

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 2517 OF 2024

Vinod Shamrao Achalkhamb ...Applicant
Versus
State Of Maharashtra ...Respondent

Mr. Santosh Deshpande for the Applicant.

Mrs. Mahalaxmi Ganapathy, APP for the Respondent – State.

CORAM : N. J. JAMADAR, J.
DATE : 10th SEPTEMBER 2024

PC.:

1. The applicant, who is arraigned in C.R. No.497 of 2023 registered with Malad Police Station, for the offences punishable under Sections 120B, 394, 395 and 412 read with Section 34 of the Indian Penal Code, 1860 (“the Penal Code”) and Sections 37(1)(a) read with Sections 135, 142 of the Maharashtra Police Act, 1951, has preferred this Application to enlarge him on bail, primarily, on the ground of default in filing the charge-sheet within 90 days.

2. The gravamen of indictment against the applicant and co-accused is that in pursuance of a criminal conspiracy, on 20th August 2023, the first informant was robbed of cash of Rs.1,25,00,000/-, kept in two bags, by threatening to cause death by pointing a knife. The applicant came to be arrested on 3rd September 2023 as a confederate in the conspiracy and the person,

who committed the robbery.

3. Post initial investigation, upon the arrest of co-accused Krushna Godambe (A11), who was alleged to be the leader of an Organized Crime Syndicate, with the prior approval of the competent authority under Section 23(1)(a), the offences punishable under Sections 3(1)(ii), 3(2), 3(3) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (“MCOCA Act”), were invoked. Thereafter, by an order dated 20th November 2023, the learned Special Judge, MCOCA Court, granted 21 days extension to complete the investigation by exercising the power under Section 21(2) of MCOCA, 1999.

4. On 12th December 2023, the competent authority, however, declined to grant sanction under sub-Section (2) of Section 23 of the MCOCA, 1999. Thereupon, on 12th December 2023 itself, an application was filed before the learned Special Judge, seeking a direction to remit the record and proceedings to the jurisdictional Magistrate as the competent authority refused to grant sanction under Section 23(2) of the MCOCA, 1999. The learned Special Judge, MCOCA Court, directed that the record and proceedings be sent to the Court of learned Chief Metropolitan Magistrate.

5. Eventually, the charge-sheet for the offences punishable under Sections 120B, 395, 394 and 412 read with 34 of the Penal Code and Sections 37(1)(a) read with 135, 142 of the Maharashtra Police Act, 1951 came to be lodged on 14th December 2023 at 01.20 p.m.

6. In the meanwhile, the co-accused Dinesh Indre (A5), Mehul Bhostekar (A10), Ravi Yashwante (A8). Pratik Bhojne (A6), Karima Shah (A9), Akshay Gaikwad (A1) and Kunal Gaikwad (A2), preferred applications for default bail under Section 167(2) of the Code of Criminal Procedure, 1973 (“the Code”) before the learned Chief Metropolitan Magistrate, 24th Court Borivali, Mumbai. By an order dated 15th December 2023, the learned Additional Chief Metropolitan Magistrate was persuaded to reject the applications for default bail holding, *inter alia*, that since the learned Special Judge had extended the period by 21 days and that period was to expire on 18th December 2023 and, in the meanwhile, on 14th December 2023, the charge-sheet was lodged, the said co-accused were not entitled to default bail.

7. Dinesh Indre (A5) and others preferred Bail Application

No.210 of 2024 before this Court. By an order dated 26th March 2024 this Court was persuaded to allow the said application for default bail holding that, the applicants therein had 'availed' their right to default bail by filing an application on 13th December 2023, a day before the charge-sheet came to be lodged and, therefore, the indefeasible right of the applicants stood cemented.

8. Mr. Deshpande, the learned Counsel for the Applicant submitted that the aforesaid order enures for the benefit of the applicant as well. Since the charge-sheet was not lodged within the statutory period prescribed under the first proviso to Section 167 (2) of the Code, 1973, the applicant, like the co-accused, who have been given the benefit of the first proviso to Section 167(2) of the Code, 1973, also deserves the same dispensation. Mr. Deshpande would urge that, the learned Additional Sessions Judge, did not properly appreciate this aspect of the matter and rejected the prayer for bail by an order dated 23rd April 2024 though submissions were advanced, by simply observing that the applicant was not entitled to claim parity.

9. Mr. Deshpande fairly submitted that the applicant had not

filed an application for default bail, like Dinesh Indre (A5) and others, who were granted bail by this Court by an order dated 26th March 2024, before charge-sheet was lodged by the Investigating Officer on 14th December 2023. Nonetheless, according to Mr.Deshpande, the applicant deserves the same dispensation. A submission was strenuously canvassed by Mr.Deshpande that, it was the duty of the learned Magistrate to ensure that the right of an under-trial prisoner to avail default bail under the first proviso to Section 167(2) of the Code, 1973, was effectively protected. Since the applicant was not apprised of the right that he was entitled to be released on bail in view of the default on the part of the Investigating Agency to file the charge-sheet within the stipulated period, the applicant cannot be deprived of the said right for the reason that the applicant did not make an application for default bail.

