IN THE HIGH COURT OF MANIPUR

AT IMPHAL

BAIL APPLICATION No. 24 of 2021

Ramyang Keishing, aged about 27 years, s/o Joseph Keishing, Kangpat Khunou Village, Kamjong District, Manipur.

... Petitioner.

-Versus -

The State of Manipur represented by the Officer-in-Charge, Women Police Station, P.O.& P.S.Ukhrul, Ukhrul District, Manipur.

……..Respondents.

B E F O R E

HON'BLE MR. JUSTICE AHANTHEMBIMOL SINGH

For the petitioner	:	Mark Khapai, Adv
For the respondent	:	Y. Ashang, G.A.
Date of Hearing	:	03.12.2021 & 06.12.2021.
Date of Order	:	**13.12.2021**

JUDGMENT & ORDER
(CAV)

The present application had been filed under section 439 of the CrPC with a prayer for granting bail to the petitioner in connection with FIR No. 03 (11) 2018 WPS Ukl u/s 6 of the POCSO Act, 2012.

[2] Mr. Mark Khapai, learned counsel for the petitioner submitted that the petitioner was arrested by a Combine Team of Women Police Personnel of Ukhrul Police Station on 05.11.2018 on mere suspicious ground that the petitioner had forcibly raped and committed sexual assault on 03.11.2018 to the victim who is a minor girl of Kongkan Vilage, Kamjong District. It has been

submitted that after his arrest on 05.11.2018, the petitioner has been under Judicial Custody till today.

The learned counsel further submitted that while the petitioner was in judicial custody since his arrest, the I.O. of the case submitted the charge sheet against the petitioner only on 11.11.2019 after more than 1 (one) year of the arrest of the petitioner and beyond the statutory period, however, the petitioner could not file any bail application in time before filing charge sheet for granting statutory bail due to financial constraint and lack of legal knowledge.

[3] It has also been submitted on behalf of the petitioner that the petitioner earlier approached the special Judge (POCSO), Ukhrul in 2021 by filing Cril. Misc. (Bail) No. 5 of 2021 for releasing the petitioner on bail, however, the learned Special Judge (POCSO), Ukhrul rejected the said bail application by an order dated 12.04.2021.

[4] It has been strenuously submitted by Mr. Mark Khapai, the learned counsel appearing for the petitioner that as the I.O. of the case failed to submit the Charge-Sheet of the case within the statutory period prescribed under section 167 of the CrPC, the petitioner is entitled to the grant of default bail as provided under section 167 of the CrPC.

[5] Mr. Y. Ashang, learned PP appearing for the respondent submitted that the right under section 167 (2) CrPC to release on bail on default if charge-sheet is not filed within the prescribed period from the date of arrest is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survived after filing of the charge-sheet. The

learned PP submitted that even if an application for bail is filed on the ground that charge-sheet was not filed within the prescribed period, but before consideration of the bail application and before being released on bail, if charge-sheet is filed, the said right of the accused to be released on default bail would be lost. The learned PP further submitted that as the charge-sheet had already been filed in the present case, the ground raised by the petitioner for releasing him on default bail has no merit and that as the learned counsel for the petitioner did not address this Court on the merit of the case for granting bail, the present bail application deserves to be rejected. In support of his contentions, the learned PP relied on the judgment rendered by the Apex Court in the case of ***"Pragyna Singh Thakur Vs. State of Maharashtra"*** reported in (2011) 10 SCC 445, wherein, it has been laid down at paragraph 54 and 58 as under:-

> ***"54*** *There is yet another aspect of the matter. The right under Section 167 (2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in Sanjay Dutt (2) v. State [paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49.*
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> ***"58*** *From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not*

filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all."

