

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

CRL.M.C. 2242/2020

Reserved on : 22.09.2021

Date of Decision : 18.10.2021

IN THE MATTER OF:

ABHISHEK

..... Petitioner

Through: Mr. Rajesh Anand, Advocate.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Neelam Sharma, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present petition has been filed under Section 482 Cr.P.C. on behalf of the petitioner assailing the order dated 29.10.2020 passed by the learned Addl. Sessions Judge-02, Central District, Tis Hazari Courts, Delhi in Criminal Revision No. 226/2020 arising out of FIR No. 37/2020 registered under Sections 304B/498A/406/34 IPC at Police Station Burari, Delhi.

2. Vide the aforesaid order, the petitioner's revision petition, challenging dismissal of his application seeking default bail under Section 167(2) Cr.P.C. by the learned Metropolitan Magistrate, has been dismissed.

3. Briefly stated, the facts involved in the present case are that on 16.01.2020, a case bearing FIR No. 37/2020 came to be registered against the petitioner and his family members under Sections 304B/498A/406/34 IPC at Police Station Burari, Delhi, on a complaint filed by his father-in-law i.e., father of the deceased.

4. During investigation, the petitioner was arrested on 18.01.2020 and on being produced before the concerned Metropolitan Magistrate on 19.01.2020, was sent to judicial custody. The petitioner's judicial custody was extended from time to time, including on 15.04.2020 when his custody was extended till 29.04.2020. Admittedly, the time period of 90 days prescribed under the proviso (a) to Section 167(2) Cr.P.C. for filing the charge sheet expired on 18.04.2020.

5. Before proceeding further, let me capture the fact situation existing on that date in the NCT of Delhi. The entire country was facing an unprecedented situation caused by the COVID-19 pandemic, on account of which a nationwide lockdown was announced by the Central Government on the eve of 24.03.2020. As a result of the lockdown, not only the movement of people was restricted, but even the physical functioning of Courts was hampered. Although physical filing and listing of bail application was not permitted, a mechanism for electronic filing of urgent applications including bail applications was available through a dedicated email being aojdelhicourts@gmail.com. The bail applications were to be heard via Video Conferencing mode.

6. During this time, the undertrials suffering judicial custody could not be produced before the concerned Courts and their custody was extended by the Jail Visiting Magistrate. In these circumstances, as per the Status Report

filed by the Superintendent, Central Jail No.7, Tihar, Delhi the petitioner's judicial custody was also extended on 15.04.2020 for 14 days i.e., upto 29.04.2020 by the Jail Visiting Duty Metropolitan Magistrate. The petitioner's Custody Warrant is also placed on record.

7. As no charge sheet was filed during the prescribed time of 90 days which came to an end on 18.04.2020, an application under Section 167(2) Cr.P.C. on behalf of the petitioner was filed by his counsel on 20.04.2020 through the aforementioned dedicated email address. The email containing prayer for default bail was sent at about 1:16 PM on 20.04.2020 with the subject "Fwd: Urgent hearing of bail application u/s 167(2) CrPC on behalf of Abhishek in FIR NO 37/2020 PS BURARI U/S 304B/498A/406/34 IPC". The email was addressed to Sh. Balbir Singh AO(J) and it read as under:-

*"Respected Sir,
kindly find enclosed scanned copy of the bail application and annexures in FIR No 37/2020, PS Burari, U/s 304B/498A/406/34 IPC in the case titled as State Vs Abhishek and ors which is presently pending in the court of Sh Pranav Joshi, Ld. MM, Central, Tis Hazari Courts, Delhi room no 286. The accused/applicant is in judicial custody for over 90 days of post-arrest. to our knowledge and information charge sheet in this case qua the accused/applicant is not yet filed and hence in terms of section 167(2) crpc, he is entitled to be released on bail on furnishing the bail bonds which he is ready to file. the bail application may kindly be considered for listing and urgent hearing.
in case any additional information is required please do let us know so that the same came to be provided at the earliest.
regards.
Rajesh Anand
counsel for the accused/applicant Abhishek
9899402429/9810146988"*

8. Along with the aforesaid email, a copy of the bail application was also attached. In response to the email, a reply was received at 03:42 p.m. on the same day wherein it was asked as to whether the application was to be listed before the duty Metropolitan Magistrate or the Sessions Court. Another email was sent by the learned counsel for the petitioner at 07:21 p.m. thereby clarifying that the bail being a default bail and charge sheet having not been filed, the application was to be listed before the duty Metropolitan Magistrate. It is averred that thereafter no response was received by the petitioner's counsel from the concerned AO(J). It is further averred that the Investigating Officer misled the petitioner by informing that he had filed the charge sheet within time, because of which the application was not further pursued believing the same to have become infructuous.

