

(2009) 06 GUJ CK 0018

In the Gujarat High Court

Case No : Spl. Criminal Application No. 1424 of 2008

Karshanbhai Kamabhai Harijan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-06-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(1), 167(2), 173, 209
Penal Code, 1860 (IPC) — Section 376

Citation : (2009) CriLJ 4613

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : Himanshu M. Padhya, for the Appellant; L.R. Poojari, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—Short but interesting question of law posed for consideration of this Court is that in a case where charge-sheet is not submitted within 90 days / 60 days as the case may be and application for default bail is submitted u/s 167(2) of the Code of Criminal Procedure ("Cr.P.C." for short) before the learned Magistrate having no jurisdiction to try the case or commit for trial and application has been submitted before another Court and during the pendency of such application, before another Court when another application is submitted by the accused u/s 167(2) of the Code of Criminal Procedure for default bail before the learned Magistrate having jurisdiction to try the case or commit it for trial and before application for default bail is preferred before the learned Magistrate having jurisdiction to try the case or to commit the case, charge-sheet is filed by the police, whether in that case accused is required to be released on default bail ?

2. Facts leading to the present Special Criminal Application and chronological events which are necessary for the purpose of determination of Special Criminal Application are as under:

A criminal complaint/FIR has been lodged against petitioner - original accused on 12.02.2008 with Mavsari Police Station being CR No. I-4 of 2008 for the offences punishable u/s 376 of Indian Penal Code. That the petitioner - accused came to be arrested by the Mavsari Police Station on 13.02.2008. The petitioner preferred Criminal Misc. Application No. 240 of 2008 u/s 439 read with Section 167(2) of the Code of Criminal Procedure before the learned Additional Sessions Judge, Deesa on 13.05.2008 for releasing him on bail on merits as well as on default bail by submitting that the charge-sheet has not been filed within 90 days from the date of his arrest. It is the case on behalf of the petitioner that the learned Additional Sessions Judge advised the petitioner's Advocate that they may file application before the learned Magistrate u/s 167(2) of the Cr.P.C. and therefore, the petitioner submitted application before the concerned Magistrate on 23.05.2008 u/s 167(2) of the Cr.P.C. for releasing him on default bail. That the petitioner withdrew Criminal Misc. Application No. 240 of 2008 submitted by him before the learned Additional Sessions Judge, Deesa on 06.06.2008. Before that Investigating Officer submitted charge-sheet before the learned Magistrate, Vav on 13-5-2008. That thereafter, aforesaid Criminal Misc. Application submitted by the petitioner before the learned Magistrate, Vav being Cr. Misc. Application No. 19 of 2008 came to be heard, decided and disposed by the learned JMFC, Vav, who vide order dated 09.06.2008 dismissed the said application by submitting that before filing application by the petitioner before him u/s 167(2) of the Cr.P.C., Investigating Officer has already filed charge-sheet on 13-5-2008. That being aggrieved and dissatisfied with the order passed by the learned JMFC, Vav dated 9-6-2008 in dismissing the said application and not releasing the petitioner on default bail u/s 167(2) of the Cr.P.C., the petitioner - accused preferred Criminal Revision Application No. 34 of 2008 before the learned Additional Sessions Judge, Banaskantha who vide his judgment and order dated 26.06.2008 dismissed the said Revision Application confirming the order passed by the learned JMFC, Vav. It is required to be noted at this stage and as stated above the petitioner accused submitted application before the learned JMFC, Vav u/s 167(2) of the Cr.P.C. on 26.05.2008 and before that not only charge-sheet was submitted by the Investigating Officer in the Court of learned JMFC, Vav on 13.05.2008 but even the learned JMFC, Vav also committed the case to the learned Sessions Court on 23.05.2008. Hence, the petitioner has preferred present Special Criminal Application to quash and set aside aforesaid two orders passed by both the Courts below and to release the petitioner on bail u/s 167(2) of the Cr.P.C. on the ground that charge-sheet has not been submitted by the Investigating Officer within 90 days from the date of his arrest.

