



WEB COPY



Crl.A.Nos.769 and 828 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2023

CORAM

**THE HONOURABLE MR. JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR. JUSTICE SUNDER MOHAN**

Criminal Appeal Nos.769 and 828 of 2022

1.Sathick Batsha (A1)
2.Mohammed Ashik (A2)
3.Mohammed Irfan (A3)
4.Jagabar Ali (A4)
5.Rahamath (A5) ...Appellants/Accused 1-5

Vs.

Union of India rep. by
The Deputy Superintendent of Police,
National Investigation Agency,
Chennai.
(R.C.No.2/2022/NIA/DLI)

...Respondent/Complainant

Prayer in Crl.A.No.769 of 2022: Criminal Appeal filed u/s.21 of National Investigation Agency Act, 2008, to call for the records in Crl.M.P.No.1341 of 2022 order dated 19.05.2022 on the file of the learned Principal District and Sessions Judge, Nagapattinam in Cr.No.165 of 2022 on the file of the 1st respondent [now the records are available before the Special Court for NIA cases in Cr.No.R.C.No.20/2022/NIA/DLI) and set aside the same and grant bail to the appellants.

Prayer in Crl.A.No.828 of 2022: Criminal Appeal filed u/s.21 of National Investigation Agency Act, 2008, to call for the records in Crl.M.P.No.383 of 2022 order dated 12.07.2022 in RC-20/2022/NIA/DLI on the Special Court



Crl.A.Nos.769 and 828 of 2022

under the NIA Act 2008, Chennai at Poonamallee and set aside the same and grant bail to the appellants.

For Appellants : Mr.M.Radhakrishnan
in both Appeals
For Respondent : Mr.R.Karthikeyan
in both Appeals Special Public Prosecutor (NIA Cases)

COMMON JUDGMENT

(Order of the Court was delivered by **SUNDER MOHAN, J.**)

The instant appeals have been filed by the accused 1 to 5 facing trial in RC-20/2022/NIA/DLI before the Special Court under the NIA Act 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee.

2. The brief facts leading to the filing of the above appeals are as follows:

(i) A case was registered on 21.02.2022 in Cr.No.165 of 2022 on the file of the Mayiladuthurai Police Station, for offences under Sections 148, 506(ii) of IPC r/w 28 of Arms Act, 1959 against the appellants/accused, alleging that when the appellants who were travelling in a car, were intercepted during a routine vehicle check up, the 1st appellant got down from the vehicle and pointed a pistol to the police party and threatened them.



Crl.A.Nos.769 and 828 of 2022

The appellants were arrested immediately.

WEB COPY

(ii) Thereafter, during investigation, the offences in the said crime number were altered to Sections 148, 506(ii) and 307 IPC r/w 28 of Arms Act, 1959. On 30.04.2022, the respondent herein re-registered the FIR in Cr.No.RC.No.20/2022/NIA/DLI for offences under Sections 18, 39 and 40 of Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'UA(P) Act, 1967'), Sections 148, 506(ii) IPC and Sections 13, 38 and 39 of UA(P) Act, 1967 and Section 28 of the Arms Act, 1959 against the appellants herein.

(iii) While so, the respondent filed the petition in Crl.MP.No.1341 of 2022 under Section 43(D)(2)(b) of UA(P) Act, before the learned Principal District and Sessions Judge, Nagapattinam, to extend the remand period of the appellants beyond 90 days and up to 180 days, since they could not complete the investigation within a period of 90 days. Notice was ordered to the accused. All the accused, who were in judicial custody, received the



Crl.A.Nos.769 and 828 of 2022

notice on 17.05.2022.

WEB COPY

(iv) On 19.05.2022, the learned Principal District and Sessions Judge, Nagapattinam, passed an order extending the period of investigation and the remand period from 90 days to 180 days.

(v) The appellants filed Crl.M.P.No.383 of 2022 before the learned Judge, Special Court under the NIA Act 2008, (Sessions Court for Exclusive Trial of Bomb Blast Cases) Chennai at Poonamallee, seeking bail under Section 167(2) Cr.P.C., on the ground that the accused were not produced before the learned Judge, as mandated by the Hon'ble Supreme Court, when the trial Judge passed the order extending the remand from 90 days to 180 days.

(vi) As against the order passed in Crl.M.P.No.1341 of 2022 dated 19.05.2022, on the file of the learned Principal District and Sessions Judge,



Crl.A.Nos.769 and 828 of 2022

Nagapattinam, extending the remand period, the accused have preferred

Criminal Appeal No.769 of 2022.

(vii) As against the order passed in Crl.M.P.No.383 of 2022 dated 12.07.2022, on the file of the learned Judge, Special Court under the NIA Act, 2008, (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai, refusing to grant bail, the accused have preferred Criminal Appeal No.828 of 2022.

