

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 1432 OF 2021

Alla Kouadio Boris .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr. Ayaz Khan for the applicant.
Mr. S.V. Gavand, APP for the State.
PSI Shankar Pawale from ANC, Bandra Unit.

CORAM: BHARATI DANGRE, J.
DATED : 18th OCTOBER, 2022

P.C:-

1 The present application is filed under Section 167(2) of Cr.P.C and the applicant seek his release on default bail with a submission being advanced that no charge-sheet was filed within the prescribed period of 180 days, and therefore, on an application being moved, after expiry of the said period, an indefeasible right has accrued in the applicant, for being released on bail.

2 Heard Advocate Ayaz Khan for the applicant and learned APP Mr. Gavand for the State.

3 Before I appreciate the contention of Mr.Khan, it is necessary to refer to the sequence of events, leading to the filing of the present application.

While on patrolling duty at Saki Naka, the applicant came to be apprehended by Anti Narcotics Cell, Bandra unit, on 25/11/2019, on an allegation that he was found in possession of 220 gms of cocaine. On 26/11/2019, he was produced before the Magistrate and remand was taken u/s.167 of Cr.P.C. The period of 180 days for completion of investigation, as contemplated by Section 36A(4) of NDPS Act, expired on 23/5/2020. The applicant filed Bail Application u/s.167 Cr.P.C on 5/6/2020, claiming that since the investigation was not completed, despite expiry of 180 days and the charge-sheet was not filed, he is entitled to be released on bail by taking recourse of Section 167(2) of Cr.P.C.

4 The learned counsel for the applicant and the learned APP are at loggerhead about the further events and whether they can be construed, to convey that charge-sheet was filed within 180 days.

As per the learned APP, before expiry of period of 180 days, i.e. the event which would occur on 23/5/2020, charge-sheet was filed by the Investigating Officer in the Court of Addl. Sessions Judge on 15/5/2020 and the order sheet of the said date record as under :-

“CORAM : Her Honour Additional Sessions Judge Smt.Gharat (LockDown Court No.2, Seating in C.R.No.39)

SPP Smt.Geeta Nayyar for State present.

HC 32541 attached to ANC Bandra police station.

Chargesheet is filed on 15/5/2020.

Taken on record with direction to police station to submit the same after reopening of the Court”.

In contrast, Mr.Khan has invited my attention to the order sheet dated 23/7/2020 which record as under :-

“NOB, TOB. Matter pertains to C.R.No. 44, APP Mr.S.S.Pajwani for State present. Charge-sheet received (NDPS Case 577/2020). In view of charge-sheet filed R.A. No.1319/2019 are disposed off”.

5 The question that arises for consideration is whether the charge-sheet was filed on 15/5/2020, or it was filed on 23/7/2020.

In support of the action on part of the prosecution, the learned APP Mr.Gavand would submit that since it was the period when the Pandemic had grappled the whole nation, on completion of investigation, the Investigating Agency submitted the charge-sheet before the Competent Court on 172nd day i.e. 15/5/2020, but on account of lock-down imposed, coupled with the restriction in operation, throughout the nation, the learned Judge acknowledged the filing of charge-sheet, but since the papers could not be physically touched, by accepting the same on record, direction was given to submit it to the police after re-

opening of the Court and accordingly, the charge-sheet was once again submitted in its physical form on 17/7/2020. The submission of Mr.Gavand is, the Investigating Agency acted within the prescribed parameters by completing the investigation before 180 days and submitting its charge-sheet on 172nd day, but since the Court ordered it to take it back and re-submit it, this was done on 17/7/2020.

6 The affidavit filed by Shankar Shivaji Pawale, Police Sub Inspector, ANC dated 24/8/2021 contain a specific averment to the following effect :-

“4 I say that since the Registry of the learned Sessions Court was closed, we approached to the Lockdown Court No.2, seating in Court Room No.39 for filing the charge-sheet. Due to lockdown on account of Covid-19 Pandemic situation, hence the lockdown Court No.2, seating in CR No.39 (Coram: Her Honour Additional Sessions Judge, Smt.S.J. Gharat), was pleased to pass order dated 15.05.2020, whereby the learned Special Court accepted the charge-sheet with direction to Investigating Agency to submit the same after re-opening of the Court. Hereto annexed and marked as Exhibit-A is the copy of the Order dated 15.05.2020 passed by Special Court.