3. Mr. Y.S. Lakhani, learned Senior Advocate has appeared on behalf of the petitioner with Mr. Himanshu Padhya, learned Advocate. It is submitted that the petitioner came to be arrested on 12.02.2008 and was produced before the learned Magistrate on 13.02.2008, therefore, Investigating Officer was required to submit charge-sheet on or before 12.05.2008 and thereafter immediately on 13.05.2008 the petitioner submitted application before the learned Additional

Sessions Judge, Deesa for releasing him on default bail u/s 167(2) of the Cr. P.C. and on the very day after the petitioner submitted application for default bail, Investigating Officer submitted charge-sheet before the learned JMFC, Vav on 13-5-2008. It is submitted that therefore, the petitioner exercised his right accrued in his favour by submitting application u/s 167(2) of the Cr. P.C. by submitting application before the learned Additional Sessions Judge, Deesa before submission of charge-sheet by the Investigating Officer. It is submitted that as observed by the Hon''ble Supreme Court in the case of Uday Mohanlal Acharya Vs. State of Maharashtra, on expiry 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 period prescribed and accused is entitled to be released on bail if he is prepared and furnish the bail as directed by the learned Magistrate. It is further submitted relying upon aforesaid decision that as observed by the Hon''ble Supreme Court in the aforesaid decision that when an application for bail is filed by the 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 it of 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. It is submitted that therefore, in the present case as the petitioner submitted application before the learned Additional Sessions Judge, Deesa u/s 167(2) of the Cr.P.C. on 13.05.2008, before submission of the charge-sheet by the investigating officer it can be said that the petitioner accused has availed his indefeasible right and therefore, the petitioner is entitled to be released on default bail.

3.1 Mr. Lakhani, learned Senior Advocate appearing on behalf of the petitioner has further submitted that in one of the cases before this Court, i.e. in the case of Girishbhai Arunbhai Desai Vs. State of Gujarat, the petitioner in that petition preferred application before the Court other than the Court of JMFC i.e. Court of Sessions, this Court granted him default bail. He has relied upon para - 4 of the said decision.

3.2 Mr. Lakhani, learned Senior Advocate appearing on behalf of the petitioner has also relied upon decision of this Court in the case of Babubhai Bhimjibhai Kachadiya Vs. State of Gujarat, against the observations of the Court below that as and when charge-sheet is filed by the prosecution, right of the accused u/s 167(2) is closed. It is submitted that in the aforesaid decision the learned Single Judge followed principles laid down by the Hon''ble Supreme Court in the case of Uday Mohanlal Acharya (supra). Mr. Lakhani, learned Senior Advocate has also relied upon another decision of the learned Single Judge of this Court in the case of Jayantilal Virjibhai Vaghela v. State of Gujarat reported in (2003) 2 GHJ 638. It is submitted that in the present case the petitioner preferred application on 13-5-2008 before the learned Additional Sessions Judge at 11.30 a.m. and

prosecution submitted charge-sheet in the evening on the same day before the learned JMFC, Vav. Therefore, relying upon aforesaid decisions it is requested to release the petitioner on default bail u/s 167(2) of the Cr. P.C.

