



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2022

CORAM:

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

CrI.O.P.No.14316 of 2021

R.Henry Paul

... Petitioner/Accused 2

Versus

The State of Tamil Nadu
Rep.by Inspector of Police
W4 All Woman Police Station
Crime No.6 of 2021
Kilpauk, Chennai.

... Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to direct the Sessions Judge, Special Court for Exclusive Trial under POCSO Act, Chennai, to receive the application filed under Section 167(2) of Cr.P.C., in CrI.M.P.SR.No.337 of 2021 and entertain the same and release the petitioner on default bail in Crime No.6 of 2021 on the file of the respondent Police.

For Petitioner : Mr.M.Devaraj

For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor

ORDER

This petition has been filed to direct the Sessions Judge Special Court for Exclusive Trial under POCSO Act, Chennai, to receive the application filed under Section 167(2) of Cr.P.C., in CrI.M.P.SR.No.337 of 2021 and entertain the same and release the petitioner on default bail in Crime No.6 of 2021 on the file of the respondent Police.

2. The petitioner/A2 in Crime No.6 of 2021, which was registered for the offence under Sections 10 r/w 9(1) (m) (n) and Section 17 of POCSO Act and Section 506(ii) of IPC based on the complaint dated 12.04.2021. The petitioner was arrested on 23.04.2021 and remanded to Judicial Custody on 24.04.2021.



3. The gist of the complaint is that the defacto complainant is a singer by profession and the victim girl is her daughter. Due to her professional requirement, she left her daughter under the care and custody of her sister/A4 from the age of 6 years. While the victim girl was under the care and custody of A4, she was subjected to sexual assault and harassment by A1, who is A4's husband, A2/the petitioner herein, a Pastor in a Church, and A3, relative of A1. The victim was subjected to harassment till the age of 15 years. But A4, the maternal aunt of the victim girl, was a silent spectator. During January 2020, the victim girl unable to bear the sexual assault and harassment informed her mother defacto complainant through neighbour's mobile. Immediately, defacto complainant, the mother of the victim girl, took the victim girl with her. During her stay with her mother, the victim was found uneasy. When she was examined by a psychologist, the victim girl narrated the sexual assault committed on her from the age of six. Based on which, the mother of the victim girl lodged a complaint and a case was registered against the petitioner and 3 others. The petitioner was arrested on 23.04.2021 and remanded on 24.04.2021.

4. The contention of the petitioner is that he moved a bail application in CrI.M.P.No.459 of 2021 on merits. The Trial Court by order dated 04.05.2021, dismissed the same for the reason statement of the victim girl not yet recorded and the investigation is at the preliminary stage. Thereafter, the petitioner moved a bail application before this Court in CrI.O.P.No.9099 of 2021. When the case was taken up for hearing, it was reported that the victim girl tested positive for Covid-19 and hence delay in recording 164 Cr.P.C. statement. Later, on 22.06.2021, the bail application was dismissed as withdrawn. Subsequently, the petitioner filed statutory bail application in CrI.M.P.No.562 of 2021 under Section 167(2) of Cr.P.C since charge sheet was not filed even after expiry of 60 days. Alteration report filed on 25.06.2021 which is on 62nd day. However, the same was dismissed for the reason, offence committed involves Section 6 of POCSO as per 164 Cr.P.C., statement received on 18.06.2021. Thereafter, the petitioner filed second statutory bail application in CrI.M.P.SR.No.337 of 2021 on 22.07.2021, the same was not entertained and returned for the reason that only 89 days completed as on 22.07.2021.

5. In this case, alteration report was filed after filing of the first statutory bail application. The Lower Court relied on the judgment of the Bombay High Court in the case of Kapil Wadhawan, wherein it was held that the Court has to apply its mind at every stage from remand till framing of



charges. Further, the power of Court is very wide to determine, as to whether the report to be filed was within 90 days or 60 days and dismissed the same. In this case, the alteration report not filed in time, till expiry of both statutory period. Further, 164 Cr.P.C., statement of the victim girl was recorded on 10.06.2021, received by the trial Court on 18.06.2021, it was contended that 164 statement disclose, commission of offence under Section 6 of POCSO Act. Further, Trial Court gives yet another reason that initial complaint of the defacto complainant, discloses the offences punishable under Section 6 of POCSO Act. Hence, Trial Court dismissed the first statutory bail of the petitioner/accused, even though First Information Report was registered only under Section 10 and 17 of POCSO Act, despite final report was not filed within the statutory period of 60 days.