9. The nationwide lockdown continued and no copy of charge sheet was served on the petitioner. Thereafter, the petitioner filed an application for regular bail on 05.05.2020 which came to be dismissed vide order dated 30.05.2020.

10. It is averred that subsequently on resumption of physical hearing in Courts, the applicant became aware that the charge sheet was in fact filed on 20.04.2020 i.e., the same day on which the petitioner had preferred his default bail application under Section 167(2) Cr.P.C. by way of an email. On gaining this knowledge, the petitioner preferred a second application under Section 167(2) Cr.P.C. on 15.09.2020 which came to be dismissed by the learned Metropolitan Magistrate on 16.09.2020. A revision petition challenging the said order came to be dismissed by the order impugned herein.

11. In this backdrop, while learned counsel for the petitioner has pressed the prayer made for default bail, learned APP has opposed the same by contending that neither of the bail applications filed by the petitioner were maintainable and, in this regard, made following submissions:

i) the Investigating Officer filed the charge sheet on 20.04.2020 and as such the bail application stated to be filed on the said date by the applicant under Section 167(2) Cr.P.C. was not maintainable.

ii) the bail application never saw the light of the day as neither any steps were taken on behalf of the petitioner for listing or hearing of the said application nor any notice ever came to be issued to the public prosecutor.

iii) the petitioner by filing the regular bail application on merits on 05.05.2020 had anyway abandoned his earlier application seeking default bail.

iv) the petitioner's second application seeking default bail dated 15.09.2020 was not maintainable as his right to seek statutory bail already stood extinguished by filing of the charge sheet on 20.04.2020.

12. I have heard learned counsels for the parties and have also gone through the material placed on record as well as the digitized copy of the Trial Court Record which was summoned. During the course of hearing, it was informed that the petitioner has been released on interim bail vide order dated 17.05.2021 passed by learned ASJ/Vacation Judge/Special Judge, Electricity Court No.-02, Central, Tis Hazari Courts, Delhi which order has been extended and is subsisting till date.

13. The facts not being in dispute, the primary issue that arises for consideration before this Court in the fact situation noted hereinabove is whether on 20.04.2020, the petitioner was entitled to default bail, the

ancillary issues being the obligation cast upon the Court to inform the accused of right having accrued in his favour on non-filing of charge sheet in the requisite time and the mode and manner of filing an application seeking default bail.

DEFAULT BAIL – THE INDEFEASIBLE RIGHT OF THE ACCUSED

14. Section 167(2) Cr.P.C., which deals with the issue at hand, reads as under:

"(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."

15. A plain reading of the provision would show that once the maximum period provided for an investigation prescribed under the first proviso (a) to Section 167(2) Cr.P.C. is over and no charge sheet is filed, the accused becomes entitled to be released on bail, more appropriately called the 'default bail'. The right to seek default bail under Section 167(2) Cr.P.C. is a

fundamental right and not merely a statutory right, which flows from Article 21 of the Constitution of India. It has been held to be an indefeasible part of the right to personal liberty under Article 21 of the Constitution of India, and such a right cannot be suspended even during a pandemic situation. The right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge sheet [Refer: S. Kasi v. State through the Inspector of Police Samaynallur Police Station Madurai District reported as **2020 SCC OnLine SC 529**].