4. Petition is opposed by Mr. L.R. Poojari, learned Additional Public Prosecutor appearing on behalf of the State. Relying upon Section 167(2) of Code of Criminal Procedure it is submitted that on proper perusal and examination of the provisions contained in Section 167(2) and proviso and explanation thereto, it is very clear that authority to authorise the detention of the accused in custody and to release him on bail after expiry of period specified thereunder is conferred on the learned JMFC and not on any other Court. Therefore, the application of the accused u/s 167(2) is to be made in the Court of learned JMFC, Vav only. It is submitted that this is so because after completion of investigation report u/s 173 of the Cr.P.C. is to be filed by Investigating Officer in the Court of learned Magistrate. It is further submitted that such application is to be made by the accused in the Court of learned Magistrate only and not before any other Court. Therefore, it is submitted that application submitted by the petitioner on 13.05.2008 before the learned Additional Sessions Judge, Deesa u/s 167(2) was not maintainable before the learned Additional Sessions Judge. Therefore, on the basis of such application submitted by the petitioner before wrong Court applicant cannot be released on default bail. It is submitted that as such the applicant was required to submit application u/s 167(2) before the learned JMFC, Vav. It is submitted that therefore, the petitioner's Advocate rightly not pursued application before the learned Additional Sessions Judge, Deesa and he withdrew subsequently on 06.06.2008 and submitted application before the learned JMFC, Vav u/s 167(2) of the Cr.P.C. on 13.05.2008. Admittedly, before that chargesheet is already submitted by the prosecution before the learned JMFC, Vav on 13.05.2008. Therefore, as charge-sheet was already filed before the petitioner - accused submitted application before the learned Magistrate u/s 167(2) of the Cr.P.C, the application made by the petitioner for releasing him default bail is rightly rejected by both the Courts below. It is submitted that aforesaid submission would be without prejudice to the contention by the prosecution that charge-sheet was infact filed within 90 days as stated herein after.

4.1. It is submitted by Mr. Poojari, learned APP that as per provisions of Section 167(2) of the Code, period of 90 days or 60 days as the case may be is to be considered from the date of authorisation of detention of accused in custody u/s 167(2) of the Cr.P.C. after production. It is submitted that proviso to Sub-section 167 (2) (a) provides that the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police beyond the period of 60 days, if he is satisfied that adequate grounds exists for doing so, but no Magistrate shall authorise the detention of the accused person in custody (i) 90 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. Proviso to Sub-section 2(b) of Section 167 provides that no Magistrate shall authorise detention in any custody under said section unless the accused is

produced before him. It is submitted that on conjoint reading of proviso to Sub-section 2(a) and Sub-section 2(b) of Section 167 it is clear that period of custody for the purpose of calculating 90 days is otherwise than in the custody of police. Therefore for the said purpose date of sending accused to judicial custody is relevant date and not the date on which accused is taken into police custody. It is submitted that in the instant case accused was produced before the learned JMFC, Vav on 13.05.2008. He was send to judicial custody on 13.05.2008. Therefore, it is submitted that considering 16 days of February, 31 days of March and 31 days of April, 2008, 90 days would be completed on 14.05.2008. It is submitted that thus admittedly charge-sheet has been filed on 13.05.2008 within 90 days from the date of authorisation of detention of custody on 13.05.2008. It is submitted that on 13.05.2008 accused had no right u/s 167(2) of the Code for releasing him on bail. Hence, right u/s 167(2) of the Cr.P.C. has accrued to the petitioner - accused only after 14.05.2008. Therefore, it is submitted that application u/s 167(2) was even otherwise not maintainable on 13.05.2008. It is further submitted that provisions with regard to the Constitution of Criminal Courts and Offices are made in Chapter II of the Code. Besides the High Court constituted under any law, other than the Code, there shall be, in every State, following classes of criminal courts namely:

(i) Courts of Sessions

(ii) Judicial Magistrate of this First Class and in any Metropolitan area, Metropolitan Magistrate

(iii) Judicial Magistrate of the Second Class and

(iv) Executive Magistrate

4.2. It is further submitted by Mr. Poojari, learned APP that provisions regarding jurisdiction of Court in inquiries and trials are made in Chapter XIII of the Code. Chapter XIV of the Code makes provisions regarding the commencement of proceedings before the Magistrate. Provisions regarding trial before the Court of Sessions is made under Chapter XVII of the Code. How the warrant cases and summons cases are to be conducted is provided in Chapter XII and XX respectively. Provision regarding appeal, reference and revisions are made in Chapter XXIX and XXX. Provisions relating to bail and bail bonds are made in Chapter XXXIII of the Code. It is further submitted that the aforesaid provisions clearly define how any proceeding is to be initiated and trial thereof should be conducted. The powers and functions and jurisdiction of the Courts are also clearly defined under the aforesaid provisions. Therefore, unless and until specific powers are conferred under the Code, no Court can take cognizance or entertain any application or petition contrary to the said provisions. So far as exclusion of time in certain cases are concerned provision is made u/s 470 of the Code in Chapter XXXVI of the Code. It is submitted that no concurrent jurisdiction is provided under the Code to the learned Magistrate and the Sessions Court for the application u/s 167(2) of Cr.P.C, as it is provided under Sections 438 and 439 of

