

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

CRIMINAL APPLICATION (APL) NO. 1063 OF 2024

1. Zahir Mohammad Nasir Shaikh @ Chatti
Age about 46 years, Occu. Driver,
Residing at : Room No.19, Nasirruddin Chawl,
Katrak Road, Wadala (W),
Mumbai – 400 031.
2. Altaf Iqbal Shaikh
Age about 34 years, Occu. Service,
Residing at : 5/04, Jay Kaywadi,
Barkat Ali Naka, Mumbai – 400 037. Applicants

Vs.

1. The State of Maharashtra
(At the instance of RAK Marg Police Station)
2. Nazibulla Baitulla Gani
Age about 55 years, Occu. Business,
Residing at : Room No.3, Fakri Mohammad
Chawl, Wadala Fish Market,
Wadala (W), Mumbai – 400 031. Respondents

**WITH
CRIMINAL WRIT PETITION (ST.) NO. 17797 OF 2024**

Nazibulla Baitulla Gani
Age : 55 years, Occ. Business,
Residing at : Room No.3,
Fakir Mohd. Chawl, Wadala Fish Market,
Katrak Road, Wadala (West),
Mumbai – 400 031. Petitioner

Vs.

1. The State of Maharashtra
(Through Ld. Asst. Public Prosecutor)
2. The Senior Inspector of Police
(Through RAK Marg Police Station, Mumbai)

3. Mohammed Shoeb Shakil Qureshi
Age : 31 years, Occ. Driver,
Address : D-9, MMRDA Colony,
Pratiksha Nagar, Sion,
Mumbai – 400 022.

.... Respondents

Mr. Rajendra Rathod a/w. Mr. Sohail Ahmed, Mr. Aamir Koradia, Mr. Umar Dalvi, Mr. Mudassir Ansari, Mr. Zeeshan Sardar and Adv. Shabana Shah for Applicants in APL/1063/2024 and for Respondent No.3 in WPST/17797/2024.

Mr. Y.M. Nakhwa, APP for the State.

Mr. Sudeep Pasbola, Sr. Advocate a/w. Mr. Satyaram Gaud, Mr. Rohin R. Chauhan, Mr. Swaraj Sable, Mr. Chinmay Godse, Mr. Rajan Gurnani, Mr. Pratik Tomti, Adv. Shikhani Shah, Mr. Maniram Gaud and Adv. Usman Menon for Respondent No.2 in APL/1063/2024 and for the Petitioner in WPST/17797/2024.

Mr. Vilas Khilare, R.A.K. Marg Police Station, Mumbai, present.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 09th DECEMBER, 2024.

PRONOUNCED ON : 22nd JANUARY, 2025.

JUDGMENT :-

. As noted in the case of **Enforcement Directorate, Government of India v/s. Kapil Wadhawan and Anr¹**, “John Locke in his work, *Two Treatises of Government* (1689) stressed on personal liberty and stated that, “The end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no law, there is no Freedom.”

This statement has relevance here as the aforesaid Application and

1. (2024) 7 SCC 147.

Petition are involving a common question of correctness or otherwise of the Orders of bail granted due to default in filing charge-sheet within statutory period of 90 days.

2) The Application and the Petition arose out of the same crime. The Applicants in APL/1063/2024 and Respondent No.3 in WPST/17797/2024 are original Accused Nos.1, 3 and 2 respectively. Respondent No.2 in APL/1063/2024 and Petitioner in WPST/17797/2024 is the original informant. Hence, the Application and the Petition are being disposed of together. *(Hereinafter the parties are being referred to by their said original status in the F.I.R).*

2.1) In APL/1063/2024, the Accused Nos.1 and 3 seek to quash and set-aside the Order dated 31/07/2024 passed by the learned Additional Sessions Judge, Mumbai in Criminal Misc. Application No.1325/2024 and to restore the common Order dated 20/06/2024, passed by the 13th Court of learned Metropolitan Magistrate, *Bhoiwada*, Dadar thereby allowing their applications for default bail bearing Cril.Appln. Nos.881/BA/2024 and 879/BA/2024. In WPST/17797/2024, the informant seeks to quash and set-aside the same impugned Order dated 31/07/2024 to the extent it confirmed the subsequent Order dated 21/06/2024 passed by the same learned Magistrate thereby allowing the default bail application of Accused No.2 bearing Cril.Appln. No.878/BA/2024.

3) Heard Mr. Rathod, learned Advocate for the Accused Nos.1 to 3, Mr. Pasbola, the learned Senior counsel for the informant and Mr. Y.M. Nakhwa, learned APP for the State.

4) **Rule.** The Rule is made returnable forthwith. Heard finally with consent of the parties.

5) The facts are that, on 20th March 2024, at about 19:50 hours, near Nuri Masjid Macchi Market Lane, Wadala, Mumbai-31, the Accused Nos.1 to 3 with six other (total 9 accused) assaulted the informant Nazibulla Baitullah Gani and his sons viz., Javed Gani, Sajid Gani, Rizwan Gani and Hasim Gani, by means of knife, stump and rod, with an intention to cause their death. In the said assault, Javed Gani was given knife blows, over stomach and neck. Therefore, the informant filed an oral report with RAK Marg Police Station, which came to be registered as F.I.R. being C.R.No.134/2024 under Sections 307, 504, 506, 143, 147, 148 and 149 of the Indian Penal Code of 1986, against all the accused persons. Unfortunately, Javed Gani succumbed to the injuries on 25/03/2024. As a result, the offence punishable under Section 302 of I.P.C. was added in the F.I.R.

