

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 22ND DAY OF AUGUST 2019 / 31ST SRAVANA, 1941

Bail Appl..No.5939 OF 2019

AGAINST THE ORDER/JUDGMENT IN CRMC 1394/2019 DATED 05-08-
2019 OF SESSIONS COURT,KOLLAM

AGAINST THE ORDER/JUDGMENT IN SC 999/2019 OF III
SESSIONS COURT, KOLLAM

CRIME NO.23/2019 OF Kollam Excise Circle Office , Kollam

PETITIONER/S:

ROY @ COMPAN ROY
AGED 46 YEARS
S/O. VARGHESE, PRATHEEKSHA NAGAR NO.137,
KUNNEMUKKU, KILIKOLLOOR, KOLLAM(CITY CENTRAL
NAGAR NO.54, VADAKKUMBHAGOM, BUNGLAW PURAYIDOM,
KOLLAM EAST VILLAGE, KOLLAM)

BY ADV. SRI.B.MOHANLAL

RESPONDENT/S:

- 1 STATE OF KERARLA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, PIN-682031.
- 2 THE CIRCLE INSPECTOR OF EXCISE,
CIRCLE OFFICE, EXCISE COMPLEX, CHINNAKKADA,
KOLLAM-691001.

OTHER PRESENT:

SMT.V.SREEJA, PP

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON
22.08.2019, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

The petitioner is the sole accused in Crime No.23 of 2019 of Excise Circle Office, Kollam registered for the offence punishable under Section 8(c) read with Section 20(b)(ii)B of NDPS Act.

2. The prosecution allegation is that on 23.5.2019 at about 5.10 p.m., the petitioner was found in possession of 1.250 Kg of ganja, for the purpose of sale at a place on the side of S.V. Talkies Junction – Kunnemukku public road, in contravention of the provisions of the NDPS Act.

3. The petitioner was arrested from the spot and ever since he has been in custody.

4. Heard.

5. The learned Public Prosecutor has opposed the application.

6. The learned counsel for the petitioner has argued that since the petitioner was arrested on 23.5.2019, the petitioner is entitled to be released on bail under proviso to Section 167(2) of the Code, as the investigation was not complete within the period stipulated under proviso to Section 167(2) of the Code. The learned counsel for the petitioner has further argued that even though the petitioner filed CrI.M.C. No.1394 of 2019 before the filing of the final report, the court below dismissed the said CrI.M.C. stating that since the final report was filed before the court before disposing of the said CrI.M.C., the petitioner was not entitled to 'default bail' and in the said circumstances, the order passed by the court below cannot be sustained.

7. The learned Public prosecutor, on the other hand, has argued that since the offence involved in this case is an offence under the NDPS Act, there is inhibition under

Section 37 of the NDPS Act in granting bail even under proviso to Section 167(2) of the Code and in the said circumstances, the petitioner is not entitled to get 'default bail'. It has been further argued by the learned Public Prosecutor that since the final report was filed before passing the order in CrI.M.C. 1394/2019, the indefeasible right of the petitioner to get 'default bail' under proviso to Section 167(2) of the Code got extinguished and hence, the court below was perfectly justified in denying bail to the petitioner.

8. The question as to whether Section 37 of the NDPS Act excludes the application of Section 167 of the Code was considered by the Apex Court in *Union of India v. Thamisharasi* [JT 1995(4) (SC) 253]. The Apex Court held that Section 37 of the NDPS Act does not exclude the application of the proviso to 167(2) of the Code, even in

respect of persons who are accused of offences under the NDPS Act. The three Judge Bench of the Apex Court in *Bipin Shantilal v. State of Gujarat* (AIR 1996 SC 2897) quoted the above ratio with approval. In view of the above legal position, there can be no dispute that the accused in a case registered for the offence under the provisions of the NDPS Act is entitled to get 'default bail' under proviso to Section 167 (2) of the Code as Section 37 of the NDPS Act does not exclude the application of proviso to Section 167(2) of the Code. In the said circumstances, the argument advanced by the learned Public Prosecutor in this regard cannot be correct.

