

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 20TH DAY OF MAY 2020 / 30TH VAISAKHA, 1942

Bail Appl..No.2856 OF 2020

CRIME NO.53/2020 OF VALAPPATANAM POLICE STATION, KANNUR

PETITIONER/ACCUSED:

MOHAMMED ALI
AGED 45 YEARS
S/O. SAITHU, MUKKANNAN HOUSE, PADINHARE MOOLA,
CHIRAKKAL, VALAPATTANAM P. O., KANNUR - 670010.

BY ADV. SRI.MANSOOR.B.H.

RESPONDENTS/COMPLAINANT/STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.
- 2 STATION HOUSE OFFICER
VALAPPATTANAM POLICE STATION,
KANNUR DISTRICT - 670010.

SRI T.R RENJITH PUBLIC PROSECUTOR

_____THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
20.05.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

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The petitioner herein is the accused in Crime No.53 of 2020 of Valapattanam Police Station registered under Sections 354B, 376(2)(f)(n), 376(3) of IPC and Sections 4(2) r/w. Section 3(a), (b), 6(l), 5(j), (ii), (n), 8 r/w 7, 10 r/w. 9(l)(n) of Protection of Children from Sexual Offences Act, 2012 and Section 75 of Juvenile Justice (Care and Protection of Children) Act, 2015.

2. The petitioner was arrested in connection with the aforesaid crime on 17.1.2020 and was remanded to judicial custody. Immediately prior to the expiry of 90 days, the petitioner herein filed an application for bail invoking Section 167(2) of the Cr.P.C. The learned Special Judge took note of the submission of the learned Public Prosecutor that the investigation has already been completed and the final report has been prepared. However, in view of the lockdown imposed consequent to SARS COVID 19 Pandemic, the investigating officer was not in a position to submit the final report within the statutory period. The learned Special Judge held that owing to the aforesaid fact, the petitioner herein was not entitled to default bail and his application was dismissed.

3. Sri.B.H.Mansoor, the learned counsel appearing for the

petitioner, submitted that on the expiry of 90 days, there was no final report placed before the Special Judge for the consideration of the court. According to the learned counsel, the provision of the Cr.P.C. does not contemplate any extension of period on any grounds whatsoever and if the final report is not laid within the period prescribed in the Code and if the accused expresses his willingness to be admitted to the benefit of bail and prefers an application, the jurisdictional court will have no jurisdiction to authorise the detention of the accused beyond the said period. The expiry of the period under Section 167(2) confers on the accused a valuable and indefeasible right and the same cannot be denied on any grounds whatsoever. It is argued that the prosecution cannot be allowed to trifle with the individual liberty and the provision with regard to conferment of benefits to the accused for bail will have to be construed strictly in favour of individual liberty flowing from Article 21 of the Constitution of India. In order to substantiate his contention, the learned counsel has relied on the decision reported in **Uday Mohanlal Acharya v. State of Maharashtra¹, Hitendra Vishnu Thakur and Others v. State of Maharashtra and others², Sanjay Dutt v. State through C.B.I., Bombay³ and Union of India Thamisharasi and Others⁴.**

¹ [2001(5) SCC 453]

² [1994 (4) SCC 602]

³ AIR 2013 SC 2687

⁴ [1995 (4) SCC 190]

4. Sri.T.R.Renjith, the learned Public Prosecutor, on instructions submitted that the prosecution allegation is that the petitioner herein had subjected his minor daughter to penetrative sexual assault consequent to which she became pregnant. He would point out that the allegation against the petitioner is so heinous that the prosecution had taken all steps to complete the investigation in an expeditious manner and submit the final report before the jurisdictional court within the statutory period. However, in view of the spread of the pandemic and the imposition of the lockdown in the State, the Magistrate Court was also not functioning and hence the Police were not in a position to submit the final report. It is contended that to prevent the spread of the pandemic, the Hon'ble Supreme Court had directed in order dated 23.3.2020 in Suo Motu Writ Petition (Civil) No.3/2020 that the period of limitation prescribed under the general law of Limitation or under Special Laws (both Central and/or State) will stand extended with effect from 15.3.2020 till further orders to be passed in the said proceeding. He points out that the said order was passed in exercise of powers under Article 142 r/w. Article 141 of the Constitution of India and is binding on all Courts/Tribunals and Authorities. Later, by order dated 6.5.2020, the limitation period prescribed under the Arbitration and Conciliation Act, 1996 and under Section 138 of the Negotiable Instruments Act, 1881, was extended from 15.3.2020 until

further orders. He would also refer to a judgment of a learned Single Judge of the Madurai Bench of the Madras High Court in S Kasi v State , through The Inspector of Police, Samayanallur Police Station (Crl. OP (MD) No. 5296 of 2020) and it was argued that the order passed by the Supreme Court will eclipse the time prescribed under Section 167(2) of the Cr.P.C.

