

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 27<sup>TH</sup> DAY OF JUNE 2023 / 6TH ASHADHA, 1945

CRL.MC NO. 4508 OF 2023

PETITIONER/ACCUSED NO.1:

JUSTIN T.J  
AGED 27 YEARS  
S/O JOSEPH T.J, DOOR NO.1/148, MANVAYAL DESOM,  
SREE MADURAI, NILGIRI, TAMIL NADU- 643 212,  
PIN - 643212.

BY ADVS.  
V.VINAY  
M.S.ANEER  
NISSAM NAZZAR

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA  
REP BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM- 682031 (CRIME NO.26/2022 OF EXCISE RANGE  
OFFICE, KALIKAVU, MALAPPURAM)
- 2 EXCISE CIRCLE INSPECTOR-II  
EXCISE CRIME BRANCH (NORTH ZONE) KOZHIKODE - 673 020.
- 3 SUPERINTENDENT  
DISTRICT JAIL, PALLIKKUNNU P.O, KANNUR, PIN - 670004

SRI. M.P.PRASANTH, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
27.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**"CR"**

**ORDER**

This petition is filed under Section 482 of the Code of Criminal Procedure ("the Code" for the sake of brevity) challenging the order dated 24.05.2023 in C.M.P.No.1361/2023 on the file of the Special Court for SC/ST(POA) Act & NDPS Act Cases, Manjeri. By the order impugned, the learned Additional Sessions Judge allowed the application filed by the learned Public Prosecutor under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for brevity) and allowed the detention of the accused for a further period of 90 days.

2. Before advertng to the contentions of the petitioner to assail the order passed by the learned Sessions Judge, I shall narrate the undisputed facts.

- a. The petitioner herein is arrayed as the 1st accused in Crime No.26/2022 of the Excise Range Office, Kallikavu. The aforesaid crime was registered on the allegation that on 24/11/2022 at 9:10 am, the petitioner had transported 66.85 kilograms of Ganja in a car bearing registration No.TN-43-Z-8264. The petitioner was arrested, and the contraband was seized consequent to the registration of the crime.

Records reveal that the petitioner was produced before the jurisdictional court, and he was remanded to judicial custody on 24.11.2022.

- b. On 9.5.2023, an application for regular bail was filed by the petitioner as CMP No.1353/2023. However, no orders were passed on the said application.
- c. In the case on hand, the 180th day from the date of initial remand fell on 23.05.2023. Seeking an extension of detention of the accused for a further period of three months, an application was filed by the learned Public Prosecutor as early as 12.5.2023. The accused was put on notice, and he submitted an application on 19.5.2023 seeking an adjournment by a day to file his objection.
- d. The petitioner stated that an oral application for statutory bail was filed by the petitioner on 23.05.2023. Immediately thereafter, on the same day itself, CMP No.1533/2023 was filed seeking statutory bail. No orders were passed on the same.
- e. On 24.5.2023, the application was filed under Section 36A (4) of the Act, which was allowed by the learned Sessions Judge.

f. On 26.05.2023, CMP No.1353/2023 for regular bail was rejected, and on 2.06.2023, the application for statutory bail was rejected.

3. Sri. Vinay, the learned counsel, submitted that the order passed by the learned Sessions Judge cannot be sustained under law. Relying on the law laid down by the Apex Court in **Sanjay Dutt v State through the C.B.I. Bombay<sup>1</sup>** and **Jigar alias Jimmy Pravinchandra Adatiya v. State of Gujarat<sup>2</sup>**, it was submitted by the learned counsel that it is mandatory for the Court of Sessions to inform the accused with regards to the filing of an application under Section 36A(4) of the NDPS Act, for extension of period and also to insist for the presence of the accused at the time when the Court considers the application for extension submitted by the learned Public Prosecutor. He pointed out that except for giving the notice of the application, the court did not secure the presence of the accused either virtually or physically on the date on which the application was heard. Relying on the law laid down by the Apex Court in **Uday Mohanlal Acharya v. State of Maharashtra<sup>3</sup>** and in **M. Ravindran v. Directorate of Revenue Intelligence<sup>4</sup>**, it was submitted by the learned counsel that the learned Sessions Judge is bound to consider the application for default bail along with

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<sup>1</sup> (1994) 5 SCC 410.