10. To bolster up this submission, Mr.Deshpande placed strong reliance on the decision of the Supreme Court in the case of *Hussainara Khatoon and Ors. Vs. Home Secretary, State of Bihar, Patna*¹, an order passed by this Court in the case of *Arvind Ramesh Bagul Vs. State of Maharashtra* in Bail Application

1 AIR (1979) SC 1377

No.1849 of 2017, dated 6th December 2017 and a decision of the Allahabad High Court in the case of ***Amar Singh and Ors. Vs. State of U.P.***².

11. In opposition to this, Mrs.Ganapathy, the learned APP, stoutly opposed the prayer for default bail. It was submitted that the applicant had not “availed” the right to bail under the proviso to Section 167(2) of the Code, 1973. The moment the charge-sheet is filed, the right of the accused to default bail under Section 167(2) of the Code stands extinguished. After the charge-sheet is lodged, the accused can claim bail on merit only. The fact that the charge-sheet was lodged beyond the period prescribed under Section 167(2) of the Code, in itself, does not imply that the accused is entitled to bail on the said count, even after filing of the charge-sheet. Mrs.Ganapathy urged with tenacity that, the submission sought to be canvased on behalf of the applicant would render the words “if he is prepared to and does furnish bail” in the first proviso to Section 167(2) of the Code, otiose.

12. Ms. Ganapathy would urge that the controversy sought to be raised on behalf of the applicant is no longer *res integra* and

² (1993) DMC 165

stands settled by the Constitution bench Judgment of the Supreme Court in the case of *Sanjay Dutt Vs. State through C.B.I.*³ and a recent pronouncement of the Supreme Court in the case of *Central Bureau of Investigation Vs. Kapil Wadhawan and Anr.* in Criminal Appeal No.391 of 2024 (arising out of Special Leave Petition (Cri.) No.11775 of 2023).

13. The legal position is well settled. Firstly, the right to default bail, as is evident from the text of 167(2) of the Code accrues on account of default on the part of investigating agency in not completing the investigation within the period stipulated by section 167(2) of the Code and, in cases where the extended period is prescribed by a special enactment, within the extended period. Secondly, while considering the application for default bail, merits of the allegations against the accused are not at all germane. Thirdly, once the right of default bail accrues in the sense that the accused had availed the said right by filing an application for release on bail, the subsequent act on the part of the investigating agency to lodge the charge-sheet does not deprive the accused of the said right which then partakes the character of an indefeasible right. Fourthly, the factors like the Court did not entertain the application, refrained from passing an order or passed a wrong

³ (1994) 5 SCC 410

order also do not defeat the said right.

14. Lastly and most importantly, the right to default bail is construed to be a facet of fair procedure guaranteed under Article 21 of the Constitution of India and whenever the question of application of the provisions contained in section 167(2) of the Code arises for consideration, the said provision is required to be interpreted keeping in view the three-fold objective behind incorporation of such a salutatory safeguard, namely, ensuring a fair trial, expeditious investigation and trial and setting down a rationalized procedure that protects the interest of indigent sections of the society. Those objectives are held by the Supreme Court in the case of **M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence**⁴ to be the subsets of the overarching fundamental right guaranteed under Article 21.

15. As noted above, in the instant case, the applicant did not file an application for default bail, unlike the co-accused who have been enlarged on bail. The thrust of the submission of Mr. Deshpande was that the said factor is not of decisive significance. It was urged that it was the duty of the Magistrate to apprise the applicant of his right to apply for default bail and since neither the applicant was produced before the Magistrate before the

⁴ (2021) 2 Supreme Court Cases 485.

chargesheet was filed nor the applicant was communicated by the authorities of the State that he had a right to apply for default bail, the applicant cannot be deprived of the said right.

16. In the case of **Hussainara Khatoon** (supra), the Supreme Court, after noticing that the under-trial prisoners had been produced before the concerned Magistrate on numerous occasions and the remands were extended, observed that it was doubtful where the attention of the under-trial prisoners was drawn to the fact that they were entitled to be released on bail under the first proviso to sub section (2) of section 167 and thus directed that when an under-trial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may, the Magistrate must, before making an order of further remand to judicial custody, point out to the under-trial prisoner that he is entitled to be released on bail. The State Government must also provide, at its own cost, a lawyer to the under-trial prisoner with a view to enable him to apply for bail in exercise of his right under the proviso (a) to sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the under-trial prisoner to the assistance of a lawyer provided at State cost, is secured to him.