the Code wherein concurrent jurisdiction is conferred on the High Court and the Court of Sessions. Therefore, when there is no current jurisdiction for entertaining application made by the accused u/s 167(2) of the Code, the Sessions Court has no jurisdiction to entertain an application u/s 167(2) of the Code.

4.3 Relying upon decision of the Hon''ble Supreme Court in the case of Sanjay Dutt Vs. State through C.B.I., Bombay, as well as another decision of the Hon''ble Supreme Court in the case of Uday Mohanlal Acharya (supra) Mr. Poojari, learned APP has submitted that on fair reading of observations of the Hon''ble Supreme Court in the aforesaid two decisions the expression "availed of indicates that application by the accused should be filed in the Court of Magistrate on expiry of period specified u/s 167(2) of the Code before filing of the charge-sheet and not thereafter. It is submitted that in the present case it is admitted fact that application u/s 167(2) of the Cr. P.C. was filed by the accused in the Court of Sessions on expiry of said stipulated period and before filing of the charge-sheet. It is submitted that as stated above even otherwise, infact charge-sheet was filed on 13.05.2008 and stipulated period was expiring on 14.05.2008. Therefore, no right was accrued to the accused on 13.05.2008. It is submitted that it is also required to be noted that case was committed to Sessions Court u/s 209 prior to the application u/s 167(2) was filed by the accused in the Court of learned Magistrate. It is submitted that once case is committed to the Sessions as held by the Hon''ble Supreme Court in the case of Sanjay Dutt (supra) and in the case of Mohamed Iqbal Madar Sheikh and Others Vs. State of Maharashtra, the learned Magistrate must deal with the accused in the matter of remand to custody subject to the provisions of the code relating to bail and subject to provisions of cancellation of bail. Therefore, once case is committed by the learned Magistrate to the Court of Sessions he becomes functus officio. It is submitted by Mr. Poojari, learned APP that no power is conferred on the Court of Sessions u/s 167(2) as there is no jurisdiction conferred to Sessions Court to entertain such application u/s 167(2) of the Code. It is submitted that Code authorises only the learned Magistrate to exercise power conferred under the said provisions. It is submitted that in the instant case it is not in dispute that when application being Cr. M.A. No. 240 of 2008 was filed by the accused before the learned Additional Sessions Judge, Deesa it was u/s 439 of the Code also. It is therefore, submitted that as such decision relied upon by the learned Advocate for the petitioner in the case of Uday Mohanlal Acharya (supra) would not be applicable in favour of the petitioner as sought to be canvassed. It is submitted that in the case of Uday Mohanlal Acharya (supra) application u/s 167(2) of the Code was already filed by the accused before the learned Magistrate and during the pendency of the proceedings in respect of such application pending before the High Court, charge-sheet was filed. Therefore, observations made in the said decision is relating to the proceedings pending with respect to application which has been already filed by the accused in the Court of Magistrate. It is submitted that in the instant case application u/s

167(2) was not filed before the learned Magistrate. Therefore, on true interpretation both the Courts below have rightly rejected the application u/s 167(2) for default bail. Therefore, it is requested to dismiss present application.

