
(2003) 12 MAD CK 0150

In the Madras High Court

Case No : Criminal R.C. No"s. 1824 and 1825 of 2003

Nagarajan and Suresh and 12 Others

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 23-12-2003

Acts Referred:

Citation : (2003) 12 MAD CK 0150

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : Mr. D. Stephen for Shalom Associates in Crl.R.C. 1824/2003 and Mr. S. Sathia Chandran in Crl.R.C. 1825/2003, for the Appellant; Mr. M.K. Subramanian Government Advocate (Crl. Side), for the Respondent

Judgement

S. Ashok Kumar, J.—Crl.R.C. No. 1824 of 2003 is filed by one Nagarajan and Crl.R.C. No. 1825 of 2003 is filed by 13 persons against the order of the learned District Munsif cum Judicial Magistrate, Vanthavasi passed in Crl.M.P. Nos. 3018 and 3630 of 2003 dated 17.11.2003 and 27.11.2003.

2. The brief facts of the case are as follows: The Petitioners are accused in Crime No. 115 of 2003 on the file of South Police Station, Vandavasi wherein the Respondent registered a case for the alleged offence u/s 147, 148, 302 and 307 IPC. As per the F.I.R. there were six accused viz., one by name Kumaran and five unnamed persons. Due to repeated raids by the police in the village, the Petitioners have also surrendered in court and thus 13 more accused have been inducted as accused in the later investigation. The Petitioner in Crl.R.C. No. 1824 of 2003 surrendered in court on 11.08.2003. So far as Crl.R.C. No. 1825 is concerned the Petitioners 1 and 2 surrendered before the court on 25.07.2003, the 3rd Petitioner surrendered on 30.07.2003, the 4th Petitioner was arrested on 23.07.2003, the 5th Petitioner was surrendered 1.08.2003 and the 6th Petitioner was arrested on 07.08.2003 and the Petitioners 7 to 13 surrendered on 21.07.2003.

3. The Petitioners in both these revisions filed bail applications before the court

after completion of 90 days of their remand invoking the provisions of Section 167(2) Code of Criminal Procedure, By order dated 17.11.2003, the application of the Petitioner in CrI.R.C. No. 1824 of 2003 and by order dated 27.11.2003 the bail application of the Petitioners in CrI.R.C. No. 1825 of 2003 were dismissed on the ground that charge sheet was filed on 13.10.2003 which was returned for rectifying certain defects and therefore relying on the decision of this Court reported in Palanisamy @ Palani v. State (2003 (1) CTC 29), the learned Judicial Magistrate held that the rights accrued to the accused u/s 167(2) Code of Criminal Procedure, are not applicable since charge sheet was already filed, but returned for certain defects. Aggrieved over the said orders of the learned Magistrate, these revisions have been preferred.

4. The point for consideration in these revisions is, as to whether all these Petitioners should have been enlarged on bail after expiry of 90 days of the remand period, as provided u/s 167(2) of Code of Criminal Procedure.

5. The fact that on the date of filing of the bail applications by these Petitioners 90 days remand period was already over, is not in dispute. The fact that the charge sheet

6. Section 167(2) of Code of Criminal Procedure reads thus:

167. Procedure when investigation cannot be completed in twenty-four hours:

(1)....

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

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in 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 authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life, 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 purpose of that

Chapter;

(b) no Magistrate shall, authorise 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 authorise detention in the custody of the police.

Explanation 1: For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation-2: If any question arises where an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

7. In the decision reported in *Sanjay Dutt v. State Through C.B.I., Bombay* (1994 SCC (Cr) 1426), the Supreme Court has held that the proviso to 167(2) Code of Criminal Procedure creates an "indefeasible right" in an accused person on account of the default on the investigating agency in the completion of investigation within the maximum period prescribed or extended as the case may be, to seek an order for his release on bail. The "indefeasible right" to be enlarged on bail accrues in favour of the accused, if the police failed to complete the investigation and put up the chalan against him in accordance with law u/s 173 Code of Criminal Procedure. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand. There is yet another obligation also which is cast upon the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf.

