

ORISSA HIGH COURT: CUTTACK

BLAPL No. 10951 of 2021
I.A. No. 277 of 2022

(An application under Section 167(2) of Cr.P.C.)

AFR Sankar Purty & Others Petitioners

-Versus-

State of Odisha Opp. Party

Advocate(s) appeared in this case :-

For Petitioners : M/s. Rajalaxmi Biswal &
B.S. Das, Advocates

For Opp. Party : Mr. P. Tripathy,
Addl. Stading Counsel

CORAM
JUSTICE SASHIKANTA MISHRA

ORDER
20th May, 2022

SASHIKANTA MISHRA, J. The I.A. has been filed on the ground that during pendency of the bail application, the right to be released on default bail has accrued to the accused petitioners.

2. Heard Mr. Bhabani Sankar Das, learned counsel for the petitioners and Mr. P. Tripathy, learned Addl. Standing Counsel for the State.

3. The petitioners are in custody since 02.08.2021 in connection with Khamar P.S. Case No. 143 of 2021 corresponding to G.R. Case No.317 of 2021 pending in the Court of learned S.D.J.M., Pallahara for the alleged commission of offence under Sections 302/201/120-B/34 of IPC.

4. The prosecution allegation is that one Srimati Gagarai lodged FIR on 31.07.2021 that on the previous day at about 5 p.m. her husband had been to the forest to collect some branches of trees for feeding of goats along with his son Purna Chandra Gagarai. Suddenly her son came back and informed that while his father had gone to the house of Budhram Chhatar, he was assaulted by some persons. On getting such information, the informant sent her daughters, Sumitra, Sukanti and her son Purna Chandra to bring their father back but they returned and informed that Rasi Hembran and Titu Dang were dragging

the body of the deceased by means of a rope tied around his neck and that all the accused persons were in a drunken condition. Accordingly, the informant suspected that the accused persons had killed her husband and thrown his dead body into the river. Basing on this report, Khamar Police registered P.S. Case No. 143 of 2021 which corresponds to G.R. Case No.317 of 2021 of the Court of learned S.D.J.M., Pallahara for the alleged commission of offence under Sections 302/201/120-B/34 of IPC followed by investigation. In the meantime, the petitioners were arrested on 02.08.2021 and forwarded to the Court of learned S.D.J.M., Pallahara and on the same day they were remanded to judicial custody.

5. While the regular bail application was filed before this Court on the ground that the case had been falsely foisted against the petitioners, yet as already stated, during pendency of the bail application, the petitioners claim to have acquired an indefeasible right to be released on bail as per the provision of Section 167(2) of Cr.P.C as the investigating agency had not submitted

charge sheet within the stipulated period of 120 days.

6. It is submitted by Mr. Das that the petitioners being remanded to custody for the first time on 02.08.2021, the stipulated period of 120 days expired on 30th November, 2021, but charge sheet was not submitted within the aforesaid period and therefore, the indefeasible right of the accused petitioners to be released on default bail accrued on 1st December, 2021. It is further submitted that though the accused partitioners were produced before the Court on 01.12.2021, yet their right to be released on default bail was not informed to them. The petitioners being unaware of the legal provisions also could not apply for default bail. However, upon receiving proper legal advice they filed an application seeking release on default bail on 14.12.2021. The bail application was considered on the same day and was allowed by directing release of the petitioners on certain terms and conditions. On the next day at 10.30 a.m. the petitioners submitted the bail bonds as per order passed by learned Court below. On the same day charge sheet was also

submitted. Learned Court below considered the prayer of the learned public prosecutor for recalling the order of bail and accordingly by order dated 15.12.2021, held that as the petitioners had not complied with the conditions of the order dated 14.12.2021 by submitting bail bonds prior to submission of the charge sheet, their right to be released on default bail stood automatically extinguished. According to Mr. Das, the order passed by learned Court below on 15.12.2021 in recalling the order of bail is entirely contrary to law as the petitioners had submitted the bail bonds within a reasonable period of time and therefore, this could not be treated as a case of abandonment of their rights so as to recall the order of bail.

7. Per contra, Mr. Priyabrata Tripathy would contend that the indefeasible right of the petitioners continues so long as charge has not been filed but once the charge sheet has been filed and the petitioners have not complied with the conditions of the bail, the right stands automatically forfeited. To the above extent

therefore, the order dated 15.12.2021 cannot be said to be in any manner contrary to law.

8. A perusal of the case record reveals that the petitioners were remanded to judicial custody on 02.08.2021. Excluding the said date, 120 days expired on 30th November, 2021. Admittedly as on the said date, charge sheet had not been submitted and therefore, the indefeasible right to be released on default bail accrued to the petitioners on the 121st day, i.e., on 01.12.2021. It is well settled that the accused persons are not only to be produced before the Court upon expiry of the stipulated period but are also to be informed of their right of being released on bail for the default of the prosecution in submitting charge sheet within the stipulated period. It appears that the petitioners were in fact produced before the Court on 01.12.2021. However, the order sheet does not disclose if they were ignored of their right to be released on default bail. Be that as it may, it further appears that on 14.12.2021, the petitioners filed an application seeking default bail. Learned Court below