<sup>2</sup> 2022 SCC Online SC 1290.

<sup>3</sup> 2001(5) SCC 453.

<sup>4</sup> (2021) 2 SCC 485

the application for extension of time and pass orders together. In the case on hand, the application for default bail was filed on 23.5.2023, and the same was rejected only on 2.6.2023, whereas the application for extension was allowed for granting 3 months on 24.5.2023. The learned counsel would then refer to the law laid down in **Judgebir Singh alias Jasbir Singh Samra alias Jasbir and Ors. v. National Investigation Agency**<sup>5</sup> and it was urged that the right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding the pendency of the bail application or subsequent filing of the charge sheet or a report seeking extension of time, and the court could not have said that since the extension application is pending, it shall pass orders on the default bail application only after the extension application was decided.

4. The learned Public Prosecutor has vehemently opposed the submissions advanced by the learned counsel appearing for the petitioner. It was submitted by the learned Public Prosecutor by referring to the order itself that the information as to the filing of the application by the Public Prosecutor was made known to the accused and he had filed an application seeking time to file an objection. Referring to the principles of law in **Jigar** (supra), it is submitted that the application for extension filed by the Public Prosecutor has

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<sup>5</sup> 2023 SCC OnLine SC 543

to be made known to the accused and nothing more. In the instant case, the said mandate has been complied with, contends the learned Public Prosecutor. It was further submitted that as notice was given to the accused and he was represented by a counsel, there was no need to secure his presence at the time of the hearing. It was also submitted that all procedural formalities have been complied with in its letter and spirit, and hence, there is no reason to interfere with the well-considered passed by the learned Sessions Judge.

5. I have considered the submissions advanced and have gone through the entire records.

6. Section 167 of the Cr.P.C. details the procedure to be followed when an investigation cannot be completed. The said provision reads thus:

167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under

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

Provided that—

- (a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—
  - (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
  - (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;
- b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on

production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

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

XXXXX            XXXXX            XXXXX

7. Section 167 (2) (b) says in unmistakable terms that no Magistrate shall authorize the detention of the accused in the custody of the police under the above provision unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on the production of the accused either in person or through the medium of electronic video linkage.

8. It can be seen that Section 167 of the Code does not envisage an extension of the period of detention of an accused in custody beyond the specified period. The legislature, however, thought in its wisdom that certain special categories or situations required that the investigating agencies should be given more time to investigate a matter and to file their complaint or charge sheets, and such provisions



have been made under special statutes. The NDPS Act, 1985 is one such legislation.

9. Section 36-A(4) of the Act insofar as it is relevant, reads as under:

36-A. Offences triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

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(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to 'ninety days', where they occur, shall be construed as reference to 'one hundred and eighty days':

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year 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 said period of one hundred and eighty days.

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10. Section 36-A of the NDPS Act prescribes a modified application of the Cr.P.C. as indicated therein. The effect of sub-section (4) of Section 36-A,

NDPS Act, is to require that investigation into certain offenses under the NDPS Act be completed within a period of 180 days instead of 90 days as provided under Section 167(2) Cr.P.C. Hence the benefit of an additional time limit is given for investigating a more serious category of offenses. This is augmented by a further proviso that the Special Court may extend the time prescribed for investigation up to one year if the Public Prosecutor submits a report indicating the progress of the investigation and giving specific reasons for requiring the detention of the accused beyond the prescribed period of 180 days. (See **M. Ravindran v. Directorate of Revenue Intelligence**).

