

(2002) 12 BOM CK 0083

In the Bombay High Court

Case No : Criminal Application No. 709 of 2002

Afzal Ibrahim Jariwala

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-12-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2)

Citation : (2003) 2 ALD(Cri) 38 : (2003) BomCR(Cri) 899 : (2003) 2 MhLj 684 : (2003) 3 RCR(Criminal) 393

Hon'ble Judges : V.K. Tahilramani, J

Bench : Single Bench

Advocate : Subhash Jha, Vatrall Varmma, Priyanka Vegad and Shailesh, instructed by Law and Global, for the Appellant; P. Janardan, A.A.G. and K.K. Kapoor, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.

Heard the learned Advocate for the applicant and the learned Additional Advocate General with learned A.P.P for the State. By consent, rule is made returnable forthwith and heard finally.

1. The applicant has preferred this application for bail in C. R. No. 15/2001 registered at DCB CID Unit VII, Mumbai. The said case was initially registered u/s 489-A, 489-B, 489-C, 420 and 120B of Indian Penal Code. Later on the provisions of the MCOC Act were applied. The present application is not on merits but it is only pressed u/s 167(2) of Criminal Procedure Code.

2. A few dates would be relevant-

1) Date of arrest and first remand of applicant - 19-3-2001.

2) Provisions of MCOC Act applied - 27-4-2001.

3) Period of 90 days from arrest and first remand expired - 16-6-2001.

4) Chargesheet filed - 23-7-2001.

5) Application for bail u/s 167(2) - 13-8-2001

3. The applicant in the present case came to be arrested on 19-3-2001 for the offences u/s 489-A, 489-B, 489-C read with 120B, Indian Penal Code.

4. It is the prosecution case that on the relevant date i.e. 19-3-2001, the applicant was found in possession of counterfeit currency notes and thus, he came to be arrested in the said case. Later on the provisions of MCOC Act were also added.

5. The learned Advocate for the applicant has submitted that in the present case, the applicant was arrested on 19-3-2001 and the chargesheet ought to have been filed on 16-6-2001. He has submitted that though the MCOC Act was applied on 27-4-2001, the period of 90 days has to be calculated from the date of first remand i.e. 19-3-2001.

6. The application for bail preferred by the applicant on 13-8-2001 u/s 167(2), Criminal Procedure Code came to be rejected by the Special court by order dated 6-9-2001. The main ground for rejecting the said application was that the period of 90 days would not be computed from 19-3-2001 but as the provisions of the MCOC Act came to be applied on 27-4-2001, the period would have to be computed from 27-4-2001 and thus, the Special Court was of the opinion that the period of 90 days was not over on 16-6-2001. Hence, the application for bail u/s 167(2) came to be rejected. However, now it is settled law that even if the provisions of the MCOC Act are applied at a later date, the time of the remand period has to be computed from the first date of remand i.e. from the first date when the accused was produced in Court. Therefore, the period would start running from the first date of remand i.e. 19-3-2001 and not from the date the provisions of MCOC Act are applied. Therefore, the view taken by the learned Sessions Judge is clearly erroneous.

7. However, in the present case, it is an admitted fact that the chargesheet came to be filed on 23-7-2001. Period of 90 days expired on 16-6-2001 and the application for bail u/s 167(2) was preferred only on 13-8-2001. In the decision of the Apex Court in the case of Sanjay Dutt Vs. State through C.B.I., Bombay, , the Apex Court has observed thus:--

"46. On the other aspect, Shri Kapil Sibal conceded that the indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period prescribed by Section 20(4)(bb) as held in Hitendra Vishnu Thakur is right of the accused which is enforceable only upto the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. Shri Sibal submitted that the decision of the Division Bench in Hitendra Vishnu Thakur cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues in custody. He stated

unequivocally that on filing of the challan, such a right which accrued prior to filing of the challan has no significance and the question of grant of bail to an accused in custody on filing of the challan has to be considered and decided only with reference to the provisions relating to grant of bail applicable after filing of the challan, since Section 167, Criminal Procedure Code has relevance only to the period of investigation.

