BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 28.07.2022

PRONOUNCED ON: 02.08.2022

CORAM

THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

Crl.A.(MD)No.461 of 2022

Kannan : Appellant/Petitioner/Sole Accused

Vs.

1.State represented by its
The Deputy Superintendent of Police,
Srivilliputtur,
Virudhunagar District.

2.The Inspector of Police,
All Women Police Station,
Virudhunagar,
Virudhunagar District. : Respondents/Respondents/Complainant

3.Prosecutrix,(screened),
Virudhunagar. : Respondent/Respondent/
Defacto Complainant

PRAYER : Criminal Appeal has been filed under Section 14A(2) SC & ST (Prevention of Atrocities) Amendment Act, 2015, to set aside the order dated 04.07.2022, passed in Cr.M.P.No.1103/2022, on the file of the learned Sessions Judge, Special Court for trial of SC/ST (POA) Act Cases, Virudhunagar District at Srivilliputtur and pass an order to release the petitioner on bail under Section

167(2)(a)(i) Cr.P.C., in connection with Crime NO.05 of 2021, on the file of the Inspector of Police, All Women Police Station, Virudhunagar, Virudhunagar District.

For Appellant : Mr.B.Jeyakumar

For Respondents : Mr.B.Nambi Selvan
Additional Public Prosecutor
for R.1 and R.2

: No Appearance for R.3

JUDGMENT

This Criminal Appeal is directed against the order passed in Cr.M.P.No. 1103 of 2022, dated 04.07.2022, on the file of the Special Court for trial of SC/ST (POA) Act Cases, Virudhunagar District at Srivilliputtur dismissing the petition for bail under Section 167(2) Cr.P.C.,

2. The appellant is the sole accused in Cr.No.05 of 2022, for the offences under Sections 376(2)(n), 417, 506(i) I.P.C., and Sections 3(1)(w)(i), 3(2)(v) of SC/ST(POA) Act, 1989 on the file of the Inspector of Police, All Women Police Station, Virudhunagar, Virudhunagar District.

3. The case of the prosecution is that the prosecutrix/defacto complainant, who is the third respondent, belongs to Pallar Community and whereas the

appellant/accused belongs to Veerakudi Vellalar Community, that the appellant is employed as a Constable in the Armed Reserve of Virudhunagar District, that the appellant got acquaintance with the prosecutrix through face book and the same developed into love affair, that the appellant by giving promise to marry her, moved closely with her and took her to his quarters at Virudhunagar and had sexual relationship with her, that when the victim asked the appellant to marry her, the appellant had allegedly threatened that if she discloses about their relationship to anyone, he would take police action against her and thereby he had sexual relationship on three occasions, that the prosecutrix got conceived and again asked the appellant to marry her, but the appellant refused and hence, a complaint was lodged and on that basis, F.I.R. came to be registered.

4. It is not in dispute that the appellant earlier filed a regular bail application under Section 439 Cr.P.C., in Cr.M.P.No.476 of 2022 and the learned Sessions Judge of Special Court for trial of SC/ST (POA) Act Cases, vide order dated 26.04.2022 dismissed the same. Aggrieved by the dismissal of the bail application, the accused invoking Section 14A(2) of SC&ST (Prevention of Atrocities)Amendment Act 2015, has preferred an appeal in Crl.A.(MD)No.357 of 2022 for setting aside the order dated 26.04.2022 dismissing the bail application and to enlarge him on bail and that this Court, vide order dated 05.07.2022, dismissed the appeal.

5. It is not in dispute that in the meanwhile, the accused has filed another application in Cr.M.P.No.1103 of 2022 under Section 167(2) Cr.P.C., seeking statutory bail and the learned Sessions Judge, vide order dated 04.07.2022 dismissed the said petition also. Challenging the said dismissal order, the accused has preferred the present appeal.

6. At the outset, this Court is constrained to observe that it is very much shocking to notice that the impugned order was passed, the way in which, the personal liberty of the accused was handled by the Judicial Officer, who has already put in 19 years of judicial service from the post of Judicial Magistrate to the present post of Sessions Judge, in complete violation of provisions of Cr.P.C., and legal position settled by the Hon'ble Supreme Court and reiterated by this Court.

7. The appellant in the application filed under Section 167(2) Cr.P.C., has specifically averred that he was arrested on 02.04.2022, that though the police ought to have filed a charge sheet within 90 days from the date of arrest, they have not chosen to file charge sheet till the end of 30.06.2022, the day on which 90 days period got expired and that therefore, the accused is entitled to be released on statutory bail.