11. For clarity, the conditions that should be satisfied while considering the application for extension under Section 36A(4) are:

- (1) a report of the Public Prosecutor,
- (2) which indicates the progress of the investigation, and
- (3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and
- (4) after notice to the accused. (See **Sanjay Kumar Kedia v Intelligence Officer, Narcotics Control Bureau and**

**Another<sup>6</sup>).**

12. What is discernible in this case is that the 180th day of the initial remand expired on 23.5.2023 and that on the same day itself, the petitioner herein had filed an application for statutory bail as C.M.P.No. 1533/2023. It is also discernible that the application for regular bail preferred by the petitioner as C.M.P.No.1353/2023 was pending before the learned Sessions Judge since 9.5.2023 without orders. The application for extension of remand filed by the Public Prosecutor as C.M.P.No.1361/2023 was pending since 15.5.2023. Clearly, on the date on which the detention was extended by a period of 90 days, the presence of the petitioner was not secured either in person or virtually. This Court had directed the Registry to get a report from the learned Sessions Judge as to whether the presence of the petitioner was secured at the time of consideration of the application. The learned Sessions Judge, in his report dated 14.6.2023, has reported that the accused was not produced physically or by video conference before the learned Sessions Judge in the petition as a notice in writing was given to the accused and his counsel.

13. In this context, it would be relevant to note that **Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.**<sup>7</sup>, the Hon'ble

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<sup>6</sup> (2009) 17 SCC 631

<sup>7</sup> [(1994) 4 SCC 602]

Apex Court had held that that the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bond as directed by the court. It was also held that a 'notice' to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period of 180 days for completing the investigation. Subsequently, the question of the proper construction of Section 20(4)(bb) was referred to a Constitution Bench of the Apex Court in **Sanjay Dutt** (supra). Reservation was expressed before the Apex Court that the decision in **Hitendra** (supra) should not be held as conferring an indefeasible right on the accused to be released on default bail even after the final report or challan has been filed. To settle this point, observations in **Hitendra** (supra) were clarified in **Sanjay Dutt** (supra), and it was held as follows in paragraphs Nos.48 and 49 of the judgment:

48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of

bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in asuch case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan v. State of Punjab* [(1952) 1 SCC 118]; *Ram Narayan Singh v. State of Delhi* [AIR 1953 SC 277] and *A.K. Gopalan v. Government of India* [AIR 1966 SC 816 ])

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 CrPC in such a situation. We clarify the



Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in *Hitendra Vishnu Thakur* is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage."

15. The Apex Court in **Sanjay Dutt** (supra) clarified the position that the right of an accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 Cr.P.C. is indefeasible prior to the filing of the chargesheet. This right, however, is extinguished once the chargesheet is filed if such right was not availed of previously. After the chargesheet is filed, the grant of bail is contingent upon the merits of the case under provisions of the Code relating to the grant of bail and the special provisions for the grant of bail in other enactments like the NDPS Act. The custody of the accused is then governed by different provisions of the Code of Criminal Procedure and not under Section 167 of the Code. If an accused applies for bail upon the expiry

of 180 days (or the extended period), he must be released on bail immediately. If that right had accrued to the accused, but no request was made, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 of the Code would cease to apply. If the accused has filed an application for bail and the public prosecutor has filed an application for an extension of time to complete the investigation, both applications are to be considered together. The grant of bail in such a situation is subject to the rejection of the prayer for the extension of time if such a prayer is made.

16. In **Rambeer Shokeen v State (NCT of Delhi)**<sup>8</sup>, the Apex Court, while expatiating further on the principles laid down in **Sanjay Dutt** (supra), went on to hold that the consideration of an application for grant of statutory bail was dependent on the rejection of prayer of the Public Prosecutor for extension of time. When such prayer is made, it is the duty of the Court to consider the report/application for the extension of the period for filing of the chargesheet in the first instance. Only if it was to be rejected could the prayer for the grant of statutory bail be considered. It was held that in no case shall the hearing on statutory bail application precede the consideration of prayer for an extension of the period for filing of the chargesheet made by

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<sup>8</sup> (2018) 4 SCC 405)



the Public Prosecutor.

