

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 1318 OF 2022

Abdul Rehman Abdul Latif Shaikh @ .. Applicant
Sonu

Versus

The State of Maharashtra .. Respondent

...

Mr.Gaurav Bhawnani with Shahabuddin Shaikh i/b Khan Abdul Wahab for the applicant.
Mr.S.V.Gavand, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 15th NOVEMBER, 2022

P.C:-

1 Criminal Appeal No.509/2021 came to be converted into Criminal Application seeking relief of bail and this exercise was permitted to be carried out by an order passed by the Division Bench of this Court on 11/4/2022.

The said application primarily seek the following reliefs :-

(a) This Hon'ble Court may graciously be pleased to allow the present application and quash and set aside the impugned order dated 13.01.2021 passed by the Ld.Special Judge under the MCOC Act, Greater Bombay in Bail Application in MCOC No.1212/2020 being

Exhibit H hereto and thereby enlarge the applicant on bail in C.R.No.118 of 2020 of DCB CID Unit-IX corresponding to C.R.No.258/2020 of Juhu Police Station upon such terms and conditions as this Hon'ble Court may deem fit and proper.

(a)(a) This Hon'ble Court may graciously be pleased to quash and set aside order dated 13/11/2020 in MCOC MA No.1018/2020 at Exhibit-G herein upon such terms and conditions as this Hon'ble Court may deem fit.”

2 Heard Advocate Gaurav Bhawnani for the applicant and the learned APP Mr.Gavand for the State.

Before appreciating the arguments on behalf of the applicant, seeking his release on bail, I must cursorily refer to the events in which the present application is filed.

One Khalid Abdul Rehman Shaikh lodged FIR with Juhu police station against unknown persons on 17/8/2020 which was registered as C.R.No. 258/2020. I need not deliberate upon the details any further, as that is not necessary for adjudication of the present application. Suffice it to say that in the said C.R, on 18/8/2020, the applicant came to be arrested and he was produced before the Metropolitan Magistrate's Court, Andheri on 19/8/2020 and remanded to police custody. He remained in the custody of the police upto 30/8/2020 and was thereafter remanded to judicial custody. At present, he is in custody in Taloja Central Prison as under-trial prisoner.

3 On 27/10/2020, the Joint Commissioner of Police (Crimes) granted prior approval for invoking the provisions of MCOC Act as per Section 23(1). Pursuant to this, the proceedings of C.R.No.118/2020 of DCB CID, Unit IX, came to be transferred from the Court of Metropolitan Magistrate to the Court of the Special Judge under MCOCA in Mumbai. The prosecuting agency sought police custody of the applicant before the Special Judge under MCOCA by filing Remand Application (RA) No.815/2020 on 31/10/2020. The applicant was again remanded to police custody and thereafter to judicial custody.

4 On 11/11/2020, the Public Prosecutor filed an application, seeking extension of time to file charge-sheet as period of 90 days as specified u/s.21(2)(b) of the MCOCA, was about to expire on 16/11/2020.

On the said date, the applicant requested the Special Judge to provide legal assistance counsel from Legal Aid, and accordingly, the learned Judge directed the concerned Department to provide a counsel at State's expense and attend legal assistance, and the matter was adjourned to 13/11/2020. The roznama of 11/11/2020 record as under :-

“The chief P.P submitted that he has filed the Misc. Application u/s.21(2)(d) for extension of period of filing of charge-sheet beyond the 90 days.

Accused no.1 – Abdul Rehman @ Sonu Abdul Latif Shaikh submitted that he has objection to file charge-sheet beyond 90 days as there is no reason to extend

the period and hence, prayed to reject the application. Accused no.2 submitted that he has an objection to file charge-sheet. The reason mentioned in the charge-sheet are not proper and hence, prayed to reject the application.

The Ld. Adv.for accused no.3 submitted that matter be adjourned to 13/11/2020 as his senior is out of station.

Accused no.1 and 2 requested for appoint the legal aid counsel for them. Hence, concerned department is directed to provide legal aid advocate to both the accused.

5 When the application was then listed on 13/11/2020 and the extension as prayed, by the prosecution was granted. On being satisfied that reasons exist for granting the extension, particularly, when the offence relate to as organized crime committed by Organized Crime Syndicate and it has high magnitude, which certainly require thorough investigation., extension of 20 days to file the charge-sheet was granted by the Spcial Judge.