9. The “indefeasible right” of the accused to be released on bail in accordance with the proviso to Section 167(2) of the Code in default of completion of the investigation and filing of the final report within the time

allowed is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the final report and it does not survive or remain enforceable after filing of the final report. The Three Judge Bench of the Apex Court in Rakesh Kumar Paul v. State of Assam (AIR 2017 SC 3948) relied on the decision of the Constitution Bench of the Apex Court in Sanjay Dutt v. State through CBI, Bombay [1994 (5) SCC 410] and held in paragraph 36 thus:

“36. While dealing with this common stance, the Constitution Bench in Sanjay Dutt made it clear in paragraph 48 of the Report that the indefeasible right accruing to the accused is enforceable only prior to the filing of the charge sheet and it does not survive or remain enforceable thereafter, if already not availed of. In other words, the Constitution Bench took the view that the indefeasible right of ‘default bail’

continues till the charge sheet or challan is filed and it gets extinguished thereafter.”

10. The Apex Court relied on the decision in Sanjay Dutt (supra) and further held in Rakesh Kumar Paul (supra) that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext.

11. The Apex Court further held in Rakesh Kumar Paul (supra) in paragraph No.39 thus:

“This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the Court frustrates the indefeasible right. Reference was made to Mohamed Iqbal Madar Sheikh v. State of Maharashtra, 1996 KHC 1405: 1996(1) SCC 722: 1996 SCC (Cri)202: JT 1996(1)SC 114: 1996 (4) KarLJ 29:

1996(1)SCALE 123: 1996(1)SCR 183 wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some Courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court.”

12. The above discussion would make it clear that if the accused files application for 'default bail' when the indefeasible right for default bail accrues due to non-completion of the investigation and filing of the charge-sheet within the time prescribed by proviso to Section

167(2) of the Code, the accused is entitled to 'default bail' even if the final report is filed subsequent to the filing of the application by the accused. However, if the accused files application subsequent to the filing of the charge-sheet, the indefeasible right gets extinguished even if the charge-sheet was filed after the period stipulated under proviso to Section 167(2) of the Code. The above view gains support from the decision of the Apex Court in *Rakesh Kumar Paul (supra)*.

13. The offence alleged against the petitioner is the offence punishable under Section 20(b)(ii)(B) of the NDPS Act, which is punishable with imprisonment for a term which may extend up to 10 years and with fine.

14. The Apex Court in *Rakesh Kumar Paul (supra)* held that the period of 60 days for completing the investigation stipulated under proviso to Section 167(2) of

the Code relates to offence having a minimum punishment of ten years or more and not to offences which are punishable with imprisonment for less than ten years. In this case, the offence alleged is punishable with imprisonment up to 10 years and not above 10 years. Therefore, there can be no dispute that the period stipulated for completing the investigation in this case is 60 days as provided under proviso (a) to Section 167(2) of the Code.

15. In this case, it is not disputed that the petitioner was arrested on 23.05.2019. The report of the learned Sessions Judge would show that CrI.M.C.1394/2019 seeking for 'default bail' was filed by the petitioner on 30.07.2019. The final report was filed on 02.08.2019. Thus, it is clear that the petitioner filed application for 'default bail' before filing of the final report by the Investigating Agency. It is also not disputed that the

statutory period for completing the investigation in this case as provided under proviso to Section 167(2) of the Code, expired on 21.7.2019 as the accused was in custody from 23.5.2019 onwards. The above facts are not disputed. It appears from the above facts that the petitioner got the indefeasible right to be enlarged on bail under proviso (a) to Section 167(2) of the Code on 22.07.2019, as the prosecution failed to file the final report within the statutory period, after completing the investigation. It further appears that the indefeasible right accrued by the petitioner extinguished on 02.08.2019, as the investigating agency filed the final report on 02.08.2019. However, during the interregnum period from 22.07.2019 to 02.08.2019, the accused had the indefeasible right to get 'default bail'. It appears that the accused filed application seeking for 'default bail' during the said interregnum period. However, the court below

