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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Judgment: 06th November, 2020***

\+ **BAIL APPLN. 3141/2020**

SUBHASH BAHADUR @ UPENDER ..... Petitioner

Through: Mr. Mohd. Perwez, Advocate.

versus

THE STATE (N.C.T. OF DELHI) ..... Respondent

Through: Ms. Meenakshi Chauhan, APP for State.
Mr. Amit Gupta, APP.
Inspector Rajiv Kumar, PS Alipur.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. ***(ORAL)***

1. The petitioner has filed the present petition seeking bail in FIR No. 486/2019 under Sections 393/397/34 of the IPC registered with PS Alipur.

2. Mr Perwez, learned counsel appearing for the petitioner contended that there is no risk that the petitioner would influence any

witness; tamper any evidence or; flee from the law. He stated that the petitioner has been falsely implicated without any material witness or evidence of his involvement in the offence. He further submitted that the petitioner was also entitled to compulsory bail under Section 167(2) of the Code of Criminal Procedure (Cr.PC) but his applications for bail were rejected and the petitioner was not informed of his rights.

3. Ms Chauhan, learned APP countered the aforesaid contentions. Mr Amit Gupta, learned APP had also made submissions on behalf of the State on the question whether the petitioner was entitled to bail under Section 167(2) of the Cr.PC as he stated that the said question is also common to other petitions.

4. The FIR in question (FIR No. 486/2019 under Sections 393/397/34 of the IPC with PS Alipur) was registered at the instance of one Karamveer (the complainant). The complainant is employed as a Driver with the Delhi Transport Corporation. He stated that on 27.12.2019, after completing his duty, he was going to his village from GTB Bus Depot in his Wagon R car (bearing registration no. DL 7 CN 6340). At about 10.30 PM, when he was near Singhu School and Rajiv Gandhi Sports Complex, Singhu, three persons came on a motorcycle and stopped his vehicle. All the three boys alighted from the motorcycle and came towards him and indicated to him from their gestures, to open the glass window. He did so. They sought directions from him to Khatkarh Village. While he was giving them directions, one of the boys (who was sitting in the middle of the motorcycle) opened the door of his vehicle. One of the other boys (who was driving the motorcycle)

took umbrage in the manner in which the complainant was speaking. The complainant stated that he got out from the car and the boy (who, according to the Investigating Officer (IO), is the petitioner herein) attempted to snatch his mobile phone. The complainant stated that he resisted the same and pulled his mobile phone back. At that stage, the boy was trying to snatch the phone and he (the petitioner) told his associate (the third boy who was sitting on the rear of the motorcycle) that the complainant would not give in easily and therefore, to shoot him (*"ye aise nahi manega ise goli mar do"*). At that stage, the third boy took out a weapon from the rear of his belt and shot the complainant in his leg. The complainant stated that he raised an alarm and the three boys fled on their motorcycle. The complainant described the age of the said boys as between 22 to 27 years. The boy who had fired the shot was described as thin and of whitish complexion. The complainant further stated that if the said boys were produced before him, he would recognise them.

5. The information regarding the said incident was received at PS Alipur and was recorded as DD No. 32A. Thereafter, one of the police officials reached at the spot and found the complainant's car. He also found bullets and empty cartridges on the spot. He was informed that the injured was taken to the hospital. The IO reached the hospital and collected the MLC (MLC No. 9707/19). The complainant did not make a statement at that point of time. He made a statement three days later, on 30.12.2019 and on the basis of the said statement, the FIR was registered.

6. The status report has been filed, which states that on 10.01.2020, three persons – Manoj, Satpal and Subhash (the petitioner herein) – were arrested in FIR No. 176/2018 under Sections 457/380/34 of the IPC. During the interrogation, the said accused disclosed their involvement in the above incident. Thereafter, they were also arrested in connection with the present case (FIR No. 486/2019).