6 The applicant is aggrieved by this order, since the order was passed behind his back as Advocate appointed by the Registrar, Sessions Court from Legal Aid Panel did not appear on his behalf on 13/11/2020 and even the appointment was never communicated to the said Advocate and even the applicant was not intimated about such an appointment.

On the ground that period of 90 days expired from the arrest of the applicant on 16/11/2020 and since no charge-sheet has been filed and the time to file charge-sheet has been extended, without hearing the appellant, he moved an application for being released on bail u/s.167 (2) of Cr.P.C.

This application was rejected by the Special Court on 13/1/2021 by recording as under :-

“4. Upon perusal of the application, it would reveal that the applicant has complained that respondent had filed an applicaiton for extension of time to submit the charge-sheet on 11.11.2020. The matter was adjourned 13.11.2020, but since the applicant did not engage an advocate and he was not produced before the Court from custody, fair hearing has nsot been given to him. Thus, it appears that it is the contention of the applicant that the order of extension of time to file charge-sheet was granted without giving him an opportunity to be heard. Therefore, he has claimed bail under section 167(2) of the Cr.P.C.

5. Upon perusal of the aforesaid contention raised by the applicant, it can be said that the applicant wants to raise dispute about the order passed by my learned Predecessor which is not permissible. If, this Court by considering the contention raised by the applicant allows the application indirectly this Court would be deciding the matter as an Appellate Court which would be contrary to law. In this view of the matter, I do not find merit in the application. In view of the fact that time to file charge-sheet was extended and thereafter within the stipulated time charge-sheet has also been submitted, it cannot be said that right is accrued in favour of the applicant for his release on default bail”

7 The present application filed by the applicant, seek quashing and setting aside of the order dated 13/11/2020 passed by the Special Judge and seek his release on default bail.

The submission advanced by the learned counsel for the applicant is that, while granting extension to complete the investigation, beyond the prescribed period of 90 days, on the report of the Public Prosecutor indicating the progress of the investigation, the procedure prescribed has not been followed. It is submitted that the extension of time to file charge-sheet, without hearing the applicant, was bad-in-law and reflected total non application of mind. It is the submission of the learned counsel, that if the extension is held to be not properly granted, then, filing of the charge-sheet on 4/12/2020 is beyond the prescribed period of 90 days and the applicant is entitled for the benefit of the default, in not filing the charge-sheet within the stipulated period and he deserve his release on default bail since he had already moved an application on 23/11/2020, seeking his rrelease on default bail and has availed the right available to him since there was failure to file charge-sheet on 16/11/2020.

The learned counsel would vehemently submit that the applicant was entitled for an hearing before the concerned Court granted an extension and particularly, when he had objected to extend the time to complete the investigation, as a consequence of which he was being deprived of his liberty.

It is further submitted that if the extension of time is held to be bad-in-law and indefeasible right has accrued in favour of the applicant u/s. 167(2) on the 91st day i.e.17/11/2020 and since no charge-sheet was filed till 4/12/2020 and the applicant having preferred an application, he is entitled to be released on default bail.

8 Per contra, the learned APP Mr.Gavand would submit that the applicant had objected to extend the time for filing of charge-sheet, when the application was filed on 11/11/2020 and it is submitted that his objection being noted on 13/11/2020, the Court was perfectly justified in considering the application filed by the prosecutor and that was a matter purely between the Court and the prosecution and the Court did not deem it appropriate to consider the objection of the applicant and thus, granted extension of 20 days. The learned APP would submit that no prejudice is caused to the present applicant on the said count, and atleast none of such prejudice can be inferred.

9 The Assistant Commissioner of Police, DCB CID has also filed his affidavit to justify the involvement of the applicant in the subject crime by submitting that he is a member of the gang headed by accused no.6 and played active role in the Organized Crime Syndicate. It is submitted that there is sufficient evidence to prove continuous unlawful activities of the Organized Crime Syndicate and since the ingredients of the MCOCA were met, the provisions were invoked and sanction was

granted. It is perfunctorily submitted in the affidavit that the provisions of Section 167(2) of Cr.P.C r/w Section 21(2)(b) of MCOCA are duly complied by the prosecution and considering his prima facie involvement, he do not deserve his release on default bail.

