

(2016) 08 BOM CK 0189

In the Bombay High Court

Case No : Criminal Writ Petition No. 475 of 2016

Pankaj s/o Sundarlal Yadav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-08-2016

Acts Referred:

Arms Act, 1959 — Section 25, Section 3
Criminal Procedure Code, 1973 (CrPC) — Section 167
Penal Code, 1860 (IPC) — Section 120B, Section 302, Section 34
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,

Citation : (2017) 2 AIRBomRCri 60 : (2017) ALLMRCri 564 : (2017) 1
BomCR(Cri) 725 : (2016) 6 MhLJCrI 217

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : Shri R.M. Daga, Advocate, for the Petitioner; Shri T.A. Mirza, A.P.P,
for the Respondent No.1/State; Shri Anjan De, Advocate, for the Respondent
No.2/Intervenor

Final Decision : Allowed

Judgement

S.B. Shukre, J. (Oral) - Heard. Rule. Rule made returnable forthwith.

2. Heard finally with consent of the learned Counsel for the parties.

3. By this writ petition, the petitioner, who is accused No.7 in Crime No.113/2015, registered against him and 7 others at Police Station Gondia, for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and also for an offence punishable under Section 3 read with Section 25 of the Arms Act and under Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "the Atrocities Act") read with Section 120B of the Indian Penal Code, has challenged the order passed by the learned Additional Sessions Judge on 09/06/2016 rejecting his application vide Exh.95 seeking his release on bail in exercise of his statutory right under Section 167(2) of the Code of Criminal Procedure.

4. The incident in this case occurred on 13/06/2015 and the F.I.R. has been filed on the same day. In the F.I.R., it has been alleged that in the evening of 13/06/2015 at about 06:00 p.m., the informant was told by some persons that his brother viz. Chhedilal had been shot at by means of pistol by one of the accused persons viz. Sharukh Khan and this was done at the behest of this applicant, who was having an old enmity with the deceased and the informant, the brother of the deceased. Initially, an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and also offences punishable under the relevant sections of the Atrocities Act and the Arms Act were registered and, later on, Section 120B of the Indian Penal Code was added. As the investigation was in progress, another development took place. A sanction order was passed for making investigation under the provisions of the Maharashtra Control of Organised Crime Act, 1999 (for short, "the MCOC Act").

5. In this crime, in all eight persons have been made as accused. Out of them, five accused persons were arrested and two accused are still absconding. This applicant is the accused No.7. He was released on anticipatory bail by the order passed by this Court in Criminal Application No.408/2015 on 24/08/2015. However, the order was carried to the Hon"ble Apex Court and it was then directed by the Hon"ble Apex Court that the matter be heard by the trial Court by considering the application of this applicant for grant of regular bail afresh without being influenced by the order passed by this Court. The trial Court, after hearing the applicant and the prosecution, rejected the application for grant of regular bail of this applicant. However, as the applicant was under protection given by the Hon"ble Apex Court, the applicant was not formally arrested. The applicant, meanwhile, moved this Court by filing an application for grant of regular bail. That application was rejected by this Court on 05/02/2016. After rejection of his bail application by this Court, the applicant surrendered himself before the Additional Sessions Court, Gondia on 06/02/2016 and he was immediately taken custody by that Court. He was then remanded to police custody remand on the request of the learned Public Prosecutor till 12/02/2016. On 12/02/2016, the applicant was produced before the learned Additional Sessions Judge and the learned Judge remanded the applicant to the magisterial custody till 17/02/2016. Since, then the applicant is in magisterial custody.

6. Before this applicant surrendered before the Court, the Investigating Officer filed the charge-sheet against the accused on 06/11/2015. In this charge-sheet, the present applicant was shown as one of the accused, who was absconding. On 06/05/2016 at 11:00 a.m., this applicant had filed an application for grant of default bail contending that as no charge-sheet as against him was filed within stipulated period, he was entitled to be released on bail in exercise of his statutory right. On the same day, in the afternoon time, however, a supplementary charge-sheet also came to be filed as against this applicant. This application filed by the applicant before the concerned Sessions Court was rejected. Therefore, the applicant is before this Court by filing this writ petition.

