

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 6th OF DECEMBER, 2022

CRIMINAL APPEAL No. 5380 of 2022

BETWEEN:-

**DINESH S/O RAJARAM KORKU, AGED ABOUT 32
1. YEARS, OCCUPATION: LABORER GRAM BORANIYA
TEHSIL BAGLI (MADHYA PRADESH)**

**MAHESH S/O RAJARAM KORKU, AGED ABOUT 23
2. YEARS, OCCUPATION: LABOUR GRAM BORANIYA
TEHSIL BAGLI (MADHYA PRADESH)**

.....APPELLANTS

(BY SHRI VIKAS YADAV, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH STATION HOUSE
1. OFFICER THROUGH POLICE STATION BAGLI (MAD-
HYA PRADESH)**

**SHAMU BAI W/O ATMARAM BALAI GRAM BORAN-
2. IYA TEHSIL BAGLI (MADHYA PRADESH)**

.....RESPONDENTS

***(BY SHRI RANJEET SEN APPEARING ON BEHALF OF ADVOCATE
GENERAL)***

*This appeal coming on for admission/orders this day, the court
passed the following:*

ORDER

They are heard. Perused the case diary /challan papers.

This is the first criminal appeal filed under Section 14-A (2) of SC/ST (Prevention of Atrocities) Act, 1989 against order dated 27.05.2022 passed by the Special Judge (SC/ST Act), Dewas whereby the learned Judge has rejected the bail application filed by the appellants under Section 167(2) of Cr.P.C. in Crime No.166/2018 registered at Police Station Bagli, District Dewas for the offence under Sections 302, 307, 323, 294, 147, 148, 149 of IPC and Section 3(2)5 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The appellants are in jail since 21.02.2022. Their application under Section 167(2) of Cr.P.C. has been rejected on the ground that the appellants were earlier absconding as the date of incident is 25.04.2018, and the date of FIR is 26.04.2018, whereas the appellants were arrested only on 21.02.2022 and the charge-sheet has been filed on 13.06.2022 only.

In brief, the facts of the case are that on 26.04.2018, a Dehati Nalisi was lodged by the complainant Shamu Bai, W/o Ambaram regarding the murder of her husband Ambaram on 25.04.2018, at around 7.30 p.m.. In the Dehati Nalisi, five persons were named including the present applicants Mahesh and Dinesh. As per the prosecution, co-accused Anil, Mithun and Naniya were arrested on 20.08.2018, against them, the charge-sheet was filed on 31.08.2018 whereas, as the appellants Mahesh and Dinesh were absconding, the case was kept open against them under Section 173(8) of Cr.P.C., and subsequently, the present appellants were also arrested on 21.02.2022. The application

on their behalf for default bail under Section 167 (2) Cr.P.C. was filed on 27.05.2022, as the 90 days expired on 21.05.2022 whereas, the charge-sheet has been filed on 13.06.2022 only. The aforesaid application was dismissed by the learned Judge of the Trial Court while relying upon a decision rendered by the Bombay High Court in the case of **Anil Somdatta Nagpal and one another Vs State of Maharashtra reported as 2005 SCC On line Bom 1428** wherein, it is held that plea under Section 167 (2) Cr.P.C. cannot be invoked in respect of accused persons who have absconded earlier and they cannot be allowed to take advantage of their own wrong.

Counsel for the appellants has submitted that the right to apply for bail was accrued to the appellants on expiry of 90 days and the decision relied upon by the learned Judge of the Trial Court in the case of **Anil Somdatta Nagpal (Supra)** is not applicable in the present case. Hence, they are entitled to be released on bail.

Counsel for State on the other hand has opposed the prayer and it is submitted that no case for grant of bail is made out as the appellants have absconded for a period of around 4 years and no error has been committed by the learned Judge of the Trial Court in holding that they cannot be allowed to take advantage to their own wrong. It is further submitted that the decision rendered by the Bombay High Court squarely covers the field and thus, no interference is called for.

Heard learned counsel for the parties and perused the case diary.