8. The learned Sessions Judge, after referring to the factual aspects of the case, had considered the written objections of the Investigating Officer filed and reiterated by the learned Special Public Prosecutor to the effect that the accused is a Government employee in a police force and he was already married and had kids, that since the prosecutrix might not have been aware that the accused was married, the accused should have shown restraint even if there was closeness, that the prosecutrix got conceived and later the same was aborted and that if the accused is released on bail, he being a member of police force, there is every possibility of indulging in tampering the witnesses.

9. The learned Sessions Judge has thereafter recorded his observations that the accused and the prosecutrix appeared to have intimacy for over one year, that there is *prima facie* case to the effect that the accused who was married and had kids, had frequent sexual relationship with the prosecutrix, consequent to which she was conceived and that whether it was consensual or a sexual relationship on the promise of marriage are matters for trial, about which that Court cannot express its opinion at this stage. The learned Sessions Judge has thereafter proceeded to dismiss the application by concluding

"Having regard to the gravity of an offence, the objections raised by the Spl.P.P., and the Defacto Complainant and the investigation is still not complete and that an Appeal petition in C.A.(MD)No.357 of 2022 filed by the petitioner in the Hon'ble Madurai Bench of Madras High Court is still pending, this Court is not inclined to grant bail. Accordingly, the petition stands dismissed."

10. As rightly contended by the learned Counsel for the appellant, a perusal of the impugned order would only reveal that the learned Sessions Judge has passed the impugned order as if the petition was filed for regular bail and he has not dealt with the bail application under Section 167(2) Cr.P.C., At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in ***M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence. Reported in (2021)2 SCC 485,*** wherein the principles laid down by the Hon'ble Supreme Court in ***Uday Mohanlal Acharya vs State Of Maharashtra*** reported in ***(2001)5 SCC 453,*** were extracted and the same are read as follows:

" *The Principles Laid Down in Uday Mohanlal Acharya*

10. Upon perusal of the relevant jurisprudence, we are unable to agree with Mr. Lekhi's submissions. Rather, we find that both points (a) and (b) mentioned supra have been answered by the majority opinion of a three Judge Bench of this Court in the case of Uday Mohanlal Acharya (supra) by observing thus: "13…It is also further clear that that indefeasible right does not survive or remain

enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt's case (supra). The crucial question that arises for consideration, therefore, is what is the true meaning of the expression 'if already not availed of'? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had

expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge sheet then also the so called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution….

10.1 We also find it relevant for the present purpose to quote the following conclusions of the Court in the said judgment: "13.3. 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.

13.4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no chargesheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the

object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

11. In ***M. Ravindran's case,*** after referring to ***Uday Mohanlal Acharya's case*** and other decisions of the Hon'ble Apex Court, the Hon'ble Supreme Court has held as follows***:***

> *12.7 We agree with the view expressed in Rakesh Kumar Paul (supra) that as a cautionary measure, the counsel for the accused as well as the magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights. Such knowledgesharing by magistrates will thwart any dilatory tactics by the prosecution and also ensure that the obligations spelled out under Article 21 of the Constitution and the Statement of Objects and Reasons of the CrPC are upheld. IV. The Import of Explanation I to Section 167(2), CrPC"*

12. This Court in ***K.Muthuirul Vs. The Inspector of Police, Samayanallur*** Police Station reported in ***(2022)1 MWN(Crl) 196***, has specifically held that the bail Court while considering the bail under Section 167(2) Cr.P.C., is having no power or jurisdiction to go into the merits of the

case and to see as to whether the ingredients necessary for granting regular bail are available or not and the relevant passages are extracted hereunder:

"5.At the outset, as rightly contended by the learned counsel for the petitioner, the trial Court in its order has dealt with the merits of the case and came to the conclusion that the petitioner cannot be enlarged on statutory bail. It is necessary to refer the relevant paragraph of the order passed by the trial Court here under : "Considering the seriousness, gravity of the offence, serious objections on prosecution side and huge quantity of the contraband, this Court is not inclined to grant statutory bail to the petitioner and therefore, this petition is liable to be dismissed."

6.The Bail Court, while considering the application under Section 167(2) Cr.P.C, is duty bound to decide the application forthwith without any unnecessary delay, after getting necessary information from the concerned Public Prosecutor and to consider as to whether the ingredients necessary for releasing the accused on default bail are existing and that if the Court is satisfied with the existence of such ingredients, then the Court has to release the accused on bail forthwith.

7.Moreover, the Bail Court, while dealing with the petition for statutory bail, is having no power or jurisdiction to go into the merits of the case and to see as to whether the ingredients necessary for granting regular bail are available or not."

