

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE VIJU ABRAHAM

TUESDAY, THE 12TH DAY OF JULY 2022 / 21ST ASHADHA, 1944

BAIL APPL. NO. 5188 OF 2022

CMP 753/2022 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE , ERNAKULAM

CRIME NO.1768/2018 OF TOWN NORTH POLICE STATION, ERNAKULAM

PETITIONER/2ND ACCUSED:

ARSHOM P.M.

AGED 27 YEARS, S/O.P.C.MANI

PAZHUKKATHARA HOUSE, MUTHUKURUSSI P.O.

PALAKKAD- 678593

BY ADVS.

B.RAMAN PILLAI (SR.)

RENJITH RAJAPPAN, SAM M.THOMAS

SANDRA SUNNY, ARUN KUMAR M.A, C.HARIKUMAR

RESPONDENT/STATE:

1 STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA

ERNAKULAM - 682031

ADDL.R2 NISSAM NAZAR, AGED 37 YEARS, S/O.NAZAR

VELLUPARAMBIL HOUSE, NADAKKAL, ERATTUPETTAH VILLAGE,

MEENACHIL TALUK, KOTTAYAM, KERALA, INDIA.

IS IMPEADED AS PER ORDER DATED 08/07/2022 IN CRL.M.A.

NO.2/2022.

R1 BY SR.PUBLIC PROSECUTOR SRI.C.K.SURESH

R2 BY ADVS.S.RAJEEV, V.VINAY

M.S.ANEER, PRERITH PHILIP JOSEPH

SARATH K.P.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 12.07.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

VIJU ABRAHAM, J.

.....
B.A.No. 5188 of 2022
.....

Dated this the 12th day of July, 2022

ORDER

Application for regular bail.

2. Petitioner is the 2nd accused in Crime No.1768 of 2018 of Town North Police Station, Ernakulam registered alleging commission of offences punishable under Sections 323, 324, 455, 308, 506 and 427 of the Indian Penal Code (in short, "IPC"). The investigation of the above case was handed over to the District Crime Branch on 10.06.2022 and offence punishable under Section 458 IPC was also added by the new investigating agency.

3. The prosecution allegation is that the petitioner along with the other accused trespassed into the rented residence of the defacto complainant at about 11.30 p.m. on 17.11.2018 with an intention to commit culpable homicide and attacked him with deadly weapons causing injuries and thus committed the abovesaid offences.

4. The petitioner was originally arrested on 22.01.2019 and was released on bail on 20.03.2019 as per Annexure-A1 order in B.A. No.1786 of 2019. While granting bail, this Court has imposed certain

conditions including one that the petitioner shall not get involved in any other crime and that any such involvement will be a ground for cancellation of bail.

5. After issuance of Annexure A1 bail order, the defacto complainant filed CrI. M.A. No.01 of 2021 in B.A. No.1786 of 2019 before this Hon'ble Court alleging that condition No.4 imposed by this Court was violated by the petitioner. Thereupon, by Annexure-A2 order dated 28.02.2022 the bail granted as per Annexure-A1 order was cancelled with a further direction to the investigating officer to arrest the petitioner. The petitioner challenged the said order before the Apex Court and while so petitioner was arrested on 12.06.2022 and was remanded to custody. The specific case of the petitioner is that he has completed 56 days of incarceration in the 1st spell (from 23.01.2019 to 19.03.2019) and 4 days of incarceration in the 2nd spell (from 13.06.2022 to 16.06.2022) whereby making him eligible for the benefit of statutory bail under Section 167(2)(a)(ii) of the Code of Criminal Procedure (in short, "Cr.P.C.") on the ground that even on completion of 60 days of maximum custody period the final report has not been filed by investigating agency. Even though the petitioner moved the Addl. Chief Judicial Magistrate Court, Ernakulam seeking statutory bail, the same was dismissed as per Annexure-A3 order dated 21.06.2022 in C.M.P No.753 of 2022.

Aggrieved by Annexure-A3, the petitioner moved the Sessions Court, Ernakulam seeking statutory bail filing CrI. M.C. No.1456 of 2022 but the same was also rejected by Annexure-A4 order dated 01.07.2022. It is further submitted that the investigation of the crime was handed over to Asst. Commissioner of Police, District Crime Branch, Kochi City as is evident from Annexure-A5.