6) The Accused Nos.1 to 3 were arrested and produced before the learned Magistrate on 21/03/2024. Since the 1st remand of the Accused Nos.1 to 3 on 21/03/2024, the 90 days period to file charge-sheet against them was over on 18/06/2024. Hence, on 19/06/2024

the Accused Nos.1, 3 and 2 filed the Application Nos.881/BA/2024, No.879/BA/2024 and 878/BA/2024 respectively, for grant of default bail under Section 167 (2) Cr.P.C.

7) In all the three applications it was stated that, the police has not filed the charge-sheet within the statutory period of 90 days. In 881/BA/2024, it was stated that the prosecution failed to file the charge-sheet till 13:05 hours of 19/06/2024. Additionally, in 878/BA/2024 it was stated that initially, the Accused No.2 filed the said application online, on 19/06/2024, at 11:07 AM and then physically, at 12:00 PM. Therefore, it was prayed that the default bail may be granted. The said bail applications were placed before the in-charge 62nd Court of the learned Metropolitan Magistrate. On perusing the Applications, the learned Magistrate of the in-charge Court passed the following Order on each Application :-

*“1. J.C. to report if chargesheet is still awaited or it is filed.
2. Learned APP to say.”*

8) Thereafter, the In-charge judicial clerk of the 62nd Court of the learned Magistrate submitted his report dated 19/06/2024 that the charge-sheet was filed by the police on 19/06/2024, at 11:15 AM. The Police Inspector (Crimes) submitted his report before the regular Court on 20/06/2024 that after completion of the investigation in the crime, charge-sheet was filed within 90 days on 19/06/2024, at 11:00

AM. The learned Asstt.P.P. before the Magistrate's Court filed his say that, the said accused were arrested on 21/03/2024 and, excluding the date of their arrest, the 90 days period of the investigation was completed on 19/06/2024. Hence, the bail applications be rejected.

8.1) The learned Advocate on record for the Accused No.2 filed his Affidavit in support of the application of the Accused No.2. In the Affidavit, the learned Advocated contended that he had filed an online application on 19/06/2024, at around 11:07 AM. Then he went to file the bail application physically. When he went to the department to inquire about the process of filing of the bail application and whether the charge-sheet was filed or not, he was told that the bail application will have to be numbered with the filing section and then submit the same with the Interpreter of the Court concerned. At about 11:45 AM, he went to the Filing Section and filed the bail application which was numbered as 878/BA/2024. At that time, the Filing Section informed him that till that time, the charge-sheet was not filed. Then, he went to submit the said application with the Interpreter, where, he was informed that the *Karkoon* of the RAK Marg Police Station has been informed that the bail application is filed; that, the *Karkoon* informed the Interpreter that he is filing the charge-sheet in the said matter; that, the charge-sheet was in the *Karkoon's* possession at that moment; and that, the same was not filed till then. The Advocate

stated that, then he went to the filing section and requested to at least mention the time of filing the bail application as the charge-sheet would be filed on that day itself and therefore, it will create confusion as to which filing was done prior. It is stated that, after inquiring with the judicial clerk, the filing clerk informed them that the format does not permit them to mention the time on the register and therefore, cannot do the same, but also informed that the bail applications were filed with the filing section before filing of the charge-sheet. However, the Interpreter informed the Advocate that the bail applications will be taken up before the in-charge Court at 01:30 PM. Yet, the said matter was not taken up at 01:30 PM as the filing of the charge-sheet was not completed. Ultimately, the said bail application was taken up before the in-charge Court at around 01:45 PM along with the charge-sheet. In this background it is contended that the bail application of the Accused No.2 under Section 167 (2) of Cr.P.C. was filed before filing of the charge-sheet.

9) On considering the applications and other material in the light of rival submissions, the learned Metropolitan Magistrate of the 13th Court held that the Accused Nos.1 and 3 were arrested on 21/03/2024. That, on the same date they were produced before the Court and remanded to the police custody. In view of the decision in *Kapil Wadhawan* (Supra) the date on which the accused was remanded

should be computed. Therefore, the investigation officer ought to have filed the charge-sheet on or before 18/06/2024. The charge-sheet was filed 19/06/2024. Hence, the learned Magistrate held that, the Accused Nos.1 and 3 are entitle for the default bail and accordingly, allowed their default bail Applications 881/BA/2024 and 879/BA/2024, by the common Order dated 20/06/2024.

9.1) However, the learned Magistrate confused the Accused No.2 with Accused No.6–Mohd. Sohail Shakil Ahmed Qureshi. The Accused No.6 was arrested on 26/03/2024. Hence, the learned Magistrate held that the charge-sheet was filed within 90 days from 26/03/2024, i.e., the date of 1st remand of the Accused No.6. As a result, by the same common Order dated 20/06/2024, the learned Magistrate rejected the Application 878/BA/2024 (treating the same was filed by the Accused No.6). Therefore, on 21/06/2024 the learned Advocate for Accused No.2 filed an application seeking modification of the common Order on the ground that, the Advocate for Accused No.2 did not mention the accused number in the Application 878/BA/2024. Consequently, the learned Magistrate decided the said application for Accused No.6 and rejected the same. That the Accused No.2 was remanded to the custody on 21/03/2024 and therefore, he was covered within the ambit of Section 167 (2) of the Cr.P.C. Accordingly, it was prayed that the Application 878/BA/2024 be

reconsidered and appropriate Order be passed. In this background, the learned Magistrate held that, the said common Order to the extent of the Application 878/BA/2024 was infructuous as the Accused No.6 did not prefer the default bail Application. As a result, the learned Magistrate allowed the said application seeking modification of the common Order. Then, on 21/06/2024 the learned Magistrate passed a fresh Order below the Application 878/BA/2024 and held that, the charge-sheet was not filed within 90 days from the date of arrest and 1st remand of Accused No.2 on 21/03/2024. Accordingly, the learned Magistrate allowed the Application 878/BA/2024.