13. As already pointed out, in the case on hand also, the learned Sessions Judge has only dealt with the merits of the case and passed the impugned order dismissing the petition. Moreover, the learned Sessions Judge has not even referred to the points or aspects required to be considered in an application filed under Section 167(2) Cr.P.C., seeking statutory bail.

14. In the present case, admittedly the appellant has been arrested on 02.04.2022 and the 90days period for laying the final report expired on 30.06.2022. As already pointed out, the appellant has filed his application for statutory bail only on 01.07.2022 and the learned Sessions Judge has passed the impugned order on 04.07.2022. It is pertinent to note that even according to the prosecution, no charge sheet was filed till 04.07.2022, but now the learned Additional Public Prosecutor would submit that the final report has been filed on 25.07.2022 and the case is yet to be taken on file.

15. As rightly contended by the learned Counsel for the appellant, since the respondent police has not filed any charge sheet till 30.06.2022 and even thereafter till 04.07.2022 and also the fact that 90days period already got expired, the learned Sessions Judge has no other option, but to grant statutory bail. It is pertinent to mention that personal liberty is an important aspect of our Constitutional mandate. The Hon'ble Supreme Court in the catena of decisions

has been reiterating the position that the personal liberty of an accused cannot be taken lightly. The Hon'ble Supreme Court in ***Rakesh Kumar Paul Vs. State of Assam (***in Crl.A.Nos.2009 and 2176 of 2017, dated 16.08.2017) reported in ***(2017)15 SCC 67,*** has held that in matters of personal liberty, we cannot and should not be too technical and must lean in favour of the personal liberty and that in matters of personal liberty under Article 21 of Constitution of India, it is not always advisable to be formalistic or technical and the relevant paragraphs are extracted hereunder:

> *"40. In the present case, it was also argued by learned counsel for the State (1996) 1 SCC 722 that the petitioner did not apply for 'default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court – he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail – such an application was definitely*

made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court."

16. In the above decision, the Hon'ble Supreme Court went to the extent of saying that whether the accused makes a written application for default bail or an oral application for default bail is of no consequence and that the concerned Court must dealt with such an application for default bail by considering the statutory requirements namely whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

17. Considering the above, this Court has no hesitation to hold that the impugned order is not good in law and the same is liable to be set aside. Consequently, the appellant is certainly entitled to be released on bail statutorily. This Court is at loss to understand that the Sessions Judge, who is having 19 years of experience in judicial service, has over looked the legal provisions and the legal dictum laid down by the Hon'ble Apex Court and the way he played with the personal liberty of the appellant/accused, completely oblivious of a basic provision, which every Officer dealing in criminal cases comes across day in and day out. Apart from experience, our High Court through State Judicial Academy at Chennai and Regional Centers at Coimbatore and Madurai have been imparting continuous legal education to the Judges of the State of TamilNadu and Puducherry. **Hence, the Registry is directed to call for an explanation from the concerned Officer in this regard.**

18**.** In the result, the Criminal Appeal is allowed and the appellant/accused is released on statutory bail on the following conditions:

(i) The petitioner is ordered to be released on bail on his executing a bond for a sum of Rs.25,000/- (Rupees Twenty five thousand only) with two sureties each for a like sum to the satisfaction of the learned the learned Sessions Judge,

Special Court for trial of SC/ST (POA) Act Cases, Virudhunagar District at Srivilliputtur, within a period of three days from the date of receipt of a copy of this order;

(ii)the sureties shall affix their photographs and left thumb impression in the surety bond and the Magistrate/concerned court may obtain a copy of their Aadhar card or Bank Pass Book to ensure their identity;

(iii)the petitioner shall appear before the second respondent police daily at 10.30a.m., until further orders;

(iv)the petitioner shall not tamper with evidence or witness;

(v)the petitioner shall not abscond during trial;

(vi)On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in ***P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560].***

(vii)If the accused / petitioner thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

02.08.2022

Index : Yes/No
Internet : Yes/No

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Special Court for trial of SC/ST (POA) Act Cases,
   Virudhunagar District at Srivilliputtur.

2. The Deputy Superintendent of Police,
   Srivilliputtur,
   Virudhunagar District.

2.The Inspector of Police,
   All Women Police Station,
   Virudhunagar,
   Virudhunagar District.

3. The Additional Public Prosecutor,
   Madurai Bench of Madras High Court,
   Madurai.

K.MURALI SHANKAR, J.

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PRE-DELIVERY ORDER MADE IN

Crl.A.(MD)No.461 of 2022

02.08.2022