16. The Courts have been repeatedly seized with various nuances of the provision time and again, and each time have emphasized on the need to secure the personal liberty of an individual as guaranteed under Article 21 of the Constitution of India. The guiding principles have been laid down by the Supreme Court in catena of decisions and one such case was Rakesh Kumar Paul v. State of Assam reported as **(2017) 15 SCC 67**, wherein the Court took note of the 41st Report of the Law Commission of India, which in view of an anomaly created by the then prescribed limit of 15 days to complete investigation, recommended fixing a maximum period of 60/90 days for completing the investigation depending upon the seriousness of the offence. While referring to the decision of a Constitution Bench in Sanjay Dutt v. State through C.B.I., Bombay (II) reported as **(1994) 5 SCC 410** as well as its decisions in Uday Mohanlal Acharya v. State of Maharashtra reported as **(2001) 5 SCC 453** and Union of India through Central Bureau of Investigation v. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav reported as **(2014) 9 SCC 457**, the Supreme Court in Rakesh Kumar Paul (Supra), by a majority view, further held as under:

“37. This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav. In that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows : (Nirala Yadav case, SCC p. 472, para 24)

“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.’ (Uday Mohanlal case, SCC p. 473, para 13)”

38. This Court also dealt with the decision rendered in Sanjay Dutt and noted that the principle laid down by the Constitution Bench is to the effect 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. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.”

17. While castigating on the practice adopted by the prosecution as well as by some Courts in defeating the purpose of the provision inhering in Section 167(2) Cr.P.C., the Court also held:-

“39. 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 Mohd. Iqbal Madar Sheikh v. State of Maharashtra 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 the 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."

18. In Bikramjit Singh v. State of Punjab reported as **(2020) 10 SCC 616**, the Supreme Court again reiterated the above principles in the following words:

"36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge-sheet is filed, the right to default bail becomes complete. It is of no moment that the criminal court in question either does not dispose of such application before the charge-sheet is filed or disposes of such application wrongly before such charge-sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted."

19. In Saravanan v. State represented by the Inspector of Police reported as **(2020) 9 SCC 101**, where the case of the appellant was that he was inside jail for more than 101 days but the investigation was not completed and the police did not file the final report within the period prescribed under Section 167 Cr.P.C., the Supreme Court held as follows:-

"9. ...However, as observed by this Court in catena of decisions and more particularly in the case of Rakesh Kumar Paul, where the investigation is not completed within 60 days or 90 days, as the case may be, and no charge-sheet is filed by 60th or 90th day,

the accused gets an "indefeasible right" to default bail, and the accused becomes entitled to default bail once the accused applies for default bail and furnish bail. Therefore, the only requirement for getting the default bail/statutory bail Under Section 167(2) CrPC is that the accused is in jail for more than 60 or 90 days, as the case may be, and within 60 or 90 days, as the case may be, the investigation is not completed and no charge-sheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail. ...As observed by this Court in Rakesh Kumar Paul and in other decisions, the accused is entitled to default bail/statutory bail, subject to the eventuality occurring in Section 167 CrPC, namely, investigation is not completed within 60 days or 90 days, as the case may be, and no charge-sheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail."

(emphasis added)

20. More recently, in M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence reported as **(2021) 2 SCC 485**, the Supreme Court has dealt with the issue at hand comprehensively and opined thus:-

"8. This Court in a catena of judgments including Ravi Prakash Singh v. State of Bihar, has ruled that while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court has to be included.

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22.3. We are of the firm opinion that the view taken in Uday Mohanlal Acharya is a binding precedent. It has been followed by a subsequent three-Judge Bench in Sayed Mohd. Ahmad Kazmi. Hence, the opinion rendered by the two-Judge Bench in paras 54 and 58 of Pragyna Singh Thakur, to the effect that "even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before consideration of the same and before being released on bail, the said right to be released on bail would be lost" or "can only be on merits", must

be held per incuriam.

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23. At the cost of repetition, it must be emphasized that the paramount consideration of the legislature while enacting Section 167(2) and the proviso thereto was that the investigation must be completed expeditiously, and that the accused should not be detained for an unreasonably long period as was the situation prevailing under the 1898 Code. This would be in consonance with the obligation cast upon the State under Article 21 to follow a fair, just and reasonable procedure prior to depriving any person of his personal liberty.