17. In **M. Ravindran** (supra), the Apex Court had occasion to consider the earlier precedents and had elucidated the principles with regard to the right of the prosecutor under Section 167(2) of the Code read with Section 36(A)(4) of the NDPS Act. It was held as follows in paragraph 20.1 of the judgment.

20.1 The observations made in **Hitendra Vishnu Thakur** and **Sanjay Dutt** to the effect that the application for default bail and any application for extension of time made by the Public Prosecutor must be considered together are, in our opinion, only applicable in situations where the Public Prosecutor files a report seeking extension of time prior to the filing of the application for default bail by the accused. In such a situation, notwithstanding the fact that the period for completion of investigation has expired, both applications would have to be considered together. However, where the accused has already applied for default bail, the Prosecutor cannot defeat the enforcement of his indefeasible right by subsequently filing a final report, additional complaint or report seeking extension of time.

20.2. It must also be added and it is well settled that issuance of notice to the State on the application for default bail filed under the Proviso to S.167(2) is only so that the Public Prosecutor can satisfy the Court that the prosecution has already obtained an order of extension of time from the Court; or that the challan has been filed in the designated Court before the expiry of the prescribed period; or that the prescribed period has actually not expired. The prosecution can accordingly urge the Court to refuse granting bail on the alleged ground of default. Such issuance of notice

would avoid the possibility of the accused obtaining default bail by deliberate or inadvertent suppression of certain facts and also guard against multiplicity of proceedings.

20.3. However, Public Prosecutors cannot be permitted to misuse the limited notice issued to them by the court on bail applications filed under Section 167(2) by dragging on proceedings and filing subsequent applications/reports for the purpose of "buying extra time" and facilitating filling up of lacunae in the investigation by the investigating agency.

18. It was held that the position that applications for default bail and any applications for extension of time by the Public Prosecutor must be considered simultaneously would only be applicable if the Prosecutor files a report seeking extension of time prior to the accused filing for default bail. If the accused has already applied for default bail, the Prosecutor cannot circumvent the enforcement of this indefeasible right by later filing a final report or report seeking time extension. Notice to the State on an application for default bail under Proviso to S.167(2) is issued so that the Public Prosecutor can confirm to the court that either time extension has already been obtained, the charge sheet has been filed before the expiry of the prescribed period, or the prescribed period hasn't expired. The issuance of notice prevents the accused from obtaining default bail through omission of facts and guards against multiple proceedings. However, Public Prosecutors are

not allowed to misuse the limited notice issued to them by the court on bail applications filed under Section 167(2) by prolonging proceedings and filing subsequent applications/reports to 'buy extra time' or to fill gaps in the investigation.

19. In **Bikramjit Singh v. State of Punjab**<sup>9</sup> dealing with a question that arose in an application for default bail under the UAPA, the Hon'ble Supreme Court has observed thus:

36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge-sheet is filed, the right to default bail becomes complete. It is of no moment that the criminal court in question either does not dispose of such application before the charge-sheet is filed or disposes of such application wrongly before such charge-sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

It was held by the Supreme Court that the rigorous powers conferred under special statutes for curtailing the liberty of the accused are not exercised in an arbitrary manner.

