



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.M.P. (M) No. 838 of 2021

Date of decision: 28.6.2021

Om Prakash.

...Petitioner.

Versus

The State of Himachal Pradesh.

...Respondent.

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes.

For the Petitioner: Mr.Vishal Gupta, Advocate through Video Conferencing.

For the Respondent: Mr.Desh Raj Thakur, Additional Advocate General, through Video Conferencing.

Vivek Singh Thakur, Judge (oral)

Petitioner herein has been arrested on 17.3.2021 in case FIR No. 24 of 2021, dated 17.3.2021 registered in Police Station Parwanoo, District Solan, H.P. under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act). He has approached this Court on 30.4.2021 seeking regular bail under Section 439 of Code of Criminal Procedure (for short Cr.P.C.).

2. During pendency of petition, on 14.6.2021, learned counsel for the petitioner, on the basis of information placed on record in status report, had canvassed for release of petitioner on 'default bail' by invoking provisions of Section 167 of Cr.P.C. However, on that day, matter was adjourned for 17.6.2021, enabling learned Additional Advocate General to have complete instructions with respect to date of filing of challan. On 17.6.2021, matter was adjourned for 18.6.2021 and on that date matter was again adjourned for 21.6.2021, enabling learned Additional Advocate General to have complete instructions

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

with respect to filing of challan. On 21.6.2021, it was informed that challan has been presented in Court on 17.6.2021.

3. Petitioner in present case has been arrested on 17.3.2021 and he was produced before the Magistrate on the same day and since then he is in judicial custody.

4. As per prosecution case, petitioner has been found in possession of 522 grams charas, which is intermediate quantity of contraband under NDPS Act, for which punishment has been provided in Section 21(b) of NDPS Act as rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees. As per section 167(2) of Cr.P.C., the maximum period to which Magistrate may authorize the detention of the accused person in such a case is sixty days, as in present case offence is not punishable with death, imprisonment for life or imprisonment for a terms not less than ten years. Sixty days of detention period of petitioner has completed on 16.5.2021.

5. As per instructions received by learned Additional Advocate General challan has been presented on 17.6.2021, but without any extension of time to file the challan beyond sixty days.

6. Learned counsel for the petitioner, seeking default bail, has placed reliance upon ***Rakesh Kumar Paul Vs. State of Assam, 2017(15) SCC 67; Bikramjit Singh Vs. State of Punjab, (2020) 10 SCC 616*** and ***M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485***.

7. In *Rakesh Kumar Paul's* case relevant paras referred by learned counsel for the petitioner read as under:-

“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.

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 *Mohamed Iqbal Madar Sheikh v. State of Maharashtra* (1996) 1 SCC 722 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.

Procedure for obtaining default bail

40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for “default bail” on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court – he made no specific application for grant of ‘default bail’. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail – such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too

technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

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

42-43.

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.

45-48

49. The petitioner is held entitled to the grant of 'default bail' on the facts and in the circumstances of this case. The Trial Judge should release the petitioner on 'default bail' on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

8. In *Bikramjit Singh's* case relevant paras read as under:-

"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.

37.

38. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on "default bail" under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgment will have no impact on the arrest of the petitioner in any other case."

9. In *M. Ravindran's* case, the Supreme Court, after considering its earlier pronouncements including judgments in *Rakesh Kumar Paul's* and *Bikramjit Singh's* cases referred supra has concluded that indefeasible right accruing to the accused under Section 167 (2) Cr.P.C. does not get extinguished by subsequent filing of additional complaint by investigating agency and Court should take into consideration the time of filing of the application for bail based on default of investigating agency, but not the time of disposal of application for bail. The conclusion drawn by the Court is as under:-

"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 36A (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 chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet 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 chargesheet, 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.”

10. Applying the provisions of law, in light of principles propounded by the Supreme Court, to the facts of present case, where challan has been filed after expiry of statutory period of sixty days, without any extension of time from the concerned Court/Magistrate and also after the oral submission made by learned counsel for the petitioner for enlarging the petitioner on default bail by invoking provisions of Section 167 Cr.P.C. coupled with the fact that petition for bail has been filed on behalf of petitioner in April, 2021 undertaking therein to abide by any condition imposed upon him by the court and

learned counsel for the petitioner is constantly contending that petitioner is ready to furnish bail bonds for extending his undertaking averred in para 6 of the application/petition, I find that petitioner is entitled for 'default bail' under Section 167(2) Cr.P.C. and accordingly in case of furnishing personal bond in the sum of ₹50,000/- with one surety in the like amount to the satisfaction of trial Court/Special Judge, petitioner is ordered to be enlarged on bail, subject to following further conditions:-

- (i) *That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;*
- (ii) *that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to Court or to any Police Officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;*
- (iii) *that the petitioner shall not obstruct the smooth progress of the investigation/trial;*
- (iv) *that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;*
- (v) *that the petitioner shall not misuse his liberty in any manner;*
- (vi) *that the petitioner shall not jump over the bail;*
- (vii) *that the petitioner shall keep on informing about the change in address, landline number and/or mobile number, if any, for his availability to Police and/or during trial;*
- (viii) *that the petitioner shall not leave India without permission of the Court.*

11. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

12. In case the petitioner violates any conditions imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

13. It is made clear that enlargement of petitioner on default bail shall not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to file petition for grant of regular bail which application should be considered on its own merit.

14. Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

15. Observations made in this petition hereinbefore shall not affect merits of the case in any manner and are strictly confined for the disposal of the bail application.

16. The petitioner is permitted to produce copy of order downloaded from the High Court website and the trial Court shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

The petition stands disposed of in the aforesaid terms.

Dasti copy on usual terms.

28th June, 2021
(Keshav)

(Vivek Singh Thakur),
Judge.