6. Thereafter, the petitioner once again filed 2nd statutory bail application in CrI.MP.SR.No.337 of 2021 on 22.07.2021 and the same was not entertained and returned for the reason that only 89 days was completed as on 22.07.2021.

7. The learned counsel for the petitioner submitted that the petitioner was arrested on 23.04.2021 and remanded to judicial custody on 24.04.2021, statutory bail application in CrI.MP.SR.No.337 of 2021 was filed on 22.07.2021. Though the application was filed after 90 days of remand, the Trial Court wrongly returned the application as "not maintainable", for the reason only 89 days completed. According to the learned counsel, the date of remand has to be included while considering the statutory bail application. If the date of remand is included, 90 days would be completed on 22.07.2021 and hence, the petition filed under Section 167(2) Cr.P.C is maintainable.

8. In support of the contention of the petitioner, the learned counsel relied upon the judgment of the Hon'ble Apex Court in the case of Chaganti Satyanarayana and others Vs. State of Andhra Pradesh, reported in 1986 SceJ 001, wherein the Apex Court held that the date of remand has to be included. The learned counsel for the petitioner also referred to the judgment of Uday Mohanlal Acharya, on this point.

9. The learned counsel further stated 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." and the same was settled by a Constitution Bench of this Court in Maneka Gandhi Vs. Union of India reported in (1978) 1 SCC 248.



10. The learned counsel also relied upon the case of Rakesh Kumar Paul Vs. State of Assam, reported in (2017) 15 SCC 67, wherein it is held that the Court should not be too technical in matters of personal liberty.

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11. The Division Bench of the State of Maharashtra in the case of Hitendra Vishnu Thakur, held that unless the Court grants extension in time based on the report of the Public Prosecutor, the designated Court under TADA would have no jurisdiction to deny the accused his indefeasible right to default bail if the accused seeks and is prepared to furnish the bail bonds as directed by the Court.

12. The learned counsel further referred to the judgment of the Apex Court in the case of Enforcement Directorate, Government of India, Vs. Kapil Wadhawan & Another etc., wherein it is held that while computing the period of 90 days or 60 days for default bail as contemplated in Section 167(2) (a) (ii) of the Cr.P.C., whether the day of remand is to be included or excluded, the concerned Court may take a decision on this issue depending upon the judgments brought before the notice of the Court. Further, directed the Registry to place all the relevant documents before the Hon'ble Chief Justice for constituting a bench of at least 3 judges to resolve the conflict in law on the issue of grant of default bail.

13. The learned counsel for the petitioner further submitted that Rule 6 (8) in the Criminal Rules of Practice reads as follows:

"6(8) In computing the period of 15 days mentioned in Sub-Section (2) of Section 167 or the first proviso to sub-section (2) of Section 309 of the Code, both the day on which the order of remand is made and the day on which the accused is ordered to be produced before the Court, should be included in Judicial Form Nos.14 and 25, respectively." This Court which has been stated that the date of remand is to be included while calculating the period of remand under Section 167(2) of Cr.P.C.

14. In view of the same, the trial Court in rejecting the statutory bail application on its own interpretation on 28.06.2021, would amount to defeating the rights of the accused. The Apex Court time and again held that the indefeasible rights of the accused should be protected. The enactment of Section 167(2) Cr.P.C., is the safeguard for



default bail contained in the provision thereto is intrinsically linked to Article 21.

15. The learned Additional Public Prosecutor filed his objection that the victim's statement was recorded under Section 164 of Cr.P.C., on 10.06.2021 and the same was received by the trial Court on 18.06.2021. The statutory bail application was filed on 24.06.2021. The perusal of 164 Cr.P.C., statement of the victim discloses the offence is punishable under Section 6 of POCSO Act and hence, non filing of alteration report in time is not a ground to consider the statutory bail.

16. He further submits that the accused was arrested on 23.04.2021 and remanded on 24.04.2021. The petitioner filed first bail application under Section 167(2). The trial Court rightly rejected the same since 164 statement disclosed offence under Section 6 of POCSO Act is attracted. Thereafter, alteration report was filed on 25.06.2021. Subsequently, the petitioner filed second statutory bail application under Section 167(2) of Cr.P.C. on 22.07.2021, contending that even after expiry of 90 days, charge sheet not filed. In this case, charge sheet was filed on 23.07.2021. According to the learned Public Prosecutor, the date of remand to be excluded which is clearly held in the case of M.Ravidran Vs. Intelligence Officer, Directorate of Revenue, Intelligence. But the petitioner wrongly included the date of remand, hence, the trial Court rightly rejected the statutory bail application.