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<sup>9</sup> [(2020) 10 SCC 616]

20. In **Jigar** (supra), the question urged before the Hon'ble Apex Court was that whether it can be regarded as an error in procedure when the Special Court passed orders on the reports submitted by the learned Public Prosecutor by which time to complete the investigation was extended up to 180 days, the presence of none of the accused was procured either physically or through video conference and that they were not even informed about the reports submitted by the Public Prosecutor. After considering the entire law on the subject, it was held as follows by the Hon'ble Supreme Court:

35. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt, [1994 (5) SCC 410] to the decision in the case of Hitendra Vishnu Thakur, [1994 (4) SCC 602] is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of Sanjay Dutt, 1994 (5) SCC 410 held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to sub-section (2) of S.167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the

prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by sub-section (2) of S.20 of the 2015 Act to sub-section (2) of S.167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

36. The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Art.21 of the Constitution. The procedure contemplated by Art.21 of the Constitution which is required to be followed before the liberty of a person is taken away has to be a fair and reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Art.21. The failure to procure the presence of the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Art.21.

21. In a recent judgment rendered by the Apex Court in **Judgebir Singh** (supra), the Apex Court had occasion to refer to the law laid down in **Jigar** (supra) and **Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi)**<sup>10</sup> and issued the following directions as an eye-opener

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<sup>10</sup> [(2012) 12 SCC 1]

litigation for the NIA /State Police. Reference to paragraphs No. 76 and 77 would be apposite.

76. As is evident from the chronology of dates and events referred to in the earlier part of our judgment, the final report under Section 173(2) of the CrPC was filed in the Court of SDJM, Ajnala on 15.11.2019. 15.11.2019 was the 161st day from the date of arrest of two of the appellants before us, namely, Jasbir Singh and Varinder Singh. They were the first to be arrested on 08.06.2019. The Punjab Police applied to the Court of the Additional Sessions Judge, Amritsar, for extension of time to complete the investigation invoking the proviso to Section 43D(2)(b) of the UAPA on 04.09.2019. When this application for extension of time was filed only two days were left for 90 days to expire. This is suggestive of the fact that the 91st day would have fallen on 07.09.2019. What is important to highlight is that the Additional Sessions Judge, Amritsar, looked into the extension application dated 04.09.2019 filed by the Punjab Police and ultimately, extended the time limit vide its order dated 17.09.2019 i.e., on the 101st day. By the time, the Additional Sessions Judge, Amritsar, passed an order extending the time, the period of 90 days had already expired. Indisputably, there was no chargesheet before the Court on the 91st day i.e., on 07.09.2019. The reason why we say that this is a grey area is because what would have happened if the appellants Jasbir Singh and Varinder Singh had preferred an application seeking statutory/default bail under Section 167(2) of the CrPC on the 91st day i.e., on 07.09.2019. The application seeking extension of time was very much pending. The Additional Sessions Judge could not have even allowed such application promptly i.e., on or before the 90th day without giving notice to the accused persons. The law is now well settled in view of the decision of this Court in the case of Jigar alias Jimmy Pravinchandra Aditya v. State of Gujarat reported in 2022 SCC OnLine SC 1290 that an opportunity of hearing has to be given to the accused persons before the time is extended up to 180

days to complete the investigation. The only error or lapse on the part of the appellants Jasbir and Varinder Singh was that they failed to prefer an appropriate application seeking statutory/default bail on the 91st day. If such application would have been filed, the court would have had no option but to release them on statutory/default bail. The Court could not have said that since the extension application was pending, it shall pass an appropriate order only after the extension application was decided. That again would have been something contrary to the well settled position of law. This litigation is an eye opener for the NIA as well as the State investigating agency that if they want to seek extension, they must be careful that such extension is not prayed for at the last moment. (emphasis supplied)

77. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the court. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, or a report seeking extension of time is preferred before the Magistrate or any other competent court, the right to default bail would be extinguished. The court would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

22. The Apex Court had held that the mere fact that the extension application is pending is no reason for the court to refuse to consider the application for statutory bail, which was pending on the 180th day of remand.

23. Guided by the principles above, I shall detail the chronological list of the relevant events for the sake of clarity.

24.11.2022	Remand of the accused
15.05.2023	CMP No 1361/2023 filed by the public prosecutor under Section 36A(4) of the NDPS Act
22.5.2023	180th day of remand completed
23.05.2023	CMP No 1533/23 filed by accused seeking statutory bail
24.05.23	CMP No 1361/23 seeking extension of detention allowed
2.06.23	Request for statutory bail rejected.