10) Aggrieved, the informant filed the Criminal Miscellaneous Application No.1325/2024 before the Sessions Court and impugned the aforesaid common Order and the subsequent Order dated 21/06/2024. In the Application No.1325/2024 the informant conceded that the 90 days period should be calculated from the 1st remand on 21/03/2024. But he averred that the charge-sheet was filed well within time on 19/06/2024, at 11:00 AM and in particular, at 11:15 AM, few minutes prior to the filing of the default bail applications. He stated that, the Accused No.1 filed his default bail application at about 13.05 hours. He stated that, the act of granting the default bail to Accused No.2 by the subsequent Order dated

21/06/2024 is review of the common Order dated 20/06/2024. Therefore, he prayed that the default bail granted to Accused Nos.1 to 3 be cancelled and they be taken into custody.

11) The Accused Nos.1 to 3 opposed the said Application by their say at Exhibits-6, 9 and 7, respectively. The Accused No.1 contended that, the charge-sheet was produced in the Court at 1:30 PM and it was not filed till 02:00 PM. However, the timing of filing of the charge-sheet was not recorded. The judicial clerk submitted his say at 03:30 PM and 05:00 PM. Then the said Court posted the matters on 20/06/2024. There is no *Roznama* of the date 19/06/2024 thereby noting that the charge-sheet was filed on that day prior to filing of the default bail applications. Thus, it was evident that the prosecution failed to file the charge-sheet on or before the 90th day and the indefeasible right for the default bail was exercised, accordingly. The Accused No.2 contended that, his default bail application was submitted on-line at 11:07 AM as above and then it was submitted physically. The charge-sheet was filed at about 01:30 PM. However, the police incorrectly reported that it was filed at 11:00 AM. Therefore, the default bail was granted to him. The Accused No.3 contended that, the Order of granting default bail to him is lawful. There are no other grounds for cancellation of the bail. Thus, the accused Nos.1 to 3 prayed to reject the Application No.1325/2024.

11.1) The prosecution filed its reply at Exhibit-5 and submitted that, the learned Magistrate enlarged the Accused Nos.1 to 3 on default bail without considering the facts of the case. The offence is of serious nature. Thus, the prosecution supported the Application.

12) On considering the record and rival submissions, the learned Additional Sessions Judge noted that the parties did not dispute the filing of charge-sheet on 19/06/2024. As stated in the common Order dated 20/06/2024, the endorsement of the judicial clerk states the timing of receipt of the charge-sheet as 11.15 AM. The Accused No.2 had preferred the default bail Application with the Court of Ld. ACMM on 19/06/2024, at 11.07 AM. Further, the learned Additional Sessions Judge considered the decision in the case of *Bikramjit Singh v/s. State of Punjab*² and noted that even an oral application for default bail can be entertained. In the case of *Sanjay Dutt v/s. State through C.B.I., Bombay (II)*³, the Hon'ble Supreme Court has observed and held that if an indefeasible 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 Cr.P.C. ceases to apply. This decision is squarely applicable to the case in hand. Therefore, the learned Additional Sessions Judge held that, the

2. (2020) 10 SCC 616.

3. (1994) 5 SCC 410.

bail applications preferred by Accused Nos.1 and 3 were filed post filing of the charge-sheet.

12.1) However, the learned Additional Sessions Judge held that, the Accused No.2 had filed the default bail application with the registry of the ACMM and the said aspect was not denied by the prosecution. Thus, the Accused No.2 had exercised the right accrued to him prior to filing of charge-sheet. Choosing the wrong forum should not amount fatal to the case of the Accused No.2, and hence, his application deserves consideration. The said learned Judge further held that, in view of the decision of the Hon'ble Supreme Court in *Ramadhar Sahu v/s. The State of Madhya Pradesh*⁴, the impugned common Order was interlocutory in nature. Hence, allowing the Accused No.2's default bail Application 878/BA/2024 by the subsequent Order dated 21/06/2024, would not amount to review of the said common Order.

12.2) In the backdrop, the learned Additional Sessions Judge held that, the common Order passed by the learned Magistrate thereby granting the default bail to Accused Nos.1 and 3 is liable to be quashed and set aside. Thus, the said learned Judge partly allowed the Cril. Misc. Application No.1325/2024 and passed the impugned Order. As a result, the Applications 881/BA/2024 and 879/BA/2024

4. *Cri. Appeal No.3223 of 2023, arising out of SLP(Cri.) No.11130 of 2023, dated 16.10.2023.*

came to be rejected and the subsequent Order dated 21/06/2024 in respect of the Application 878/BA/2024, was upheld.

13) Mr. Rathod, the learned Advocate for the Accused Nos.1 to 3 emphatically submitted that all the three default bail applications were properly filed prior to the filing of the charge-sheet. Initially, the default bail application of Accused No.2 was inadvertently filed online with Mazgaon Court, but it was filed at 11:07 AM and prior to filing of the charge-sheet. Subsequently, said default bail Application was submitted physically at 12:00 hours with the clerk concerned. Therefore, it cannot be held that the Accused No.2 failed to claim the indefeasible right of default bail prior to filing of the charge-sheet. He submitted that, the record clearly indicates that, the charge-sheet was presented with the judicial clerk at about 01:30 PM and it was actually filed at about 02:00 PM. That apart, no *Roznama* was maintained on 19/06/2024 to show exactly when the charge-sheet was filed. The timing of filing the charge-sheet at 11:00 AM or 11:15 AM was nowhere mentioned in the record of the case on 19/06/2024. Mere presentation of the charge-sheet with the judicial clerk is not amount to presentation/forwarding of charge-sheet to the Magistrate. The aforesaid factual situation was well considered by the regular 13th Court of the learned Magistrate at Dadar, and accordingly, all the default bail Applications were allowed. However, the learned