6. Shri B. Raman Pillai, learned Senior Counsel appearing for the petitioner submits that the petitioner is now in custody for a total period of 79 days as of the date of filing of bail application and the charge sheet has not been filed to date. It was further contended that the Addl. Chief Judicial Magistrate Court, Ernakulam as well as Sessions Court, Ernakulam dismissed the applications on erroneous grounds and that the judgments relied on by the courts, i.e., **Rajubai Bhalubhai Bharvad (Mevada) v. State of Gujarat, 2019 KHC 2353** and **Nishil v. Station House Officer and another, 2007 (4) KHC 336** are not applicable in the facts and circumstances of this case. The further case of the petitioner is that on completion of 60 days he has the right for statutory bail as provided under S.167(2)(a)(ii) Cr.P.C. and the said right emanates from Article 21 of the Constitution of India and this view has been reiterated by the Apex Court in **Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67** and **M. Raveendran v. Intelligence Officer,**

(2021) 2 SCC 485, Gautam Navlakha v. National Investigation Agency, 2021 SCC Online SC 382 and Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453. Admittedly charge sheet is not filed to date and in order to extinguish the indefeasible right under Section 167(2) Cr.P.C., the investigation in the case has to be completed before 17.06.2022. Petitioner relies on the judgment of this Court in **Sabu K.A. v. Central Bureau of Investigation, 2020 (2) KHC 601** to contend for the position that even though the detention of the petitioner is in two spells, the same would be counted together for granting statutory bail. The learned Senior Counsel also relied on an unreported judgment of the Madras High Court in **Gopinath v. State represented by Inspector of Police, Central Crime Branch, Salem City, Crl. R.C. No. 257 of 2018 and Crl. M.P. No. 2876 of 2018** to contend for the position that even if there is a violation of earlier bail conditions the right of the petitioner for statutory bail cannot be curtailed. It is also further contended by relying on the decision of Apex Court in **Achpal @ Ram Swaroop v. State of Rajasthan 2018 (4) KLT 664**, that even in cases where final report has been filed and the same was returned only due to technical defects, the applicant is entitled to statutory bail. It is also contended on the basis of the decision in **Union of India v. Thamisharashi and others, (1995) 4 SCC 190** that the intention of the

legislature in incorporating Section 167(2) Cr.P.C. is not to grant any discretion to the court in the grant of bail but making the same obligatory on the courts.

7. The learned Senior Public Prosecutor, Shri C.K.Suresh submitted upon instructions that the investigation is not yet complete, and now that the investigation has been entrusted to Asst. Commissioner of Police, District Crime Branch, Kochi City as per proceedings dated 10.06.2022 issued by the Deputy Commissioner of Police (Administration), City Police Office, Kochi and therefore charge sheet could not be filed within the statutory period.

8. The defacto complainant in the above said crime got himself impleaded in this case and in the petition filed to get impleaded, serious objections were raised regarding the grant of bail to the petitioner. He would submit that Crime No.1768 of 2018 of Ernakulam Town Police Station was registered on the basis of the statement given by him. It is stated by him in the said complaint that the petitioner/2nd accused along with four others in pursuance of a conspiracy hatched by them with the intention to commit the murder of the defacto complainant, trespassed into his rented room with dangerous weapons like knife and iron pipe, shouting to do away with the defacto complainant, physically assaulted him with the abovesaid weapons causing imminent threat to life. The

defacto complainant was hit on the head and left arm with iron pipe. He was intimidated by means of a knife. The accused also caused damages to the belongings of the defacto complainant. Petitioner/2nd accused is the mastermind behind the attack and he was wielding a knife thereby putting the defacto complainant in the fear of death thereby facilitating the attack by the other accused. It was further submitted that the petitioner was involved in more than 40 criminal cases and he produced Annexure-R2(b) list showing the details of the crimes in which the petitioner is involved. It was also contended that the present bail application is also not maintainable since Annexures-A3 and A4 orders rejecting bail are not challenged and the same has become final. It is also submitted that the attempt of the petitioner to camouflage his contentions of statutory bail is the result of a collective conspiracy hatched by him, hand in glove with the police and prosecution. The regular bail granted to the petitioner was cancelled by this Court on 28.02.2022 vide Annexure-A2 order. Thereafter, the petitioner roamed scot-free under the nose of the State Police, participating in various party meetings across the State including press conference. Thereafter, all of a sudden the petitioner was arrested on 12.06.2022 after almost four months. Immediately thereafter on 13.06.2022 Annexure-A5 affidavit was filed by the City Police Commissioner informing compliance and