17. In the case of **Arvind Bagul** (supra), a learned single Judge of this Court was persuaded to grant default bail, after adverting to

the aforesaid judgment of the Supreme Court in the case of **Hussainara Khatoon** (supra). Likewise, in the case of **Amar Singh** (supra), a learned single Judge of the Allahabad High Court, after following the aforesaid decision in the case of **Hussainara Khatoon** (supra) granted default bail observing, inter alia, that it is the duty of the Magistrate to pass an order for bail calling upon the accused to furnish bail bonds. The Magistrate can not ask the accused to move an application for that purpose and if the accused does not move an application after completion of 90/60 days then the bail cannot be rejected to him after filing of the charge sheet on the ground that the accused had not applied for bail under the aforesaid provisions.

18. The Supreme Court in the case of **Hussainara Khatoon** (supra) has emphasized the duty of the Magistrate to apprise the accused that he is entitled to default bail in the event the investigation is not completed within the stipulated period and also to ensure that the statutory safeguard is enforced and the rights of the accused are secured. The question that wrenches to the fore is, whether the accused is entitled to bail the moment there is default on the part of investigating agency to complete the investigation and file the charge sheet within the statutory period, without the accused availing the said right ?

19. The key words in first proviso to section 167(2) of the Code are, “the accused person shall be released on bail if he is prepared to and does furnish bail”. If the submission canvassed by Mr. Deshpande is accepted, it would imply that in case of default in filing of the charge-sheet within the statutory period, *eo instante*, the Court must pass an order of releasing the accused on bail, without anything more, and irrespective of the fact as to whether the accused is prepared to furnish bail. Then, on textual interpretation, the words “if he is prepared to and does furnish bail” would become otiose. It is well recognized principle of interpretation of statutes that no word in a statutory provision should be construed to be a ‘surplusage’ and such interpretation ought to be adopted which does not render any word, consciously used by the legislature, redundant.

20. The expression, “if he is prepared to and does furnish bail”, has been interpreted to mean that the accused ought to avail the said right to default bail. If the accused fails to avail the said right and, in the meanwhile, charge-sheet is lodged, then the said right stands extinguished. Conversely, the moment the accused avails the said right, it partakes the character of an infeasible right as it cannot be defeated by filing the charge-

sheet subsequently.

21. The judgment of the Constitution Bench in the case of **Sanjay Dutt** (supra) sets the controversy at rest. The observations of the Supreme Court in paragraph 48 are instructive and hence extracted below.

48] We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply.

(emphasis supplied)

22. In the case of **Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and Anr.**⁵ the Supreme Court reiterated the position, inter alia, in the following words.

18] None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.PC. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to

⁵ 2013 (3) SCC 77.

the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.PC., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.PC. The scheme of the [Cr.PC.](#) is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.PC., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.PC. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

23. In a recent pronouncement in the case of **Kapil Wadhawan** (supra), the following observations were made.

23] The benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to the offender only when a chargesheet is not filed and the investigation is kept pending against him. Once however, a chargesheet is filed, the said right ceases. It may be noted that the right of the investigating officer to pray for further investigation in terms of sub-section (8) of Section 173 is not taken away only because a chargesheet is filed under sub-section (2) thereof against the accused. Though ordinarily all documents relied upon by the prosecution should accompany the chargesheet, nonetheless for some reasons, if all the documents are not filed along with the chargesheet, that reason by itself would not invalidate or vitiate the chargesheet. It is also well settled that the court takes cognizance of the offence and not the offender. Once from the material produced along with the chargesheet, the court is satisfied about the commission of an offence and takes cognizance of the offence allegedly committed by the accused, it is immaterial whether the further investigation in

terms of Section 173(8) is pending or not. The pendency of the further investigation qua the other accused or for production of some documents not available at the time of filing of chargesheet would neither vitiate the chargesheet, nor would it entitle the accused to claim right to get default bail on the ground that the chargesheet was an incomplete chargesheet or that the chargesheet was not filed in terms of Section 173(2) of Cr.PC.

(emphasis supplied)

24. In view of the aforesaid position in law, “availing of” the right to default bail is an essential component of the jurisdiction to grant default bail. If the accused does not avail the said right before filing of the charge-sheet, such right stands extinguished. It then ceases to be an indefeasible right.

25. In the facts of the case, it does not appear that the applicant was produced before the Magistrate during the intervening period of 12th and 14th December, 2023, the day the charge-sheet was lodged. Nor does it appear that the applicant had even made an oral application for default bail. Had the applicant expressed his willingness to avail the right to default bail before filing of the charge sheet, the submission of Mr. Deshpande would have carried some substance. In the absence thereof, an inference becomes inescapable that the applicant did not ‘avail’ the right to default bail. Therefore, the applicant cannot be released on bail on the ground that the co-accused, who availed the said right, have been released on bail.

26. Hence, the following order:-

ORDER

The Application stands rejected.

(N. J. JAMADAR, J.)