Additional Sessions Judge gave undesired importance to the report of the junior clerk that the charge-sheet was filed at 11:15 AM and based on that, the said learned Judge wrongly held that the default bail applications of the Accused Nos.1 and 3 were filed subsequent to the filing of the charge-sheet. Therefore, the impugned Order is erroneous to the extent of it setting-aside the common Order dated 20/06/2024 thereby allowing the default bail Application Nos.878/BA/2024 and 881/BA/2024. To support the aforesaid submissions, Mr. Rathod relied upon following decisions :-

- (i) *Gurcharan Singh @ Mintu v/s. State of Haryana*⁵.
- (ii) *Master Bholu through his father and natural guardian Vinod Kumar v/s. Central Bureau of Investigation*⁶.
- (iii) *Ramadhar Sahu v/s. The State of Madhya Pradesh*⁷.
- (iv) *Aslam Babalal Desai v/s. State Of Maharashtra*⁸.

14) Mr. Pasbola, the learned Senior counsel, on the other hand submitted that, as per the report of police, the charge-sheet was filed on 19/06/2024, at 11:00 AM and said timing was 11:15 AM, as reported by the judicial clerk. He submitted that, presentation of the charge-sheet with the clerk is sufficient compliance with the provisions of Sections 167 (2) (a) (ii) and 173 of Cr.P.C. He submitted

5. CRM-M-41691 of 2015 (O&M). DD. 11.02.2016.

6. Cril. Appeal No.S-646-SB of 2018, PHHC, DD.06.06.2018.

7. Cril. Appeal No.3223 of 2023, arising out of SLP(Cri.) No.11130 of 2023, DD. 16.10.2023.

8. (1992) 4 SCC 272.

that, the Accused No.1 filed his default bail application at 13:05 hours. The Affidavit submitted by Mr. Abdulla, Advocate on record for Accused no.2 clearly indicates that all the default bail Applications and the charge-sheet were placed before the learned Magistrate together, at about 01:45 PM. This fact also confirms that the charge-sheet was filed at or before 11:15 AM. This background was not considered by the learned Magistrate when he allowed the default bail Applications. He submitted that, in the instant Application the Accused No.3 for the first time claimed that he filed his default bail Application at 11:00 AM of 19/06/2024. Therefore, the said claim of the Accused No.3 about the timings, is not correct. That apart, the provision of Section 114 (e) of the Indian Evidence Act of 1872 provides that the judicial and officials act have been regularly performed. Therefore, the learned Additional Sessions Judge rightly set aside the common Order to that extent and rejected the default bail Applications of the Accused Nos.1 and 3.

14.1) Mr. Pasbola urged that, the Accused No.2 initially filed his default application online at 11:07 AM, but with wrong Court, i.e., at Mazgaon. Until said application was placed before the jurisdictional Magistrate, it cannot be accepted as a lawful application for default bail. He submitted that, later on the said application of Accused No.2 was physically submitted, but at 12:00 PM. By that time, the charge-

sheet was filed with the clerk concerned. Therefore, it cannot be held that the Accused No.2 availed the indefeasible right to bail, prior to filing of the charge-sheet. He submitted that admittedly, the default bail application of Accused No.2 was wrongly rejected by the learned Magistrate holding that it was filed by Accused No.6. After said rejection, the learned Magistrate had become *functus officio* and therefore, he had no authority to again hear the default bail application of Accused No.2 and allow it by the subsequent Order dated 21/06/2024. Thus, said function of the learned Magistrate is amount to review of the common Order, which is not permissible in law. Hence, the subsequent Order dated 21/06/2024 was illegal. However, the same has been upheld by the learned Additional Session. Therefore, Mr. Pasbola claimed that the impugned Order is illegal and urged that said Order be quashed and set aside.

15) Mr. Nakhwa, the learned A.P.P. is in agreement with the submissions made by Mr. Pasbola. Additionally, Mr. Nakhwa submitted that, the Accused Nos.1 to 3 could not contradict the claims/reports of the police and the judicial clerk that the charge-sheet was filed at 11:00 AM/11:15 AM. He submitted that the record clearly indicates that all the default bail Applications were filed post filing of the charge-sheet. He submitted that presenting the charge-sheet before the clerk concerned is sufficient to hold that the charge-

sheet was duly forwarded to the learned Magistrate on time. As such, there is no merit in the submissions made on behalf of the accused, submitted Mr. Nakhwa.

16) Considering the facts and the rival submissions, following questions arise for my determination :-

- (a) Whether the Accused Nos.1 to 3 filed their default bail Applications prior to filing of the charge-sheet?
- (b) Whether filing of the default bail Application of Accused No.2 with the wrong Court is amount to non claiming of the indefeasible right for default bail?
- (c) Whether the subsequent Order dated 21/06/2024 is amount to review of the earlier common Order dated 20/06/2024?

17) Now let us deal with first of the said three questions. In the case of ***Gurcharan Singh @ Mintu*** (Supra), the petitioner-accused was arrested by police on 14/8/2015 and was produced before the learned Judicial Magistrate 1st Class, Panchkula on 15/8/2015. On 13/11/2015 the said Petitioner filed an application for default bail under Section 167 (2) of Cr.P.C. on the ground that the period of 90 days had elapsed but the challan was not presented. The learned Magistrate called for the report of the *Ahlmad*. The *Ahlmad* reported that the challan was filed before him on 10/11/2015 at 4.45 PM and accordingly, produced the challan before learned Magistrate. In this

background, the learned Magistrate held that even if the challan was not presented before him on 10/11/2015 even then the period of 90 days had not elapsed as the Petitioner was produced before him for the first time on 15/08/2015 and that, date 13/11/2015 was the 90th day of the investigation. Hence, the Magistrate dismissed the Application. However, on considering provisions of Section 173 (2) of Cr.P.C., the High Court held that if the challan papers are left with the *Ahlmad*, it is not proper presentation of the final report under Section 173 (2) before the Magistrate. Therefore, the date of presentation of challan was to be betaken as 13/11/2015. This decision is followed by the same High Court in the case of *Master Bholu* (Supra).