praying to close CrI.M.A.No.1 of 2021 in B.A.No.1786 of 2019. It is pertinent to note that in the said affidavit it was informed to this Court that the investigation in Crime No.1768 of 2018 is handed over to Crime Branch, a prayer the defacto complainant was seeking for the last more than three years in W.P.(C) No.23729 of 2019 and the State had been declining ever since. Thereafter, quite surprisingly the petitioner filed a petition under Section 167(2) Cr.P.C. seeking statutory bail with a contention that the investigation is continuing. The clinical precision by which the entire episode is staged shows the larger conspiracy and culpable criminal intention of the petitioner to deceive this Court. It was also submitted that even though proceedings under Section 107 Cr.P.C. were also initiated against the petitioner, due to political influence the same was dropped as per Annexure- R2(d). It is also submitted that on an earlier occasion, the bail application submitted by the petitioner was dismissed by this court as per Exhibit R2(g) order dated 27.02.2019 in B.A. No.849 of 2019. It is only thereafter taking a lenient view the petitioner was granted bail as per Annexure-A1 order by imposing stringent conditions. After the bail was granted as per Annexure-A1 the petitioner was involved in various crimes, the details of which are as follows: (i) Crime No.1428 of 2019 under Sections 143, 147, 149 and 283 IPC; (ii) Crime No.1554 of 2019 under Sections 283, 143 and 149 IPC;

(iii) Crime No.1569 of 2019 under Sections 283, 143 and 149 IPC; (iv) Crime No.1732 of 2019 under Sections 341, 323, 324, 294(b) and 34 IPC; (v) Crime No.2064 of 2019 under Sections 342, 323, 324, 365 and 34 IPC; (vi) Crime No.1354 of 2020 under Sections 143, 147, 149, 188, 269, 271 of Kerala Police Act and Section 4(2)(4)(c) of Kerala Epidemic Diseases Ordinance, 2020 and (vii) Crime No.1390 of 2020 under Sections 143, 147, 149, 188, 269, 271, 283, 118(e), 4(2)(a), 4(2)(e), Section 5 of Kerala Epidemic Diseases Ordinance, 2020 of Ernakulam Central Police Station; (viii) Crime No.23 of 2020 under Sections 143, 149 and 323 of Mattanchery Police Station and (ix) Crime No.2084 of 2021 under Sections 143, 147, 149, 323, 354, 354(A)(1)(i), 506, 294(b), Section 3(1)(S), 3(1)(R) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 of Gandhi Nagar Police Station. It is also submitted that it is on his application that the bail granted as per Annexure 1 was cancelled by this Court as per Annexure- A2 order dated 28.02.2022. In the said order there is a specific direction by this Court to the State Police Chief to report compliance with the said order. It is the case of the defacto complainant that even when the police informed the court that strict action is being taken to arrest the petitioner herein, he has been participating in various meetings including the Student Federation of India, Ernakulam District meeting held on

20.04.2022 and 21.04.2022 (Annexure-R2 (h) is the true copy of the photograph), DYFI State Party meeting held at Pathanamthitta from 27.04.2022 to 30.04.2022 (Annexure-R2(i) is the true copy of the photograph) and thereafter participated in a press conference with the National Secretary of the Student Federation of India on 27.05.2022 (online news report regarding the same is produced as Annexure-R2(j)).

It is the specific case of the defacto complainant that the petitioner participated in all these activities when in Annexure-A5 affidavit the Commissioner of Police has intimated this Court that even a lookout notice has been issued against the petitioner as early as on 06.05.2022.

