

(2015) 02 MAD CK 0044
In the Madras High Court
Case No : Criminal R.C. No. 1302 of 2014

N. Vaidyanathan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161(3), 167, 167(2), 167(2)(a)(i), 170

Penal Code, 1860 (IPC) — Section 114, 119, 120-B, 272, 380

Citation : (2015) 02 MAD CK 0044

Hon'ble Judges : C.T. Selvam, J.

Bench : Single Bench

Advocate : V. Gopinath, Senior Counsel for L. Mahendran, for the Appellant; S. Shanmugavelayutham, Public Prosecutor, Advocates for the Respondent

Judgement

C.T. Selvam, J.—This revision challenges the order of learned Chief Judicial Magistrate, Villupuram, passed in CrI.M.P. No.2010 of 2014 on 04.12.2014.

2. By the order under challenge the claim to right of statutory bail under section 167(2) Cr.P.C. was negated. Petitioner is the fourth accused in case registered in Crime No. 122 of 2014 on the file of Vellimedupettai Police Station. He was arrested and remanded to custody on 20.09.2014. There are as many as 23 accused in the case and investigation therein was transferred to the file of CBCID, Villupuram on 03.09.2014 and registered in Crime No. 5 of 2014 of such department. Pursuant to investigation conducted by the Deputy Superintendent of Police, CBCID, Villupuram, a charge sheet was filed informing commission of offences under sections 120-B, 407 and 380 IPC @ 272, 114, 119 r/w 407 and 411 IPC. Such charge sheet was filed in Court on 18.11.2014. The same was returned for rectification on 25.11.2014. Petitioner moved a petition for relief u/s. 167(2) Cr.P.C. on 28.11.2014. Petitioner contended that the nature of offences alleged in the case did not permit his being held in custody beyond a period of 60 days unless the charge sheet had been filed by then, that he had thus become entitled to bail on 19.11.2014 and as the charge sheet was not before Court on

such date, he was entitled to release. The charge sheet had been returned on 25.11.2014. Respondent resubmitted the same on 28.11.2014 along with an explanation for queries raised by Court. Notice in the bail petition had been issued to respondent police on 28.11.2014 and case stood posted for objections on 01.12.2014. After hearing of the bail petition on 03.12.2014, orders of dismissal were passed on 04.12.2014.

3. Heard Mr.V.Gopinath, learned senior counsel for petitioner and Mr.S.Shanmugavelayutham, learned Public Prosecutor for State.

4. Learned senior counsel relied on decision of Apex Court in Union of India (UOI) Vs. Nirala Yadav, and submitted that therein the Apex Court had made clear that the right to be released on bail u/s. 167(2) Cr.P.C. fructified on the failure of investigating agency to file charge sheet within the stipulated 60/90 days period and even if the same came to be filed subsequent thereto, during the pendency of the consideration of claim therefor, such subsequent filing was of no consequence.

5. Learned senior counsel referred to judgment of Apex Court in Uday Mohanlal Acharya Vs. State of Maharashtra, and the following conclusions drawn therein:

"1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. 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.

4. 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.

5. 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 paragraph (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.

6. The expression "if not already availed of" used by this Court in *Sanjay Dutt Vs. State through C.B.I., Bombay*, 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 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."

6. Learned senior counsel relied on judgment of this Court in *Nagarajan and others v. State* [2004 (2) L.W. (Crl.) 545] to submit that filing of a defective charge sheet and return of the same to rectify such defects amounts to non-filing of charge sheet and the right of the accused to be released on statutory bail would not be defeated. Few other decisions have also been relied upon by learned senior counsel in support of such contention.

7. Learned Public Prosecutor, on the other hand, placed reliance on judgment of this Court in *Guna Alias Gunasekaran Vs. The State*, to submit that returns for compliance of defects pointed out by Court are matters of mere routine administration and could not be understood to mean that no charge sheet or final report had been filed into Court.

8. Learned Public Prosecutor relied on the following observations in the judgment of Allahabad High Court in *Pravin Kasana and Others Vs. State of U.P.*, :

"15. In the instant case, the Magistrate applied its mind to the record available before it and on the day of presentation of the bail application, upon examining the parameters required for grant of such bail, found that the charge-sheet had already been filed and cognizance had been taken, therefore, it rejected the application as not maintainable. In the given circumstances, the satisfaction of the learned Magistrate that charge sheet had already been filed and, therefore, the relief under the proviso to sub section (2) of Section 167 of the Code cannot be granted, is a view permissible in law and is not vitiated in any manner, particularly, in the light of the judgment of the Apex Court in the case of *State through CBI Vs. Mohd. Ashraft Bhat and Another*, , which was noticed by the larger Bench in the case of *Uday Mohanlal Acharya Vs. State of*

Maharashtra, ." Learned Public Prosecutor submitted that in the case on hand, learned Magistrate had dismissed petition u/s 167(2) Cr.P.C. on being satisfied that charge sheet had been filed within the stipulated period.