[6] The above principle at paragraph 54 and 58 of ***"Pragyna Singh Thakur's"*** case (Supra) had been declared as not the correct principle of law and the same has been treated to be not a good law and had been impliedly overruled by the Apex Court in a subsequent judgment rendered in the case of ***"Union of India Vs. Nirala Yadav"*** *reported* in (2014) 9 SCC 457. The relevant portions of the judgments are as under:-

> ***"45*** *The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur which we have emphasised as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya which has been followed in Hassan Ali Khan and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case the learned Judges have referred to Uday Mohanlal Acharya case but have stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.*

*"**46** At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so: (SCC p. 481, paras 29-30)*

> *"**29**. My learned Brother has referred to the expressing 'if not already availed of' referred to in the judgment in Sajay Dutt case for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a) (ii) of the proviso read with Explanation I to Section 167 (2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167 (2) is over, as such right is extinguished the moment the challan is filed.*
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> *"**30** In this background, the expression 'availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."*

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is binding precedent. That apart, it has been

followed by a three-Judge Bench in Sayed Mohd. Ahmad Kazmi case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case which is based on three-Judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold that the principle laid down in para 54 and 58 of Pragyna Singh Thakur case (which has been emphasized by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd.

[7] As the principle of law laid down in paragraph 54 & 58 of **"*Pragyna Singh Thakur's*"** case (Supra) had been impliedly overruled by the subsequent judgment of the Hon'ble Apex Court in the case of **"*Nirala Yadav*"** (Supra), this Court cannot accept the contention made by the learned PP and the present bail application cannot be rejected on the basis of such submission.

[8] In the case of ***"Sanjay Dutt Vs. State through CBI, Bombay (II)"*** reported in (1994) 5 SCC 410, a constitution bench of 5 (five) Judges of the Hon'ble Apex Court has laid down that the indefeasible right accruing to the accused for availing default bail by virtue of section 167 CrPC is enforceable only prior to the filing of the charge-sheet and it does not survive or remain enforceable on the charge-sheet being filed if already not avail off, and that once the charge-sheet has been filed, the question of grant of bail has to be considered and decided only with reference to the merit of the case under the provisions relating to grant of bail to an accuse after the filing of the charge-sheet/challan and as the custody of the accused after the challan/charge-sheet has been filed is not governed by section 167 but by different provisions

of the CrPC. The Hon'ble Apex Court further held that if the right for availing default bail had accrued to the accused but if remain unenforced till the filing of the charge sheet/challan, then there is no question of its enforcement thereafter, since it is extinguished the moment when the charge sheet/challan is filed because section 167 CrPC ceased to apply. The relevant paragraph of the Judgment are as under:-

> ***"48*** *We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20 (4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filling of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the Investigation according to the proviso in Section 20 (4) (bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The*

accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan v. State of Punjab; Ram Narayan Singh v. State of Delhi and A.K. Gopalan v. Government of India.)

"53 As a result of the above discussion, or answer to the three questions of law referred for our decision are as under:

> ***"2)(a)*** *Section 20 (4) (bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167 (1)of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in Hitendra Vishnu Thakur.* The requirement of such notice to the accused before granting the extension for completing the Investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose
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> ***"2)(b)*** *The "indefeasible right" of the accused to be released on bail in accordance with Section 20 (4) of the TADA Act read with Section 167 (2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filling of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this*

provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan by the provisions relating to the grant of bail applicable at that stage."

[9] The aforesaid principle of law laid down by the Apex Court in the case of Sanjay Dutt (Supra) has been followed by the Apex Court in many subsequent judgments including the case of ***"Sayed Mohd. Ahmad Kazmi Vs. State (Govt. of NCT of Delhi)"*** reported in (2012) 12 SCC 1 wherein, the Hon'ble Apex Court has in paragraph 25 of the Judgment held that it is well established that if an accuse does not exercise his right to grant statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge sheet is filed and can, thereafter, only apply for regular bail.

[10] In the present case, the accused was arrested on 05.11.2018 and he remains in custody till today. The I.O. submitted the charge-sheet on 11.11.2009 after about 1 (one) year from the date of arrest of the petitioner. Even though, the petitioner is entitled to the grant of statutory bail as provided under section 167 of the CrPC on account of default of submitting charge-sheet within the prescribed period, however, as the petitioner did not file any application for releasing him on statutory bail before filing of the charge-sheet and as the petitioner filed such application only after the charge-sheet has been filed, I am of the considered view that the petitioner is not at all entitled to grant of default bail in view of the well settled principle of law laid down by

the Apex Court in the aforesaid case of ***"Sanjay Dutt (Supra)"*** and ***"Mohd. Ahmad Kazmi (Supra***)."

In the result, this Court find no merit in the present application and accordingly, the same is hereby dismissed.

JUDGE

FR/NRF

Sapana