The counsel for the defacto complainant, Shri. Vinay, relying on Annexure-R2(k) news report would submit that even on the date of arrest of the petitioner on 12.06.2022 he was given VIP treatment by the police and was even allowed to even garlanded in the premises of the District Jail, Kakkanad and the police stood as mute spectators and therefore it was further contended that non-filing of the charge sheet till date in a Crime registered as early as in 2018 is only to help the petitioner who is now the State Secretary of the Student Federation of India, Kerala unit. It is also further contended by him that the petitioner is a person who has violated the bail conditions and got involved in several other cases and thereafter he was re-arrested as per the directions issued by this Court

as per Annexure-A2 order. Petitioner has misused the freedom and therefore he cannot now turn around and claim the right of statutory bail in as much as he was not remanded to judicial custody not in connection with any investigation but consequent to re-arrest after the cancellation of bail and this fact is vividly clear from Annexure-R2(l) remand report dated 12.06.2022. Defacto complainant relies on **Rajubai Bhalubhai Bharvad (Mevada)**'s case (supra) and **Nishil**'s case (supra) to contend for the position that the arrest of the petitioner is not for the purpose of any investigation but only for violating the conditions in the earlier bail order and therefore provisions of Section 167(2) Cr.P.C. will not be applicable and also relied on the judgment in **Ranjith @ Kadavi Ranjith v. State of Kerala, 2021 KHC 3231** to contend for the position that even a statutory bail granted under Section 167(2) could be revoked under Section 439(2) Cr.P.C. when the accused misuses the liberty granted as per the bail order. **Gopinath**'s case (supra) relied on by the petitioner is not applicable in the facts of this case as the bail granted to the petitioner therein was cancelled only for the reason that he could not deposit a sum of Rs.50 lakhs and furnish two sureties for a like sum of Rs.50,000 as directed in the bail order and it is in the said circumstance the court has held that violation of bail condition cannot be a reason for denying statutory bail under S.167 (2) and based on all the above said

contentions, counsel for defacto complainant prayed for dismissal of the bail application.

9. The question to be considered herein is as to whether earlier cancellation of bail for violation of bail condition would serve as a bar to the subsequent application made under Sub-section (2) of Section 167 Cr.P.C. It is indisputable that if the charge sheet is not filed within the time prescribed the petitioner/applicant has an indefeasible right for grant of bail going by Section 167 (2) Cr.P.C. as held by the Apex Court in **Rakesh Kumar Paul's** case; **M. Raveendran's** case; **Gautam Navlakha's** case; **Uday Mohanlal Acharya's** case and **Thamisharashi's** case (supra). It is also not in dispute that even in cases where the detention of the applicant was in two spells as in the case of the petitioner herein, the two spells could be counted together for granting statutory bail as held by this Court in **Sabu K.A.'s** case (supra). Section 167 deals with the *procedure to be followed when investigation could not be completed in 24 hours* and Section 167(2)(a)(ii) speaks about grant of statutory bail if investigation could not be completed within the period specified therein, the release, of course, being subject to the provisions of Chapter XXXIII Cr.P.C. So essentially the grant of statutory bail is due to the laches on the part of the investigating agency in completing the investigation within the period stipulated therein. Coming

which are relevant for consideration of this bail application are extracted

below:

9. The final statement dated 22.12.2021 filed by the ACP, Ernakulam shows that the petitioner got involved in 38 cases during the entire period. He got involved in 10 cases, after the bail was granted. I do not feel that the above list is exhaustive, since even on record, he is involved in more number of cases. Ext.R2(j) filed by the defacto complainant shows that, 35 cases are registered against him by the Central Police Station, Ernakulam alone. One was registered by Ernakulam North Police Station, one by Mattanchery police and another one by Gandhi Nagar Police Station, Kottayam. However, the list of ACP regarding cases in Ernakulam shows three cases registered by Ernakulam North Police Station, one by Munambam Police station. Further, case numbers shown in Annexure R2(j) as items 1, 4, 6, 17, 18 and 37 are not referred to in ACP's list. Again, though Crime No.2397/2018 of Ernakulam Central Police Station is reported to have been quashed on 6/11/2020, as per ACP's statement, this is vehemently opposed by the learned counsel for the defacto complainant. It is stated in the statement that, the above case, which involved attack with sharp weapons, final report was laid and is now pending as SC No.95/2021.