8. In the decision reported in *T.V. Sarma Vs. Smt. Turgakamala Devi and Others*, , The Andhra Pradesh High Court has held as follows: (Para-14)

A plain reading of Section 173 Code of Criminal Procedure, shows that every investigation must be completed without unnecessary delay and as soon as it is completed, the officer-in-charge of the Police Station shall forward a report to the Magistrate in the form prescribed. Therefore, there is no question of sending up of a police report within the meaning of Section 173 Code of Criminal Procedure Sub-section (2) until the investigation is completed. Any report sent before the investigation is completed will not be a police report within the meaning of Sub-section (2) of Section 173 Code of Criminal Procedure, and there is no question of the Magistrate taking cognizance of the offence and consequently the provisions of Section 309 Code of Criminal Procedure, cannot be invoked.

9. In the decision reported in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , the Supreme Court has held as follows:

When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the under-trial prisoner with a view to enable him to apply for bail in exercise of his right under proviso (a) to Sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cos is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated 12 th February, 1979. We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrate and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law.

10. In the decision reported in Babubhai Parshottamdas Patel Vs. State of Gujarat, Full Bench of the Gujarat High Court has held as follows:

If it is not possible to complete the investigation within a period of ninety days, even in serious and ghastly types of crimes, the accused will be entitled to be released on bail. Any reference to the provision relating to bail occurring in Section 167(2), Proviso is merely with a view to enable the prosecution if necessary to apply that the person released on bail u/s 167(2) Provisio (a) be taken back in custody.

So far as Expl. I to Section 167(2) proviso is concerned, it is clear that the accused shall be detained in custody so long as he does not furnish bail but the right of the accused or the entitlement of the accused to be released on bail is clear once the period of ninety days from the accused being first presented before the Court is over. The accused has to show his preparedness to furnish bail and has to furnish bail. In view of para (a) of the proviso to Section 167(2), no Magistrate can authorise detention of the accused person in jail custody beyond the period of ninety days. The deeming fiction is for the purpose of enabling the prosecution to apply to the Court and empowering the Court to cancel the bail and to take the concerned accused in custody if the requirements of Section 437 (5) are met.

The power of remanding accused into custody is to be found in Section 309 but ultimately that is the source of the power through which, even during the pendency of investigation, the accused can be remanded into jail custody. Even if bail has been refused on the merits of the case, the case has to be considered purely in the light of Section 167(2) proviso when the period of ninety days is over. Mere subsequent filing of charge-sheet will not authorise the accused being taken back in custody.

To prevent any such abuse of the power to carry on the investigation, the right or the entitlement conferred on the accused to be released on bail after ninety days, must be considered to be an absolute right, subject of course to the cancellation of the bail if the requirements of Section 437(5) are satisfied. *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, and AIR 1980 SC 846, Rel. on.

11. In the decision reported in *Umashanker v. State of Madhya Pradesh* (1983 Cri. 453), a Division Bench of Madhya Pradesh High Court has held as follows:

A plain reading of proviso (a) makes it clear that an accused is entitled to be released on bail on the expiry of 90 days or days, as the case may be, "if he is prepared to and does furnish bail". The right to release arises on the expiry of the aforesaid period when the accused intimates the Court that he is prepared to furnish bail although the release naturally has to follow as stated in the explanation when bail is furnished. The proviso does not in terms say that the accused has to make a formal written application for exercising the right of being released on bail. All that he has to do is to intimate that he is prepared to furnish bail that may be ordered by the Court. If he does so intimate the Court whether orally or in writing, the Court cannot refuse to pass an order directing his release on bail for want of a written application. *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, relied on.

It has been further held as follows:

If a challan is filed before the expiry of the minimum period for which an accused can be detained in custody u/s 167 further remand to custody can be ordered u/s 309. No maximum period of remand is provided for u/s 309. The Magistrate, however, cannot postpone the release of an accused under proviso (a) to Section 167(2) after the expiry of 90 days or 60 days, as the case may be, just to enable the police to file the challan and to alter the detention u/s 167 to one u/s 309.

12. In the decision reported in *P.V. Vijayaraghavan and Others Vs. C.B.I. and Another*, it has been held thus:

In a case involving several cognizable offences the first charge sheet against the accused persons in respect of some of the offences was filed by the investigator within the period of 90 days, referred to in Section 167(2) Proviso (a)(i) and the second charge-sheet relating to the remaining offences was filed after the expiry of 90 days on the ground that the investigator had been awaiting expert legal opinion as to whether a charge would lie in respect of those offences, it must be taken that the investigation was not complete on the date of filing of the first charge-sheet and it was complete only when the second charge-sheet was filed. Thus, since the investigation was completed only after the expiry of 90 days, the accused were entitled to be released on bail u/s 167(2) proviso (a)(i).