10 Before I proceed to deal with the contentious arguments, I must turn my attention to Section 167 of the Cr.P.C.

11 The Code of Criminal Procedure expect that an arrested person who has been detained in custody, shall not kept under detention for any unreasonable time, and the investigation must be completed as far as possible within 24 hours else, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused. The Magistrate would then scrutinize the material placed bfore him carefully and consider whether the arrest is legal and proper and whether the formalities required by law to be followed are to be complied with and then to grant further remand, if the Magistrate is so satisfied. The law enjoins upon the Investigating Agency to carry out the investigation, in case where a person has been arrested and detained, with utmost promptitude and complete the investigation in the prescribed period.

The object behind enactment of Section 167 of Cr.P.C, being not to permit detention of an accused, pending

investigation for unreaosnably long period of time. Parliament, while introducing Section 167 accompanied it with the proviso prescribing the outer limit within which the investigation must be completed. The proviso to sub-section (2) fix the outer limit within which the investigation must be completed and in case, where the same is not, the accused would acquire a right to seek his release on bail and if he is prepared to and does furnish bail, the magistrate shall secure his release, which shall be deemed to be grant of bail under Chapter XXXIII of Cr.P.C.

12 Some special statutes contain provision as they are enacted with an avowed purpose and at times, contain provision to the effect that the provisions of Cr.P.C shall apply to the Special Statute in it's modified form. One such provision is contained in the MCOCA in form of Section 21 and Section 167, is held applicable in relation to the cases involving the offences punishable under the Act, subject to the modification as stipulated in sub-section (2).

“(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that,in sub-section (2),—

(a) the references to “fifteen days”, and “sixty days”, wherever they occur, shall be construed as references to “thirty days” and “ninety days”, respectively ;

(b) after the proviso, the following proviso shall be inserted,namely :—

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days.”

In the wake of the above provision, if the investigation cannot be completed within a period of 90 days, the Special Court is empowered to extend the said period upto 180 days, on the report of the Public Prosecutor, indicating the progress of the investigation and the specific reasons for detention of the accused beyond period of 90 days.

A similar provision was contained in the Terrorist and destructive Activities (Prevention Act 1987) and fell for consideration before the Hon'ble Supreme Court in case of *Hitendra Vishnu Thakur and Ors, vs. State of Maharashtra, (1994) 4 SCC 602*, and the right available to an accused came to be crystallised in the following words :-

"The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass

an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

14 The aforesaid position of law was taken further in case of *Sanjay Dutt Vs. State through CBI, 1994(5) SCC 410*, where the Apex Court deliberated upon the expression "*if not already availed of*" to mean, when the accused filed an application and is prepared to offer bail on being directed. It was held that on expiry of the period specified in Para(a) of the proviso to subsection (2) of Section 167, if the accused filed an application for bail and also offers to furnish bail, on being directed, than it has to be held that he has availed of an 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. Recently, in the case of *M. Ravindran vs The Intelligence Officer, 2021(2) SCC 485*, the position of law was reiterated in the wake of the object embodied in Section 167 for balancing the need to provide sufficient time for completion of the investigation, with the need to protect civil liberties of the accused, which has been accorded paramount importance in the Constitution of the country.

15 The question whether the accused has any say in the matter of granting extension on the application filed by the Public Prosecutor, when the investigation cannot be completed, came up

for consideration in case of Hitendra V. Thakur (supra) and the Hon'ble Apex court held as under :-

“23 We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it on an investigating officer to make an application for seeking extension from the Court. This provision is in tune with the legislative intend to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during necessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused”

16 There is no doubt about the proposition that when the application is made by the Public Prosecutor, he is forwarding the request of the Investigating Officer, but he must disclose that he has also applied his mind himself to the said report and is satisfied about the progress of the investigatin and consider it a fit case for grant of extension. It has been consistently held by the higher Courts that the report of the P.P is not merely a formality

but a very vital report because the consequence of its acceptance affects the liberty of an accused, as it must therefore, strictly comply with the requirements contemplated. The contents of the report as submitted by the P.P will ultimately assist the designated Court to independently decide whether or not the extension is to be granted. The concerned Court has to strike a balance between the two interest of the two parties, one being, the interest of the prosecution to complete the investigation and on the other hand, the interest of the accused to secure his liberty if prosecution is unable to complete the investigation in the period prescribed, so that no prejudice is caused to him.