dismissed the application stating that the final report was already filed before passing the order in Crl.M.C.1394/2019. Since the accused had an indefeasible right to get 'default bail' on the date on which he filed Crl.M.C.No.1394/2019, the court below was not justified in denying the 'default bail' stating that the final report was filed subsequently. In fact, the court should have allowed Crl.M.C.1394/2019 immediately after filing the same, after affording opportunity of hearing to the prosecution. However, the court below dismissed it, which is not legal and correct, as the accused had the indefeasible right to get 'default bail' on the date when he filed the said Crl.M.C. In the said circumstances, the order passed by the court below cannot be justified.

16. Now the question to be considered is as to whether once the bail is granted under Section 167(2) of the

Code, the said bail can be cancelled after filing the final report. The Three Judge Bench of the Apex Court in *Aslam Babalal Desai v. State of Maharashtra* [AIR 1993 SC 1] held that once an accused is released on bail under Section 167(2) of the Code, he cannot be taken back in custody, merely on the filing of a charge-sheet.

17. The provisions of the code, in particular Sections 57 and 167, manifest the legislative anxiety that once a person's liberty has been interfered with by the police arresting him without a Court order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by proviso (a) to Section 167(2) of the Code. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed,

the accused would be entitled to be released on bail. Since Section 167 of the Code does not empower cancellation of the bail, the power to cancel the bail can only be traced to Section 437(5) or 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or (2) or Section 439(1) of the Code. Once an accused has been released on bail, his liberty cannot be interfered with lightly i.e, on the ground that the prosecution has subsequently submitted a charge-sheet. There must exist special circumstances for cancelling the bail. The above discussion would make it clear that once the bail is granted under Section 167(2) of the Code., the bail granted cannot be cancelled on mere filing of the final report by the police. The above view is supported by the decision in *Aslam Babalal Desai* (supra).

18. The above discussion would lead to the following

conclusions:-

(1) The accused has indefeasible right to get 'default bail' under proviso to Section 167(2) of the Code, if the investigation is not complete within the statutory period as provided under proviso (a) to Section 167(2) of the Code. Therefore, if the accused is prepared to execute the bail, he shall be released on bail if the investigation is not complete within the statutory period.

(2) If the accused files any application for 'default bail' after the statutory period and before filing the final report, the accused is entitled to 'default bail' under proviso (a) to Section 167(2) of the Code.

(3) If the accused files application for 'default bail' after filing the final report, if at all the final report is filed after the expiry of the statutory period provided under proviso (a) to Section 167(2) of the Code, the accused is not entitled

to get 'default bail' as the 'indefeasible right ' of the accused to be released on bail in accordance with the provisions of proviso to Section 167(2) of the Code is enforceable by the accused only from the time of default till the filing of the charge-sheet and it does not survive or remain enforceable after filing the charge-sheet.

(4) Once the accused is released on bail under proviso to Section 167(2) of the Code, he cannot be taken into custody merely on the filing of the charge-sheet.

19. In this case, the accused filed Crl.M.C. when the indefeasible right of the accused was subsisting. Therefore, the accused was entitled to be granted the 'default bail' under proviso to Section 167(2) of the Code. In the said circumstances, the court below is directed to release the petitioner under Section 167(2) of the Code on such terms and conditions as the court below deems fit and necessary.

I make it clear that this order will not take away the right, if any, of the prosecution in approaching the Court below for cancellation of the bail, in accordance with the provisions of the Code.

In the result, this application stands allowed as above.

Sd/-B. SUDHEENDRA KUMAR, JUDGE.

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