24. The accused was remanded on 24.11.2022. The 180th day fell on 22.5.2023. The application for an extension of time under Section 36A(4) was filed on 15.5.2023. No orders were passed on the same. On 23.05.2023, the petitioner filed an application for statutory bail on the 181st day. In terms of the law laid down in **Ravindran** (supra), as the application for extension of detention was filed well in advance and before the filing of the application for statutory bail, the learned Sessions Judge was bound to consider both applications simultaneously. Orders had to be passed in accordance with the law and in terms of the mandate under Section 36A(4) of the NDPS Act. If the application for extension is allowed, then the statutory bail application will



necessarily have to be dismissed. On the other hand, if the application for the extension of detention is rejected, then prompt orders have to be passed on the statutory bail application. In the case on hand, the extension application was allowed only on the 182<sup>nd</sup> day, whereas the statutory bail application was filed and was pending on 23.05.2023, i.e., on the 181<sup>st</sup> day. In view of the law laid down in **Judgebir** (supra), the learned Sessions Judge had no option but to allow the application for the grant of statutory bail. Furthermore, admittedly the presence of the petitioner was not procured at the time of consideration of the application for the extension of the remand. As held in **Jigar**, it is mandatory to produce the accused at the time when the Court considers the application for extension and also furnish the information to the accused that the question of extension of the period of detention is being considered. Though the accused has been informed about the filing of the application for extension, his presence was admittedly not procured. The learned Sessions Judge, in his report, has also reported that the presence of the accused was not procured.

25. Sri.Prasanth, the learned Public Prosecutor, urged that the observations in **Jigar** were made because no notice was given to the accused with regard to the filing of the application for extension in the said case.

According to the learned counsel, the presence of the accused is not to be insisted on when notice has been issued to him informing him about the filing of the application for the extension of detention. I am unable to agree. In the instant case, the initial period of custody of 180 days was to expire on 22.5.2023. If the court were to extend the period of detention of the accused for a further period, then the court is bound to ensure the presence of the accused either physically or virtually. As held by the Apex Court in **Jigar** (supra), when the application for the period of detention is extended for a further period based on an application filed by the learned Public Prosecutor under Section 36A(4), it legally strips the accused of their infeasible right to claim default bail. This is because the extension of time curtails the right of the accused to default bail, a right intimately linked with the fundamental freedoms safeguarded under Article 21 of the Constitution. Article 21 demands a fair and reasonable procedure before curbing the liberty of a person. These procedural safeguards are indeed instrumental in preserving the liberties enshrined in Article 21. Failing to ensure the presence of the accused, either physically or virtually, in the court and not informing him about the application filed by the learned Public Prosecutor for the time extension goes beyond a simple procedural violation. It is a significant illegality that infringes upon the rights of the accused under Article 21. In the case at hand, although notice

was served, the presence of the accused was not secured. Furthermore, not ensuring the presence of the accused on the day when the period of extension of detention is being considered would be against the mandate of clause (b) of the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure.

26. In view of the discussion above, I hold as under.

- a) The failure of the learned Sessions Judge in not insisting upon the presence of the accused while considering the application for detention beyond a period of 180 days is illegal and against the law laid down by the Apex Court in **Jigar**. The order passed by the learned Sessions Judge extending the period of detention for a further period of three months, therefore, is illegal.
- b) The application for extension of detention was filed on 15.05.2023, much prior to the expiry of the period of 180 days, which falls on 22.5.2023. As the application for statutory bail was filed by the accused on the 181st day, i.e., on 24.5.2023, the learned Sessions Judge was bound to consider both the applications together as held in **Sanjay Dutt** and reiterated in **Ravindran**.