No extension can be granted beyond the prescribed period if the Court comes to a conclusion that the request for extension of time is not justiciable and the accused cannot be further detained.

17 One another question further arose out of the said situation about whether while granting extension to the prosecution, the accused must be put to notice and permitted to have his say.

This issue came up for consideration in case of Sanjay Dutt (supra) where the argument advanced was that presence of the accused before the Special Court is sufficient compliance when the application of the prosecution is to be heard, and it was held that the requirement of a notice to the accused before

granting extension for completing the investigation is not a written notice, but production of the accused at the time in the Court, informing him about the extension sought for, is sufficient for the purpose.

This issue was further taken up recently by the Hon'ble Apex court in case of *Jigar @ Jimmy Pravinchandra Adatiya Vs. State of Gujarat 2022 SC Online SC 1290*, and the counsel for the applicant is perfectly justified in relying upon the observations of the law report to the following effect :-

35. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to sub-section (2) of Section 167 of Cr.P.C. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the Investigating Agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by sub-section (2) of Section 20 of the 2015 Act to sub-section (2) of Section 167 of Cr.P.C. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

36. The logical and legal consequence of the grant of extension of time is the deprivation of the

indefeasible right available to the accused to claim a default bail. If we accept the argument that the failure of the prosecution to produce *Crl.A.@SLP(Crl.)No.7696 of 2021* etc. the accused before the Court and to inform him that the application of extension is being considered by the Court is a mere procedural irregularity, it will negate the proviso added by sub-section (2) of Section 20 of the 2015 Act and that may amount to violation of rights conferred by Article 21 of the Constitution. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Article 21 of the Constitution. The procedure contemplated by Article 21 of the Constitution which is required to be followed before the liberty of a person is taken away has to be a fair and reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Article 21. The failure to procure the presence of the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Article 21.

18 I do not think that in the wake of the aforesaid authoritative observation to the above effect, submission of *Mr.Gavand* hold any water. On 11/11/2020, when the application was filed by the prosecution, the applicant recorded his protest and sought assistance from the legal Aid and the Special Judge granted such a request, but unfortunately, before the Legal Aid could be arranged for, or rather without ensuring

that the legal aid is made available, he proceeded to decide the application on 13/11/2020, apparently, without the presence of the applicant before him, and merely noting that there is an objection. It is not sufficient compliance as the applicant is deprived of raising an objection to the extension, as it would prejudicially affect his interest. In the wake of the above, since there is a complete failure on the part of the learned Judge to secure the presence of the applicant physically or virtually before him, and there is an abject failure to inform him about such an application, and without hearing him or his counsel, it has definitely violated his rights under Article 21 of the Constitution. The prejudice is inherent and as observed by the Hon'ble Apex Court in case of *Jigar* (supra), need not be established by the accused.

As a consequence of the above, the impugned order dated 13/11/2020 cannot be sustained and is quashed and set aside.

19 As a consequence of setting aside the order, the extension of 20 days granted under the impugned order, is also set aside. The charge-sheet filed before the Court on 4/12/2020 is therefore, held to be filed beyond the prescribed period of 90 days. Since the applicant has moved an application for being released on bail and availed his indefeasible right, he deserve his release on bail u/s.167(2) of Cr.P.C. He deserve the following order :-

ORDER

- (a) The Applicant - Abdul Rehman Abdul Latif Shaikh @ Sonu in connection with C.R.No.118/2020 registered with DCB CID Unit IX, shall be released on bail under Section 167(2) of Cr.P.C, on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.
- (b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer. The Applicant should not tamper with evidence.
- (c) The Applicant shall attend the trial on regular basis.
- (d) On being released on bail, the applicant shall furnish his contact number and residential address to the Investigating Officer and shall keep him updated, if there is any change.

The Application is allowed in the aforestated terms.

(SMT. BHARATI DANGRE, J.)