18) In the case of *Wasudeo s/o. Shrawan Kamble v/s. State of Maharashtra*⁹, cited by Mr. Pasbola, the applicant was arrested on 13/7/2020. He was produced before the jurisdictional Court and was remanded on 14/7/2020. The applicant claimed that the 90 days investigation period expired on 11/10/2020 and preferred an application dated 12/10/2020, seeking default bail under Section 167 (2) of the Code. It was indubitable that the investigating officer presented or submitted the charge-sheet with the clerk concerned on 7/10/2020. The Standard Operating Procedure (“SOP”) formulated in view of the pandemic mandated that charge-sheets were to be kept

9. 2021 ALL MR (Cri) 1294.

isolated and insulated for three days. Presumably, since the 10th and 11th October were holidays, the charge-sheet was verified on 12th October and was registered and put up before the learned Judge on 13th October. Therefore, the seminal question was whether there was due compliance with the provisions of section 167 (2) read with section 173 (2) of the Code.

18.1) Considering the aforesaid facts and various decisions in the field, the learned Single Judge of this Court, in paragraph 19 held that, “While the right to default or compulsive bail flows from the proviso to sub-section (2) of Section 167 of the Code, which prescribes the maximum period to complete the investigation, the legislative mandate is not that the Magistrate shall take cognizance within the said period. The submission of the police report under section 173 (2), which envisages that as soon as the investigation is complete, a police report, in consonance with the said provision, shall be forwarded to a Magistrate empowered to take a cognizance of offence, is deemed to be completion of the investigation. ...” Then the learned Single Judge considered the decision in the case of **Master Bholu** (Supra) and in paragraph 22 held as under :

“22. *“With due respect to the decision of the Punjab and Haryana High Court in **Master Bholu**, I am not persuaded to fall in line. The legislative intent is that the investigation shall be completed within the maximum time prescribed*

and in default, the accused shall be entitled to compulsive or statutory bail, if such right is availed. The emphasize is on completion of investigation and not on the learned Judge taking cognizance of the final report or chargesheet. The submission of the final report or chargesheet within the maximum time prescribed is relevant and significant only to the extent that the stage of investigation as defined in sub-section (h) of section 2 is deemed to be over with such forwarding or submission of the chargesheet. In my considered view, the submission of the final report or chargesheet, with or before the concerned court officer is sufficient compliance with the provisions of sub-section (2) of section 173. The date on which the chargesheet is put up before the learned Judge may assume some relevance, if there is a dispute or controversy touching the submission of the final report or chargesheet with or before the concerned court officer. Pertinently, in the factual matrix, there is no dispute that a complete final report or chargesheet was as a fact submitted and / or filed with the concerned court officer and that the same was dully verified on 12.10.2020. The expression, the “officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence”, in my considered view cannot be understood to mandate that the police report must be as a fact put up before the learned Judge within the maximum period prescribed. Considering the legislative intent, and particularly in the context of the salutary purpose of providing for default or compulsive bail, which is the expeditious completion of the investigation, it would suffice if the investigation is completed and a complete police

report in conformity with the provisions of sub-section (2) of section 173 is submitted or filed before the concerned court clerk. Any other view may perhaps cause serious prejudice to the investigating agency since an accused involved in serious crime/s may be bestowed with the indulgence of default or compulsive bail due to reasons beyond the control of the investigating agency and which may be attributable to the concerned court clerk not discharging duty diligently or to any extraneous consideration coming into play.”

19) As noted above, in the case in hand the charge-sheet was submitted with the judicial clerk. Such ministerial staff members are appointed to help Judicial Officers to discharge their judicial and administrative functions, expeditiously. Therefore, it was the duty of the said clerk to immediately place the charge-sheet and the default bail applications before the learned Magistrate, as soon as he received the same after their registration and filing.

20) Now turning to the controversy as to the filing of the default bail applications before the filing of the charge-sheet. As claimed in the report submitted by the police, the charge-sheet was filed at 11:00 AM. In 881/BA/2024, it was stated that the prosecution failed to file the charge-sheet till 13:05 hours of 19/06/2024. In 879/BA/2024 it was stated that, the police has not filed the charge-sheet within the statutory period of 90 days. However, no time was stated in the Applications 881/BA/2024 and 879/BA/2024, exactly

when the said applications were submitted with the clerk concerned. In the present application filed by Accused Nos.1 and 3 and the Affidavit referred above, it is clearly stated that the default bail applications and the charge-sheet were taken together before the In-charge learned Magistrate and thereafter, the first Order was passed to call the say of the learned Assistant P.P. and report of the judicial clerk. Accordingly, the clerk submitted his report that the charge-sheet was filed on 19/06/2024, at 11:15 AM.

