

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRWP-2917-2024

Reserved on : 20.04.2024

Date of Pronouncement : 30.04.2024

Arwaz Khan

...PETITIONER

VERSUS

State of Haryana & Ors

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present : Mr. Ashish Jhamb, Advocate for the petitioner.
Mr.Chetan Sharma, DAG Haryana,
for respondents/State.

HARKESH MANUJA, J.

CRM-W-449-2024

This is an application u/s 482 Cr.P.C to consider/treat the present Criminal Writ Petition as a petition filed u/s 482 r/w 439 Cr.P.C for setting aside the order dated 28.02.2024 passed by the Ld. JMIC, Faridabad and order dated 28.03.2024 passed by Ld. Additional Sessions Judge, Faridabad.

For the reasons mentioned in the application, sufficient cause has been shown to consider/treat the present criminal writ petition as a petition filed u/s 482 r/w 439 Cr.P.C, thus, the same is allowed and present Criminal Writ Petition would be treated as petition filed u/s 482 r/w 439 Cr.P.C.

CRM-W-450-2024

This is an application u/s 482 Cr.P.C for arraying the (detenue) Saif Khan as Petitioner No.2 and for placing on record the amended memo of parties.

For the reasons mentioned in the application, sufficient cause has been shown for arraying the (detenue) Saif Khan as Petitioner No.2, thus, the same is allowed and amended memo of parties is taken on record.

CRM-W-451-2024

This is an application u/s 482 Cr.P.C for placing on record order dated 28.03.2024 passed by Ld. Additional Sessions Judge, Faridabad as ANNEXURE P-5 in Criminal Revision against order dated 28.02.2024 passed by Ld. JMIC, Faridabad.

For the reasons mentioned in the application, the same is allowed and order dated 28.03.2024 passed by Ld. Additional Session Judge, Faridabad is taken on record as ANNEXURE P-5.

MAIN CASE:

1. By way of present Criminal Writ Petition filed under Article 226 of the Constitution of India, initially prayer was made for the issuance of a writ in the nature of Habeas Corpus for release of Saif Khan confined in District Jail, Faridabad and to quash the order dated 28.02.2024 passed by Learned JMIC, Faridabad u/s 167(2) Cr.P.C. However subsequently an application CRM-W-449-2024 was filed u/s 482 Cr.P.C to consider/treat the present Criminal Writ Petition as a

petition filed u/s 482 r/w 439 Cr.P.C for setting aside the order dated 28.02.2024 passed by Ld. JMIC, Faridabad and order dated 28.03.2024 passed by Ld. Additional Session Judge, Faridabad, which has been allowed by this Court.

2. Brief facts necessary to determine the points in dispute in present case are that detenue/petitioner No.2 was named as an accused in FIR No. 4, dated 05.08.2022, registered u/s 419, 420, 120B, 279-B IPC, 66C, 66D IT Act, 2000, 14-A, 32 of Foreigners Act, at P.S Cyber Cell, Ballabgarh, Faridabad along with other accused persons and was arrested on 24.12.2023. Ld. Magistrate granted 6 days Police remand which continued till 29.12.2023 after which detenue/petitioner No.2 - Saif Khan was sent to judicial custody. Since the offences mentioned in the FIR were governed by the provisions of Section 167(2)(a)(ii) of Cr.P.C., detenue/petitioner No.2 - Saif Khan filed default bail on 27.02.2024 after 61 days of judicial custody before Ld. JMIC, Faridabad. On 28.02.2024, in reply filed before the Ld. JMIC by the investigating officer, it was informed that on 11.02.2024, offences under section 467, 468 & 471 of IPC were also added during the investigation and prayed for the dismissal of the bail application.

2.1 Ld. JMIC, Faridabad on 28.02.2024 dismissed the default bail filed by the detenue/petitioner No.2 - Saif Khan u/s 167 Cr.P.C by giving findings that Section 467 Cr.P.C. was added during investigation, hence statutory period of 90 days available for filing of

report under Section 173 Cr.P.C. was yet to elapse.

2.2 Criminal Revision filed by the detenue/petitioner No.2-Saif Khan before the Ld. ASJ, Faridabad against the order of Id. JMIC was also dismissed vide order dated 28.03.2024.