5. In reply, Sri.B.H.Mansoor, the learned counsel referred to two orders; one rendered by a learned Single Judge of the High Court of Uttarakhand at Nainital in order dated 12.05.2020 in Vivek Sharma v. State of Uttarakhand (First Bail Application no.511 of 2020) and the other order dated 08.05.2020 of a learned Single Judge of the Madras High Court in Settu v. The State (CRL.OP (MD) No.5291 of 2020) and it was persuasively argued that the learned Single Judge after detailed analysis have conclusively held that the prosecution cannot avail of the benefits of the directions issued by the Supreme Court in Suo Motu Writ Petition. He would also point out that no materials have been placed before this Court to show that the final report was prepared and that it was submitted before the Jurisdictional Court or any other authority.

6. I have anxiously considered the submissions advanced. As the questions posed by the learned counsel revolves around Section 167 of the Code, as far as it is relevant for the purpose is extracted below for easy

reference.

"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 authorise 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.

Explanation II.-If any question arises whether an Accused person was produced before the Magistrate as required under Clause (b), the production of the Accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the Accused person through the medium of electronic video linkage, as the case may be:

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

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7. Coming to the object and scope of Section 167 it is well-settled that it is supplementary to Section 57 of the Code. Section 57 of the Code provides that the investigation should be completed in the first instance within 24 hours; if not the arrested person should be brought by the police before a Magistrate as provided under Section 167. Such Magistrate may or may not have jurisdiction to try the case. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody, i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this

period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. Even at this stage the Magistrate can release him on bail if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167. It is at this stage that sub-section (2) of section 167 comes into operation. It lays down that the Magistrate to whom the accused person is thus forwarded may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole. Sub-Section (2) then prescribes certain limitations on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for a total period exceeding 90 or 60 days, as the case may be. The significance of the period of 60 days or 90 days, as the case may be, is that if the investigation is not completed within that period then the accused, who is in custody, is entitled to "default bail" if no charge-sheet or challan is filed on the 60th or 90th day as the case may be, subject of course, to the condition that the accused applies for "default bail" and is

prepared to and does furnish bail for release.

8. To clear all apprehensions and doubts, the rights of an accused who is in custody pending investigation and where the investigation is not completed within the period prescribed under Section 167(2) of the Code is crystallised in the judgment of the Supreme Court in **Uday Mohanlal Acharya v. State of Maharashtra**⁵ . Having analysed the provisions of the Code and the law settled in **Hitendra Vishnu Thakur v. State of Maharashtra**⁶, **Sanjay Dutt v. State**⁷, **Bipin Shantilal Panchal v. State of Gujarat**⁸, **CBI v. Anupam J. Kulkarni**⁹, **Rakesh Kumar Paul v. State of Assam**¹⁰, and **Achpal @ Ramaswaroop and Another v. State of Rajasthan**¹¹, it was held that on the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate. The principle laid down has been consistently followed and it must therefore be taken to be well

5 (2001) 5 SCC 453

6 (1994) 4 SCC 602

7 (1994) 5 SCC 410

8 (1996) 1 SCC 718

9 (1992) 3 SCC 141

10 (2017) 15 SCC 67

11 (2019) 14 SCC 599

settled that on the expiry of the period stipulated, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period stipulated and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate. It has also been held that when the right for default bail has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. When the Supreme Court noticed that there are occasions when even the court frustrates the indefeasible right of the accused, it was held that such practice should be strongly discouraged and no subterfuge should be resorted to, to defeat the indefeasible right of the accused (see **Mohammed Iqbal Madar Sheikh v. State of Maharashtra**¹²). The Supreme Court went on to hold that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical [see Rakesh Kumar Paul (supra)].

9. In the case on hand, the petitioner herein was remanded to judicial custody on 17.1.2020. The period of 90 days had expired on 16.4.2020. His bail application was taken up for consideration by the learned Special Judge on 6.5.2020. It is clear from the order that even on that day, the final report had not been submitted before the jurisdictional

court. In the light of the above settled precedents, the petitioner has to be held entitled to the grant of default bail. The situation would not change even if after the dismissal of the application by the Special Judge, the final report was laid. As held in **Rakesh Kumar Paul** (supra), the petitioner having availed of his right to default bail immediately on the expiry of the statutory period, and the same having been denied, his right could not be defeated by subsequently filing a final report.