20.1) Even though the learned Magistrate granted the default bail to all the accused, in his common Order dated 20/06/2024 and the subsequent Order dated 21/06/2024 the learned Magistrate did not discuss anything about the controversy as to the timings of filing the charge-sheet nor recorded a clear finding in that regard. However, the learned Additional Sessions Judge held that as per the report of the judicial clerk, the charge-sheet was filed on 19/06/2024, at about 11:15 AM. Nothing significant is pointed by Mr. Rathod, to show that, the learned Additional Sessions Judge has incorrectly accepted that the charge-sheet was filed at 11:15 AM. As noted above, the timing of filing the Applications 881/BA/2024 and 879/BA/2024 of the Accused Nos.1 and 3 is not mentioned in the said applications. These applications do not state that the Advocates for the said accused first went to the Filing Section and there, on inquiry, they were told that

the charge is not filed. The contention in the Applications 881/BA/2024 that the prosecution failed to file the charge-sheet till 13:05 hours of 19/06/2024 indicates that said application was not filed till 13:05 hours. Therefore, I find it difficult to hold that the said Applications 881/BA/2024 and 879/BA/2024 were filed prior to filing of the charge-sheet. In view thereof and considering the matter as a whole, I am in agreement with the said finding recorded by the learned Additional Sessions Judge. Accordingly, I hold that the charge-sheet was filed at 11:15 AM.

20.2) However, it is significant to note that as stated in the Application 878/BA/2024, said application of the Accused No.2 was initially filed online, on 19/09/2024, at 11:07 AM and then physically, at 12:00 PM. Said claim was confirmed by the online filing memo, at page 76 of the Petition. Accordingly, I hold that Application 878/BA/2024 was initially filed online and then it was submitted physically, as stated above.

20.3) In view of the above discussion, my answer to question No.1 is that only Accused No.2 filed his default bail application prior to filing of the charge-sheet.

21) Now I deal with the second question viz., “Whether filing of default bail Application of Accused No.2 with the wrong Court is amount to non claiming of the indefeasible right for default bail?

22) It is well settled and it hardly needs to be emphasized that the question of default bail is inextricably linked to personal liberty and Article 21 of the Constitution of India. In *Kapil Wadhawan* (Supra), in paragraphs 47 and 48 the Hon'ble Supreme Court noted that, "... in **Bikramjit Singh** (Supra), a three-Judge Bench observed, that the right to secure a default bail under the first proviso to Section 167 (2) of the Code is a part of the procedure established by law under Article 21 of the Constitution of India. Therefore, the right therein is raised to the status of a fundamental right. The court in this context observed that while considering the consequences that flow towards liberty of an accused, it is immaterial whether the accused makes a written or an oral application for default bail and the Court is only required to deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan had expired and whether the accused is prepared to and does furnish bail." In Paragraph 48 it is held that, "In other words, to claim default bail under Section 167 (2) first proviso CrPC, the accused does not have to make out any substantive grounds for securing bail nor does he have to file a detailed bail application. All he has to aver in the application is that since the stipulated 60/90 day period has expired and the charge-sheet has not been filed, he is entitled to bail and such indefeasible right cannot be defeated by

filing the charge-sheet after the accused has offered to furnish bail.”

23) In the case in hand, the default bail Application of Accused No.2 was submitted online. This fact is not in controversy from the prosecution side. The said Application, however, was sent to the Metropolitan Magistrate’s Court at Mazgaon, instead of the Court of the Jurisdictional Magistrate, at Dadar. But it was a clear and inadvertent mistake of the Advocate on record, acting for and on behalf of the Accused No.2, who was in jail and obviously depended upon the said lawyer’s services. Therefore, the said mistake cannot be attributed to the Accused No.2. Otherwise, only Accused No.2 will have to suffer its serious consequences, notwithstanding he was in fact innocent and being in jail, not in a position to serve to himself and see that, his constitutional right is a reality.

24) In *Kapil Wadhawan* (Supra), in paragraph 57 the Hon’ble Supreme Court observed that, “The right to personal liberty is directly related to the inalienable right towards human dignity and personhood. The concept of dignity is central to our Constitutional law discourse. In fact, the Preamble itself, provides the guarantee of upholding “*the dignity of the individual*”. The Constitution scheme provides that all human rights, including the right to personal liberty, are specifications of one special fundamental right- that is the right to have one’s personal dignity respected.”

25) In *Kapil Wadhawan* (Supra), the accused were arrested and remanded on 14/05/2020. Therefore, the Hon'ble Supreme Court held that, the charge-sheet ought to have been filed on or before 12/07/2020 (i.e., the sixtieth day). But the same was filed, only on 13/07/2020 which was the 61st day of their custody. Therefore, it is held that, the right to default bail accrued to the accused persons on 13/07/2020 at 12:00 AM, midnight, onwards. On that very day, the accused filed their default bail applications at 8:53 AM, through e-mail and physical filing token was issued at 11:00 AM. The ED filed the charge-sheet, later in the day, at 11:15 AM. Thus, the default bail applications were filed well before the charge-sheet. In this regard the Hon'ble Supreme Court observed that, if the accused persons avail their indefeasible right to default bail before the charge-sheet/final report is filed, then such right would not stand frustrated or extinguished by any such subsequent filing. The stipulated 60/90 day remand period under Section 167 Cr.P.C. ought to be computed from the date when a Magistrate authorizes remand. If the first day of remand is excluded, the remand period, will extend beyond the permitted 60/90 days' period resulting in unauthorized detention beyond the period envisaged under Section 167 Cr.P.C. In cases where the charge-sheet/final report is filed on or after the 61st/91st day, the accused would be entitled to default bail. The very moment the

stipulated 60/90 day remand period expires, an indefeasible right to default bail accrues to the accused. The Hon'ble Supreme also observed and held that, when the day of remand order is included in the stipulated period under Section 167 (2), the same would encourage the prosecution to promptly comply with Section 57 Cr.P.C. The leaning towards the accused's right to personal liberty by reducing the 60 day period to something more than 59 days, and a few hours, is based on the constitutional protection afforded to an accused under Article 22 (2) and Article 21. In this way, the Code's application in dealing with an accused would be consistent with the inviolable right of personal liberty and dignity.