3. (i) Learned Counsel for the appellants submitted that during the pendency of these appeals, the 3rd accused/3rd appellant was released on bail on merits by the orders of this Court in Crl.A.No.340 of 2023. Hence, he has made an endorsement in the case bundle, withdrawing the appeals, in respect of the 3rd accused/3rd appellant herein. ***Accordingly, these appeals stands dismissed as withdrawn in respect of 3rd accused/3rd appellant herein.***



Crl.A.Nos.769 and 828 of 2022

WEB COPY

(ii) As regards the other accused/appellants 1,2,4 and 5, the learned counsel submitted that the order passed by the trial Court in Crl.M.P.No.1341 of 2022 is liable to be set aside since the accused were not produced and heard by the learned Sessions Judge, while passing the orders extending the remand beyond 90 days. The learned counsel relied upon the judgment of the Hon'ble Supreme Court in ***Jigar Alias Jimmy Pravinchandra Adatiya Vs. State of Gujarat***, reported in (2023) 6 SCC 484 in support of his submissions.

(iii) The learned counsel for the appellants further submitted that as a consequence, the appellants are entitled to default bail and hence, criminal appeal viz., Crl.A.No.828 of 2022, also has to be allowed. Accordingly, he prayed for grant of bail to the appellants /accused 1, 2, 4 and 5.

4. The learned Special Public Prosecutor *per contra* submitted that the respondent has duly served the notice on the appellants as per the direction of the trial Court and they were not directed to produce the appellants on the



Crl.A.Nos.769 and 828 of 2022

date of hearing. In any case, since the appellants were in judicial custody, the respondent could not have produced the appellants and hence, the respondent was not at fault for non production of the appellants on the date of hearing.

5. We have heard the submissions of the learned counsel for the appellants and the learned Special Public Prosecutor and perused the records.

6. When the matter was last listed on 15.12.2023, we had called for a report from the learned Sessions Judge, Special Court under NIA Act (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, to ascertain whether the appellants were produced before the Court when the application for extension of remand in Crl.MP.No.1341 of 2022 was heard and decided.

7. The learned Sessions Judge has sent a report in Dis.No.609/2023 dated 20.12.2023. The relevant portion of the said report reads as follows:



WEB COPY



Crl.A.Nos.769 and 828 of 2022

“I further submit that on perusal of records, it is seen that the report submitted by the Public Prosecutor u/s.43(D)(2)(d) of UA(P) Act, 1967 for extending the period of Judicial Custody of Accused persons beyond 90 days upto 180 days and the petition has been filed by the Public Prosecutor, Nagapattinam, before the Principal District and Sessions Court, Nagapattinam on 17.05.2022 and assigned Crl.M.P.No.1341/2022 and further the notice has been served to the Accused persons A1) Sathik Batcha A2) Mohammed Ashik, A3) Mohammed Irfan, A4) Jagabar Ali, A5) Rahmath through the Superintendent of Central Prison, Trichy on 17.05.2022.

I further submit that on perusal of records, it is seen that the Order in Crl.M.P.No.1341/2022 has been passed on 19.05.2022 by the Principal District and Sessions Judge, Nagapattinam and on that day i.e., on 19.05.2022, above said accused were not produced before the District and Sessions Court, Nagapattinam and the same was verified with the remand warrants of the said accused persons.”

8. The report confirms that the accused/appellants were not produced before the learned Sessions Judge on 19.05.2022, when the application for extension of remand, was heard. The question is whether the non production of the accused before the Court would vitiate the order granting extension of remand beyond 90 days. This question came up for consideration for the first time before the Hon'ble Supreme Court in ***Hitendra Vishnu Thakur and others Vs. State of Maharashtra and others***, reported in (1994) 4 SCC 602. The decision in the said judgment was



modified by a larger Bench of the Hon'ble Supreme Court in ***Sanjay Dutt v. State through CBI, Bombay (II)***, reported in (1994) 5 SCC 410. However, the Hon'ble Supreme Court in ***Jigar @ Jimmy Pravinchandra Adatiya's case*** [cited supra], while referring to both the decisions had observed as follows:

“44. As noted earlier, the only modification made by the larger Bench in the case of *Sanjay Dutt v. State through CBI, Bombay (II)* ((1994) 5 SCC 410) to the decision in the case of *Hitendra Vishnu Thakur and others Vs. State of Maharashtra and others* ((1994) 4 SCC 602) is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of *Sanjay Dutt* [cited supra] held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. 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 CrPC. 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



WEB COPY



Crl.A.Nos.769 and 828 of 2022

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.