13. In the decision reported in *Dodha (a) Chainsai v. State of M.P.* (1992 (2) Cri 1171), the Madhya Pradesh High Court has held as follows:

It was no disputed that the applicant was not produced on 10.12.1991 when the charge sheet was presented in the Court. The reason for his non-production is said to be non-availability of escort guards. In *Rajkumar and Ors. v. State of M.P. and others*, a Division Bench of this Court, has held that non-availability of Police guard is not an abnormal circumstance to justify grant of remand by a Magistrate when the accused is not produced before him. In *Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Central Bureau, New Delhi*, the Supreme Court has held:

An order for release on bail under proviso (A) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge sheet within the prescribed period. The right to bail u/s 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all, in fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.

14. In the decision reported in *Matchumari China Venkatareddy and Others Vs. State of Andhra Pradesh*, Hon'ble Justice Subashan Reddy (as His Lordship then was) has held as follows:

Mere filing of charge sheet within prescribed time, unaccompanied by material papers as contemplated u/s 173(5) renders it incomplete and such filing of charge sheet amounts to failure to file the same which in-turn confers on the accused right to be released on bail u/s 167(2). The Court is not competent to take cognizance of offence on the basis of such incomplete sheet.

Thus where prosecution filed only an incomplete charge sheet within 90 days, as contemplated u/s 167(2) and the Court returned the same for removing the objection it cannot be said that the mandatory provisions of Section 167(2) were complied with. A charge sheet, unless bears all specifications enumerated u/s 173(2), Code of Criminal Procedure and accompaniments u/s 173(5) Code of Criminal Procedure filed into the Court and the Court scrutinises it on its administrative side to satisfy that such documents are in order and unless the court takes it on record and keeps it on its file for its examination for deciding whether cognizance should be taken or not, it can be said that a police report/charge-sheet is filed as contemplated u/s 173(2) Code of Criminal Procedure once the police report is filed, it should be capable of examination for the purpose of judicial determination to take cognizance of the offence and to proceed further into chapter XVI Code of Criminal Procedure and any act short of that cannot be construed as "taking Cognizance".

Requirement u/s 173(5) of Code of Criminal Procedure (1970) accompaniment of the copies of charge sheet alongwith original charge sheet u/s 173(2) of Code to

be submitted to the court, is mandatory in nature. This mandatory requirement is a procedure established under law having genesis in the fundamental right of life and liberty under Article 21 and if there is infraction of the same it will be violative of Article 21 of Constitution.

Fairness and reasonable procedure is what is contemplated by the expression "procedure established by law" in Article 21 of the Constitution. Section 167 (2), Code of Criminal Procedure was not there in the old Code. It was introduced in 1973 amendment. The effect of the new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days or 90 days as the case may be. An order for release of bail made under proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge sheet or by remand to custody u/s 309(2). The order of bail can only be cancelled u/s 437(5) or 439(2). The duty of the police is to forward the police report after completion of investigation u/s 173(2) Code of Criminal Procedure. The forwarding is done for the purpose of taking the same on record and file of the court and then only, the same is perused by the court to take cognizance of the offence. Mere forwarding without meaning it to be taken on file is not contemplated under law. If the police report is forwarded to the Magistrate for taking it on file, but if the Magistrate finds that the said report is not in consonance with Section 173(2) read with Section 173(5) Code of Criminal Procedure, he declines to take it on record and that act is only administrative and not judicial. The judicial act commences only when the charge-sheet is in order and the Magistrate proceeds further under Chapter XVI. Unless the charge-sheet is in the official custody of the court together with its accompaniments to be furnished to the accused, it cannot be construed that there is a filing of charge-sheet. Chapter XVI relates to commencement of proceedings before Magistrates, process to be issued when Magistrate takes cognizance of the offence. The next stage is framing of charges under Chapter XVII. Next stage is trial and the eventual being the judgment.

