi was the pillion rider in the vehicle. The contraband ganja was procured from Malkangiri and Mahananda Mandal, Dillip Biswas, Nilakantha Basu of village MV-84 are the financiers. Further it was disclosed that the consignment was to be delivered to one Ajay Verma of Faridabad, who had engaged these persons for transportation of ganja and he himself was waiting at Jeypore.

3. It is submitted by learned counsel for the Petitioners that the FIR was lodged at Mathili police station on 14.09.2020. On being arrested, the two accused persons were forwarded to court on 15.09.2020. It is further submitted by learned counsel for the Petitioners that after investigation, the I.O. has filed charge-sheet on 26.04.2021 under the aforesaid sections of the N.D.P.S. act.

4. It is submitted by learned counsel for the Petitioners that in view of the provision contained under Section 36-A (4) of N.D.P.S. Act, the charge-sheet in the present case should have been filed within 180 days from the date when the accused were remanded to the custody for the first time. He further contends that in view of the Section 36-A(4) of the N.D.P.S. Act, Section 167(2) of the Cr.P.C. stands modified and the I.O. is required to file charge-sheet within 180 days instead of 90 days as provided under Section 167(2) of the Cr.P.C. Therefore, he submits that the right is accrued to enlarge the Petitioners on bail in case the charge-sheet is not filed within 180 days from the date of first remand of the accused to custody. In the present case, the accused persons were first remanded to custody on 15.09.2020, therefore the period of 180 days as provided under Section 36-A(4) comes to an end on 13.03.2021. Since the I.O. could not submit the charge-sheet by 13.03.2021, a valuable right accrued in favour of the Petitioners to be released on default bail as has been provided in law, i.e. by the conjoint reading of Section 167 (2) of Cr.P.C. and Section 36-A(4) of the N.D.P.S. Act.

5. Learned counsel for the Petitioners further contends that in the meanwhile the I.O. has made a prayer on 26.02.2021 for further

extension of time and accordingly the time was further extend by 60 days. Learned counsel for the Petitioners contends that while extending the time by another period of 60 days as provided under Section 36-A(4) of the N.D.P.S. Act, learned Special Judge, Malkangiri has not provided any opportunity of personal hearing to the Petitioners. Even on the date of expiry of initial 180 days, the accused persons were not informed of their right to be enlarged on bail on default by the learned court below. This according to the learned counsel for the Petitioners is gross violation of the statutory provision of law. Therefore, he urges that the accused persons be enlarged on default bail and the extension which has been granted in violation of the statutory provision of law should have been rejected. However, when such a situation arose and the accused Petitioners filed an application under Section 167 Cr.P.C. and Section 36-A(4) of the N.D.P.S. Act, the same has not been considered in its proper perspective and the learned court below has mechanically rejected the application of the petitioners for grant of default bail.

6. Per contra, learned Additional Standing Counsel appearing for the State-Opposite Party submits that the Petitioners were

remanded to the jail custody on 15.09.2020 and in view of the legal provision, the charge-sheet should have been submitted within 180 days from the date of remand. Therefore, according to him, the charge-sheet should have filed by 13.03.2021. Since the I.O. could not complete the investigation and could not file charge-sheet in time, on 26.02.2021, the I.O. made an application for extension of time to submit the charge-sheet, such prayer for extension of time at the behest of the I.O. was considered by the learned court below vide its order dated 02.03.2021 and extended time for filing charge-sheet by within further 60 days time. Thereafter, charge-sheet was filed on 27.04.2021. It is within the extended period of 60 days. As such, learned counsel for the State submits that the trial court has not committed any illegality in rejecting the application of the Petitioners under Section 167(2) of Cr.P.C.

7. Further relying upon the judgments of the Hon'ble Supreme Court of India in the case of ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence***, reported in ***(2021) 2 SCC 485***, learned counsel for the State submits that where accused fails to apply for default bail when right accrues to him and subsequently charge-sheet additional complaint or report seeking extension of

time is granted by Magistrate, right to default bail would be extinguished.