2.3 Both these orders have been impugned by the petitioners by way of present petition.

3. Learned Counsel for the petitioners contended that custody beyond the period of 60 days violated the fundamental right guaranteed by Article 21 of the Constitution of India as held in judgment of Bombay High Court in “**Rajkumar Bhagchand Jain v. Union of India**”, reported as 2018(1) Mh.LJ (CrL.) 546. He further submitted that if during the course of investigation, prosecution finds that certain other Sections were to be added apart from the ones what were mentioned in the FIR, they were obligated to bring it to the knowledge of the Magistrate as held by Delhi High Court in “**Varun Goyal vs The State of NCT of Delhi**”, bearing Neutral Citation No. 2023 DHC 1704.

3.1 He also submitted that in view of the abovementioned judgments, it was mandatory on the part of the investigating agency if new material is brought on record during the judicial custody, which constitutes a new offence, in that case, the police was to bring it to the notice of the accused by submitting fresh remand papers before the Court. He submitted that this requirement was mandatory so that the accused had an opportunity to oppose the further extension of

the judicial custody for the new offences as held by Bombay High Court in “**Irfan Moiuddeen Saiyyed & Ors, vs State of Maharashtra**”, reported as 2024(1) Cri.CC 617.

4. On the other hand, learned counsel for the respondents submitted that offences under Sections 467, 468 & 471 of IPC were added in the FIR on 11.02.2022, i.e. much prior to the expiration of 60 days period and it was also not the case of petitioner No.2 that these sections were added just to scuttle the right of petitioner No.2 to get the default bail. They further submitted that these sections were added as it was found during investigation that petitioner No.2 has fabricated multiple Aadhaar Cards so as to dupe the innocent victims.

4.1 They also submitted that the learned JMIC as well as the revisional court found that the offences under these sections were ex-facie made out and therefore, rightly, bail was not granted to petitioner No.2. Though, they fairly submitted that before filing the reply, no information in this regard was given to the learned JMIC, Faridabad. However, relying upon another judgment of Bombay High Court in “**Alnesh Akil Somji v. State of Maharashtra**”, reported as 2022(3) Cri.CC 198, they submitted that this requirement was not mandatory. They concluded their arguments by submitting that judgments relied upon by learned counsel for petitioner No.2, were discussed in this case and despite that it was held that it was the learned Judicial Magistrate who was to verify that on the basis of

material produced before him, whether the offences were made out or not and no right was vested with the arrested person to get default bail in such cases.

5. I have heard learned counsel for the parties and gone through the paper book, however, I do not find much substance in the submissions made on behalf of petitioner No.2.

6. At the first instance, in the facts and circumstances of the present case, it would be apt to peruse Section 167 of CrPC which is the fulcrum of the present case. Section 167 is reproduced below:-

“167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that—

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the

detention of the accused person in custody under this paragraph for a total period exceeding—

*(i) **ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;***

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate,

on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where no order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject

to such directions with regard to bail and other matters as he may specify.”

Note: *emphasis supplied*

7. From a perusal of the provision of Section 167(2)(a)(i), it is apparent that period for investigation is ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. In the facts and circumstances of the present case, when offence under Section 467 IPC was added on 11.02.2014, it would follow that investigation is going on qua this offence as well. It must be pointed out here that Id. JMIC, Faridabad as well as the revisional court has recorded its satisfaction that from the materials present before the Courts, offences under these sections are *prime facie* made out. Under similar circumstances, Delhi High Court in **"Ashwani Lochan Aggarwal v. State"**, reported as 2007(93) DRJ 578, held that when the investigation is going on u/s 467 IPC, period of 90 days would be applicable for investigation and accused is not entitled for the default bail. Relevant para from this judgment is reproduced hereunder:

"25. Where the police transgresses its statutory power of investigation the High Court under Section 482 Criminal Procedure Code or Articles 226/227 of the Constitution and this Court in an appropriate case can interdict the investigation to prevent abuse of the process of the court or otherwise to secure the ends of justice.

So, although investigation is within the exclusive domain of the police/ investigating agency, any transgression of this power of investigation is subject to judicial review by the High Court under Articles 226/227 of the Constitution or under

section 482 of the Code. Section 167(2) of the Code, however, stands on an altogether different footing. If any offence punishable with death, life imprisonment or imprisonment for a term of not less than ten years is being investigated, the court, at that stage, considering an application under Section 167(2) for bail on default cannot go into the question of whether the offence is made out or not. If the police transgresses its power of launching a legitimate investigation, the remedy is not in approaching the court under Section 167(2) but, in either applying for bail on merits (as suggested in Pradeep Mehta (supra)) or in approaching the High Court under Article 226/227 of the Constitution or under section 482 of the Code for interdicting such an investigation, as indicated in T.T. Antony (supra).