7. It is alleged that during interrogation, the petitioner disclosed that on the date of the incident, he along with his two other accomplices – Satpal and Manoj had tried to rob the complainant's mobile phone but when the complainant confronted them, they fled from the spot after shooting him in his leg. He also disclosed that they were using a stolen motorcycle. The same was recovered from them in FIR No.176/2018. It is stated that efforts were made to recover the weapon of offence but the same could not be recovered.

8. All the three accused were produced before the Court with their faces muffled and an application for conducting TIP proceedings was made. The petitioner and accused Satpal refused to participate in the TIP proceedings. Accused Manoj participated in the TIP proceedings, which was conducted on 14.01.2020. But, the complainant failed to identify him as one of the accused. It is stated in the status report that the complainant has identified the petitioner and the accused Satpal from the dossiers shown to him. Since the complainant had not identified the accused Manoj, he was released by the IO. The chargesheet under Sections 393/397/34 of the IPC was filed against all the three accused, however, the name of the accused Manoj was

mentioned in column no.12.

9. The chargesheet in this case was filed on 14.09.2020, which is beyond the period of sixty days from the date on which the petitioner was arrested. According to the prosecution, the delay in doing so is on account of the lockdown imposed due to the outbreak of COVID-19.

10. The petitioner filed his first bail application before the Trial Court on 27.05.2020. In his application he, *inter alia*, stated that he was arrested in another case relating to FIR No.10/2020 registered with PS Alipur and had been falsely implicated in the said case. He also stated that the petitioner had no concern with the alleged offences, yet the police officials had arrested him. He expressly stated that he is ready to furnish sound surety to the satisfaction of the Trial Court and he also undertook to produce himself before the Trial Court as and when directed.

11. The said bail application was dismissed by the learned Trial Court by an order dated 27.05.2020. The relevant extract of the said order is as under:

> "I have duly considered the rival submissions. the seriousness of allegations do not entitle the applicant to the benefit of bail. Further more, from the manner in which the crime was committed, it cannot be ruled out that the complainant will not be influenced. The application is devoid of merits and is accordingly dismissed."

12. The petitioner moved his second bail application on 08.06.2020 which was also dismissed by the Trial Court on 08.06.2020.

13. Thereafter, the petitioner moved a bail application before this Court (Bail Application no.2514/2020) which was listed on 17.09.2020. On that date, the learned counsel appearing for the petitioner withdrew the said application with liberty to approach the Trial Court as in the meantime, the chargesheet had been filed on 14.09.2020.

14. It is seen that the petitioner has been in custody for almost eleven months. No recoveries have been effected from him. Although it is alleged that he has made a disclosure statement admitting to be involved in the incident along with his two accomplices, namely Satpal and Manoj, the said disclosure statement appears to be of little value as admittedly, the complainant did not identify Manoj as one of the boys who were involved in the incident.

15. According to the IO, who has joined the proceedings, the petitioner was riding the motorcycle and the two other accused were sitting behind him on the motorcycle. The petitioner was not the accused who had shot the complainant.

16. The investigation in this matter is complete. The principal witness is the complainant and there is little possibility of the appellant being able to influence him.

17. At this stage, it is not necessary to evaluate the evidence coalesced by the investigating agency in any detail. However, considering the facts in the present case, this Court considers it apposite to allow the present petition.

18. There is yet another aspect which requires consideration – that is whether the petitioner was entitled to bail under the Proviso (a) to Section 167(2) of the Cr.PC. The petitioner was arrested on 10.01.2020 and his detention in custody for a period of sixty days expired on 10.03.2020. Concededly, the petitioner became entitled to a bail in default under the Proviso (a) to Section 167(2) of the Cr.PC (hereafter also referred to as 'default bail'). Although the petitioner had moved bail applications twice, the same were rejected. Concededly, an indefeasible right had accrued to the petitioner for being released on default bail and there is no dispute that if an application mentioning the said provision was made, the petitioner would necessarily have to be released on bail. However, the learned APP submits that since the petitioner did not avail of his indefeasible right for default bail, the same was lost on the chargesheet being filed on 14.09.2020.