8. In *M. Ravindran's case (supra)* relied upon by the learned counsel for the State that the accused person was remanded to judicial custody on 04.08.2018 and after completion of 180 days from the date of remand, i.e. on 31.01.2019, the Petitioner filed application for bail u/s.167(2) of Cr.P.C. on 01.02.2019 before the trial court on the ground that the investigation was not completed and the charge-sheet has not been filed. Accordingly, on 05.02.2019, the trial court enlarged the accused Petitioner on bail u/s.167(2) of Cr.P.C., which was challenged before the High Court of judicature at Madras. Hon'ble High Court of Madras by its judgment allowed the appeal and subsequently cancelled the order granting default bail to the accused Petitioner. Being aggrieved by the order of the Madras High Court, Hon'ble Supreme Court of India after analyzing the provision of Section 167(2) of Cr.P.C. as well as Section 36-A(4) of N.D.P.S. Act and relying upon the case of *Udaya Mohanlal Acharya vs. State of Maharashtra*, reported in *2001 (5) SCC 453*.

9. In the case of ***M. Ravindran (supra)***, Hon'ble Supreme Court in paragraph 17.1 of the said judgment held that "*Article 21 of the Constitution of India provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'*". It has been settled by the Constitution Bench of this Court in ***Maneka Gandhi vs. Union of India***, reported in ***(1978) 1 SCC 248***, that such a procedure cannot be arbitrary, unfair or unreasonable. Further it has been held that the history of the enactment of Section 167(2) Cr.P.C. and the safeguard of "default bail" contained in the proviso thereto 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. While saying so, the Hon'ble Supreme Court of India has relied upon paragraph-13 of the judgment in the case of ***Uday Mohanlal Acharya (supra)***, which is extracted herein below:

"13. ... it is also further clear that infeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution bench in *Sanjay Dutta* case. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his

willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression “availed of” to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate 28 had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression “availed of” is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression “if not availed of” in a manner which is capable of being abused by the

prosecution.... 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.”

Accordingly, the Hon’ble Supreme Court while setting aside the judgment passed by the Hon’ble Madras High Court has affirmed the judgment of the trial court and the judgment granting the benefit of default bail to the accused in the reported case was affirmed by the Hon’ble Supreme Court of India. Therefore, the

judgment in *M. Ravindran's case (supra)* no way helps the argument advanced by the learned counsel appearing for the State. On the contrary, the same supports the case of the Petitioners in the instance revision petition.

10. It is apt to mention here that the law with regard to default bail i.e. indefeasible right accruing in favour of the accused Petitioners to be released on bail in the event the Investigating Agency fails to conclude the investigation and file the charge-sheet within the time stipulated by the statute. The law in this regard is no more res integra. The law laid down by the Hon'ble Supreme Court in the case of *Sanjay Dutt vs. State Through C.B.I. Bombay*, reported in 1994 (5) SCC 410, *Hitendra Vishnu Thakur vs. State of Maharashtra*, reported in 1996 SCC(4) 602, *State through CBI vs. Mohd. Ashraft Bhat & anr.*, reported in (1996) 1 SCC 432, in the case of *Dr. Bipin Shantilal Panchal vs. State Of Gujrat*, reported in 1996 SCC(1) 718, in the case of *Mohd. Iqbal Madar Sheikh vs. State of Maharashtra*, reported in (1996) 1 SCC 722. Further the Hon'ble Supreme Court of India while considering the scope and ambit and the rights of the accused u/s.167(2) of Cr.P.C. and while laying down certain seminal principles with regard to

interpretation of Section 167(2) of Cr.P.C. in the case of ***Rakesh Kumar Paul vs. State of Assam***, reported in ***(2017) 15 SCC 67***, Hon'ble Supreme Court of India in paragraphs-29 and 41 of the said judgment held as under:

29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the Legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time limits have been laid down by the Legislature. There is a legislative appreciation of the fact that certain offences require more extensive and intensive investigations and, therefore, for those offences punishable with death or with imprisonment for life or a minimum sentence of imprisonment for a term not less than 10 years, a longer period is provided for completing investigations.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

11. In the case of ***S. Kasi vs. State through the Inspector of Police, Samaynallur Police Station, Madurai District (Criminal***

Appeal No.452 of 2020), the Hon'ble Supreme Court of India was again considering the scope, ambit and right of the accused under Section 167(2) of Cr.P.C. After carefully analyzing the facts of that case and after taking note of several Supreme Court judgments, finally the Apex Court observed that the indefeasible right to default bail under Section 167(2) Cr.P.C. 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 and further the said right to bail cannot be suspended even during the situation as is prevailing currently. Further it was emphasized by Hon'ble Apex Court that the right of the accused to be set at liberty takes the precedent over the right of the State to conduct the investigation and submit the charge-sheet.