In view of what is stated supra, I hold as follows:

- (1) That the police report (chargesheet) u/s 173(2) Code of Criminal Procedure is not complete unless it is accompanied by the material papers (Statements etc.) as contemplated u/s 173 (5) Code of Criminal Procedure.
- (2) That a perusal of police report (charge-sheet) as to whether the same is in consonance with Sub-Sections 173(2) and 173(5) Code of Criminal Procedure is only an administrative act and not a judicial act.
- (3) That judicial act commences when the police report (charge-sheet) is filed in complete form, both complying with the provisions contained under Sections 173(2) and 173(5) Code of Criminal Procedure and it is taken on the file of the court and perused by the court for taking a decision u/s 190(1)(b) Code of Criminal Procedure.
- (4) That if the investigation is not completed either within 90 days or 60 days, as

the case may be, and if the police report (Charge-sheet) is not filed in complete form as mentioned supra within the stipulated periods, the accused shall have absolute right for being released on bail subject to their readiness for furnishing sureties.

15. In the decision reported in *Basker and Ors. v. State* by Inspector of Police, Central Crime Branch, Salem (2000 (3) MWN (Cri.) 78) this High court has held as follows: (Paras 13 and 14)

13. Now it turns out and it is not disputed by the learned Government Advocate (Criminal side) that the accused has filed application for bail before the learned Magistrate on 5.9.2000, that period of 90 days has expired even by 3.9.2000, that when the bail application came up on 5.9.2000 there was no mention about the charge sheet being filed before him and that when the bail application was dismissed on 5.9.2000 the charge-sheet was not filed before the learned Judicial Magistrate. It is even stated by the learned Counsel appearing for the Petitioners and not refuted by the learned Government Advocate that the final report or charge-sheet filed before the Magistrate on 13.9.2000 has been returned for some defects. So, the fact remains that the Petitioners have filed bail application seeking bail u/s 167(2) Code of Criminal Procedure after expiry of the prescribed period and when no charge-sheet has been filed. Therefore, the Courts below ought to have released the accused on bail and they cannot take umbrage of refuse bail on the ground that it is a rare of rarest case or it is a case on merits the Petitioners do not deserve bail in view of the gravity of the offence or in view of the huge public money involved in the case.

14. The failure to file charge-sheet or final report before the period prescribed u/s 167(2) Code of Criminal Procedure will automatically result in releasing the accused on bail subject to only two conditions that there is an application for bail from the person in custody and he must be in a position to offer adequate sureties. The bail cannot be denied to him on any other ground much less on the ground that on merits the Petitioners do not deserve to be released on bail. The provision 167(2) Code of Criminal Procedure has been introduced in the Code with a view to avoid unnecessary detention of persons of the accused committing offences in prison under judicial custody. Legislature in its wisdom has thought that the prosecution must be compelled to come out with a final report or charge-sheet with expiry of 60 days or 90 days depending upon the gravity of the offence and intended period or punishment and in case the prosecution takes more time than that the Legislature wanted to mitigate, the rigour of the remand by making release on bail compulsorily after the expiry of the said period. The rulings made by the Supreme Court has further clarified this position by stating that a person in judicial custody must exercise the option of coming out of bail by making an application on expiry of the period before laying of charge sheet and he cannot come leisurely to the Court after the charge-sheet has been filed even though the charge-sheet is filed after expiry of the prescribed period in 167(2) Code of Criminal Procedure. Neither the Legislature nor the Apex Court in any of

the rulings have stated that any exemption can be made in such a case where application is filed in accordance with Section 167(2) Code of Criminal Procedure. So, once the bail application is filed after expiry of the prescribed period and before challan is filed, the Court has no business to look into the gravity of the crime committed to justify the judicial custody beyond the prescribed period u/s 167(2) Code of Criminal Procedure.

16. In the decision reported in Abdul Rahman Vs. State and Another, this Court has held as follows: (Para-I 1)

Learned Public Prosecutor also tried to rely on the observations in the celebrated decision of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, in paragraph 5 as follows:

but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail.