19. According to Ms Chauhan, learned APP, it is not sufficient that the petitioner had made an application for bail. According to her, it would be necessary for an accused to apply for bail specifically mentioning the provisions of Section 167(2) of the Cr.PC and any application moved under Section 439 of the Cr.PC could not be construed as the accused availing of his indefeasible right to default bail.

20. Thus, the question that falls for the consideration of this Court is whether an application for a bail under Section 439 Cr.PC would be sufficient for a court to construe that the accused had availed of his right to be released on bail under the provisions of Section 167(2) of the

Cr.PC if the condition stipulated therein were met.

21. At the outset, it would be relevant to note the obligations of a court towards an under trial prisoner, who is entitled to be released on default bail in terms of Proviso (a) to Section 167(2) of the Cr.PC.

22. In ***Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna: (1980) 1 SCC 108***, the Supreme Court had considered affidavits filed by the Superintendent of the Patna Central Jail, Superintendent of Muzaffarpur Jail and the Superintendent of the Ranchi Central Jail which indicated towards prisoners who were confined in the said jails and who had been produced before Magistrates from time to time in compliance with the requirement of the Proviso (a) to Section 167(2) of the Cr.PC. In the said context, the Supreme Court had observed as under:-

> "3. .... It is apparent from these charts that some of the petitioners and other undertrial prisoners referred to in these charts have been produced numerous times before the Magistrates and the Magistrates have been continually making orders of remand to judicial custody. It is difficult to believe that on each of the countless occasions on which these undertrial prisoners were produced the Magistrates and the Magistrates made orders of remand, they must have applied their mind to the necessity of remanding those undertrial prisoners to judicial custody. We are also very doubtful whether on the expiry of 90 days or 60 days, as the case may be, from the date of arrest, the attention of the undertrial prisoners was drawn to the fact that they were entitled to be released on bail under proviso (*a*) of sub-section (2) of Section 167. When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making

> an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the undertrial prisoner with a view to enabling him to apply for bail in exercise of his right under proviso (*a*) to sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cost is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated February 12, 1979. We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrates and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law."
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> [underlined for emphasis]

23. In ***Rakesh Kumar Paul v. State of Assam: (2017) 15 SCC 67***, the Supreme Court further held that it would be the responsibility of a court to at least apprise the accused of his or her indefeasible right for default bail. Paragraph nos. 43 and 44 of the said judgment are relevant and are set out below:-

> "43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, it is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right. In Khatri (2) v. State of Bihar [Khatri (2) v. State of Bihar, (1981) 1 SCC 627 : 1981 SCC (Cri) 228] the Judicial Magistrate did not provide legal representation to the accused since they did not ask for it. It was held by this Court that this was unacceptable and that the Magistrate or the Sessions Judge before whom an accused appears must be

held under an obligation to inform the accused of his or her entitlement to obtain free legal assistance at the cost of the State. In Suk Das v. UT of Arunachal Pradesh [Suk Das v. UT of Arunachal Pradesh, (1986) 2 SCC 401 : 1986 SCC (Cri) 166] the accused was tried and convicted without legal representation, due to his poverty. He had not applied for legal representation but notwithstanding this, this Court held that the trial was vitiated and the sentence awarded was set aside, particularly since the accused was not informed of his entitlement to free legal assistance, nor was an inquiry made from him whether he wanted a lawyer to be provided at State expense. In Rajoo v. State of M.P. [Rajoo v. State of M.P., (2012) 8 SCC 553 : (2012) 3 SCC (Cri) 984] the High Court dismissed [Rajoo v. State of M.P., Criminal Appeal No. 3 of 1991, decided on 5-9-2006 (MP)] the appeal of the accused without enquiring whether he required legal assistance at the expense of the State even though he was unrepresented. Relying on Khatri [Khatri (2) v. State of Bihar, (1981) 1 SCC 627 : 1981 SCC (Cri) 228] and Suk Das [Suk Das v. UT of Arunachal Pradesh, (1986) 2 SCC 401 : 1986 SCC (Cri) 166] this Court remanded his appeal to the High Court for rehearing after giving an opportunity to the accused to take legal assistance. Finally, in Mohd. Ajmal Amir Kasab v. State of Maharashtra [Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481] this Court relied on Khatri [Khatri (2) v. State of Bihar, (1981) 1 SCC 627 : 1981 SCC (Cri) 228] and held in para 474 of the Report as follows: (Mohd. Ajmal case [Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481] , SCC p. 186)