45....

46. An attempt was made to argue that the failure to produce the accused will not cause any prejudice to him. As noted earlier, the grant of extension of time to complete the investigation takes away the indefeasible right of the accused to apply for default bail. It takes away the right of the accused to raise a limited objection to the prayer for the extension. The failure to produce the accused before the Court at the time of consideration of the application for extension of time will amount to a violation of the right guaranteed under Article 21 of the Constitution. Thus, prejudice is inherent and need not be established by the accused.

47....

48....

49....

50....

51....

52. Once we hold that the orders granting extension to complete investigation are illegal and stand vitiated, it follows that the appellants are entitled to default bail.”

9. From the above observations, it would be clear that non-production of the accused before the Court when the application for extension of time is being considered, would violate the right of the accused under Article 21 of



Crl.A.Nos.769 and 828 of 2022

the Constitution of India and that when such a right is violated, the appellants could be entitled to default bail. In the instant case, as stated earlier, the accused were not produced and hence, they would be entitled to default bail. The question is whether they would be entitled to default bail at this stage, when the final report has been filed.

10. We may also remind ourselves about the observations made by the Hon'ble Supreme Court in *Udaya Mohanal Acharya Vs. State of Maharashtra*, reported in (2001) 5 SCC 453. The relevant portions are extracted hereunder.

“13...On the aforesaid premises, we would record our conclusions as follows:

- 1....
- 2....
- 3....
- 4....
- 5....

6. The expression “if not already availed of” used by this Court in *Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433]* must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files



an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his 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.

With the aforesaid interpretation of the expression “availed of” if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra [(1996) 1 SCC 722 : 1996 SCC (Cri) 202] .(emphasis supplied)”

11. It is reported by the learned Special Public Prosecutor that the



Crl.A.Nos.769 and 828 of 2022

charge sheet was filed on 18.08.2022. The application for bail has been filed admittedly before the filing of the final report i.e. on 04.07.2022.

Therefore, the appellants had availed of their indefeasible right after the expiry of 90 days and the subsequent filing of the final report would not extinguish their right. Hence, we are of the considered view that both the appeals deserve to be allowed.

12. Accordingly, the order dated 19.05.2022 in Crl.M.P.No.1341 of 2022 dated 19.05.2022, passed by the learned Principal District and Sessions Judge, Nagapattinam, is set aside and consequently, since the appellants are entitled to default bail, the order dated 12.07.2022 in Crl.M.P.No.383 of 2022 passed by learned Judge, Special Court under the NIA Act, 2008, (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai, is also set aside. Except the 3rd appellant/A3, who has been granted bail vide order dated 09.11.2023 in Crl.A.No.340 of 2023, the other appellants i.e., A1, A2, A4 and A5 are directed to be released on bail on the following conditions.

(i) Each of the appellants/A1, A2, A4 and A5 shall execute a bond



for a sum of Rs.25,000/-, with two sureties, of whom, one should be a blood relative, each for a like sum to the satisfaction of the learned Judge, Special Court under the NIA Act, 2008, (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai;

(ii) The appellants/A1, A2, A4 and A5 and the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the trial Court may obtain a copy of their Aadhar card or Bank pass Book and mobile numbers to ensure their identity;

(iii) The appellants/A1, A2, A4 and A5 shall appear before the trial Court once in a week i.e., on every Monday at 10.30 a.m., and on all hearing dates, until the disposal of the appeal and if they are not able to appear before the trial Court on any day, they shall make arrangements to file an application under Section 317 Cr.P.C. and shall appear before the trial Court on any other day in lieu of the date of their absence, as directed by the trial Court.

Index : yes / no
Speaking/Non-Speaking Order
Neutral citation : yes/no

(S.S.S.R., J.) (S.M., J.)
21.12.2023



Crl.A.Nos.769 and 828 of 2022

Issue order copy by 22.12.2023

ars

WEB COPY



Crl.A.Nos.769 and 828 of 2022

Copy to:

1. The Judge,
Special Court under the NIA Act, 2008,
(Sessions Court for Exclusive Trial of Bomb Blast Cases),
Chennai at Poonamallee,
2. The Principal District and Sessions Judge,
Nagapattinam.
3. The Deputy Superintendent of Police,
National Investigation Agency,
Chennai.
4. The Superintendent,
Central Prison-2, Puzhal,
Chennai – 600 066.
5. The Public Prosecutor
High Court of Madras,
Chennai – 600 104.



WEB COPY



Crl.A.Nos.769 and 828 of 2022

S.S. SUNDAR, J.
AND
SUNDER MOHAN, J.
ars

Criminal Appeal Nos.769 & 828 of 2022

21.12.2023