Conclusion

24. In the present case, admittedly the appellant-accused had exercised his option to obtain bail by filing the application at 10.30 a.m. on the 181st day of his arrest i.e. immediately after the court opened, on 1-2-2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to 31-1-2019 or prior to 10.30 a.m. on 1-2-2019. The Public Prosecutor participated in the arguments on the bail application till 4.25 p.m. on the day it was filed. It was only thereafter that the additional complaint came to be lodged against the appellant. Therefore, applying the aforementioned principles, the appellant-accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order i.e. at 10.30 a.m. on 1-2-2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

25. Therefore, in conclusion:

25.1. Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with

Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.

25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4. Notwithstanding the order of default bail passed by the court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid.”

21. Once again, in Fakhrey Alam v. State of Uttar Pradesh reported as **2021 SCC OnLine SC 532**, the principles laid down in earlier decisions have been upheld and it has been re-emphasized that once the conditions of the first proviso to Section 167(2) Cr.P.C. are fulfilled, the accused person

gets a fundamental right to be released on bail.

OBLIGATION OF THE MAGISTRATE TO INFORM THE ACCUSED
OF ACCRUAL OF A RIGHT TO SEEK DEFAULT BAIL

22. The order remanding an accused to custody is not an empty formality and at that stage, the Magistrate is required to apply his mind for the necessity of remand. The 60th or 90th day of custody assumes great significance as in the event of non-filing of charge sheet, a right under Section 167(2) Cr.P.C., which is held to be an infeasible and fundamental right, accrues in favour of the accused. To ensure that this right does not get defeated in any manner, an obligation is cast upon the Magistrate to inform an undertrial prisoner about accrual of such right. The issue relating to undertrial prisoners who could not avail such statutory right came up before the Supreme Court in Hussainara Khaton and Others v. Home Secretary, State of Bihar, Patna reported as (1980) 1 SCC 108, wherein it was held:-

“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 before 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 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, 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.”

23. In Rakesh Kumar Paul (Supra), the duty of the concerned Court towards apprising an accused of the accrual of a right to claim default bail after expiry of the statutory period for filing charge sheet has been recognised in the following terms:-

“44. ...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.”

(emphasis added)

24. The Supreme Court has also reiterated the importance of an accused being informed of such right in M. Ravindran (Supra). Relevant excerpt from the decision is extracted below:

“18.10. We agree with the view expressed in Rakesh Kumar Paul 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 knowledge sharing 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.”

FORMAT OF APPLICATION SEEKING DEFAULT BAIL

25. While specifying as to what procedure is to be adopted in filing an application for default bail, the Supreme Court in Rakesh Kumar Paul (Supra) held by the majority judgment that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. It was 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.”

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46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to “default bail” but must apply for regular bail — the “default bail” chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of “default bail”. It would have been another matter altogether if the petitioner had not applied for “default bail” for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for

default bail and having forfeited that right the accused cannot, after the charge- sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for “default bail” during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017. On the contrary, he had availed of his right to “default bail” which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of opinion that the petitioner had satisfied all the requirements of obtaining ‘default bail’ which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.”

(emphasis added)

26. In the present case, it is noted that the petitioner after being arrested on 18.01.2020 was first produced before the Magistrate on 19.01.2020 when he was remanded to custody. The offence that the petitioner is charged with being one falling under Section 304B IPC, which is punishable with imprisonment for a period exceeding 10 years or with imprisonment for life or death, the maximum period for which the petitioner could have been put under judicial custody was 90 days. The said period admittedly came to an end on 18.04.2020. However, in between, when the petitioner was produced before the Jail Visiting Magistrate on 15.04.2020, the concerned Magistrate without any application of mind and rather unmindful of the fact that 90 days were expiring on 18.04.2020, mechanically extended the petitioner’s

judicial custody till 29.04.2020.