5. I say and submit that these all situations were arise due to COVID-19 pandemic and severe lockdown in the Country and during this situation the Bench were specially formed for accepting all the matters and charge-sheets.

6. I say that thereafter re-opening of the learned Court, the charge-sheet was submitted on 17.07.2020, I say that the charge-sheet is filed within limitation on 15/05/2020 as per the order passed by Lockdown Court

No.2 seating in C.R.No.39 (Coram Her Honour Additional Sessions Judge, Smt.S.J. Gharat), and resubmitted on 17.07.2020 as per the directions of the Special Court.”

7 As against this contention, on behalf of the State, Mr.Ayaz Khan would deny the assertion that the charge-sheet was not accepted by the Court, and he would argue that it was only presented before the Court on 23/7/2020, when the learned Judge acknowledged receipt of the charge-sheet and allotted a number (NDPS No.577/2020), and on that day itself, disposed off the Remand Application No. 1319/2019. Mr.Khan would submit that if the charge-sheet was accepted, as contended by the learned APP, on 15/5/2020, then there was no propriety in extending the remand and the learned counsel would lay emphasis on the provision contained used in clause (a) of sub-section (2) of Section 167 of Cr.P.C, and would submit where the Magistrate is permitted to authorize the detention of the accused persons, otherwise than in the custody of the police beyond period of 15 days, if he is satisfied that the grounds exists for doing so, but he shall not authorize detention of accused in custody for a total period exceeding 90 days, where the investigation relates to an offence punishable with death or Imprisonment for life or imprisonment for a term not less than 10 years; and 60 days where the investigation relates to any other offence, and on the expiry of the said period of 90 days or 60

days, as the case may be, the accused is entitled to be released on bail.

Mr.Khan would also submit that on the very same day, i.e. 15.5.2020, the concerned Court had accepted the charge-sheet in some other case and therefore, the order dated 15/5/2020 do not lead to conclusion that the charge-sheet was accepted on that day.

Mr.Khan, has placed on record the procedure which is to be followed, when the charge-sheet is received, it being checked and on finding it to be in conformity with the procedural requirement, the Assistant Registrar of City Civil and Sessions Court, Gr.Mumbai has endorsed as under :-

“Charge-sheet received on 18/7/2020 at 1.20 p.m
with the endorsement of the SPP Geeta Nair
dated 17/7/2020”

It is on this date, the Special case was numbered and from the proforma which is placed on record, it is sought to be argued that the Case was assigned to Court No.44 by the Principal Judge on 20/7/2020.

In the wake of the aforesaid endorsement, the argument advanced is, the charge-sheet came to be filed only on the given date and not before that.

8 The law on the point as to the right of an accused who is in custody, pending investigation, and where the

investigation is not completed within the period prescribed u/s.167(2) of the Code, is crystallized through various authoritative pronouncements of the highest court of the country, including (i) *Hitendra Vishnu Thakur Vs. State of Maharashtra, 1994(4) SCC 602*, (ii) *Sanjay Dutt Vs. State of Maharashtra through CBI, 1994(5)SCC 410* and (iii) *Uday Mohanlal Acharya Vs. State of Maharashtra, 2001(5) SCC 453*.

9 The position of law which emerges through various authoritative pronouncements prescribe, that on expiry of period of ninety days or sixty days, as may be contemplated in subsection (2) of Section 167 Cr.P.C, an indefeasible right for being released on bail, accrue on account of the default by the Investigating Agency in completion of the investigation, within the period prescribed, and the accused is entitled to be released on bail, if he is prepared to, and furnish the bail as directed by the Magistrate. It has also been held that when an application for bail is filed by an accused, for enforcing his indefeasible right, for the fault of the Investigating Agency, to complete the investigation, the concerned Court must dispose off his application forthwith and the action is expected to be full of promptitude, so that the prosecution cannot frustrate the object of the legislative mandate, of an accused being released as the Investigating Agency has failed to complete the investigation and for their default in completing the investigation, the applicant need not be further incarcerated.