11. This discussion leads to the inescapable conclusion that the petitioner is not entitled to bail on default as the period of 90 days applicable in the case of an investigation relating to the offence under Section 467 Indian Penal Code has not elapsed. The petition is dismissed. However, dismissal of this petition does not debar the petitioner from applying for regular bail on merits."

8. It is pertinent to mention here that in **Ashwani Lochan Aggarwal's case** (supra), Court has relied upon another judgment by a division bench of Delhi High Court in "**Pradeep Mehta v. State and Anr.**", reported as 2006 (91) DRJ 384 (DB). In this case, it was held by the division bench that period of 90 days would be applicable because the expression used in Section 167(2) of the Code is "where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years" and it would not make any difference if, after completion of investigation, such an offence is not found to be made out. Relevant para from this judgment is reproduced hereunder:-

"15. From the foregoing observations of the Hon'ble Supreme Court there remains no manner of doubt that if for an offence being investigated by the police the Court can impose sentence of life imprisonment on the accused then the maximum period of detention of an accused during investigation without filing of charge-sheet by the police which can be authorised by the Magistrate is ninety days even if a sentence of imprisonment of less than ten years also can be imposed for that offence. In our view the said judgment of Hon'ble Supreme Court applies on all fours to the facts of present two cases since the punishment of imprisonment of life can be imposed if the accused is finally convicted for the offence under Section 467 Indian Penal Code. Therefore, the Magistrate could very well authorise the detention of the accused - petitioner upto a period of 90 days from the date of his arrest in exercise of the powers vested in him under Section 167(2) Criminal Procedure Code We do not find any force in the submission of learned senior counsel for the petitioner that unless there is definite evidence collected by the investigating agency during the investigation to sustain conviction finally for an offence which may be punishable with death, imprisonment for life or for a period of not less than ten years the period of detention would be sixty days only. The language of Section 167(2) is very clear in this regard. It is provided that the period of detention would be ninety days in case the police is investigating an offence which is punishable with death, life imprisonment or for a period of not less than ten years. Whether or not on the completion of investigation any such offence is made out is irrelevant for the applicability of clause (i) of proviso (a) to Section 167(2) Criminal Procedure Code."

9. From a further perusal of the provision of Section 167 (2) Cr.P.C., it is also apparent that once an accused is in judicial custody, he can come out of the same only on furnishing a bail bond, and though when an accused is remanded to police custody, Magistrate is bound to record reasons for the same, however, it is not so when accused is remanded to judicial custody. There is no legal requirement as such in the provision that in the event of addition of a

new section, permission has to be taken from the judicial magistrate. Though, investigation is the domain of investigating agency in which Courts should tread very cautiously, at the same time, yet an accused can challenge any order of learned Magistrate before higher forum if the said order curtails the liberty of the accused without following the procedure of law. Calcutta High Court in "**Sayantan Chatterjee v. The State of West Bengal**", reported as (2016) SCC Online Cal 4573, observed that:-

"9. With regard to the submission made on behalf of the State that the accused has no right to assail the order of adding any penal Section by Investigating Agency during investigation of the case, I am of the view that the accused may not have any right of audience before the court of learned Magistrate during course of investigation of the case, but the accused can very well challenge any order of learned Magistrate before higher forum if the said order curtails the liberty of the accused without following the procedure of law. In view of my above findings, I would like to hold that the petitioner has right to challenge the order passed by learned Magistrate by adding Section 304 Part II of the Penal Code, 1860 during course of further investigation of the case."

10. Relying upon **Sayantan Chatterjee's** case (supra), it was held in **Alnesh Akil Somji's case** (supra) that there is no doubt that the investigation is within the province and domain of the investigating agency and there is no requirement for the investigating officer to obtain permission from the magistrate for such addition, however, that does not mean that the court would be bound by the invocation of a particular section by the investigating agency against the accused. Rather the court would be required to look into the facts

and allegations made and the material collected, to determine, if in a given case whether ex-facie the provision is attracted or not and the court may not be bound by the same. Relevant para of this judgment is reproduced hereunder:-