27. In the entire petition as well as the submissions made on behalf of the petitioner, the entire thrust is on the non-filing of charge sheet by the prosecution till 18.04.2020 and accrual of right in favour of the petitioner. As noted earlier, in view of the peculiar situation existing in the country on account of the national lockdown imposed where physical filing of the bail application was not possible, an application came to be filed on behalf of the petitioner through an email sent on 20.04.2020 at 01:16 p.m. at the email address provided to the counsels. The email not only contained a prayer for release on default bail but also communicated the acceptability of condition requiring filing of bail bonds. It did mention the provision of Section 167(2) Cr.P.C. under which the default bail was sought as well as the details of the case. Nothing more was required to be done by the petitioner. The listing of such an application was not in his hand. The sending of an email on behalf of the petitioner, in the opinion of this Court, amounted to availing of his right to seek default bail. The contention raised on behalf of the State that the application never came to be listed or was abandoned by the petitioner, being meritless, is rejected. Similarly, the other contentions that the subsequent filing of a regular bail application and a second application under Section 167(2) Cr.P.C. amounted to wiping out of the first application filed on behalf of the petitioner seeking 'default bail' deserve an outright rejection in view of the law laid down in Rakesh Kumar Paul (Supra) and Bikramjit Singh (Supra).

28. In the present case, it appears that the charge sheet was filed physically before the duty Magistrate. The same is apparent from the order dated 20.04.2020 available in the Trial Court Record. It is pertinent to note

that the charge sheet having been filed before a duty Magistrate, no cognizance was taken on that date.

29. In response to the present petition, a Status Report dated 09.12.2020 under the signatures of Inspector Suresh Kumar, SHO, Police Station Burari has been placed on the record. The relevant portion of the Status Report reads as under:

“Charge sheet of the case has been filed before the Hon’ble Court on 20/04/2020. Further investigation is continue and after completion of remaining investigation, supplementary charge sheet of the case will be filed before the Hon'ble Court.

It is pertinent to mentioned here that draft charge sheet of the above said case had been prepared and on 20/03/2020, case file had been deposited in prosecution branch, THC, Delhi for scrutiny but on 21/03/2020 Govt. declared lockdown and almost prosecution branch was closed, so file could not be received back. In this regard same facts were already mentioned in the Case Diary No. 41, Dt. 28/03/20, CD No. 42, Dt. 07/04/2020, CD No. 43, Dt. 15/04/2020, CD No. 44, Dt. 16/04/2020. On 18/04/2020 file was received after scrutiny and same day Final Charge sheet was prepared and on 19/04/2020, ACP/Timarpur forwarded the Charge Sheet. Accused set and other sets were prepared and on 20/04/2020, file was put in court before the Ld. Duty MM, THC, Delhi. So, above view of facts and circumstances regarding filling the delay of charge sheet was not upon the part of investigation officer.”

30. A perusal of the above Status Report would show that it was incumbent on the State to positively state as to at what time the charge sheet came to be filed before the Court on 20.04.2020, i.e. whether it was prior to filing of the application for default bail by the petitioner or later. The answer to the said question is of paramount importance in view of the

exposition of law discussed hereinabove. However, the same remained unanswered in the Status Report as well as in the submissions.

31. It is well settled that the rights of an undertrial prisoner guaranteed under Article 21 of the Constitution of India cannot be allowed to be defeated on technicalities of procedure. At this point, I may profitably refer to the following observations of the Supreme Court in M. Ravindran (Supra):-

“17.9. Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused.

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18.6. However, the Constitution Bench decision in Sanjay Dutt cannot be interpreted so as to mean that even where the accused has promptly exercised his right under Section 167(2) and indicated his willingness to furnish bail, he can be denied bail on account of delay in deciding his application or erroneous rejection of the same. Nor can he be kept detained in custody on account of subterfuge of the prosecution in filing a police report or additional complaint on the same day that the bail application is filed.”

32. In conformity with the above, the Supreme Court in Nagesh Kumar Singh v. The State of Uttar Pradesh and Anr., SLP (Crl.) No(s). 6975/2019 directed release of the petitioner on bail under Section 167(2) Cr.P.C. vide order dated 15.10.2019. Briefly stated, the facts of the case, as noted in the

impugned order, were that the statutory period of filing the charge sheet expired on 23.05.2019. The petitioner filed an application seeking default bail on 27.05.2019 and on the same day, though at a later point of time, the charge sheet also came to be filed. Thus, to prevent the defeat of the right of the accused, the Supreme Court decided in his favour.

33. As such, in absence of any averment or submission as to the time of filing of the charge sheet and the peculiar facts of the present case, it cannot be concluded that at the time of petitioner availing his right to seek default bail, the charge sheet was already filed.