5. Heard the learned Advocates appearing on behalf of the respective parties at length.

6. From the facts narrated herein above it emerges that FIR came to be registered with Mavsari Police Station on 12.02.2008. The petitioner came to be arrested by the police / Investigating Officer on 12.02.2008. He was produced before the learned Magistrate on 13.02.2008 and was taken into custody on 13.02.2008. Therefore, the petitioner can be said to be in judicial custody on or from 13.02.2008. That according to the petitioner 90 days in the judicial custody would be over / completed on 12.02.2008 and therefore, the charge-sheet against the petitioner was required to be filed before the concerned Magistrate on or before 12.05.2008. According to the petitioner charge-sheet was not submitted before the learned JMFC, Vav on or before 12.05.2008 i.e. within 90 days and the right was accrued in favour of the petitioner for releasing him on default bail as contemplated u/s 167(2) of the Cr.P.C, as further detention of the petitioner - accused by the concerned Magistrate on or after 13.05.2008, on non-filing of submitting charge-sheet by the police / investigating officer before 13.05.2008, such detention would be illegal and therefore, the petitioner submitted application before the learned Additional Sessions Judge, Deesa on 13.05.2008 being Criminal Misc. Application No. 240 of 2008 for releasing him on bail / default bail. As stated above, it is the case on behalf of the petitioner that the learned Additional Sessions Judge, Deesa orally advised the learned Advocate for the petitioner - accused to submit application u/s 167(2) of the Cr.P.C. through proper channel i.e. to make application before the learned JMFC, Vav therefore, during the pendency of application before the learned Additional Sessions Judge, Deesa the petitioner preferred another application before the learned JMFC, Vav being Criminal Misc. Application No. 19 of 2008 on 23.05.2008 for releasing him on default bail. On filing of application for default bail before the learned JMFC, Vav on 23.05.2008 being Criminal Misc. Application No. 19 of 2008, the petitioner withdrew application which was submitted before the learned Additional Sessions Judge, Deesa on 06.06.2008. Thereafter, as stated herein above the application before the learned JMFC, Vav being Cr. Misc. Application being No. 19 of 2008 came to be dismissed by the learned JMFC, Vav on the ground that before application was submitted before him i.e. learned JMFC, Vav charge-sheet has already been filed on 13.05.2008 itself i.e. prior to submission of application for default bail before him. Said order came to be confirmed by the learned Revisional Court therefore, the petitioner - accused is before this Court.

7. It appears from the submissions made on behalf of the learned Advocate for the petitioner - accused that in view of application submitted by the petitioner - accused before the learned Additional Sessions Judge, Deesa dated 13.05.2008

which was prior to submission of charge-sheet by the prosecution before the learned JMFC, Vav and said application was on completion of 90 days, the petitioner had indefeasible right to be released on default bail. Therefore, it appears that it is the contention on behalf of the petitioner - accused that application submitted by the petitioner - accused before the learned Additional Sessions Judge, Deesa being Cr. Misc. Application No. 240 of 2008 is to be considered as valid application by him u/s 167(2) of the Cr.P.C. Therefore, the petitioner has based his case on application submitted by him before the learned Additional Sessions Judge, Deesa. Even otherwise, the petitioner cannot base his case for default bail on the application submitted by him before the learned JMFC, Vav being Cr. Misc. Application No. 19 of 2008 as same was submitted on 23.05.2008 and admittedly before that, charge-sheet was already filed / submitted by the prosecution before the learned JMFC, Vav. Therefore, the question posed for consideration of this Court is whether the petitioner is entitled to be released on default bail on the basis of the application submitted by him before the learned Additional Sessions Judge, Deesa or application for default bail u/s 167(2) was required to be submitted by the petitioner before the concerned learned Magistrate having jurisdiction to try the case or to commit the case to the Court of sessions. For the aforesaid controversy first of all Section 167(2) of the Code of Criminal Procedure is required to be considered and referred to. Section 167 of the Code is as under:

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, authorize the detention of the accused in such custody as such Magistrate thinks fit, 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 authorize the detention of the accused person, otherwise then in the 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 authorize 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 released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

