

(2013) 09 BOM CK 0080

In the Bombay High Court

Case No : Criminal Bail Application No. 1096 of 2013

Wajid Abdul Wahid Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Citation : (2013) 09 BOM CK 0080

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : Naima Shaikh instructed by Mr. Khan Abdul Waheb, for the Appellant; R.M. Gadhvi, APP, Shri Ravindra Khandagale, A.C.P., Investigating Officer and Matunga Division, Mumbai, Present in Court, for the Respondent

Judgement

Abhay M. Thipsay, J.—The applicant, who is an accused in C.R. No. 60/2013 registered at R.A. Kidwai Marg Police Station, Mumbai, by this application, prays for bail. According to the applicant, the investigation was not completed within the period prescribed by clause (a) of the first proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure (hereinafter referred to as "the Code"), but that, he was still not released on bail, thereby defeating the right to be released on bail, that had accrued to him. The applicant, therefore, is seeking bail only on the ground that effect should be given to the right that had accrued in his favour of being released on bail. Since this is the only contention and since no arguments on the merits of the allegations levelled against the applicant and the case against him have been advanced, it is not necessary to refer to the facts of the case. What, however, needs to be observed is that the provisions of the Maharashtra Control of Organised Crime Act, 1999 (M.C.O.C. Act) have been applied to the case against the applicant.

2. The details of the relevant happenings, and more particularly, the dates thereof are as follows:-

3. The substance of the contentions advanced by the applicant is that the maximum statutory period during which his detention in custody pending

investigation could be authorized, expired on 20.06.2013, and that therefore, on 21st June, 2013, the applicant was entitled to be released, mandatorily, on bail, in view of the provisions of proviso to sub-section (2) of Section 167 of the Code read with Section 21(2)(b) of the M.C.O.C. Act.

4. In view of the contentions raised on behalf of the applicant, it was thought proper to call for certain record from the Special Court. Accordingly, relevant record viz.:-(i) the remand applications relating to the applicant filed before the Special Court from time to time, (ii) the applications seeking extension of period authorizing detention pending investigation, (iii) the application for bail filed by the applicant (iv) the Roznama of the Special Court of the dates 19.06.2013, 20.06.2013, 21.06.2013 and (v) the orders passed on the applications for extending the period on two occasions, has been received. I have gone through the same.

5. Section 167 of the Code of Criminal Procedure lays down the procedure to be followed when investigation cannot be completed in 24 hours. It provides that the persons arrested and detained in custody should be produced before a Magistrate within 24 hours and the Magistrate, to whom such an accused person is forwarded, may from time to time authorize the detention of such person in custody. The first proviso to sub-section (2) of Section 167 of the Code lays down the maximum period for which the Magistrate may authorize the detention of an accused person. It provides that no Magistrate shall authorize the detention of the accused persons under the provisions of Section 167 of the Code beyond a certain period. This period would be 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. In cases relating to any other offence, this period would be 60 days.

6. By virtue of Section 21(2) of the M.C.O.C. Act, it has become permissible to extend the period, in relation to the offences punishable under the M.C.O.C. Act. Clause (b) of sub-Section (2) of Section 21 of the M.C.O.C. Act adds a proviso after the first proviso to sub-section (2) of Section 167 of the Code; and by this proviso, the Special Court has been empowered to extend the period permitting detention u/s 167 of the Code, i.e. pending investigating, for a period upto 180 days on the report of the Public Prosecutor, indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the period of 90 days.

7. It is, therefore, not disputed that the Special Court was empowered to authorize detention of the applicant even beyond the period of 90 days. As a matter of fact, the only contention that has been advanced on behalf of the applicant is, that the extended period expired on 20th June, 2013, and that, therefore, on 21st June, 2013, the applicant was entitled to be released on bail in terms of the proviso to Section 167(2), as modified by Section 21(1)(b) of the M.C.O.C. Act.