10. It is also reported by the police that, Crime in FIR No.2346/2014 of Ernakulam Central Police station pending as CCNo.2175/2014 was quashed. The applicant in the present petition has produced the order in Crl.M.C.No.1923 of 2021 as Annexure R2(o).

11. The learned counsel for the petitioner specifically invited my attention to Annexure R2(o) which is the order passed by another Bench of this court in Crl.M.C 1923 of 2021. It related to Crime No.2346 of 2014 of Ernakulam Central Police Station, in which, final report was filed and cognizance was taken as C.C.No.2175 of 2014 for offences punishable under sections 143, 144, 147, 148, 323, 324, 341, 294B r/w S.149 IPC. The Crl.M.C was filed on a premise that, the accused which included the second respondent herein had settled the dispute with the sole defacto complainant who was the injured. By the above order, criminal case was quashed by this Court on the basis of a submission by the learned Public Prosecutor that the petitioners did not have any criminal antecedents. According to the learned counsel for the petitioner, this showed that, inspite of the fact that the petitioner who was one of the accused had several cases pending against him in the very same Police Station, could manage to quash the proceedings on a false submission got

made through the learned Public Prosecutor. Hence, I am not inclined to fully rely on the statement of the ACP, which does not appear to be exhaustive.

12. However, sufficient materials are available on record to show that the present accused is involved in more than 40 cases in different police station. He got involved in 12 cases after bail was granted. Out of it, 7 cases relate to conducting procession along the public road causing obstruction to the traffic and also to the public and some among it also involved gathering together in breach of Kerala Epidemic Disturbances Ordinance. The remaining five cases involve more serious offences. It seems that, after few months of granting bail, he along with others, wrongfully restrained few persons and hit them with rafter. Crime was registered as Crime 1732 of 2019, in which, charge sheet has been laid against the petitioner. Subsequently, on 02.12.2019, he along with few other accused, wrongfully confined one person and after abducting him to a hostel, wrongly confined him in the hostel, beat him with iron rod on the various parts of the body. Crime No. 2064 of 2019 was registered and final report has been laid. In Crime No.2084 of 2021, the petitioner along with few others abused a women college student, attacked her bodily, committed sexual assault on her and committed offences defined under SC/ST (Prevention of Atrocities) Act. Crime was registered by the Gandhi Nagar Police Station and is pending. The case is being investigated and he has not been arrested. However, it is informed that, several warrants issued by various courts are also pending.

13. According to the learned counsel for the petitioner, the above facts show that, petitioner was enjoying considerable political support and protection from the police. It was vehemently pointed out by the learned counsel for the petitioner, that inspite of several cases being registered, the petitioner was never arrested except in the present crime, that too under the persuasion of the petitioner. In all other cases, he was neither arrested nor proceeded against seriously. He freely roamed around violating law and repeatedly involving in crimes with impunity. In a case involving SC/ST Act which was registered by the Kottayam police, petitioner is still moving freely, it was contended.

14. The entire facts narrated disclose that, this Court had taken a very lenient view in granting bail to the petitioner, though the petitioner was involved in 30 cases at that point of time. Leniency was shown to the petitioner on a firm belief that, petitioner will abide by the Rule of law and mend his ways. It seems that, petitioner is maintaining a wrong impression, that political activity means involvement in criminal cases, violation of statutory provisions and breach of law. He got involved in several minor cases and thereby, has misused the leniency shown by this Court. Though several of

the cases registered against him are of political nature, those cumulatively constitute instances of breach law and has to be appreciated in the background of his criminal antecedents. He has involved in more serious offences also. Having considered this, I feel that the petitioner has forfeited his right to enjoy the freedom granted by this court. The bail granted to the petitioner is liable to be cancelled. Further, considering the nature of serious allegations raised, directions are liable to be issued to ensure Rule of law.

Crl.M.A.No.1 of 2021 is allowed as follows:

1). The bail granted to the petitioner by order dated 20/3/2019 in B.A.No.1786 of 2019 in Crime No.1768 of 2018 of Ernakulam Town North Police Station stands cancelled. His bail bond stands cancelled. The accused shall be arrested forthwith by the investigating officer and shall report compliance to this Court forthwith. A copy of this order will be forwarded by the Registry to the DGP (Administration) for strict action and prompt compliance.