considered the application with reference to the facts of the case and relying upon the settled position of law, held that an indefeasible right had accrued in their favour and therefore, the Court lacked jurisdiction to further authorize the detention of the accused persons in the case. Accordingly, learned Court below directed release of the accused persons on bail inter alia on the condition of furnishing bail bonds of Rs.30,000/- along with two solvent sureties each with one of the them being blood relation of the accused and Rs.1,000/- as cash security each. On the next day, i.e., on 15.12.2021 charge sheet was submitted and on the same day, the Asst. Public Prosecutor filed a petition with prayer to cancel the bail granted to the accused persons and not to accept the bail bonds who are still in custody. Learned Court below relying upon the decision of the Supreme Court in the case ***Uday Mohanlal Acharya vs. State of Maharashtra***, reported in AIR 2001 SC 1910: (2001) 5 SCC 453 held that if the accused is unable to furnish bail the continued custody of the accused beyond the specified

period will not be unauthorized and if during that period charge sheet is filed then the so-called indefeasible right of the accused would stand extinguished. Basing on such position of law it was held that though bail was granted to the accused persons on 14.12.2021 but they had not furnished the bail bonds till the submission of charge sheet on 15.12.2021 and since the accused persons were still in judicial custody, the petition filed by the prosecution was allowed and the bail granted to the accused persons was cancelled.

9. In the above factual scenario, this Court is required to consider whether learned Court below has acted in consonance with the statutory provisions as also the settled position of law in this regard.

10. Admittedly, charge sheet was not submitted within the stipulated period of 120 days. On the 121st day, the indefeasible right of being released on bail for the default of the prosecution accrued in favour of the accused persons. Law requires that the accused persons must be produced before the Court upon expiry of the stipulated

period as also of being informed of their right to be released on default bail. As already stated, though the accused persons were produced on 01.12.2021, i.e., on the 121st day, yet no such exercise of informing the accused persons of their right to be released on default of bail appears to have been undertaken. Therefore, the detention of the petitioners beyond 30th November, 2021 becomes entirely unauthorized and illegal. Therefore, notwithstanding the fact that the petitioners had not applied for default bail on 01.12.2021 yet as per the settled position of law, their detention beyond the stipulated period becomes unauthorized particularly, when they were not informed of their right of being released on default bail. Reference in this regard may be had to the decision of the Supreme Court in **Rakesh Kumar Paul vs. State of Assam**, reported in (2017) 68 OCR (SC) 1 wherein it was held as follows;

“44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to “default bail”, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for

personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212].”

It was also held that in matters of personal liberty the Court cannot and should be too technical and must lean in favour of personal liberty and that whether the accused makes a written application for ‘default bail’ or an oral application for ‘default bail’ is of no consequence. The concerned Court must deal with such an application.

11. Even otherwise, this is not a case where bail was offered to the accused petitioners and they refused to furnish bail. It appears that on 14.12.2021 an application seeking default bail was filed as even on that date charge sheet had not been submitted. Learned Court below very rightly allowed the application for bail on certain terms and conditions as indicated hereinbefore. On the next day, a preliminary charge sheet was filed. It is claimed that the petitioners also furnished the bail bonds as per conditions imposed by the trial Court. A petition was filed on behalf

of the prosecution with prayer to cancel the bail granted to the petitioners and not to accept the bail bonds. This by itself proves that the bail bonds were indeed filed on 15.12.2021. Now the question is, when both bail bonds and charge sheet have been filed on the same day whether the infeasible right of the petitioners to be released on default bail granted but not actually availed of, could be said to have survived. As already stated, learned Court below while granting bail had imposed certain conditions. Obviously, such conditions are to be complied with within a reasonable period of time particularly when learned Court below had not specifically indicated as to the time within which the bail bond is to be filed. It would be too much to expect the accused persons to be ready with bail bonds and the cash security, not to speak of arranging sureties with one of them being their blood relation, in anticipation of the order of default bail and to furnish the same immediately upon passing of the order. Therefore, the accused must be granted a reasonable time to comply with the order as otherwise it would be sheer travesty of

the right to liberty. Now charge sheet was admittedly submitted beyond the stipulated period. So as between the prosecution's right to submit charge sheet and the right of the accused to default bail, which incidentally was acknowledged by the Court below, the latter shall obviously take precedence. What the Court held in its order dated 14.12.2021 while granting default bail was nullified by its own order dated 15.12.2021 by holding that the accused had failed to furnish bail. Though it is claimed that the bail bonds were submitted in the forenoon at 10.30 a.m. yet it is not necessary to go into such intricate details as it would suffice to note that the bail bonds were so submitted within 24 hours of passing of the order and therefore, must be held to have been submitted within reasonable time, particularly when no stipulation of time was made in the order dated 14.12.2021. Therefore, this Court is of the considered view that learned Court below has taken a hyper technical approach in the matter by accepting the prayer of the prosecution, which itself was in default by not submitting

charge sheet within the stipulated period, to allow the prayer of the prosecution to cancel the bail. While it is a fact that charge sheet can be submitted beyond the stipulated period yet it is no longer open to the prosecution to pray for detention of the petitioners beyond the stipulated period indicated in Section 167(2) of Cr.P.C. Prosecution can only pray for continued remand of the accused within the period stipulated within Section 167(2) of Cr.P.C. but thereafter can only oppose the application, if any filed by the accused on merits.

12. While this Court observes that learned Court below committed manifest error and gross illegality in cancelling the bail granted by it, it also observes that the very detention beyond 120 days i.e., from 1st December, 2021 till the prayer for default bail was made, was also unauthorized and illegal.

13. In the result, the I.A. as well as BLAPL are allowed. Let the petitioners be released on bail on such terms and conditions as the court in seisin over the matter may deem fit and proper to impose including the condition

that they shall personally appear before the said Court on each date of posting of the case, failing which necessary order shall be passed to take them to custody again.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 20th May, 2022/ A.K. Rana