26) In *Kapil Wadhawan* (Supra) in paragraph 49 the Hon'ble Supreme Court observed that, "In *S.Kasi v. State*¹⁰, the Court discussed the applicability of the Limitation Act to Section 167(2) CrPC, the right to personal liberty, and the prosecution's right to file a charge-sheet. The Court safeguarding individual freedom then held that the Supreme Court's earlier direction to relax limitation requirements, in light of COVID-19 pandemic, would not allow the State or the investigation agencies, any relaxation in terms of computing the investigation period and thereby allowing additional incarceration of the accused curtailing their personal liberty." In

10. (2021) 12 SCC 1.

paragraph 50 the Hon'ble Supreme Court held that, "In construction of a penal statute in case of ambiguity, whether actual or assumed, in order to, fulfill the legislative intent underlying Section 167(2) CrPC, the ambiguity must be resolved in favour of the accused person since liberty is at stake. This was the opinion expressed in *M. Ravindran*¹¹, where the following was pronounced: "whenever there is any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between an individual and the State." Further, in paragraph 51 the Hon'ble Supreme Court observed that, "Similarly, in *Rakesh Paul*¹², a three-Judge Bench of this Court, in context of Section 167, held that where, on reading the statute, two views are possible, then the provision that curtails individual liberty should be read strictly. It was observed that since Article 21 rights are involved, the Court should lean in favour of the interpretation that upholds and protects personal liberty. This interpretation is also supported by the idea that constitutional law is logically, morally and legally superior to the statutory law. Therefore, any statutory provision, must be in conformity with the constitutional law. Further, In the specific context of the right to default bail, under the first proviso to Section 167(2) CrPC, this Court in *Gautam*

11. *M. Ravindran v/s. Revenue Intelligence Directorate*, (2021) 2 SCC 485.

12. *Rakesh Kumar Paul v/s. State of Assam*, (2017) 15 SCC 67.

Navlakha¹³, held that, right to default bail is a fundamental right and in case a remand order is passed mechanically or in violation of law or be afflicted with vice of lack of jurisdiction, a writ of habeas corpus would lie.”

27) The facts of the case in hand and the facts in the case of ***Kapil Wadhawan*** (Supra) are similar to some extent, except that in the case in hand, initially, the default bail Application was submitted online but with the wrong Court. However, subsequently it was physically filed and registered with the jurisdictional Court. Therefore, and looking at the requirement of the indefeasible right in favour of those accused who are in jail and against whom charge-sheet in the related crimes is not filed within the stipulated 60/90 days, the Advocate’s mistake in forwarding the default bail application of the Accused No.2 to the wrong Court prior to filing of the charge-sheet, cannot be treated or considered a legal ground to deny him the benefit of the indefeasible right of compulsory bail.

28) In this context it is necessary to state that free legal aid is provided by virtue of Article 21 of the Constitution. If there are short comings in a legal aid service, whether it is paid or a free legal aid by the State, it is only the accused who shall suffer in the ultimate. For this and similar other reasons, consistent efforts are being made by

13. *Gautam Navlakha v/s. NIA, (2022) 13 SCC 542.*

legal services authorities at all levels, in the direction of providing the best and quality free legal aid to the entitled and needy, including those languishing behind bars.

29) While stressing upon the need of free legal aid, in *RakeshKumar Paul* (Supra) in paragraph 43 the Hon'ble Supreme Court considered the decision in *Mohd. Ajmal Amir Kasab v/s. State of Maharashtra*¹⁴ and noted the following observations from paragraph 474 in that decision :

“474. ... it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.”

29.1) In view of the aforesaid observation, in *Rakesh Kumar Paul* (Supra) in paragraph 44 the Hon'ble Supreme Court observed and held that :

14. (2012) 9 SCC 1.

“44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to “default bail”, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in *Nirala Yadav* [(2014) 9 SCC 457].”

29.2) Then in paragraph 83 the Hon’ble Supreme Court observed that, “This Court in a large number of judgments has held that the right to legal aid is also a fundamental right. Legal aid has to be competent legal aid and, therefore, it is the duty of the counsel representing the accused whether they are paid counsel or legal aid counsel to inform the accused that on the expiry of the statutory period of 60/90 days, they are entitled to “default bail”. In my view, the Magistrate should also not encourage wrongful detention and must inform the accused of his right.”

29.3) Considering the aforesaid observations and the facts of the case in hand, in my opinion, the aforesaid duty of the counsel for accused also includes the duty to file the default bail application with due diligence before a proper Court, may it be online or physically.

30) In view the above discussion, my answer to question No.2 is in negative.

31) Let us now turn to 3rd and the last question, i./e., “Whether the subsequent Order dated 21/06/2024 is amount to review of the earlier common Order dated 20/06/2024?” As noted above, initially, the learned Magistrate rejected the default bail Application 878/BA/2024, thinking that said application was filed by Accused No.6. Admittedly, the Accused No.6 had not filed any default bail Application. Looking at the facts of the case, in my considered view it was a *bonfide* mistake of the learned Magistrate. May be, for want of proper assistance by the Advocate on record and not stating the correct accused number in the application. Thus, it is clear that, the default bail application of Accused No.2 was not at all considered on merits and rejected after taking into consideration the grounds stated therein. In other words, said application was rejected without giving any reason. Needless to state that reasons are hallmark of a judicial order. Every litigant is entitled to know the reasons recorded in the order thereby deciding the litigation wherein he/she was a party. This is not possible in the case of Accused No.2 because in the facts, indirectly the common Order has rejected that application for bail of Accused No.6, which was never filed nor in existence. Without filing and existence of a lawful litigation, there cannot be a lawful Order thereby disposing of such litigation finally. The Accused No.2 had no control on his default bail application, except taking steps for