17. Considering the submissions made by the learned counsels appearing on either side and on perusal of the materials, it is seen that the case in Crime No.6 of 2021 registered on 22.04.2021, the petitioner is arrayed as A2 for offence under Sections 10, 9(i), 9(m) 9(n) 17 of POCSO Act and Section 506(ii) of IPC. The petitioner filed a bail application before the Trial Court on merits in CrI.M.P.No.459 of 2021, and it was dismissed on 04.05.2021. Thereafter, the petitioner filed bail application before this Court in CrI.O.P.No.9099 of 2021 and the same was dismissed as withdrawn on 22.06.2021.

18. Thereafter, the petitioner filed first statutory bail application in CrI.M.P.No.562 of 2021. The Trial Court while considering the said application placing reliance on the decision of Bombay High Court in the case of Kapil Wadhawan, wherein it was held that the concerned Court has sufficient power to examine whether the period of filing final report is 90 days or 60 days.



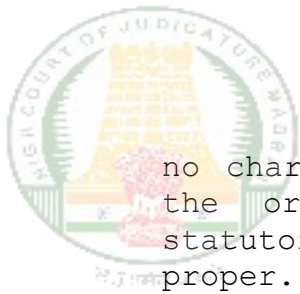
19. In the present case, Trial Court considered the 164 statement of the victim girl, found that Section 6 of POCSO Act gets attracted, hence assumed the statutory period as 90 days. On such assumption, the Trial Court dismissed the statutory bail application, even though FIR was registered only under Sections 10 r/w Section 9 (i) (m) (n) and Section 17 of POCSO Act, and the accused was remanded for the said offences only. The accused was arrested and remanded on 23.04.2021, charge sheet ought to be filed within 60 days that is on or before 22.06.2021, admittedly alteration report filed on 25.06.2021. On the contrary, Lower Court on its own, assumed Section 6 of POCSO Act gets attracted and dismissed the first statutory bail petition on 28.06.2021, which is not proper.

20. Subsequently, the petitioner once again filed 2nd statutory bail application in CrI.MP.SR.No.337 of 2021 on 22.07.2021 and the same was not entertained for the reason that only 89 days completed as on 22.07.2021 and returned the statutory bail application on 26.07.2021. The petitioner resubmitted the petition giving calculation of 90 days;

Date of remand 24.04.2021,

April	-	7 days
May	-	31days
June	-	30 days
July	-	22 days
		90 days

21. The petitioner admittedly was arrested on 23.04.2021 for the offence under Sections 10 r/w Section 9 (i) (m) (n) and Section 17 of POCSO Act and Section 506(ii) of IPC, the petitioner was remanded on 24.04.2021. It is seen that in the remand order, Section 6 of POCSO Act is not found. The alteration report was filed on 25.06.2021. Admittedly, charge sheet not filed till 22.06.2021, hence accused entitled for mandatory bail. The trial Court in its order in CrI.MP.No.562 of 2021 dated 28.06.2021, on its own, gives reason that 164 statement of the victim girl dated 10.06.2021, was received by the trial Court on 18.06.2021 and the statement reveals commission of offence under Section 6 of POCSO Act. In the First Information Report, remand report and in remand order, there is no mention of inclusion of Section 6 of POCSO Act. Admittedly, in this case, the accused was not remanded under Section 6 of POCSO Act. Likewise, the alteration report with Section 6 of POCSO Act filed only on 25.06.2021, the date of considering the first statutory bail application is on 22.06.2021 on that date,



no charge sheet filed. Hence, this Court is of the view that the order passed by the Magistrate dismissing the first statutory bail in CrI.M.P.No.562 of 2021 on 28.06.2021 is not proper.

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22. The prayer now sought for in this petition is to consider and direct the Special Judge to grant statutory bail, in CrI.M.P.SR.No.337 of 2021. The Hon'ble Apex Court in the case of Sanjay Dutt vs. State through C.B.I. cited supra clarified that when the accused promptly exercised his right under Section 167(2) and indicated his willingness to furnish bail, no reason to deny bail. Further held that the accused cannot be detained in custody on account of subterfuge of the prosecution in filing a police report or additional complaint on the same day, for reason the bail application is filed. Thus, when 60 days default bail was filed, no alteration report filed, the petitioner is entitled for statutory bail which is an accrued and indefeasible right. The Hon'ble Apex Court in the case of Bikramjit Singh v. The State of Punjab reported in 2020 10 SCC 616, reiterated and confirmed the right of accused and principles and guidelines to be followed while considering statutory/default bail under Section 167(2) Cr.P.C, by referring to various decisions of Apex Court, and the relevant portions are extracted hereunder:-

"27. The second vexed question which arises on the facts of this case is the question of grant of default bail.