2). On his arrest, intimation shall be given to the SHO's of all the police stations, from where arrest warrants are pending execution as against the accused herein.

3).The DGP(Crimes) shall cause an enquiry to be conducted regarding the circumstances under which instructions were given by the prosecuting agency in Crl.M.C.No.1923 of 2021 in Crime No.2346 of 2014 of Ernakulam Central Police Station that the accused herein has no criminal antecedents and caused the quashing of the criminal case.”

Thus it could be seen that the bail earlier granted to the petitioner was rejected for having got involved in 12 other criminal cases in total disregard to the condition in Annexure-A1 bail order that he shall not get involved in any other crime and that involvement of it will be a ground for cancellation of bail in the present case. The case of the petitioner herein is that he is entitled to statutory bail under Section 167(2) as the charge sheet is not filed to date and further, that petitioner has completed 56 days of incarceration in the first spell (from 23.01.2019 to 19.03.2019) and 4 days of incarceration in the second spell (from 13.06.2022 to

16.06.2022) whereby making him eligible for the benefit of statutory bail. As stated above, the question to be considered is whether the petitioner is entitled to statutory bail in the facts and circumstances narrated above. Heavy reliance is placed by the learned Senior Counsel for the petitioner on **Sabu K.A. v. Central Bureau of Investigation, 2020 (2) KHC 601**. In the said case, the only question that was considered by this Court is as to whether the two spells of detention while the case was initially investigated by the Kerala Police and then later investigation transferred to CBI could be combined together to claim statutory bail. That was a case where though originally bail was granted and the same was set aside by the Apex Court in an appeal filed by the State and later on the petitioner was arrested by the CBI who later took charge of the investigation. The finding of this Court in the said judgment could be seen from paragraph 28 of the judgment which reads as follows.

“28.Thus, from a conspectus of all the precedents referred to above and on a consideration of the peculiar facts of this case, I am of the considered opinion that the petitioner is entitled to get the two periods of custody that he has undergone, i.e., 43 days (03/07/2019 to 14/08/2019) and 47 days (16/02/2020 to 02/04/2020), combined for the purpose of claiming 'compulsive bail' under the proviso (a)(i) of sub-section (2) of S.167 of the Code.”

It could be seen that in that case the bail was not cancelled for any default on the part of the petitioner therein in complying with the bail condition but in an appeal filed by the State. Thus it could be seen that

the question that is considered in the present bail application was not the subject matter in **Sabu K.A.**'s case (supra). The other judgment relied on is an unreported judgment of Madras High Court in **Gopinath v. State represented by Inspector of Police, Central Crime Branch, Salem City**. That was a case where the High Court of Madras held that even in a case where earlier cancellation of bail for non-adherence of the conditions would not be a bar for considering subsequent applications made under Section 167(2) Cr.P.C. In that case, the cancellation of bail was only due to noncompliance of onerous condition of deposit of Rs.50 Lakhs. The reason for cancellation of the bail is detailed in paragraph 2 of the judgment which reads as follows:

“2. The petitioner moved a bail application in Crl.M.P.No.7224 of 2017 before the learned Judicial Magistrate No.II, Salem and he was enlarged on bail by an order dated 06.12.2017 on condition that he should deposit a sum of Rs.50,00,000/- and to furnish two sureties for a like sum of Rs.50,000/-. As the petitioner has not complied the condition stipulated above, the bail granted to the petitioner was cancelled subsequently.”

Therefore it could be seen that though the present case and in **Gopinath's** case (supra) cancellation for bail was for non-adherence of conditions it could be seen that in **Gopinath's** case (supra) bail was cancelled for non-deposit of an amount of Rs.50 Lakhs as a pre-condition for grant of bail but in the present case bail was cancelled for violation of the condition for having been involved in 12 other crimes

after the bail was granted.