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

7.1. On considering Section 167 it refers to custody of the accused by the learned Magistrate. Sub-section (1) of Section 167 cast duty upon the Investigating Officer / police to produce person who is arrested and detained in custody before the nearest Judicial Magistrate and also casts duty upon the police to forthwith transmit to the nearest Judicial Magistrate a copy of entries in the diary containing arrest and detention of such person, in a case where any person is arrested and detained in custody and it appears that investigation cannot be completed within a period of 24 hours of such arrest / detention and there are grounds for believing that the accusation or information is well-founded. Therefore, after completion of 24 hours of arrest and detention, such person who is arrested and detained, would be in custody of Judicial Magistrate unless some further order is passed with respect to remand / police custody. As per Sub-section (1) of Section 167 such a person who is arrested and detained is required to be produced before the nearest Judicial Magistrate may be such a Magistrate has or has no jurisdiction to try the case. As per Sub-section (2) of Section 167 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, authorize the detention of the accused in such custody as such Magistrate thinks fit, 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. Idea behind forwarding such accused to Magistrate having jurisdiction to try the case or commit it for trial is that in such a case i.e. the learned Magistrate before whom accused is forwarded so that Magistrate having jurisdiction to try the case or commit it for trial may release such accused on bail if his further detention is found unnecessary. Therefore, on true interpretation and fair reading of Section 167(2) of the Cr.P.C. only such Magistrate having jurisdiction to try the case or commit it for trial would have jurisdiction to release

the accused on bail. If Magistrate before whom a person is arrested and detained is forwarded, such Magistrate may authorise detention of accused person otherwise in the custody of police beyond 15 days if he is satisfied that adequate grounds exists for doing so but no Magistrate shall authorize detention of custody of accused person in custody for total period of exceeding 90 days or 60 days as the case may be. Therefore, Section 167 refers to detention of person by the Magistrate. Section 167(2) of the Code also provides that after expiry of 90 days or 60 days as the case may be and if investigation is not completed and charge-sheet is not filed, such accused - person shall be released on bail if he is prepared to and 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 purpose of that Chapter. Therefore, such person has to be prepared and furnish bail before his release on bail u/s 167(2) of the Cr.P.C. and that can only be furnished before the Magistrate having jurisdiction to try the case or commit it for trial. Even considering Chapter XXXIII and relevant provision of the Cr.P.C, a person who is arrested is released on bail has to furnish bail before the Magistrate having jurisdiction to try the case or commit it to the sessions. Therefore, when it is provided in Section 167(2) that such accused person under said provisions shall be released on bail if he is prepared and furnishes bail meaning thereby it is only before and by Magistrate who can accept bail i.e. Magistrate having jurisdiction to try the case or commit it for trial. Therefore, on true interpretation of Section 167(2) of the Cr.P.C, application u/s 167(2) for default bail on non-filing of charge-sheet before the concerned Magistrate within 90 days, person who is arrested and/or detained has to submit application before the Magistrate having jurisdiction to try the case or commit it to trial. It is also required to be noted at this stage that even charge-sheet/challan is required to be filed/ submitted only before the Magistrate who has jurisdiction to try the case or commit it to trial. Therefore, application submitted by the petitioner before the learned Additional Sessions Judge, Deesa on 13.05.2008 for releasing him on default bail contending inter-alia that charge-sheet has not been filed within 90 days, cannot be said to valid application for default bail as contemplated u/s 167(2) of the Cr.P.C. There is no concurrent jurisdiction vested with the Court of Sessions as well as learned Magistrate u/s 167(2) as so provided in Section 438 and 439 of the Cr.P.C conferring concurrent jurisdiction with Sessions and High Court. It is to be noted that in the present case admittedly the petitioner submitted application before the learned Magistrate i.e. JMFC, Vav on 23.05.2008 for releasing him on default bail u/s 167(2) of the Cr.P.C. being Cr. Misc. Application No. 19 of 2008 and on aforesaid interpretation it can be said that such application before the learned JMFC, Vav can be said to be only valid application for default bail u/s 167(2) of the Cr.P.C. As stated herein above such application was filed on 23.05.2008 and admittedly, before that charge-sheet was already filed by the prosecution before the learned JMFC, Vav on 13.05.2008. Therefore, it cannot be said that both the Courts below have committed any error in not releasing the petitioner on default bail u/s 167(2) of the Cr.P.C.