8. In this case, the period of 90 days expired on 05.06.2012. An application was made by the Public Prosecutor for extending the period authorizing detention on 03.06.2012. After hearing the accused persons, the period was extended till 20.06.2013. The validity, correctness, or the propriety of the order extending the period authorizing detention has not been challenged before me. However, on examination of the record, I have noticed some disturbing aspects, which deserve a mention here, though the ultimate decision on this application depends not on these aspects.

9. The matter initially appeared before Judge "M". On 24.04.2013, on an application for remand, he remanded the applicant and other accused in police custody till 03.05.2013. On 03.05.2013, when the applicant and the other accused were produced before him, he rejected the prayer of the police for grant of police custody and remanded the applicant and the other accused to judicial custody till 17.05.2013. On 17.05.2013, the learned Special Judge "M" observed that the investigation was in progress, that the period of 90 days was not over, and therefore, extended the judicial custody remand of the accused persons (including the applicant) till 30th May, 2013.

10. On 30.05.2013, the accused were produced before another Judge-"K"-on account of absence of Judge "M". Admittedly, the period of 90 days was getting over on 05.06.2013. No order extending the period authorizing detention had been passed by that time, and as a matter of fact, no application for such extension had been made by the Public prosecutor by that date. Judge "K" extended the judicial custody remand of all the accused till 14.06.2013, which was not in accordance with law. It is a mandate of Section 167 of the Code, that no detention beyond the period stipulated therein should be authorized by the Magistrate-(here, the learned Judge of the Special Court.) Judge "K" extended the period of detention in judicial custody beyond the period authorized by law. The provisions of Section 167(2) of the Code are imperative. The phrase used by legislature is "..... no Magistrate shall authorize the detention of the accused person in custody for a total period exceeding...." Therefore, an order authorizing detention beyond the said period cannot be passed at all. Unfortunately, Judge "K" did not consider this aspect, which was considered by his Predecessor Judge "M", who had, while passing an order of remand on 17.05.2013, clearly observed that the period of 90 days was not over till then, showing an awareness of the period for which detention had already been authorized; but Judge "K" did not attempt to ascertain for how much period the applicant had already suffered detention, and till what date his further detention could be authorized. Without ascertaining this and without even touching this aspect, he went on to authorize detention beyond the period prescribed by statute. This type of error was committed once again-this time by another Judge-on 14.06.2013. When the accused were produced before him on that date, the period of detention had already been extended only till 20.06.2013, but the learned Judge remanded the accused persons beyond 20.06.2013, i.e.-till 29.06.2013. This is the major cause for the controversy that has arisen.

11. Any way, though the detention beyond 05.06.2013 as had been ordered by Judge "K" was illegal, it is a fact that actually an application for extending the period authorizing detention was made by the Public Prosecutor on 03.06.2013. Such extension was duly granted on 05.06.2013, by extending the period upto 20th June, 2013. Therefore, the detention beyond 05.06.2013, which was unauthorized when it was ordered, was duly authorized before the time to undergo such detention arose. The discussion on the impropriety of the order passed on 30.05.2013, remanding the accused into police custody till 14.06.2013 has been therefore rendered academic in the context of the present application. Nevertheless, it has been thought necessary to mention this aspect, as much of the case law with respect to the right of the accused to be released on bail on the expiry of the period laid down by the first proviso to section 167(2) of the Code and the hair-splitting arguments on "whether an accused has to do anything for exercising this right" and "when can this right be said to have accrued to him", "whether it gets defeated by the filing of the charge-sheet before he is actually released on bail", "what is meant by his being released on bail i.e. whether, securing an order of bail or actual physical release on bail from custody" etc., can be seen to have arisen from such careless orders of remand passed by the Magistrates, or the Judges of the Special Courts, who are empowered to authorize detention u/s 167 of the Code, as the case may be. It may be recalled that the way the relevant provision is worded leaves no manner of doubt that an order of detention beyond the maximum period prescribed should not be passed at all, in the first instant; and if this is faithfully followed, the remand would be only upto a date, which is the last date authorizing detention. The accused would naturally be produced before the Court for securing his further remand u/s 167 or he would be produced alongwith a charge-sheet. If charge-sheet is not filed, there would be no question of remanding the accused further, without passing an order of bail. The Magistrate or the Judge, as the case may be, would immediately be able and also required to decide the question of grant of bail then and there. There would be no necessity of giving any separate notice, either to the accused or to the Investigating Officer and/or Public Prosecutor, as all would be any way before the Court at the time when the legality of further detention would fall for consideration. Authorizing detention beyond the maximum permissible period improperly, and in contravention of the mandate of the proviso to Section 167(2) of the Code creates unnecessary complications as on the day on which the maximum period of permissible detention gets over, the accused would not be before the Court for making a prayer for release on bail. When on a later date, he makes an application, occasion arises for disputes and resort is taken to hair-splitting arguments on legal position. All this happens because the mandate of section 167, which is given in plain language, is not followed.