12. Learned counsel for the Petitioners has relied upon the following judgment in respect of his contention as has been raised in the precise case:

- (i) Suo Motu *W.P.(C) No.3 of 2020*, decided on 23.03.2020;
- (ii) In the case of *S. Kasi vs. State through the Inspector of Police, Samaynallur P.S., Madurai District*, decided on 19.06.2020;
- (iii) In the case of *Lambodar Bag vs. State of*

Odisha, BLAPL No.7337 of 2017, decided on 16.05.2018;

- (iv) Judgment in the case of ***Iswar Tiwari vs. State of Orissa*** in ***BLAPL No.10152 of 2019***;
- (v) Judgment in the case of ***Naresh Digal vs. State of Odisha*** in ***BLAPL No.4652 of 2020***, decided on 27.01.2021.

13. Upon careful scrutiny of the judgment relied only the learned counsel for the Petitioners in support of his contention, it is seen that the factual background of each case are clearly distinguishable from the facts of the present case. In consider view of this Court, the aforesaid judgments are not applicable to the factual scenario of the present case. Since the fact of the petitioner under the proviso of Section 167(2) of Cr.P.C. depends on the technical and factual aspect of the matter. Therefore, each case has to be decided on its own factual background while considering the application under Section 167(2) of Cr.P.C.

14. Coming back to the facts of the instance case, it is seen that the FIR was lodged on 14.09.2020. The accused persons were remanded to custody on 15.09.2020. In view of Section 36-A(4) of N.D.P.S. Act and Section 167(2) of the Cr.P.C., the charge-sheet should have been filed within 180 days, i.e. on or before 13.03.2021. Further on 26.02.2021, the prosecution filed an

application seeking extension of time, the said application was taken up for hearing on 2.3.2021. On perusal of the impugned order dated 31.08.2021, which has been assailed in the present revision petition, it is seen that the learned Sessions Judge-cum-Special Judge, Malkangiri has observed that the application for extension of time under Section 36-A(4) of the N.D.P.S. Act was considered after hearing from both the sides. Thereafter, the Special Judge has extended the time by a further period of 60 days. Accordingly, the charge-sheet should have been filed on or before 12.05.2021. However, the I.O. has filed the charge-sheet on 27.04.2021. So far the present Petitioners are concerned, they have filed an application u/s.167(2) of Cr.P.C. on 31.08.2021 along with petition to advance the date of hearing. This clearly shows that the application under Section 167(2) has been filed after the charge-sheet was submitted on 27.04.2021. Further the case record reveals that the application for extension of time had been allowed by the learned Special Judge by order dated 2.3.2021 after hearing both the sides. Moreover, the Petitioners have not challenged the order dated 2.3.2021 in the present writ application as it appears from the bare reading of the prayer portion of the revision petition.

15. No doubt, the right of an accused under the provision of Section 167(2) of Cr.P.C. to be enlarged on default bail is an indefeasible right, which flows from the provision contained under Section 21 of the Constitution of India. Such right is subject to law and procedure as laid down by the Legislature. In the instant case, the accused persons having not challenged the order dated 02.03.2021 and have filed an application under Section 167(2) of Cr.P.C. much after filing of the charge-sheet. This Court is of the considered view that the learned Special Judge, Malkangiri has not committed any illegality in rejecting the application of the accused persons-Petitioners under Section 167(2) of Cr.P.C.. Therefore, the order passed by the learned Sessions Judge-cum-Special Judge, Malkangiri assailed in the present revision petition seeks no interference by this Court. Accordingly, the present revision petition being devoid of merit, the same is dismissed. There shall be no order as to cost.

**(A.K. Mohapatra)
Judge**