9. Placing reliance on the judgment of the Division Bench of Andhra Pradesh High Court in Velinedipurnam Vs. State, , learned Public Prosecutor submitted that the failure to file all enclosures as required under section 173(5) Cr.P.C. along with the final report u/s. 173(2) Cr.P.C. would not be reason to release the accused on the premise that a complete charge sheet had not been filed within the stipulated period.

10. Learned Public Prosecutor also relied on judgments of Apex Court in Bhupinder Singh and Others Vs. Jarnail Singh and Another, and Satya Narain Musadi and Others Vs. State of Bihar, , the second of which usefully will be referred to hereunder.

11. The decision of Apex Court in Union of India (UOI) Vs. Nirala Yadav, makes clear that the right u/s. 167(2) Cr.P.C. is an indefeasible one and cannot be defeated by filing of a charge sheet subsequent to the accrual of the right, except where accused does not furnish bail. (Explanation I to Section 167 Cr.P.C.)

12. In the present case, originally the charge sheet was filed on 18.11.2014 i.e., before the expiry of period contemplated u/s. 167(2)(a)(i) Cr.P.C. However, the same was returned and re-presented on 28.11.2014 i.e., on a date on which the right u/s. 167(2) Cr.P.C. had accrued to petitioner.

13. This Court informs hereunder the reasons for return on 25.11.2014 as also the record of compliance in re-submitting the charge sheet on 28.11.2014: Reasons for return:

(1) In Sl.No.18, 161(3) Cr.P.C. statements of witnesses 1 to 6, 7 and 8 were not enclosed.

(2) In the memo of evidence, 161(3) Cr.P.C. statements of List Witnesses 1, 2, 3, 9, 10, 13, 16, 17, 18, 28, 30 and 19 were not enclosed.

(3) The father's name of LW-17 has wrongly been mentioned.

(4) In Sl.No.1, the crime number has wrongly been mentioned.

(5) In Sl.No.27, the confession statement of Dorai dated 08.10.2014 was not found.

(6) The dates wrongly were mentioned in the statements found in Sl.Nos.5, 14 and 15.

(7) Explanation regards the absconding accused viz., A1 and A2.

Record of compliance:

(1) 161(3) Cr.P.C. statements of witnesses found in Sl.No.18 have been recorded

by officials of Vellimedupettai Police Station and forwarded to learned Judicial Magistrate I, Tindivanam and thereafter, at the request of CBCID, Villupuram, the same was forwarded to learned Chief Judicial Magistrate, Villupuram.

(2) 161(3) Cr.P.C. statements of L.Ws. 1, 2, 3, 9, 10, 13, 16, 17 and 18 have been recorded by officials of Vellimedupettai Police Station and forwarded to learned Judicial Magistrate I, Tindivanam and thereafter, at the request of CBCID, Villupuram, the same was forwarded to learned Chief Judicial Magistrate, Villupuram. 161(3) Cr.P.C. statements of L.Ws.19, 28 and 30 were forwarded to learned Chief Judicial Magistrate, Villupuram.

(3) There are two list witnesses in the name of Sakthivel viz., (1) Sakthivel S/o.Muniyappan and (2) Sakthivel S/o.Murugesan.

(4) Crime No. 122 of 2014 on the file of Vellimedupettai Police Station has wrongly been mentioned as Crime No. 12 of 2014.

(5) The confession statement found in Sl.No.5 is that of the witness Dorai S/o.Kannan.

(6) In Sl.No.6, list of witnesses, the confession statement found in Sl.No.5 was recorded by Vellimedupettai Police Station on 20.08.2014. The confession statements found in Sl.Nos.14 and 15 were recorded by C.B.C.I.D. on 03.09.2014.

(7) The accused A1 and A2 specified in Sl.No.7 are, A2 - Mrs. Revathy, proprietor of Deepika Transport and A1 - Deepika Transport.