"13. There is no manner of doubt that the investigation is within the province and domain of the investigating agency. However that does not mean that the court, in almost all cases, would be bound by the invocation of a particular section against the accused by the prosecuting agency. This is because the label of the section or the provision invoked would not be decisive. To hold otherwise, would amount to placing the said right at the mercy of the investigating agency and would indirectly result in the magistrate abdicating the duty to enforce the right wherever necessary. Thus the court would be required to look into the generality of the allegations made and the material collected. In a given case where ex-facie the provision is not attracted the court may not be bound by the same. Although there is no requirement for the investigating officer to obtain permission from the magistrate for such addition, as held by the Calcutta High Court in Sayantan Chatterjee (supra), the Magistrate is not precluded from looking into the facts and the material collected, whether the offence is ex facie made out or not. The matter depends on the facts and circumstances of each case. For instance, where the investigating officer invokes section 326 of IPC, however the medical report does not ex facie show that the victim has suffered a 'grievous injury', within the meaning of Section 320 of IPC. OR a case where section 409 of IPC is invoked and admittedly the accused does not fall under any of the seven categories mentioned in the said section namely the accused is neither a public servant a banker etc. I would hasten to add that where however the facts and the material collected prima facie indicate the ingredients of a particular offence the court obviously cannot examine or appreciate the same the same at that stage in order to arrive at a different conclusion."

11. In view of the aforesaid discussion, in the humble opinion of this Court, the proposition needs to be affirmed that in cases

where a new offence is added under the provisions of Indian Penal Code (IPC) by the investigating team, the mere extension of the period for filing charge-sheets to 90 days without prior notification to the Judicial Magistrate, does not automatically entitle the accused for grant of default bail. In such cases, the appropriate recourse for the accused would be to challenge the addition of these new sections before the Judicial Magistrate, demonstrating the lack of basis for their inclusion or asserting that they have been added with ulterior motives to circumvent the accused's right to default bail. Subsequently, any order issued by the Judicial Magistrate could be appealed before higher courts. Though, it would certainly have been a better approach that on any date after 11.02.2024 when new offences were added, in remand papers filed before the judicial magistrate these new offences should have been brought to his knowledge. It requires to be pointed out here that in other statutes where the standard of granting bail is higher like in **“The Narcotic Drugs and Psychotropic Substances, Act, 1985”** & **“The Unlawful Activities (Prevention) Act, 1967”**, there are specific provisions and specific procedure to extend the bail period in such circumstances. However, in the absence of specific statutory provisions for an offence committed under the provisions of IPC, there being no specific procedure in CrPC, the failure to inform the Judicial Magistrate about the addition of a new offence does not provide sufficient grounds for the accused to claim default bail.

12. In the facts of the present case, the only statutory requirement before the investigating team was to submit the challan under Section 173 Cr.P.C. before the Ld. Judicial Magistrate. When police custody was not required by the investigation team but on the basis of material collected by them, offences u/s 467/468/471 IPC were added in the FIR and investigation was continuing, no prejudice was caused to the accused on account of no application being filed before the judicial magistrate in this regard.

13. Judgments cited by the Id. Counsel for the petitioners are either distinguishable in the facts and circumstances of the present case or this court with utmost respect is in disagreement with them. In **Rajkumar Bhagchand Jain's case** (supra), this point was not discussed as a preposition of law. Factual background in **Varun Goyal's case** (supra) was also different as in that case even the sections in the case diary were added after expiry of 60 days when admittedly petitioners had already availed their right of default bail by filling an application. In that case, offences added against the petitioner was also under section 304 IPC and it was not clear whether the investigation related to offence following under part 1 or part 2 of this section.

14. It cannot be denied that in **Varun Goyal's case** (supra) as well as in **Irfan Moiuddeen Saiyyed's case** (supra), there are observations by the Bombay & Delhi High Courts that if no information is provided by the investigating team to the court

concerned regarding the higher offences being added, this would entitle the accused for default bail. But there are counter view as well from both the High Courts on the same aspect and this Court does not subscribe to this view taken by the Courts in **Varun Goyal's case** (supra) as well as in **Irfan Moiuddeen Saiyyed's case**.

15. In view of the discussion made above, finding no merit in the present petition, same is hereby dismissed and no interference is warranted in the impugned orders dated 28.02.2024 passed by Ld. JMIC, Faridabad and order dated 28.03.2024 passed by Ld. Additional Session Judge, Faridabad.

16. Pending miscellaneous application(s), if any, shall also stand disposed of.

30.04.2024
sanjay

(**HARKESH MANUJA**)
JUDGE

Whether speaking/reasoned ?	Yes/No
Whether reportable ?	Yes/No