34. Keeping in view the aforesaid, this Court is inclined to release the petitioner on default bail, subject to his furnishing a personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the concerned Court/Duty M.M. and also subject to the following further conditions:-

- i) The petitioner shall remain available on mobile no. i.e. 9999984794, which he undertakes to keep operational at all times during the pendency of the trial.
- ii) The petitioner shall not directly/indirectly try to get in touch with the complainant or any other prosecution witnesses or tamper with the evidence.
- iii) The petitioner shall regularly appear before the concerned Court during the pendency of the trial.
- iv) The petitioner shall not leave the NCT of Delhi without prior permission of the concerned Court.

35. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case.

36. The order of remanding an undertrial or its extension is held to be a judicial function requiring due application of mind. To ensure that the rights of undertrial prisoners to seek default bail are not defeated despite the legislative mandate and the principles of law enumerated by the Courts time and again, and that the custody of an undertrial is not extended mechanically as has been done in this case, this Court deems it necessary to direct that:

- i) While extending the custody of an undertrial prisoner, the Magistrate/concerned Court shall not mechanically extend the period of custody for the maximum period of 15 days as prescribed under Section 167(2) Cr.P.C.;
- ii) The custody shall be extended while keeping in mind the 60th, 90th or 180th day (depending on the nature of offence and applicability of any Special Act) of completing the investigation and submission of charge sheet. If such 60th, 90th or 180th day falls before the maximum extension period of 15 days, then the custody shall be extended only upto the 60th, 90th or 180th, as may be applicable;
- iii) As a necessary corollary, the undertrial prisoner, shall be produced before the concerned Court on the next day i.e., on the 61st, 91st or 181st day as the case may be, so that he can be duly informed of his fundamental right to seek default bail if no charge sheet is filed in the maximum period prescribed or the permitted extended period of investigation, as the case may be.

iv) The present format of the ‘Custody Warrant’ be modified. The existing format already ensures mention of certain details with respect to an undertrial including the date of arrest, period of police custody, date of first judicial custody etc. and it reads as under:

IN THE COURT OF _____		
<u>CUSTODY WARRANT</u>		
STATE VS.	FIR NO.	
NAME OF UNDERTRIAL :		
S/O :		
R/O :		
DOB/AGE :		
	Sections and Act	
FIR		
Investigation		
Chargesheet		
Cognizance		
Charge		
Amendment/alteration of charge		
Stage	Record of UTP	Remarks, (if any).
Date of arrest		
Period of PC		
Date of first Judicial custody		
Date of bail, if granted, and Court granting bail		
Amount of bail bond		
On the date of taking cognizance		
Sections	Date on which right U/s 436-A Cr.P.C. accrues	

It shall now also include a column indicating the day on which the right of ‘default bail’ will accrue to the undertrial under proviso (a) to Section 167(2) Cr.P.C.

v) The concerned District Legal Services Authority shall also ensure that the remand Advocates/legal aid counsels posted in criminal courts are instructed to keep an undertrial informed of his right to seek default bail and the date of accrual of such right.

vi) The jail authorities shall also have a corresponding obligation to inform the undertrial of the date when the right to seek default bail accrues.

37. Considering the seriousness of the issue involved, this Court deems it apposite to seek a response from the Registrar General of this Court as well the DG (Prisons) as to the steps being undertaken so that an undertrial is informed of his right to seek ‘default bail’ and that such right is not defeated but rather timely exercised. The response and suggestions, if any, shall be submitted in light of the ‘Inter-operable Criminal Justice System (ICJS)’, a platform which came into existence under the aegis of the e-Committee, Supreme Court. Let the response be filed within four weeks from today.

38. List the matter for the aforesaid purpose on 18.11.2021.

39. A copy of this judgment be forwarded to all District and Sessions Judges forthwith to ensure strict compliance with the directions passed. The Registry shall also bring the judgment to the notice of the Registrar General and transmit a copy of the same to the DG (Prisons) as well as to the Member Secretary, Delhi State Legal Services Authority.

MANOJ KUMAR OHRI, J

OCTOBER 18, 2021/na

Click here to check corrigendum, if any