10. Now the question is whether the period for submitting the final report can be taken to be extended as contended by the learned Public Prosecutor. The said contention is based on the order passed by the Supreme Court in *Suo Motu Writ Petition (C) No.3/2020* whereby, the period of limitation in all proceedings in respective courts/Tribunals across the country including the Supreme Court under the general law or Special Laws were extended until further order. A reading of the order would show that those directions were issued to obviate difficulties faced by the litigants, lawyer due to the situation arising out of the pandemic. Those directions are applicable to petitions/applications/suits/appeals and other proceedings wherein a period of limitation is prescribed under the general law of Limitation or under Special Laws. Section 2(j) of the Limitation Act, 1963 defines 'period of limitation' as the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period"

means the period of limitation computed in accordance with the provisions of this Act. Section 3 of Act 36 of 1963 provides for limitation of suits, appeals and applications and Section 5 provides for extension of prescribed period in certain cases. Section 29(2) of Act 36 of 1963 provides that where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed in the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule. In this context, if Section 167 of the Cr.P.C. is analysed, it is luculent that the said provision does not provide any outer limit for the period of completion of investigation. It only interdicts the Magistrate from authorising detention of the accused person other than in the custody of the police for the statutory period. However, the police can continue with the investigation and take their own sweet time to conclude the same and file a final report. This provision is unlike Section 468 of the Cr.P.C., which provides for limitations for taking cognizance of certain offences. If the submission of the learned Public Prosecutor is accepted, the very same contention can be taken by the investigating agency and they can very well contend that they can detain the accused in custody for more than 24 hours which would clearly be violative of Article 22(2) of the Constitution and Section 57 of the Cr.P.C. They can also demand that they are entitled to get police custody even

beyond the period of 15 days from the first remand. This will result in serious deprivation of the rights of the accused and most certainly will be misused in certain cases.

11. In **Achpal** (supra), the Supreme Court was confronted with the issue as to whether the High Court could have extended the period prescribed under Section 167 of the Cr.P.C. It was held thus under paragraph No.20 of the report.

"20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant." (emphasis supplied)

12. What has been emphatically stated is that the provisions of the Code do not empower anyone to extend the period within which investigation must be completed. If on the expiry of the period mentioned the final report is not laid, the right of the accused gets crystallised and if the accused expresses his willingness to be admitted to the benefit of bail and prefers appropriate application, he has to be granted default bail. Right of personal liberty is not only a legal right but it is a human right which is inherent in every citizen of any civilized society. Article 21 only recognizes this right. Section 57 and 167 are the provisions in the Code which provides for procedure established by law which curtails this right. Such provisions which provide for the procedure to keep an accused under prolonged incarceration will have to be interpreted keeping in mind the constitutional rights of the accused.

13. I respectfully concur with the exposition of law laid down by the learned Single Judge of the Madras High Court in CrI.O.P.(MD) No.5291 of 2020 as well by the learned Single Judge of Uttarakhand High Court when their lordships held that the investigating agency cannot benefit from the directions issued by the Supreme Court in the suo moto Writ petition.

14. For the afore reasons I allow this application and grant default bail to the petitioner. However, it is made clear that this order will not

prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds under sub section (2) of Section 439 of the Cr.P.C relevant for cancellation of an order and upon arrest or re-arrest, the petitioner is entitled to seek for regular bail, which application shall be considered on its own merit. This order granting default bail is in respect of Crime No. 53 of 2020 of Valapattanam Police Station and will have no impact in other cases, if any, in which the petitioner is involved.

15. The petitioner shall be released on bail on his executing a bond for Rs.50,000/- (Rupees Fifty thousand only) with two solvent sureties each for the like sum to the satisfaction of the court having jurisdiction. The above order shall be subject to the following conditions:

- a) The petitioner shall continue to appear before the Investigating Officer on every Saturdays between 10 a.m. and 1 p.m., until such condition is modified by the trial court.
- b) He shall not make any attempt to contact the victim in any manner whatsoever.
- c) He shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence.
- d) He shall not enter the limits of Kannur District except for complying with the condition No. (a) of this order. If for any extraordinary reason the petitioner requires to enter the limits, previous permission has to be obtained from the jurisdictional Court.
- e) He shall surrender his passport before the court below or if he does not have one, he shall file an affidavit to that effect within five days of his release. Application for release of the passport, if any, shall be considered by the Trial court at the appropriate stage.

f) He shall not commit any offence while on bail.

g) The investigating officer concerned will ensure that a woman Police Constable in plain clothes is deputed to the residence of the survivor child once in a month for the next six months and thereafter in intervals to ascertain whether she or her family members or witnesses are subjected to any threat or intimidation by the petitioner herein or his men. If any such complaint is received, the same shall be inquired into and if it is found genuine, the Officer shall report the matter before the jurisdictional court, and seek cancellation of bail.

In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with the law.

Sd/-

RAJA VIJAYARAGHAVAN V

JUDGE