> "474. … it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows

> from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."
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> 44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to "default bail", to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212]"
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> [underlined for emphasis]

24. In ***Arvind Kumar Saxena v. State***: ***(2018) 250 DLT 130***, a coordinate Bench of this Court, following the observations made by the Supreme Court in paragraph no. 44 of its decision in ***Rakesh Kumar Paul*** (*supra*), issued directions to the Registrar General of this Court to explore the possibility of creating a database and software for the District Courts of Delhi in order to provide ready access to data in relation to remand applications during the course of investigation pending before the trial courts, including dates of arrest; the dates on which the requisite chargesheets are to be filed in terms of Section 167(2) of Cr.PC and; the dates on which the chargesheets have been filed. The Court had observed that this would assist the trial courts in

preservation of personal liberties of the accused appearing before them by informing the accused of their entitlement to a default bail under the Proviso (a) to Section 167(2) of the Cr.PC.

25. In ***Rakesh Kumar Paul*** (*supra*), the right to apply for default bail in terms of proviso (a) to Section 167(2) of the Cr.PC had accrued to the accused (appellant therein) on 04.01.2017. The chargesheet in that case was filed on 24.01.2017 and on that date, his right to secure a default bail stood extinguished. The petitioner had applied for a regular bail on 11.01.2017 before the Gauhati High Court, but he had not made any specific application for default bail. The Court noted that in that case, the accused had mentioned that the statutory period for filing the chargesheet had expired and he had also argued the issue orally. However, the same was not accepted. In the aforesaid context, the Supreme Court held that the petitioner had made an application for default bail, if not in writing, then orally. The Court further observed as under:

> "40. ….. 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 court concerned 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.

42. In *Sunil Batra (2)* v. *State (UT of Delhi)* [*Sunil Batra (2)* v. *State (UT of Delhi)*, (1980) 3 SCC 488 : 1980 SCC (Cri) 777] this Court accepted a letter, which was treated as petition, written by a prisoner in Tihar Jail, Delhi complaining of inhuman torture inflicted on another prisoner by the Jail Warder. In *Hussainara Khatoon (4)* v. *State of Bihar* [*Hussainara Khatoon (4)* v. *State of Bihar*, (1980) 1 SCC 98 : 1980 SCC (Cri) 40] a number of writ petitions, some by way of a letter, were grouped together and treated as habeas corpus petitions. In *Rubabbuddin Sheikh (1)* v. *State of Gujarat* [*Rubabbuddin Sheikh (1)* v. *State of Gujarat*, (2007) 4 SCC 318 : (2007) 2 SCC (Cri) 290] the brother of the deceased wrote a letter to the Chief Justice of India complaining of a fake encounter and subsequent disappearance of his sister-in-law. This was treated as a habeas corpus petition. In *Kishore Singh Ravinder Dev* v. *State of Rajasthan* [*Kishore Singh Ravinder Dev* v. *State of Rajasthan*, (1981) 1 SCC 503 : 1981 SCC (Cri) 191] the petitioners sent a telegram to a learned Judge of this Court complaining of solitary confinement of prisoners. The telegram was treated as a habeas corpus petition and the persons concerned were directed to be released from solitary confinement. In *Paramjit Kaur* v. *State of Punjab* [*Paramjit Kaur* v. *State of Punjab*, (1996) 7 SCC 20 : 1996 SCC (Cri) 167] a telegram received at the residential office of a learned Judge of this Court alleging an incident of kidnapping by the police was treated as a habeas corpus petition. In *Bandhua Mukti Morcha* v. *Union of India* [*Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389] a petition