7. Shri Daga, learned Counsel for the applicant has submitted that filing of first charge-sheet on 06/11/2015 in which this applicant has been shown as absconding accused, is of no consequence for this applicant and it does not affect his right under Section 167(2) of the Code of Criminal Procedure. He submits that the applicant was taken custody and was arrested by the order passed by the learned Additional Sessions Judge on 06/02/2016 and thereafter was remanded to police custody till 12/02/2016. He submits that after 12/02/2016, the request of the Investigating Officer for extension of his police custody remand was rejected by the learned Additional Sessions Judge and the applicant was put under magisterial custody remand till 17/02/2016. He submits that further investigation was carried out by the police after the arrest of this applicant and it was on the order passed by the Court. He further submits that the supplementary charge-sheet was filed on 06/05/2016 and it was filed after the applicant had asserted his right of default bail. He submits that the supplementary charge-sheet marked the completion of investigation so far as this applicant was concerned and, therefore, for the purpose of counting the period of limitation of 90 days from the date of arrest, the date of 06/11/2015, when the first charge-sheet was filed, is not relevant and the date on which the supplementary charge-sheet was filed i.e. 06/05/2016, is relevant.

8. The learned Counsel for the applicant further submits that in any case, detention of this applicant in the magisterial custody is illegal as after 17/02/2016, the magisterial custody remand of the applicant has not been extended by passing any order by the Additional Sessions Judge nor the applicant was produced before that Court at any point of time after 12/02/2016 till the first week of June, 2016. He further submits that although the ground of his illegal detention was not raised before the concerned Sessions Court, the ground constitutes a question of law having related exclusively to legal and fundamental guarantee against illegal detention and so can be raised for the first time in this petition.

9. In support of his argument, he has placed reliance upon the following case-laws :

- i. State through CBI v. Dawood Ibrahim kaskar and others ? (2000) 10 SCC 438.
- ii. Central Bureau of Investigation v. Rathin Dandapat and others ? 2015 ALL MR (Cri) 3678 (S.C.).
- iii. Sonu Madanlal Yogi v. The State of Maharashtra and another ? 2012 ALL MR (Cri) 4025.

10. Shri Mirza, learned A.P.P. strongly opposing the writ petition submits that the basic charge-sheet that was filed on 06/11/2015 needs to be taken consideration and in that charge-sheet as the name of this applicant also figured, it would have to be taken as charge-sheet filed against this applicant and then this applicant would not have any statutory right to seek his release on bail under Section 167(2) of the Code of Criminal Procedure. He submits that so far as the

extension of magisterial custody remand is concerned, that is a matter of record and this Court may pass appropriate order in that regard.

11. Shri De, learned Counsel for the intervenor submits that the charge-sheet, which was filed on 06/11/2015 showing this applicant as absconding accused, would be the charge-sheet which would have to be considered for the purpose of the ground taken by the applicant in this writ petition. He submits that the supplementary charge-sheet filed on 06/05/2016 was only by way of further investigation carried out by the Investigating Officer by resorting to his powers under Section 173(8) of the Code of Criminal Procedure, and if the Investigating Officer has done something by adopting a course the permissible under the law, it would not mean that the charge-sheet as against the present applicant has been filed for the first time. After all, he further submits, a charge-sheet filed under Section 173(8) of the Code of Criminal Procedure is only a supplementary charge-sheet and it cannot be considered to be a basic charge-sheet filed under subsection (2) of Section 173 of the Code of Criminal Procedure. Therefore, he submits that this applicant would not be entitled to be released on the consideration of what is now known as concept of default bail.

12. Shri De, learned Counsel for the intervenor further submits that the concerned Sessions Court had extended time for filing of the charge-sheet by passing an order on 10/09/2015 and the extension so granted was valid till 11/11/2015. He submits that although the extension of time for filing of the charge-sheet was granted under Section 21 of the MCOC Act, and although the charge under the MCOC Act was dropped on 04/11/2015, the effect of the order continued in view of de facto doctrine as laid down in the case of Gokaraju Rangaraju v. State of Andhra Pradesh ? AIR 1981 SC 1473. According to him, from this perspective also, the applicant is not entitled to be released on bail.