47. The learned Additional Solicitor General, in reply, agreed entirely with the above submission of Shri Sibal and submitted that the principle enunciated by the Division Bench in *Hitendra Vishnu Thakur* must be so read.

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, Criminal Procedure Code ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detentions on the basis of a valid order."

Thus, it is clear that the indefeasible right accrued to an accused is enforceable only prior to the filing of chargesheet and does not survive for enforcement on the chargesheet being filed. Once the chargesheet has been filed, the question 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 after filing of the chargesheet. Thus, it is clear that there is no question of enforcement of any right once the

chargesheet is filed, as the said right is extinguished the moment the chargesheet is filed because thereafter Section 167, Criminal Procedure Code has relevance only to the period of investigation.

8. The learned Advocate for the applicant has submitted that the applicant had filed an application for bail on 24-4-2001 before the learned Magistrate and the said application has remained pending till date. Thus, he has tried to contend that the accused had made a move to enforce his right even before the chargesheet was filed. However, it is to be noted that on 27-4-2001, the provisions of MCOC Act came to be applied and thereafter, the case was put up before the Special Court dealing with MCOC matters. It is an admitted fact that the said bail application has not been pursued by the applicant and in any event that application was not for enforcement of the alleged right u/s 167(2) but the said application was purely on merits in a case then registered only under various sections of Indian Penal Code.

9. It is very clear that if the chargesheet is not filed within the stipulated time, then the accused has to enforce his right which accrues to him u/s 167(2). In the present case, the applicant has tried to enforce his right only on 13-8-2001 when the application for bail u/s 167(2) came to be filed by him. The earlier application made by him on 24-4-2001 cannot be said to be an application made to enforce his right u/s 167(2). Hence, even if the said application was pending, it would not amount to an application being pending u/s 167(2). The applicant cannot make any use of the application which was filed by him on 24-4-2001 before the learned Magistrate by contending that the application for bail was pending at the time when the chargesheet was not filed and hence, he ought to be released on bail on that ground.

10. So also in the case of Uday Mohanlal Acharya Vs. State of Maharashtra, , the Apex Court has observed thus-

"On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the

part of the investigating agency in completing the investigation within the period stipulated.

If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished."

The expression "if not already availed of used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of if the chargesheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily . Therefore, if an accused entitled to be released on bail by application of the proviso to Sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum for consideration a chargesheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail."

11. In the present case, the chargesheet was filed earlier i.e. on 23-7-2001 and thereafter, on 13-8-2001, the applicant for the first time tried to enforce his right to bail u/s 167(2). However on 13-8-2001, the right of the accused was already extinguished.

12. The learned Advocate for the applicant has also placed reliance on the case of Narsingh Das Tapadia v. Goverdhan Das Partani and Anr. reported in (2002) 7 SCC 183 However, the facts therein are entirely different and hence, the said decision would be of no help to the applicant. The said case relates to the filing of a complaint u/s 138 of the Negotiable Instruments Act. In the said case, the Apex Court held that although the complaint was filed before the expiry of the statutory period prescribed in Section 138(c), instead of dismissing the complaint, the taking of cognisance could be postponed till the arising of cause of action. However, in the present case, it is to be noted that the application for bail which was preferred on 24-4-2001 was only preferred on merits of the case which was registered at that time only under the provisions of Indian Penal Code. Clearly, the application was not for enforcement of right which had accrued u/s

167(2) and therefore, there was no question of taking the said application into consideration at a later stage for being released u/s 167(2).

13. Thus, it is clear that the right accrues in favour of the accused for being released on bail and the accused is entitled to be released on bail if he is prepared to and furnishes the bail as directed by the Court. However, an application has to be filed for bail by the accused for enforcement of his right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in filing the chargesheet within the stipulated period. The said application has to be preferred before filing of the chargesheet.

14. Looking to the fact that it is only on 13-8-2001, that for the first time the applicant preferred an application for enforcement of his right of bail u/s 167(2) and that the chargesheet was filed much prior to that i.e. on 23-7-2001, the right which has accrued to the applicant has clearly been extinguished. Hence, the applicant is not entitled to bail u/s 167(2).

Application for bail is rejected. Rule is discharged.