12. Any way, it is a fact that further detention in custody was authorized till 20th June, 2013. The legality or correctness of the order extending the period upto 20th June, 2013 has not been challenged before me and no contentions in that

regard have been advanced. It is, therefore, a fact that for the purpose of the present application, the detention till 20th June, 2013 must be held to be authorized and legal.

13. Let us now examine what happened thereafter. An application seeking further extension of the period authorizing detention was filed on 19.06.2013. This was placed before the Court on 20th June, 2013, on which date the extended period was to expire. It appears that after giving notice to the accused persons, the application for further extension was heard and decided by a third Judge i.e. Judge "C". He extended the period upto 5th July, 2013. On the last day of the further extended period i.e. on 5th July, 2013, a charge-sheet came to be filed.

14. I have gone through the order dated 21st June, 2013 passed by Judge "C". Before proceeding further, it needs to be mentioned that certain observations made by the learned Judge in the order whereby he seems to be displeased with the applicant and the other accused for not having accepted the notice and a copy of the application for extension of period, are rather unjustified. It is clear that a copy of the application was required to be served upon the accused persons and the learned Judge has not doubted or disputed this position. The application was placed before him on 20th June, 2013, it appears that he had directed the Investigating Officer to serve the copy of the application on all the accused, who were lodged in prison, on the same day. Apparently, a report was received by the learned Judge on 21.06.2013 from the jail that the applicant and the other accused had refused to accept the copy of the application after reading the same on the ground that they would accept the same in presence of their counsel. However, all the accused including the applicant had signed overleaf the copy of the order. This was commented as "an ingenious method evolved by the defence" by the learned Judge. The view of the learned Judge was that an application had already been filed by the applicant, purportedly, u/s 167(2) of the Code and the refusal to accept the copy on 20.06.2013 was "in order to thwart the prosecution to seek further extension".

15. In making these comments, the learned Judge overlooked that the legal requirement, as per law laid down by the Apex Court, of giving a notice to the accused persons of an application for extension of period authorizing detention pending investigation, was not an empty formality and was not to be performed as a ritual. The object behind the issue of such notice is to enable an accused to make submissions opposing the extension of time. It is by keeping in mind, the submissions made and objections raised by the accused that the Court is expected to take an impartial and objective decision as to whether it would be proper and just to extend the period. When the application itself was made on 20th June, 2013, which was the last date of the extended period even assuming that such an application was taken up at the earliest about i.e. at 11 a.m., still, the order issuing notice must have been passed only thereafter. Thereafter, the notices would be issued and would be served upon the accused in prison. It is therefore, clear that the notices must have been attempted to be given to the

accused persons some time later in the day i.e. on 20.06.2013. The learned Judge overlooked that the accused persons were in prison-having been ordered to be detained till 29th June i.e. 9 days beyond the authorized period of detention-and therefore, when the prosecution had made an application on the last day, whether the anxiety felt by the accused as to the difficulty in contacting their Advocate in time and instruct him in the matter was justified. The desire of the accused to have their Advocate informed of the application, cannot be construed as a impropriety committed by the accused persons. Such a view can be formed only if giving of notice is thought to be a formality without any desire to seriously consider whether period should be extended or not and only with the object of a formal compliance of the direction of law is intended to be made. The learned Judge did not even think as to why prosecution had waited till the last date for filing the application for extension and whether that could also be termed as "an ingenious method evolved by the prosecution to prevent proper opportunity to be given to accused persons to show cause against the proposed extension" by the same logic.