20.with approval to the law laid down in Rajnikant Jivanla Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi reported in 1989 (3) SCC 532, wherein it was held that:

"9. ...13...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."

21. ...No other condition like the gravity of



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the case, seriousness of the offence or character of the offender, etc., can weigh with the Court at that stage to refuse the grant of bail to an accused under Sub-Section (4) of Section 20T TADA on account of the "default" of the prosecution.

29. ... The majority judgment of G.B.Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of: in Sanjay Dutt. The Court then held: (Uday Mohanlal Acharya Case, SCC pp. 469-70 & 472-74, para 13)

13We are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused.....

...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 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.

33. ...This was stated in Rakesh Kumar Paul Versus State of Assam reported in (2017) 15 SCC 67:-

39. ...This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the Court frustrates the indefeasible right. Reference was made to Mohd. Iqbal Madar Sheikh Vs. State of Maharashtra, wherein it was observed that some Courts keep the application for "default bail" pending for some days so that in the meantime a charge sheet is submitted. While



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such a practice both on the part of the prosecution as well as some Courts must be very strongly and vehemently discouraged, we reiterated that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in Court."

23. In the above decisions, the Hon'ble Supreme Court held the fact that the appellant filed yet another application for "default bail" would not mean that this application would wipe out the effect of the earlier application that had been wrongly decided. The dictum therefore is that in the matters of personal liberty of an accused not to be too technical and be in favour of personal liberty. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. Hence, this Court is inclined to grant bail to the petitioner.

24. This Court for the second contention as regards in dealing the second statutory bail, it is not in dispute that the accused was remanded on 24.04.2021. The petitioner made second statutory bail application on 22.07.2021, which was returned stating 89 days only completed and thereafter, it was represented. The bone of contention in this petition is whether the date of remand to be included or excluded. The Criminal Rules of Practice 2019, Rule 6 (8) clarifies the same, the date of remand to be included. Further, the Apex Court in view of conflicting decisions, in the case of Enforcement Directorate, Government of India, Vs. Kapil Wadhawan & Anr. Etc., (cited supra), directed the concerned Court to take decision on the issue whether date of remand to be included or excluded while considering the statutory period under Section 167(2) and entitlement of default bail, on its own by framing questioning of law. The Criminal Rules of Practice framed by this Court in Rule 6(8), mandates including the date of remand. As the facts placed herein clearly show that within 90 days, the charge sheet not filed. Admittedly, the charge sheet was filed on 23.07.2021. Therefore, the petitioner is entitled for statutory bail and the same is granted.



25. The petitioner is ordered to be released on bail on executing his own bond for a sum of Rs.10,000/- (Rupees Ten thousand only), before the Superintendent of the Central Prison, Puzhal. Thereafter on his release, the petitioner shall execute two sureties for a sum of Rs.10,000/- (Rupees Ten Thousand only) each, before the learned Special Court for Exclusive Trial under POCSO Act at Chennai, within 15 days from the date of lifting of the lock down and the commencement of the Court's normal functioning, failing which the bail granted by this Court shall stand dismissed automatically.

(a) the petitioner to appear before the trial Court on all hearing dates.

(b) the sureties shall affix their photographs and left thumb impression in the surety bond and the Magistrate may obtain a copy of their Aadhar card or Bank pass Book to ensure their identity;

(c) the petitioner shall not tamper with evidence or witness either during investigation or trial;

(d) the petitioner shall not abscond either during investigation or trial;

(e) on breach of any of the aforesaid conditions, the learned Magistrate/ Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in P.K.Shaji Vs. State of Kerala [(2005) AIR SCW 5560]; and;

(f) if the accused thereafter absconds, a fresh FIR can be registered under Section 229-A IPC.

25. With the above directions, this Criminal Original Petition is allowed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

dna

To

1. The Sessions Judge Special Court for Exclusive Trial under POCSO Act, Chennai.



2.The Inspector of Police
W4 All Woman Police Station
Kilpauk, Chennai.

3.The Public Prosecutor
High Court, Madras.

Copy To

The Superintendent,
Central Prison, Puzhal.

+2cc to Mr.M.Devaraj, Advocate SR.No.5471

Crl.O.P.No.14316 of 2021

NMI(CO)
GN(15/02/2022)