13. On the argument that, there was illegal detention of this applicant, the learned Counsel for the intervenor submits that this argument is not available to the applicant in this writ petition, as it was not raised before the trial Court and now it cannot be urged for the first time in view of nature of jurisdiction of this Court under Article 227 of the Constitution of India. He fairly submits that at the most, if this argument is to be considered, the case would have to be remanded to the Sessions Court or would have to be placed before Division Bench of this Court, if issue of violation of fundamental rights is to be considered. The learned Counsel for the intervenor has also placed reliance upon the judgments in the case of Narendra Kumar Amin v. CBI and others ? 2015 (3) SCC 417 and Suresh Kumar Bhikamchand Jain v. State of Maharashtra and another ? 2013 Cr.L.J. 1625, in order to support his argument that the Investigating Officer has a power to make further investigation and file a supplementary charge-sheet under Section 173(8) of the Code of Criminal Procedure and that if the charge-sheet is filed well within 90 days from the date of arrest of the accused, the accused cannot be released on default bail under Section 167(2) of the Code of Criminal Procedure.

14. Before dealing with the rival submissions, it would be necessary to consider the cases cited before me by the learned Counsel for the applicant and the learned Counsel of the intervenor, as the exercise would help in properly appreciating the arguments of both sides.

15. In the case of Dawood Ibrahim Kaskar and others (supra), the principle enumerated by the Hon"ble Apex Court is that when the accused is produced before the Sessions Court, after having been arrested in the course of further investigation, the order pertaining to his judicial custody could not be passed under Section 309(2) of the Code of Criminal Procedure and that such an accused would be governed by Section 167 of the Code of Criminal Procedure. Similar is the law laid down by the Hon"ble Apex Court in its latest judgment rendered in the case of Rathin Dandapat and others (supra). These cases were referred to me in order to support the argument of the applicant that the applicant could not have been granted police custody remand, as has been done in the instant case by the learned Additional Sessions Judge, and that the accused/applicant ought to have been referred to the concerned Magistrate for being proceeded in terms of Section 167 of the Code of Criminal Procedure. I must say, the questions involved in this petition are not of grant or refusal of police custody. They are about availability or otherwise of statutory right of bail to the applicant and nature of his detention. The order granting police custody remand was never challenged by this applicant earlier and in any case now it has already worked itself out. Therefore, the principle of law stated in both these cases would have no application to this case and the issue involved in it, which is ? Whether or not this applicant deserves to be released on bail on account of his right to default bail having been crystalised and also on the ground that his further detention after 17/02/2016 is absolutely illegal.

16. In the case of Sonu Madanlal Yogi (supra), the Division Bench of this Court has taken a view that if no order granting extension of remand of the accused in judicial custody is passed, his detention in custody after the expiry of the period of the earlier remand is illegal thereby entitling him to be released on bail. This principle of law would apply to this case if it is found on facts that the detention of the applicant in magisterial custody is illegal and as such would have to be borne in mind while considering the arguments advanced in this behalf.

17. In the case of Gokaraju Rangaraju (supra) relied upon by the learned Counsel for the intervenor, it has been held that the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding as if they are the acts of the Officers de jure. This principle of law has been pressed service to buttress the point that since extension of time for filing of the charge-sheet was granted by the learned Additional Session Judge till 11/11/2015 under Section 21(2) of the MCOC Act and the basic charge-sheet had been filed much before that date i.e. on 06/11/2015, in which the petitioner was shown as absconding accused, the petitioner cannot be given

benefit of default bail in the instant case. With due respect, I would say, there is no challenge made in this petition to the extension of time granted for filing of the charge-sheet by the learned Additional Session Judge, and even otherwise, the extension of time so granted, now is of no consequence owing to subsequent developments which showed that the charge that was to be made under the provisions of the MCOC Act was ultimately dropped by a decision taken on 04/11/2015 and the charge-sheet that was filed on 06/11/2015 was only for the offences punishable under the provisions of the Indian Penal Code, the Atrocities Act and the Arms Act. Therefore, this case-law would be of no assistance to the case of the intervenor.