16. In this context also, the observations made earlier in this order, regarding the impropriety of passing remand orders authorizing detention beyond the maximum period permitted by law, are relevant. It may be recalled that by an order passed on 05.06.2013, Judge "K" had remanded the accused persons till 14th June, 2013, though the period authorizing their detention was expiring on 5th June, 2013 itself. (It is a different matter that on 5th June, 2013 that period was further extended till 20th June, 2013.)

17. However, when the applicant and the other accused were produced before the Special Court, on 14.06.2013, this time presided over by Judge "C", he authorized their detention in custody till 29th June, 2013 though the maximum period authorizing detention was expiring on 20th June, 2013 itself and not even an application for further extension had been made. If the learned Judge had been careful to remand accused persons only till 20th June, 2013, they would have automatically been before the Court on that day along with their Advocates and the Public prosecutor, Investigating Officer and the accused persons through their Advocates could have been heard; and the question of extending the period further, could have been decided in a proper manner leaving no occasion for the accused persons to refuse to accept the copy of the application and for the learned Judge to comment on their such conduct. As aforesaid, passing such type of remand orders i.e. beyond the period authorizing detention creates complications leading to unnecessary hairsplitting arguments by both the sides consuming lot of time of the Court, inspite of the actual legal position being very clear. Majority of the issues brought before the superior Courts arise because the Magistrates or Judges authorize the detention beyond the maximum period mentioned in the first proviso to Section 167(2) of the Code either because they do not bother to find out what would be the maximum period permitting the detention under the said provision, or because they think that the account of the period of detention is to be kept by the accused, and not by them. This is

contrary to the language used in Section 167 of the Code. Though noting depends on this in the present case, this has been mentioned because the issue is of great general importance.

18. The learned Judge, in the present case while rejecting the application for bail filed by the applicant, did not consider the real issue that was involved in the matter. The learned Judge was right in saying that the application filed by the accused persons on 12.06.2013 could not be treated as one for compulsory release as the period authorizing detention was already extended by that time till 20th June, 2013. However, what he was required to consider is whether the extension of period not having been granted on 20th June, 2013 and when, whether or not to grant it, was being considered on 21st June, 2013, the accused persons had already become entitled to be released on bail. The contention of the accused persons was that "the prescribed period had expired and there had been no charge-sheet, or even an order extending the period further, and that, therefore, at that time i.e. on 21st June, 2013, the accused had a right to be released on bail", but the learned Judge bypassed the same by making observations suggesting as if the delay had been caused by the refusal of the accused to accept the notice. This was not proper as the learned Judge himself has placed the application of extension of time on 21st June, 2013 without realizing that further extension should be granted before the expiry of the prescribed period.

19. It should, therefore, now be examined what is the legal position in that regard. Undoubtedly, on expiry of the prescribed period, the accused would acquire an indefeasible right to be released on bail and there is no doubt that in this case, the accused were already seeking bail. Thus, whether to release them on bail was a question that arose before the learned Judge only on 21st June, 2013, but on that day, the application for extension of time as made by the Public Prosecutor was also before the Court. The question is whether the learned Judge should have ignored the said application and only considered the application for bail though both the applications were before him at the same time. It is not that the application for further extension of time was made on 21st June, 2013 and it is not in dispute that it was made on 20.06.2013. (That it was made on 19.06.2013 as observed by the learned Judge is however not correct. What was tendered on 19.06.2013 appears to be only a sealed packet- and not application or report-received from Assistant Police Commissioner, Matunga division and not from the Public Prosecutor. The application which was perhaps lying in a sealed packet, which was not opened at all, cannot be treated as having been made on 19.06.2013 when the same was not even opened by the Court and not even an attempt to ascertain the contents thereof was made. The Roznama of the Court of 19.06.2013 reads as under:-

Dt. 19/06/2013

CORAM: H.H. SPL. JUDGE..... (Incharge)

CR 60/13

Matter pertains to C.R. No. 56.