addressed to a learned Judge of this Court relating to the inhumane and intolerable conditions of stone quarry workers in many States and how many of them were bonded labour was treated as a writ petition on the view that the

> "Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straitjacket formula". (SCC p. 186, para 12)

In *People's Union for Democratic Rights* v. *Union of India* [*People's Union for Democratic Rights* v. *Union of India*, (1982) 3 SCC 235 : 1982 SCC (L&S) 275 : AIR 1982 SC 1473] a letter addressed to a learned Judge of this Court concerning violation of various labour laws in the construction projects connected to the Asian Games was treated as a writ petition. In *Upendra Baxi (1)* v. *State of U.P.* [*Upendra Baxi (1)* v. *State of U.P.*, (1983) 2 SCC 308 : 1983 SCC (Cri) 430] a letter relating to inhuman conditions in the Agra Protective Home for Women was treated as a writ petition and in *Sheela Barse* v. *State of Maharashtra* [*Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353] a letter addressed by a journalist complaining of custodial violence against woman prisoners in Bombay was treated as a writ petition. These cases are merely illustrative of the personal liberty jurisprudence of this Court and in matters pertaining to Article 21 of the Constitution of India this Court has consistently taken the view that it is not advisable to be ritualistic and formal. However, we must make it clear that we should not be understood to suggest that procedures must always be given a go-by — that is certainly not our intention."

[underlined for emphasis]

26. In ***Arvind Kumar Saxena*** (*supra*), the accused was arrested by the Crime Branch on 03.06.2017 and he was placed in judicial custody.

The statutory period of sixty days from the date of arrest expired on 04.08.2017. Thereafter, on 19.09.2017, he filed an application for bail under Section 439 of the Cr.PC. The said application was fixed for hearing on 26.09.2017. The chargesheet in that case was filed on 20.09.2017. Thereafter, on 21.09.2017, the applicant filed another application seeking bail under Proviso (a) to Section 167(2) of the Cr.PC, which was rejected because prior to the said application the investigation agency had filed the chargesheet. However, the petitioner had preferred an application for bail under Section 439 of the Cr.PC prior to filing of the chargesheet and after a period of sixty days from the date of his arrest had expired. In this context, this Court observed as under:

> "The period of incarceration of the petitioner from the date 19.09.2017 when he sought the grant of bail implicitly also on the ground that he was arrested on 03.06.2017 and was willing to continue to join the investigation, indicating thereby that the investigation was not complete and did not set completed till submission of the charge-sheet on 20.09.2017 cannot be overlooked and thus cannot extinguish the indefeasible right of "default bail" to the petitioner."

27. The Supreme Court in a recent decision in ***M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence: Crl. A. 699/2020, decided on 26.10.2020***, explained the provision of Section 167(2) of the Cr.PC in the context of Article 21 of the Constitution of India and held that "*the safeguard of 'default bail' contained in the Proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person*

shall be detained except in accordance with rule of law". The Supreme Court noted the legislative history of Section 167 of the Cr.PC and the rationale for its amendment. The relevant extract of the said decision setting out the legislative history of Section 167 of the Cr.PC and the rationale for its enactment as set out in the said decision is relevant and reproduced below:

> "11.2 Under Section 167 of the Code of Criminal Procedure,1898 ('1898 Code') which was in force prior to the enactment of the CrPC, the maximum period for which an accused could be remanded to custody, either police or judicial, was 15 days. However, since it was often unworkable to conclude complicated investigations within 15 days, a practice arose wherein investigative officers would file 'preliminary chargesheets' after the expiry of the remand period. The State would then request the magistrate to postpone commencement of the trial and authorize further remand of the accused under Section 344 of the1898 Code till the time the investigation was completed and the final chargesheet was filed. The Law Commission of India in Report No. 14 on ***Reforms of the Judicial Administration*** (Vol. II, 1948, pages 758760) pointed out that in many cases the accused were languishing for several months in custody without any final report being filed before the Courts. It was also pointed out that there was conflict in judicial opinion as to whether the magistrate was bound to release the accused if the police report was not filed within 15 days. Hence the Law Commission in Report No. 14 recommended the need for an appropriate provision specifically providing for continued remand after the expiry of 15 days, in a manner that *"while meeting the needs of a full and proper investigation in cases of serious crime, will still safeguard the liberty of the person of the individual."* Further, that the legislature should prescribe a maximum time period beyond which no accused could be detained without filing of the police report before the

magistrate. It was pointed out that in England, even a person accused of grave offences such as treason could not be indefinitely detained in prison till commencement of the trial.

11.3 The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on ***The Code of Criminal Procedure, 1898*** (Vol. I, 1969, pages 7677).The Law Commission reemphasized the need to guard against the misuse of Section 344 of the 1898 Code by filing 'preliminary reports' for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein *"the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner."* Hence the Commission recommended fixing of a maximum time limit of 60 days for remand. The Commission considered the reservation expressed earlier in Report No. 37 that such an extension may result in the 60 day period becoming a matter of routine. However, faith was expressed that proper supervision by the superior Courts would help circumvent the same.

11.4 The suggestions made in Report No. 41 were taken note of and incorporated by the Central Government while drafting the Code of Criminal Procedure Bill in 1970. Ultimately, the 1898 Code was replaced by the present CrPC. The Statement of Objects and Reasons of the CrPC provides that the Government took the following important considerations into account while evaluating the recommendations of the Law Commission:

> "3. The recommendations of the Commission were examined carefully by the Government, keeping in view among others, the following basic considerations:—

> (i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;
>
> (ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and
>
> (iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community."

11.5 It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time limits to complete the investigation with the need to protect the civil liberties of the accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the Court takes cognizance of the case without any undue delay from the date of giving information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.

11.6 Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose."

28. In ***S. Kasi v. State Through The Inspector of Police***

Samaynallur Police Station Madurai District: Crl. A. 452/2020 decided on 19.06.2020, the Supreme Court set aside the order of the Madurai Bench of the Madras High Court holding that the order dated 23.03.2020 passed by the Supreme Court in *Suo Moto* W.P. (C) No. 3 of 2020 extending the period of limitation in wake of the outbreak of COVID-19 which also eclipsed the time prescribed for completion of investigation. The Supreme Court held that its order dated 23.03.2020 could not be held to have eclipsed the time prescribed for completion of investigation under Section 167 (2) of the Cr.P.C. nor the restrictions which have been imposed by the Government during the lockdown could operate as any restriction on the rights of an accused person as protected under Section 167 (2) of the Cr.PC regarding his indefeasible right to get a default bail on non-submission of a chargesheet within the time period prescribed. It is important to note that the Supreme Court founded its decision on the inalienable right to life and liberty which has been recognised under Article 21 of the Constitution of India. The Supreme Court also referred to paragraph no. 136 of the decision of the Supreme Court in ***K. S. Puttaswamy and another v. Union of India and others: (2017) 10 SCC 1***, wherein D.Y. Chandrachud. J speaking for the court had formally overruled the decision in ***Additional District Magistrate, Jabalpur v. Shivakant Shukla: (1976) 2 SCC 521*** as under:

> "136. The judgments rendered by all the four Judges constituting the majority in *ADM, Jabalpur* [*ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207] are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in *Kesavananda Bharati* [*Kesavananda*

Bharati v. *State of Kerala*, (1973) 4 SCC 225] , primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilised State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the State without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Khanna, J. was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the State on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of Law which imposes restraints upon the powers vested in the modern State when it deals with the liberties of the individual. The power of the Court to issue a writ of habeas corpus is a precious and undeniable feature of the Rule of Law."