18. In the case of Suresh Kumar Bhikamchand Jain (supra), Hon"ble Apex Court has held that if the evidence on record shows that both the charge-sheet as well as supplementary charge-sheet were filed within 90 days from the date of the petitioner's arrest and remand to the police custody, it would be sufficient compliance with the provisions of Section 167(2)(a)(i) of the Code of Criminal Procedure. The Hon"ble Apex Court has also held that what is relevant for an indefeasible right seeking default bail to take birth is non-completion of the investigation as contemplated under Section 167 of the Code of Criminal Procedure and not the factum of cognizance of the offences taken by the Court. The Hon"ble Apex Court has held that if the investigation is not completed within the period as stipulated in Section 167 of the Code of Criminal Procedure, then such inviolable right would blossom a mature entity. Relevant observations of the Hon"ble Apex Court, as they appear in paragraphs 16 and 17, are reproduced herein below:

"(16) At this juncture, we may refer to certain dates which are relevant to the facts of this case, namely :

- (a) 11.03.2012 ? Petitioner arrested and remanded to police custody;
- (b) 25.04.2012 ? First charge-sheet filed against the four accused;
- (c) 01.06.2012 ? Supplementary charge-sheet filed in which the Petitioner is named;
- (d) 30.07.2012 ? The Trial Court rejected the Petitioner's prayer for grant of bail;
- (e) 13.09.2012 ? The High Court confirmed the order of the Trial Court;
- (f) 02.10.2012 ? Application filed under Section 167(2) Cr.P.C. before the Trial Court;
- (g) 05.10.2012 ? Trial Court rejected the application under Section 167(2) Cr.P.C.

(17) From the above dates, it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the Petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but

does such failure amount to noncompliance of the provisions of Section 167(2) Cr.P.C. is the question with which we are confronted. In our view, grant of sanction is nowhere contemplated under Section 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail."

19. It is obvious that for determining the availability of the right of default bail to the accused, what is required, is the completion of the investigation by filing the charge-sheet within the stipulated period of time, and if the charge-sheet is not filed within the stipulated period, it only would mean that the investigation is not over and then the accused would be entitled to be released on bail, if he is ready to furnish bail. It also becomes clear from this observation that stage of completion of investigation is marked only by filing of the charge-sheet and if further investigation is made, it would be treated as completed only after filing of the supplementary charge-sheet. These observations also throw light upon the date, which is required to be considered for computing the period of 60 days or 90 days as contemplated under Section 167 of the Code of Criminal procedure and the date of arrest of the accused is relevant date for this purpose. These principles of law would have to be borne in mind while appreciating the rival arguments.

20. In the case of Narendra Kumar Amin (*supra*), it is held that from the scheme of Section 173(8) of the Code of Criminal Procedure it is clear that after the charge-sheet is submitted, further investigation, if called for, is not precluded. There is no dispute about this principle of law and it appears that by following this principle of law only that supplementary charge-sheet has been permitted to be filed by the learned Additional Sessions Judge.

21. Now, it is clear to us that for ascertaining whether or not the right of default bail has been made available to the applicant, the date on which that charge-sheet is filed which marks the completion of investigation against the accused, is relevant. If further investigation is started against an accused arrested after filing of first charge-sheet in which he is shown as absconding accused, competition of investigation would be declared only by the act of filing of supplementary charge-sheet against him. If the supplementary charge-sheet against such an accused is