its expeditious hearing and disposal. As such, the common Order dated 20/06/2024 was no Order at all in the eyes of law to the extent of it rejecting the default bail application of Accused No.2. Unless there is a legal order, there cannot be its review. In the backdrop, the learned Magistrate reconsidered the Application 878/BA/2024 and allowed it by the subsequent Order dated 21/06/2024. In the facts, it was not a reconsideration but a fresh consideration of the application for default bail, as it was not previously considered by the same learned Magistrate. As such, in my considered view allowing the Application 878/BA/2024 by the subsequent Order dated 21/06/2024, would not amount to review of the earlier common Order. Otherwise, an innocent accused will have to suffer the consequences of such Order which has no existence without the application below which it was expected to be passed. In other words, the Accused No.2 will have to be denied his indefeasible right to protect the inadvertent erroneous Order passed by the Court of law and that too, without any fault on the part of the accused. This would be against the principles settled in the field by the Hon'ble Supreme Court. In view of the above discussion, I answer question No.3 in negative.

32) To fortify my conclusion above, I have relied upon the decision in the case of *Ramadhar Sahu* (Supra). In this case the

appellant was in pre-trial custody on allegation of lifting cash through the ATM cards which were meant to have been issued to the account holders of the bank and commission of offences, *inter-alia*, under Sections 420, 467, 468, 471, 408, 201 and 120B of the I.P.C. and Sections 66 & 66-C of Information Technology Act. An order was passed by the High Court on 28/04/2022 allowing the appellant's prayer for bail. As recorded in that order, the appellant had volunteered to deposit a sum of Rs.65,92,460/-. The said order carried the condition that the appellant had to deposit Rs.10,00,000/- before the Trial Court and Rs.55,92,460/- was to be deposited under protest, within a period of three months from the date of his release. The appellant was released on bail on deposit of Rs.10,00,000/-. The appellant had failed to deposit the remaining amount and surrendered on 24/07/2023. He applied for bail again mainly citing release of a co-accused by the Apex Court on 01/05/2023, in SLP (Crl.) No. 3158 of 2023. The said co-accused was earlier released on bail by the High Court on his willingness to deposit certain sum of money but later on failed to make such deposit. The appellant's fresh application for bail was refused by the High Court. The appellant sought parity with the co-accused in the application which was rejected. In the order rejecting his application for bail, the High Court referred to Section 362 of Cr.P.C., which reads :-

“Section 362. Court not to alter judgment- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

32.1) The opinion of the High Court, in the impugned Order, was that in the event the High Court granted bail to the appellant without compliance of the conditions specified in the earlier order of a Coordinate Bench, that would constitute modification of the order and Section 362 of Cr.P.C. prohibits such modification of a judgment or final order.

32.2) In this factual situation, the Hon'ble Supreme Court held that, “An order for refusal of bail however, inherently carries certain characteristics of an interlocutory order in that certain variation or alteration in the context in which a bail plea is dismissed confers on the detained accused right to file a fresh application for bail on certain changed circumstances. Thus, an order rejecting prayer for bail does not dis-empower the Court from considering such plea afresh if there is any alteration of the circumstances. Conditions of bail could also be varied if a case is made out for such variation based on that factor. Prohibition contemplated in Section 362 of the Code would not apply in such cases. Hence, we do not think the reasoning on which the impugned order was passed rejecting the appellant's application of

bail can be sustained.” Therefore, the Apex Court set aside the impugned order and remitted the matter to the High Court with a direction that, the bail petition of the appellant before the High Court shall revive to be examined afresh by the High Court in the light of abovestated observation made by the Apex Court.

33) In *Aslam Babalal Desai* (Supra), the Hon’ble Supreme Court in paragraph 13 referred the decision between *Bhagirathsinh S/o Mahipat Singh Judeja v/s. State of Gujarat*¹⁵ and observed that, “... When the Legislature made it obligatory that the accused shall be released on bail if the charge-sheet is not filed within the outer limit provided by proviso (a), it manifested concern for individual liberty notwithstanding the gravity of the allegation against the accused. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, e.g., an obliging investigation officer deliberately not filing the charge-sheet in time, as such misconduct can be dealt with departmentally. To permit the prosecution to have the bail cancelled on the mere filing of the charge-sheet is to permit the police to trifle with individual liberty at its sweet will and set at naught the purpose and object of the legislative mandate. The paramount consideration must be to balance the need to safeguard individual liberty and to protect the interest of administration of

15. (1984) 1 SCC 284.

justice so as to prevent its failure.”

34) In view of my aforesaid findings, there are no merits in the aforesaid Application and the Petition and both are liable to be dismissed. Criminal Application (APL) No.1063 of 2024 and Criminal Writ Petition (ST.) No.17797 of 2024 are dismissed, accordingly.

(SHYAM C. CHANDAK, J.)

35) After pronouncement of the Judgment, Mr. Rathod, the learned Advocate submitted that as this Court rejected the aforesaid application of Accused Nos.1 and 3, said both accused shall surrender before the Sessions Court to which the case is committed. However, the Accused Nos.1 and 3 are married and having children. They should make some provision of the domestic needs of their respective families. He, therefore, prayed that two weeks’ time may be granted to Accused Nos.1 and 3 to surrender before the Sessions Court. Mr. Rathod submitted that, both the accused would not misuse the time that may be granted to surrender.

36) Considering the facts of the case, the aforesaid difficulty of Accused Nos.1 and 3 and relying on the assurance given by Mr. Rathod, time to surrender is granted. Accused Nos.1 and 3 shall surrender in the Sessions Court on 31st January, 2025 at 11:00 AM.

(SHYAM C. CHANDAK, J.)