29. In ***Bikramjt Singh v. State of Punjab: Crl. A. No. 667 of 2020, decided on 12.10.2020,*** the Supreme Court observed as under:

"We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory

> rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."

30. It is important to bear the aforesaid principles enunciated by the Supreme Court in the aforementioned decision while addressing the controversy as to whether the petitioner was entitled for default bail.

31. At this stage, it would be relevant to refer to Sub-section (2) of Section 167 of the Cr.PC. The same is set out below:

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

32. A plain reading of the Proviso (a) to Section 167(2) of the Cr.PC indicates that an accused would necessarily have to be released on bail "*if he is prepared to and does furnish bail*". Thus, in cases where the statutory period of sixty days or ninety days has expired, the accused would be entitled to be released on bail provided he meets the condition as set out therein – that is, he is prepared to furnish and does furnish bail. It is important to note that there is no provision requiring him to make any formal application.

33. It is also trite law that there is no inherent power in a court to remand an accused to custody. Such power must be traced to an express provision of law [See: ***Natbar Parida Bisnu Charan vs State of Orissa: (1975) Supp SCR 137*** and ***Union of India vs Thamsharasi: (1995) 4***

SCC 190]. As is apparent from the language of Proviso (a) to Section 167(2) of the Cr.PC, the power of a Court to remand an accused to custody pending investigation is circumscribed and stands denuded if the period of sixty days or ninety days, as the case may be, has expired and the accused is ready and willing to furnish bail.

34. It is also necessary to bear in mind that courts have consistently leaned to resolve the tension between form and substance, in favour of substance and have used the interpretative tools to address the substance of the matter. In ***Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors:1981SCR(2) 79*** had, in an altogether different context, observed that "*where the constitution fundamentals vital to maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form*". Thus, if in substance the essential conditions as set out under the Proviso (a) to Section 167(2) of the Cr.PC are met and complied with – that is (i) if the investigation has not been completed within the period of sixty or ninety days, as the case may be, from the date of arrest of the accused; and (ii) if the accused is prepared to offer bail – then there would be no justifiable reason to detain the accused.

35. As noticed above, the petitioner had, unequivocally, stated that he was ready to furnish bail and provide a sound surety. He had further indicated that he would ready and willing to comply with any condition that may be imposed by the Trial Court and had also undertaken to appear before the Trial Court as and when required. Clearly, the Proviso

to Section 167(2)(a) of the Cr.PC did not require the petitioner to do anything more except to indicate that he is prepared to furnish bail. Of course, he would be released on bail only if he did so.

36. The Supreme Court in the case of ***Uday Mohanlal Acharya v. State of Maharashtra: (2001) 5 SCC 453*** had observed as under:

> "13. …. 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."

37. In the present case, there is no doubt that the petitioner had applied for being released on bail and had offered to abide by the terms and conditions of bail. Bearing that in mind, it is at once clear that the petitioner would be entitled to default bail even though he had not specifically mentioned the provisions of Section 167(2) of the Cr.PC in his application.

38. Mr Amit Gupta, the learned APP had also referred to the decision of the Supreme Court in ***Hitendra Vishnu Thakur v. State of Maharashtra***: ***(1994) 4 SCC 602*** and had drawn the attention of this Court to paragraph no. 21 of the said decision. He contended that a court cannot release an accused on bail on its own motion without any application on his behalf and, it would be necessary for the accused to make an application to be released on bail on account of default on the part of the investigation agency. It was submitted that since no such application had been made, the petitioner could not have been released

on default bail. The relevant extract of paragraph no. 21 of the said decision referred to by Mr Gupta is set out below:

> "21…. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail *on its own motion* even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (*bb*) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'...."