One sealed packet received from Asst. Police Commissioner, Matunga Division, Mumbai with letter bearing O.W. No. 1116/13 dtd. 18/06/2013 in C.R. No. 60/13 of RAK Marg Police Station.

ORDER:- Registrar (S) is directed to accept and keep the envelope/packet and letter in safe custody.

Sd/- Spl. Judge,

How, therefore the learned Judge mentioned it to be having made on 19.06.2013 is difficult to understand.)

On 21.06.2013 there arose a peculiar position before the Court. No charge-sheet was being filed on that day. The application of Public Prosecutor for extending the period was before the Court; and the application for their release on bail, as made by the accused, was also before the Court.

Naturally, the accused would suggest that their application would be considered first, in which case, they would be released on bail and the prosecution would suggest that their application for extension should be considered first, and in case it is allowed, the question of grant of bail on default would automatically come to an end. What would be the correct course to be adopted in such a situation? I have given my anxious consideration to this aspect of the matter. Ultimately, the decision of this application depends on the answer to this question. The answer is to be found in the pronouncement of the Supreme Court of India in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, . In this case, Their Lordships were dealing with the provisions of the Terrorist and Disruptive Activities Prevention Act with respect to extension of period of detention, which are in pari-materia with the relevant provisions in the M.C.O.C. Act. It is by this pronouncement, that it was laid down that the accused persons should be entitled to be heard before any extension of time on an application by the Public Prosecutor, is granted. For the purpose of the question that arises before me, the observations made in para 28 of the reported judgment are relevant. These observations show that where an accused would seek, what is popularly called a "bail in default," the prosecutor may resist the grant of bail on the said ground by seeking extension of the period authorizing detention. The observations in para 28 leave no manner of doubt that in such a situation the prayer for bail and the prayer for extension of period, are both required to be considered by the Court together, and it is thereafter that an appropriate decision is to be arrived at. If the prayer for extension of period of detention is granted, the application for bail made by the accused persons on the ground of the maximum permissible period authorizing detention is over, would not survive. Similarly, if the Court refuses to grant extension of the period as prayed for by the Prosecutor, then automatically the accused would be entitled to

be released on bail in accordance with the provisions of proviso to Section 167 of the Code, as may be modified by the relevant Special Statutes.

20. In the instant case, inspite of the various improprieties that had been taken place in remanding the applicant and the other accused beyond the authorized period before the expiry of the authorized period, it cannot be denied that extension of the period came to be applied for and granted. At the cost of repetition, it may be recalled that the legality, correctness or propriety of the orders granting such extensions-the first granted on 5th June, 2013 and the second granted on 21st June, 2013,-have not been challenged before me. Thus, the question of mandatory release of the accused persons on bail arose before the Court for the first time on 21st June, 2013; but on this date, the application made by the Public Prosecutor for extending the period, was also before the Court. The learned Judge considered the application for extension of time and allowed it. Thereafter, there remained no question of granting what is popularly called as "bail in default" to the applicant and the other accused.

21. The course adopted by the learned Judge cannot be said to be improper as he could not have decided the question of entitlement of the accused to be released on bail mandatorily, without deciding, whether or not, to extend the period further. It needs to be kept in mind that if there would be grounds to do so, the Special Court could extend the period upto 180 days and in that sense, the maximum period for which detention could be authorized was not over on 21st June, 2013. Ignoring the Public Prosecutor's application for further extension of period would have been improper and illegal, and therefore, the learned Judge has rightly considered the question of grant of bail after deciding, whether or not, to grant extension of the period as had been applied for by the Public Prosecutor.

22. In the ultimate analysis, it cannot be said that on 21st June, 2013, the applicant was entitled to be released on bail, in view of the provisions of proviso to Section 167 of the Code, as modified by the provisions of Section 21(1)(b) of the M.C.O.C. Act.

23. The applicant, is therefore, not entitled to be released on bail on the ground that an indefeasible right to be released on bail had been accrued in his favour and that it should be given effect to.

24. Since no other point is raised before me and since the application is made only on the said ground, it fails. The application is rejected.