14. The reference to the returns and note of compliance in the instant case makes clear that when the charge sheet originally was filed on 18.11.2014, all 161(3) Cr.P.C. statements were available before Court. While a crime number wrongly had been informed to be 12 of 2014 instead of 122 of 2014, learned Chief Judicial Magistrate, Villupuram, is found to be wrong in informing that the name of the father of L.W.17 is wrongly mentioned.

15. Mr.M.Mohamed Riyaz, learned Government Advocate [Crl.side], assisting learned Public Prosecutor, pointed out a most relevant aspect viz., that in satisfying the Magistrate and having his acceptance of the final report pursuant to representation on 28.11.2014, absolutely no fresh or additional documents had been presented before him. Learned Chief Judicial Magistrate had been satisfied on the completeness of the final report on the strength of papers originally filed before him on 18.11.2014.

16. The question that arises for consideration is whether any and every return of a charge sheet filed within the stipulated period, even for reasons erroneous, would revive the right of the accused u/s. 167(2) Cr.P.C. It would not. The decision in Bhupinder Singh and Others Vs. Jarnail Singh and Another, informs that where all relevant documents are before Court within the stipulated period, the accused cannot be heard to say that the charge sheet filed is defective and

hence is to be ignored.

17. The Hon'ble Apex Court in Criminal Appeal No. 94 of 2013 between Narendra Kumar Amin vs. CBI and Ors. informs thus:

"16. The observation made at para 76 of the constitution Bench judgment of this Court in the case of K. Veeraswamy (supra) that the report is complete if it is accompanied by all documents and statement of witnesses as required under Section 173(5) of Cr.P.C. cannot be construed as the statement of law, since it was not made in the context of the police report under Section 2(r) read with Section 173(2)(5) and (8) of Cr.P.C. On the contrary, the three Judge Bench of this Court in the decision in Central Bureau of Investigation v. R.S. Pai's case (supra), after referring to the earlier judgment of the coordinate Bench in Narayan Rao's case (supra) categorically held that the word "shall" used in sub-Section (5) cannot be interpreted as mandatory, but directory. The said statement of law is made after considering the provisions of Section 2(r) read with Section 173(5) and (8) of Cr.P.C. Therefore, filing of police report containing the particulars as mentioned under Section 173(2) amounted to completion of filing of the report before the learned ACJM, cognizance is taken and registered the same. The contention of the appellant that the police report filed in this case is not as per the legal requirement under Section 173(2) and (5) of Cr.P.C. which entitled him for default bail is rightly rejected by the High Court and does not call for any interference by this Court." 18. Decision in Satya Narain Musadi and Others Vs. State of Bihar, informs:

"10. Section 173(2) thus provides what the report in the prescribed form should contain. In this case the report did contain the name of the accused and the nature of the offence. In fact Section 170 provides that if upon an investigation under Chapter XII it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground to proceed against the accused such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report, etc. If the accused is on bail that fact will be notified in the final report submitted under Section 173(2). Therefore, the statutory requirement of the report under Section 173(2) would be complied with if the various details therein prescribed are included in the report. This report is an intimation to the Magistrate that upon investigation into a cognizable offence the investigating officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the report under Section 179(2) purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient evidence for the trial of the accused by the Court and when he states in the report not only the names of the accused, but names of the witnesses, the nature of the offence and a request that the case be tried, there is compliance with Section 173(2). The report as envisaged by Section 173(2) has to be accompanied as required by sub-section (5) by all the documents and statements of the witnesses therein mentioned. One cannot

divorce the details which the report must contain as required by sub-section (5) from its accompaniments which are required to be submitted under sub-section (5). The whole of it is submitted as a report to the Court. But even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2) there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report." 19. Thus, if final report of the investigating officer informs with sufficient clarity that upon investigation, he has been able to procure evidence sufficient for the Court to enquire into and informs therein the names of the accused, the names of the witnesses, the nature of offences and requests that the case be tried, the same would amount to due compliance with Section 173(2) of Cr.P.C. This position receives reiteration through the decision in Criminal Appeal No. 94 of 2013 (Narendra Kumar Amin vs. CBI and Ors.) informing that Section 173(5) only is directory. On the other hand, if the requirements of Section 173(2) Cr.P.C. are not met, a Magistrate would be well within bounds in returning the same, leading to a situation where an accused becomes entitled to relief under Section 167(2) Cr.P.C. A decision on the accrual or otherwise of right under Section 167(2) Cr.P.C. would depend on whether the Magistrate was or was not right in returning the charge sheet. In the instant case, the answer lies against the accused.

20. This Criminal Revision shall stand dismissed.