39. The two principles that emerge from the above ruling in ***Hitendra Vishnu Thakur*** (*supra*) are that (i) the Court cannot release an accused on bail on its own motion without any application from the accused offering to furnish bail; and (ii) that the investigating/prosecuting agency must be put to notice.

40. There is no dispute that an accused cannot be released on bail by

a court on its own motion and it is necessary for the accused to apply and offer to furnish bail. As noticed above, the language of Proviso (a) to Section 167(2) of the Cr.PC also requires an accused to indicate that he is prepared to furnish bail before he can be released on bail. In substance, the said condition is met. In ***Rakesh Kumar Paul*** (*supra*) the Supreme Court had noted that there may be rare cases where the accused may not be wanted to be released on bail on account of concerns of personal safety or for other reasons. It is also in this context that the accused must apply for bail. Thus, there is no controversy that it is necessary that the accused offers to furnish bail in order to avail of his right to default bail. If the accused offers to furnish bail he would comply with the condition as set out in proviso (a) to section 167(2) Cr.PC. In this case, the said condition has been met. Undisputedly, the petitioner had made an application, albeit under Section 439 of the Cr PC, offering to furnish bail. In view of the decision in *Rakesh Kumar Paul* (supra), even an oral plea for default bail is compliant with the proviso(a) to Section 167(2) Cr.PC. Thus, it would be apposite to consider an application for bail filed on expiry of stipulated period of filing chargesheet, as an application for bail under the provisio to Section 167 (2), since it does indicate that the accused *is prepared to furnish bail*.

41. The second requirement is that the prosecution agency must be put to notice of the ground on which the bail is being granted in order for the prosecution agency to point out if there is any reasons why the accused is not entitled to such bail. By virtue of certain special acts

such as the Unlawful Activities (Prevention) Act 1967, and the Narcotic Drugs and Psychotropic Substances Act 1985, certain provisions of the Cr.PC including Section 167 of the Cr.PC stand amended in regard to application to offences under the said statutes. In cases pertaining to these enactments, the court is expressly empowered to extend the period for completion of investigation and if an application for the same is pending, the investigating/prosecuting agency can also point out the same as the decision in that application would have a bearing on the question whether an accused can be released on bail.

42. As explained by the Supreme Court in a number of decisions, the Proviso to Section 167(2) of the Cr.PC is intrinsically linked to the right under Article 21 of the Constitution of India that "*no person shall be deprived of his life or personal liberty except according to the procedure established by law*". It embodies a safeguard that circumscribes the power to detain an accused pending investigation. Keeping this principle in mind and the consistent view of the Supreme Court that in matters of personal liberties, it would not be apposite to curtail the same on technicalities, this Court is of this view that the petitioner would be entitled to default bail. This is also considering the fact that the petitioner had indicated in unequivocal terms that he desires to be released on bail and he is ready to furnish surety for the same.

43. In view of the above, this Court considers it apposite to allow the present petition.

44. The petitioner is directed to be released on bail on his furnishing

a personal bond in the sum of ₹10,000/- with one surety of an equivalent amount to the satisfaction of the concerned Trial Court/Duty Magistrate. This is also subject to following further conditions:

(a) the petitioner shall provide a mobile number to the concerned SHO/IO and ensure that he is reachable at all times;

(b) the petitioner shall not leave the National Capital Territory of Delhi without prior intimation to the SHO/IO and without informing him the address of his destination;

(c) the petitioner shall mark his presence before the Duty Officer (PS Alipur) on the first Monday of each calendar month; and

(d) the petitioner shall not contact the victim, his family members, or any of the witnesses.

45. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

NOVEMBER 06, 2020
RK