From this, the learned Public Prosecutor suggests that the right of the accused would not be complete, unless he offers the sureties and executes the bonds. We have already clarified that the furnishing of the surety and execution of the bond are in the nature of the execution of a decree. It is also finalised by an order of the Court. This apart, the law laid down by the Supreme Court in Raghubir Singh and Others Vs. State of Bihar, is more than clear to the same fact. On the other hand, in Raghubir Singh's case, it has been specifically mentioned that the accused persons are not to be deprived the benefit of the order of release on bail in their favour because of their inability to furnish bail straightaway, that the orders of release on bail are effective until an order is made u/s 437(5) or u/s 439(2). These observations relied upon in State of Uttar Pradesh Vs. Lakshmi Brahman and Another, would also be of no consequence, in view of the subsequent decision in Raghubir Singh's case. Learned Public Prosecutor then attacked the tenability of the Habeas Corpus petitions on the ground that on the date of the rule or return of the rule, the accused persons were in legal custody inasmuch as their remand has been ordered u/s 309(2). Learned Public Prosecutor therefore relied on the observations in Sanjay Dutt Vs. State through C.B.I., Bombay, and more particularly in Paragraph 48 to the following effect-

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 the rule, the custody or detention is on the basis of a valid order (see Naranjan Singh Nathawan v. State of Punjab (1915 2 Cri.LJ 656: AIR 19152 SC 106): Ram Narayan Singh Vs. The State of Delhi and Others, and A.K. Gopalan Vs. The Government of India, .

Learned Additional Public Prosecutor says that since the date of rule, even on today the accused are in legal custody. On the basis of the order passed, these these Habeas Corpus Petitions would have to be dismissed as untenable. We do

not agree. We have already pointed out that subsequent remand u/s 309(2) would be of no consequence particularly where an indefeasible right has been earned by the accused. Once that right had to be found indefeasible, subsequent remand would be of no consequence, i.e. the law laid down in Raghubir Singh's case also in Sanjay Dutt's case by describing the right as an indefeasible right. Therefore in pursuance of the default of the prosecution, the accused have enforced their rights by making an application. May be that right also is crystallised by subsequent order passed by the Magistrate as has happened in this case. There would be no question of such a right being defeated by mere remand ordered by the Sessions Judge u/s 309(2). We therefore, reject this contention.

17. From the above referred to decisions of Supreme Court and of the various High Courts, it is clear that,

1. On the default committed by the investigating agency to file a charge-sheet within 90 days, to all the accused injudicial custody for 90 days an indefeasible right accrues in them for being released on bail.

2. Such indefeasible right will be in existence till the charge sheet is filed.

3. It is the duty of the court to inform the accused that he is entitled for bail.

4. If the accused files bail application under the proviso of Section 167(2) Code of Criminal Procedure he ought to have been released on bail.

5. Even if the bail is granted u/s 167(2) of Code of Criminal Procedure due to the default committed by the police in not filing the charge sheet in 90 days, but before the execution of bond with surety for bail if the charge sheet is filed, even then the accused cannot be detained in custody.

6. Filing of a defective charge sheet and returning the same to the investigating officer to rectify the defect, amounts nonfiling of charge sheet and will not defeat the indefeasible right accrued in the accused for being released on bail after the expiry of 90 days of time.

7. The subsequent filing of charge sheet could not cancel the order already passed.

8. The police report (charge sheet) u/s 173(2) Code of Criminal Procedure is not complete, unless it is accompanied by the material papers (statements etc.,) as contemplated u/s 173(5) Code of Criminal Procedure.

9. If the police report (charge sheet) is not filed in complete form as mentioned above, within the stipulated period, the accused shall have absolute right for being released on bail subject to their readiness for furnishing sureties.

18. Even though several of the above said Judgments have been mentioned during the course of arguments, the learned Magistrate has rejected them without proper application of mind and has relied upon the judgment of this

Court reported in Palanisamy @ Palani and 5 others v. State (2003 (1) CTC 29), the facts of which are totally not applicable to the facts of this case, the case relied on by the learned Magistrate mentioned above is a case in which final report was filed without sanction from the concerned authority which was returned for want of sanction and in the said case except the sanction order, all other relevant documents were filed alongwith the final report. But in the case on hand, it is not so.

19. All the Petitioners are in jail for more than 145 days. In view of all the above reasons and observations, both these revisions are allowed and the learned District Munsif cum Judicial Magistrate, Vandavasi is directed to enlarge the Petitioners herein on bail immediately on their furnishing sureties as required under law.