8. Mr. Lakhani, learned Senior Advocate appearing on behalf of the petitioner - accused has heavily relied upon decision of the Hon''ble Supreme Court in the case of Uday Mohanlal Acharya (supra) more particularly conclusions in para - 13 where the Hon''ble Supreme Court has used the word Magistrate / Court. Now so far as the decision of the Hon''ble Supreme Court in the case of Uday Mohanlal Acharya (supra) is concerned that was not the question which is posed before this Court. Controversy before the Hon''ble Supreme Court was when accused can be said to have "availed of his right. Controversy before the Hon''ble Supreme Court was that when during the pendency of application for default bail u/s 167(2) of the Cr.P.C. charge-sheet was filed, whether right in favour of accused will be defeated. In the case before the Hon''ble Supreme Court application was submitted before the concerned Magistrate for default bail u/s 167(2) of the Cr.P.C. which was erroneously refused by the Magistrate and accused moved higher forum and in the meantime challan was filed and to that Hon''ble Supreme Court held that once charge-sheet is not filed within 90 days or 60 days as the case may be and accused submits application before the Magistrate for default bail u/s 167(2). the indefeasible right cannot be frustrated or extinguished on filing of charge-sheet subsequently. There is no proposition of law laid down by the Hon''ble Supreme Court in the said decision and infact there was no controversy before the Hon''ble Supreme Court whether application u/s 167(2) of the Cr. P.C. can be filed before the Magistrate / Court of Sessions or any other Court not having jurisdiction to try the case or commit it to trial. Therefore, merely because Hon''ble Supreme Court has used the word Magistrate /Court it cannot be construed that what is held by the Hon''ble Supreme Court is that any Court inclusive of Sessions Court would have jurisdiction to entertain the application u/s 167(2) of Cr.P.C. as sought to be contended on behalf of the petitioner.

9. Mr. Lakhani, learned Senior Advocate has relied upon decision of the learned Single Judge of this Court in the case of Girishbhai Arunbhai Desai (supra) more particularly para 4 of the said decision. On considering aforesaid decision it appears that as such there was no direct controversy / issue before the learned single Judge whether application u/s 167(2) is required to be made before the Magistrate having jurisdiction to try the case or commit it to trial. It appears that there was no lis between, the parties on aforesaid issue. Therefore, observation of the learned single Judge in the aforesaid decision would not be helpful to the petitioner.

10. In view of above and for the reasons stated above it is held that for exercising right u/s 167(2) of the Cr.P.C. i.e. for default bail, accused has to submit application for default bail, before the Magistrate who is having Jurisdiction to try the case or commit it to trial as such Magistrate would have jurisdiction to accept the bail and as observed by the Hon''ble Supreme Court while availing of right of default bail u/s 167(2) of the Cr.P.C. accused has to be prepared to and furnish bail. In view of above, application submitted by the petitioner for default bail u/s 1.67(2), before the learned Additional Sessions

Judge, Deesa on the basis of which present application has been preferred, it can be said that such application cannot be said to be valid application for default bail u/s 167(2) of the Cr.P.C. and when application was submitted before the learned JMFC, Vav for default bail u/s (2) of the Cr.P.C. being Cr. Misc. Application No. 19 of 2008 which was filed on 23.05.2008 and before that charge-sheet was already filed on 13.05.2008, such application is rightly rejected by the learned JMPC, Vav which is rightly confirmed by the learned Revisional Court. In view of above, present petition deserves to be dismissed and accordingly it is dismissed by holding that petitioner is not required to be released on default bail u/s 167(2) of the Cr.P.C. on the basis of his application before the learned Additional Sessions Judge, Deesa being Criminal Misc. Application No. 240 of 2008. Rule discharged.