On due consideration of submissions and on perusal of the documents filed on record, it is apparent that it is not disputed that the incident took place 26/04/2018 whereas, the appellants were arrested on

21.02.2022. It is also not disputed that when the appellants preferred their application under Section 167 (2) Cr.P.C. on 27.05.2022, 90 days from the date of their arrest had already elapsed. The charge sheet against them was filed on 31/08/2018. So far as the provisions of Section 167 Cr.P.C. are concerned, the relevant excerpts of the same read as under:-

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

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 authorise the detention of the accused person, otherwise than in 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;]"

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(Emphasis supplied)

A perusal of the aforesaid provision clearly reveals that it does not distinguish between a person who was arrested on earlier point of time and the person/accused arrested subsequently on account of his absconsion, and after the charge sheet has been filed against the person/accused persons who whereas earlier arrested. And, on the contrary, it applies', "*Whenever any person is arrested and detained in custody*" i.e., regardless of the time he or she is arrested. In the considered opinion of this Court, when Section 167 (2) of Cr.P.C. is related to the personal liberty of an accused, it has to be strictly construed as any other interpretation along with any other provision of Cr.P.C. would only be violative of mandate as enshrined under Article 21 of the Constitution of India. So far as the finding recorded by the Bombay High Court in the case of *Anil Somdatta Nagpal (Supra)* is concerned, the relevant para of the same reads as under:-

"21. As far as Chapter-XIII of the Code is concerned, it provides for jurisdiction of Criminal Courts in inquiries and trials. Section 190 which falls under Chapter-XIV setting out conditions required for initiation of proceedings, and it states that subject to provisions of Chapter-XIV, any Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence, upon police report of such facts and upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed. In the instant case, cognizance of the offence is taken upon police report of the facts. That police report is nothing but what is popularly called "a charge sheet" and as envisaged by Section 173(2). In other words, the term "police report" referred to in Section 190(1)(b) is traceable to

the report of police officer upon completion of investigation, forwarded vide Section 173(2). Admittedly, that has been filed in this case on 5th May 2005. Therefore, it is not possible to accede to the submissions of Shri Maneshinde that the right of the applicants herein to be released on bail because of non compliance with the proviso to sub section (2) of Section 167, subsists in this case. The submissions proceed on the basis that the right under section 167(2) proviso can be availed off at the stage of even Section 173(8). In other words, the charge sheet may have been filed but since the applicants surrender later and a supplementary charge sheet/report is filed, the applicants can take benefit of the above proviso. This plea overlooks the difference between Police Report contemplated by Section 173(2) and Report of further investigation under section 173(8). Mr. Maneshinde has been unable to point out anything in the Code which permits invocation of the proviso to Section 167(2) even in case of further report covered by Section 173(8). Accepting such pleas would mean the right is never extinguished. It can continue endlessly permitting accused to take advantage of their own wrong. Once, the charge sheet was filed in this case then there is nothing in law permitting the applicants to avail of their indefeasible right, which stood extinguished."

On due consideration of the aforesaid finding, *viz-a-viz* the provisions of Section 167 (2) Cr.P.C., read with Article 21 of the Constitution of India which provides that, '*No person shall be deprived of his life and personal liberty except according to procedure established by law*', with due respect to the learned Judge of the Bombay High Court, this Court begs to differ with the finding recorded in the case of *Anil Somdatta Nagpal (Supra)* by the Bombay High Court and is of the opinion that Section 167 (2) Cr.P.C. has to be construed strictly and its benefit cannot be denied by referring to Section 173 of Cr.P.C. and no other interpretation is permissible under law when it comes to personal liberty of a person.

In view of the same, the impugned order dated 27.05.2022 is hereby set aside and since the charge-sheet has been filed in the present

case on 13.06.2022, much beyond the period of 90 days, it is directed that the appellants are entitled to be released on bail under Section 167 (2) Cr.P.C. Accordingly, in the facts and circumstances of the case without commenting on the merits of the case, the appeal stands is **allowed**. and the impugned order dated 27.05.2022 is hereby set-aside. "

It is directed that the appellants shall be released on bail upon execution of personal bond in the sum of **Rs.50,000** (Rupees Fifty thousand only) each with one solvent surety each in the like amount to the satisfaction of the learned trial Court for their regular presence during trial and shall also abide by the conditions enumerated under Section 437 (3) of Cr.P.C.

This order shall be effective till the end of the trial, however, in case of bail jump, it shall become ineffective.

C. c. as per rules.

(SUBODH ABHYANKAR)
JUDGE

krjoshi