10 Keeping in mind the spirit of the provision and focussing on the historical background which led to the enactment of Section 167 of the Code, one thing has to be prominently recorded, i.e. the letter and spirit behind the enactment of Section 167 in the Code and its modification from time to time. The entire scheme in the Code providing the procedural right from arrest of the accused is guided and on an arrest, it contemplates that if the investigation cannot be completed within the period of 24 hours as fixed by Section 57, the Officer concerned ought to transmit the entries in the diary relating to the case and at the same time, forward the accused to the Magistrate. The Magistrate will then determine whether the accused is to be remanded to custody or not. Sub-section (2) of Section 167 prescribes limitations on the exercise of power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for the period exceeding 90 or 60 days, as the case may be.

 Except the special provision, permitting extension of this period, the period of completion of investigation has been held to be sacrosanct and it is the maximum period during which an accused can be detained in custody, either pursuant to an single order or more than one such orders, but on the whole, the police custody cannot be extended period 15 days and remand to facilitate the investigation, can only be accomplished detaining the accused in judicial custody. When he is in judicial

custody, the Magistrate shall act as provided u/s.167(2) and the proviso and can remand him to such custody, as mentioned therein, during the first period of fifteen days, and thereafter in accordance with the proviso. The benefit accrues to the accused if the investigation cannot be completed within the period prescribed i.e. of 90 days or 60 days as the case may be, and if the Investigating Agency fail to file the charge-sheet, an indefeasible right accrue in favour of the accused.

11 The facts in the present case, would clearly reveal that on 15/5/2020, on completion of investigation, the charge-sheet came to be filed in presence of the Special Public Prosecutor for the State by the personnel attached to ANC Bandra Police Station. The same is taken on record by the learned Addl.Sessions Judge with a direction to the police to submit the same after re-opening of the Court. No lacunae is noted in the charge-sheet, nor it was found to be an incompetent one and it was therefore, taken on record acknowledging the fact that the police machinery has completed it's investigation. However, since the whole nation was grappling with an unforeseen contingency and the judiciary was not an exception, unable to fathom the serious repercussions of the lock-down imposed nation wide, when the papers were not allowed to be touched under the fear of they carrying the virus, the learned Judge took it on record, by recording that the charge-sheet is filed and issued directions to the Court to submit the same after re-opening. It is

not in dispute that, once again the charge-sheet was tendered on 18/7/2020 by the Special P.P and the checklist was filled by the Registrar (Sessions), upon physically receiving the charge-sheet. Upon these formalities being completed, it was numbered on 20/7/2020 and on 23/7/2020, the Remand Application was disposed off. Pertinent to note that between these dates, the accused was physically produced before the learned Judge and considering that the charge-sheet has been filed, Remand Application No.1319/2019 is disposed off.

It is to be borne in mind that the extra-ordinary situation existed in the month of May 2020 and I do not think that a right has accrued in the accused as sought to be argued by Mr.Khan, particularly in the case when the investigation was duly completed in time and the charge-sheet was tendered before the Court. The question one may therefore ask is, did the Investigating Agency commit a default in not completing the investigation within the period stipulated, and the answer which clearly surfaces is, there was no fault of theirs, as despite Pandemic, they have completed the investigation and even approached the Court with the charge-sheet.

12 In the circumstances, I do not think that any indefeasible right has accrued to the applicant for being released on bail. The other argument of Mr.Khan that the Registry was functioning and in certain other cases, the charge-sheet has been accepted, is no ground, worth consideration.

In the wake of the above position emerging,
application is rejected.

(SMT. BHARATI DANGRE, J.)