- c) In view of the law laid down in **Judgebir**, as no orders were passed on the application for extension of detention on the 181<sup>st</sup> day, and as the accused had filed an application for statutory bail as CMP No 1533/2023 on 23.05.2023, the learned Sessions Judge had no other option but to grant statutory bail. On that ground as well, the petitioner is entitled to succeed.

27. Resultantly, this petition will stand allowed. The order dated 24.5.2023 in Crl.M.P. No.1361/2023 and the Order dated 2.6.2023 in Crl.M.P. No.1533/2023 refusing statutory bail will stand quashed. Crl.M.P. No.1533/2023 will stand allowed. The petitioner shall be enlarged on default bail under sub-section (2) of Section 167 of Code on the following conditions:

- (a) The petitioner shall furnish a bail bond of Rs.2,00,000/- (Rupees Two lakhs only) with appropriate sureties as may be decided by the learned Additional Sessions Judge.
- (b) The petitioner shall not enter the limits of Malappuram District except to appear before the Investigating Officer or the jurisdictional Court. If any variation of the condition is required, he may move the court having jurisdiction.
- (c) The petitioner shall surrender his passport, if any, before the learned Additional Sessions Judge. If he is not holding a passport, or if the same has been surrendered in any

proceeding, an affidavit to that effect shall be filed.

- (d) The petitioner shall not interfere in any manner with the investigation and shall not make any effort to influence the prosecution witnesses;
- (e) The petitioner shall appear before the Investigating Officer as and when ordered.
- (f) The petitioner shall not involve in any crime while on bail.

Violation of any of the conditions above will entitle the investigating officer to move an application for cancellation of bail before the learned Additional Sessions Judge, which shall be considered, and appropriate orders shall be passed on its merits.

Sd/-

**RAJA VIJAYARAGHAVAN V,  
JUDGE**

*@S/27/6/2023*

**APPENDIX OF CRL.MC 4508/2023**

PETITIONER'S ANNEXURES:

- Annexure I THE TRUE COPY OF THE CRIME & OCCURRENCE REPORT NO.26/2022 OF KALIKAVU EXCISE RANGE.
- Annexure-II THE TRUE COPY OF THE ONLINE REGULAR BAIL FILING RECEIPT DATED 08.05.2023.
- Annexure-III THE TRUE COPY OF THE REPORT DATED 12.05.2023 SUBMITTED BY THE PUBLIC PROSECUTOR IN CRIME NO.26/2022 OF KALIKAVU EXCISE RANGE.
- Annexure-IV THE TRUE COPY OF THE CMP NO.1478/2023 DATED 19.05.2023 SEEKING TIME FOR FILING OBJECTION TO S.36A(4) REPORT.
- Annexure-V THE TRUE COPY OF THE CMP NO.1533/2023 FILED SEEKING STATUTORY BAIL WITH ONLINE FILING RECEIPT.
- Annexure-VI THE CERTIFIED COPY OF THE ORDER DATED 24.05.2023 IN CMP NO.1361/2023 OF THE SPECIAL COURT FOR SC/ST (POA) ACT & NDPS ACT CASES, MANJERI.
- Annexure-VII THE TRUE COPY OF THE E-COURT STATUS OF CMP NO.1533/2023 DISMISSING IT ON 02.06.2023.
- Annexure-VIII TRUE COPY OF THE CMP NO.107/2023 FILED SEEKING CONTEMPORANEOUS DOCUMENTS IN CRIME NO.26/2022 OF KALIKAVU EXCISE RANGE.
- Annexure-IX THE TRUE COPY OF THE ORDER DATED 26.05.2023 IN CMP NO.1353/2023 OF THE SPECIAL COURT FOR SC/ST (POA) ACT & NDPS ACT CASES, MANJERI.
- Annexure-X THE TRUE COPY OF THE ORDER DATED 02.06.2023 IN CMP NO.1533/2023 OF THE SPECIAL COURT FOR SC/ST (POA) ACT & NDPS ACT CASES, MANJERI.