10. This Court had occasion to consider a similar circumstance in **Nishil v. Station House Officer and another, 2007 (4) KHC 336** and held as follows :

“10. The learned Public Prosecutor, on the other hand, contends that the right of the individual will have to be balanced with the societal interests and perspective. An accused who is continuing in custody pending investigation simpliciter cannot be equated with an accused who has been granted bail and whose bail has been cancelled subsequently for specific reasons under S.439(2) or S.437(5) of the CrPC, submits the learned Public Prosecutor. Merely because the Investigator has not been able to complete the investigation within the period of 90 days after arrest or rearrest as the case may be, an accused person who has violated the conditions of the bail order and who has forfeited his right to continue on bail may not be conferred with a further right to be released on bail, submits the learned Public Prosecutor. The position of an accused whose bail has been cancelled under S.439(2) or S.437(5) is qualitatively different from an accused person who is continuing in custody for 90 days after his arrest without a charge sheet being filed against him. The purpose, objective and scheme of S.167 of the Cr.PC may be alertly borne in mind, submits the learned Public Prosecutor.

11. Having rendered my very anxious consideration to all the relevant circumstances, I am of opinion that the contention of the learned Public Prosecutor is to be accepted. While interpreting the proviso to S.167(2) the sacrosanct right of the individual to freedom and liberty must be balanced with the societal needs and requirements. A person who has abused the freedom granted to him and hence is rearrested must certainly be distinguished from an accused who has to continue in custody merely because the Investigator has not completed the investigation within a period of 90 days.

12. In this context, I take note of the deeming provision under S.167(2) that an accused released under the proviso to S.167(2) shall be deemed to be one who has been granted bail under Chapter 33. That inevitably means that the bail granted to him can be cancelled. Even when the circumstance which entitles him to grant of bail by default the non filing of the final report within 90 days, continues, the bail granted to an accused can be cancelled. This squarely shows that the right of an accused to be released on bail whether under the proviso to S.167(2) or otherwise is subject

to his observance of the conditions of bail and also subject to proper conduct on his part which does not disentitle him to continue on bail. If bail by default granted after 90 days is liable to be cancelled later on the ground of abuse of the liberty or violation of conditions even when the default in filing the final report continues, there can be no rhyme, reason or principle in insisting that a person who has been rearrested must again be granted the benefit of the proviso to S.167(2) when the total period of detention exceeds 180 days.

13. Such an accused continues in custody because he has abused the freedom / liberty granted to him. The case of such a person must definitely be distinguished from a person who continues in custody without any charge sheet being filed against him.” (underline supplied)

In the said case, this Court has categorically stated that the case of a person who has abused the freedom granted to him and hence re-arrested must certainly be distinguished from an accused who has to continue in custody merely because the investigator has not completed the investigation within the period stipulated. The only difference from the facts of the present case is that the case decided in **Nishil's** case (supra) was one where earlier also statutory bail was granted and the petitioner therein sought statutory bail thereafter also and in the present case a regular bail was granted earlier and now the petitioner is seeking statutory bail. On consideration of the contentions raised by both sides, I do not feel that this will not substantially affect the dictum laid down in the said judgment and the same will squarely apply in the facts and circumstances of this case.

11. The Gujarat High Court had also occasion to consider a similar issue in **Rajubai Bhalubhai Bharvad (Mevada) v. State of**

Gujarat, 2019 KHC 2353. In the said case also there was a condition imposed while granting bail that an amount of Rs. 1,25,03,000 should be deposited within the time stipulated. As the petitioner could not fulfill the said condition the bail was cancelled an arrest order was issued and later the petitioner was arrested and was in judicial custody. Thereafter the petitioner applied for bail under Section 167(2) Cr.P.C. On a consideration of the facts and circumstances, the Gujarat High Court rejected the application. The relevant portion of the said judgment reads as follows:

6. *As against this, learned Public Prosecutor Mr. Mitesh Amin submits that the re-arrest of the petitioner cannot be considered to be an arrest for the purpose of investigation as insofar as the petitioner is concerned, upon completion of 15 days, after his first arrest, investigation qua him would be concluded. The re-arrest of the petitioner was on account of non-compliance of the conditions of bail imposed by this Court and re-arrest was on the strength of the arrest warrant. This situation cannot be mixed up with the requirement of Section 167(2) of the Cr.P.C. The arrest warrant issued being on account of breach of conditions of bail can be set right only after the petitioner complies with the condition of such bail. In any case, in the given fact situation, where the petitioner has proceeded to file application for regular bail under Section 439 of the Cr.P.C., granted conditional bail by exercising powers under Section 439 of the Cr.P.C. Thereafter, on account of breach of condition of bail, his bail came to be cancelled while exercising power under Section 439(2) of the Cr.P.C. It is not open for the petitioner to change the track from right to bail under Section 439 of the Cr.P.C. to right to default bail under Section 167 of the Cr.P.C.*