not filed within 90 days or 60 days, as contemplated under Sections 167(2)(a)(i) and (ii) of the Code of Criminal Procedure, the accused would get the right of default bail, which he can assert anytime thereafter but before filing of the supplementary charge-sheet subsequently. The period of 90 days or 60 days so contemplated under Section 167(2)(a) is essentially the period for which the Magistrate may authorise the detention of the accused. In other words, a police officer must complete the investigation within the period of 90 days or 60 days, as the case may be, or otherwise, it would not be possible for the Magistrate to authorise detention pending investigation. Therefore, any charge-sheet which marks completion of an investigation against the accused under detention would have to be filed within such stipulated period computed from the date of arrest of the accused against whom it is filed. In the instant case, although, the first charge-sheet was filed on 06/11/2015, it was filed by showing this applicant as absconding accused. This applicant came to be arrested by the order of the learned Additional Sessions Judge passed on 06/02/2016, when he surrendered on that date before that Court and on that very day, this applicant was remanded to police custody till 12/02/2016. On 12/02/2016, the Investigating Officer made an application for extension of his police custody remand, but that was rejected and the applicant was remanded to magisterial custody till 17/02/2016. The supplementary charge-sheet came to be filed in the afternoon of 06/05/2016. The application asserting the right of default bail was filed by the applicant at 11:00 a.m. of 06/05/2016. During the period of detention of the applicant, initially in the police custody and later on in the magisterial custody, between 12/02/2016 and 17/02/2016 and also thereafter, although no order extending custody remand was passed, police indeed made further investigation. These are all admitted facts and it is clear from them that when the first charge-sheet was filed on 06/11/2015, investigation as against this applicant was not completed and it came to be concluded only on 06/05/2016, when the supplementary charge-sheet was filed in the afternoon. The 6th day of May, 2016 was the 91st day from the date of arrest of the applicant i.e. 06/02/2016, and the supplementary charge-sheet came to be filed after this applicant had already asserted his right of default bail by filing an application on the same day but at 11:00 a.m. much before filing of the supplementary charge-sheet in the afternoon. Therefore, the learned Additional Sessions Judge did not have any option but to release the applicant on bail by making him available his indefeasible right of default bail under the law. As it was not done by the learned Additional Sessions Judge, now this Court would have to step in and allow the applicant to realise his such right. Accordingly, I find that the applicant is entitled to be released on bail in view of his right arising under Section 167(2) of the Code of Criminal Procedure.

22. Apart from the petitioner's right of default bail, there is also a question involved about his illegal detention in custody. The copy of the Roznama filed on record discloses in no uncertain terms that the order of remand in magisterial custody was passed on 12/02/2016 and it was granted only up to 17/02/2016. The copy of Roznama further shows that neither on 17/02/2016 nor till the first

week of June, 2016, the applicant was produced before the Court of the learned Additional Sessions Judge nor his magisterial custody was extended to further dates from time to time by the learned Judge, thereby showing that his detention after 17/02/2016 was absolutely illegal. Therefore, following the law laid down by the Division Bench of this Court in the case of Sonu Madanlal Yogi (supra), I find that even on this count, this application deserves to be allowed. However, the learned Counsel for the intervenor has an objection in this regard and it is stated in previous paragraph. With due respect, I cannot but say that once it is found that the detention is illegal, this Court cannot turn a Nelson's eye to the plea of the sufferer of illegal detention by resorting to some technical ground that as no objection was raised before the authority below, the matter be remanded to that authority for considering such a objection. If such a course is to be adopted, this Court would be a party to continuation or even perpetuation of a patent illegal act and that is not the purpose of jurisdiction of writ court exercising its power under Article 227 of the Constitution of India. It is also settled law that a question of law, the question involved here is ? whether detention of accused in magisterial custody without an express order authorising his detention having been issued is legal or not is a question of law, even if not raised before the trial Court, can always be taken up before the High Court and adjudicated upon by it in accordance with law. As regards the objection about placing of this petition before a Division Bench, because issue of violation of fundamental right is raised, with due respect, I may say, the issue is basically of violation of legal right arising from breach of mandate of Section 167 of the Code of Criminal Procedure by a judicial authority and, therefore, the objection has no merit in it. Viewed in this way, I am of the opinion that the applicant is entitled to be released on bail on the additional ground of his detention in magisterial custody after 17/02/2016, being illegal. Accordingly, this petition deserves to be allowed.

1. The writ petition is allowed and the impugned order is quashed and set aside.
2. The writ petitioner is directed to be released on bail on his furnishing a P.R. Bond in the sum of Rs.25,000/together with one solvent surety in the like sum on the following conditions.
 - i. The petitioner shall regularly attend the Court dates.
 - ii. The petitioner shall cooperate with the Court in expeditious disposal of the case.
 - iii. The petitioner shall not, directly or indirectly, make any inducement, threat or promise to any of the prosecution witnesses.
 - iv. The petitioner shall not leave limits of Gondia District without prior permission of the trial Court.
3. Rule is made absolute in these terms with no order as to costs.