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17. The Court also finds some strength in the argument of the Public Prosecutor that once the Court had enlarged the petitioner on bail by exercising power under Section 439 of the Cr.P.C. and subsequent cancellation of bail in exercise of powers under Section 439(2) of the Cr.P.C.. the petitioner being re-arrested and thereafter,

changed his track to claim default bail and upon his release on bail, the period prescribed under Section 167(2) of the Cr.P.C. would become irrelevant and accept the argument of the public prosecutor that upon re-arrest of the petitioner, the time period prescribed under Section 167(2) of the Cr.P.C. would mean that the petitioner, is arrested twice for one offence. This situation is not contemplated under any provisions of Cr.P.C. and therefore, arrest of the petitioner will have to be held as an arrest pursuant to the issuance of arrest warrant and not in connection with investigation of the offence.

18. In the present fact situation, it may amount that the petitioner would be taking advantage of his own wrong, whereby on one hand, condition for bail is invited on the basis of which discretion is exercised and petitioner is enlarged on bail on 26.07.2016. Thereafter, non-compliance and breach of such condition and on the face of such non-compliance, claim default bail which is evident from the time period which has lapsed arrest on 08.05.2017, re-arrest on 22.09.2017 and application for default bail filed on 26.12.2017.”

(underline supplied)

12. From the discussion above, I am of the opinion that the petitioner is not entitled to statutory bail for the reason that he cannot be equated to that of an accused person who is continuing in custody for the statutory period after his arrest without a charge sheet being filed against him as the petitioner was in fact granted regular bail as per Annexure A1 order and now continuing in custody for violation of the condition in Annexure-A1 bail order for having been involved in 12 crimes after granting bail. The custody now of the petitioner cannot be treated to be for the purpose of investigation as envisaged under Section 167(2) Cr.P.C. The petitioner who is continuing in custody for having abused the freedom/liberty granted to him as per Annexure A1 order by

getting involved in 12 other crimes thereafter, cannot be equated to a person who continues in custody without any charge sheet being filed against him. A further aspect to be noted is that this is not a case where the petitioner is continuing in jail only for the reason that investigation is not completed whereby entitling him to statutory bail. This is a case where regular bail was granted even before the statutory period was over but on conditions. Now the petitioner is in custody not for the reason that investigation could not be completed within the stipulated period but for the reason that he has violated the conditions in the bail order for having been involved in 12 crimes after the bail was granted. Therefore, I am of the opinion that the case of the petitioner will not come under the purview of Section 167(2) Cr.P.C. If the interpretation suggested by the petitioner is adopted, the petitioner will be entitled to get bail after 6 days of custody after the cancellation of bail for having violated the conditions in Annexure A1 order, and in such a situation the provisions of Section 439(2) Cr.P.C. will be rendered purposeless and the petitioner will be taking advantage of his own wrong. It is also surprising to note that the investigation of this case is not yet completed even though the crime was registered as early as 2018. It is also seen that Annexure-A2 order cancelling bail though challenged by the petitioner before the Apex Court, as is seen from the averment in the bail

application, after the arrest of the petitioner, the Special Leave petition was not proceeded with further. On an anxious consideration of the facts and circumstances of the case, I am of the opinion that the petitioner is not entitled to grant statutory bail as envisaged under Section 167(2) Cr.P.C. Therefore, the bail application is accordingly dismissed.

It is made clear that I have considered only the right of the petitioner for grant of statutory bail as envisaged under Section 167(2) Cr.P.C. and the dismissal of the present bail application will not preclude the petitioner from approaching the court again on any other grounds available to him under law, for grant of bail.

Sd/-
VIJU ABRAHAM
JUDGE

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