Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2472 OF 2022
a/w
INTERIM APPLICATION NO.2592 OF 2024
IN
CRIMINAL BAIL APPLICATION NO.2472 OF 2022

Sunil Vitthal Wagh	]	
Age: about 33 years, Occ:- Nil	]	
R/at: Sunaynanagar, Post: - Yashwantnagar	]	
Akluj, Tal. Malsiras, District Solapur	]	
(At present in Kolhapur Central Prison)	]	Applicant
Vs.		
State of Maharashtra through	]	
Senior Inspector Pandharpur – City	]	
Police Station.	]	Respondent

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Mr. Aabad Ponda, Senior Advocate a/w Mr. Sumit Tiwari, Mr. Shailesh Kharat, Mr. Jugal Kamani, Mr. Sajid Mahat i/b Mr. Ashish Raghuwanshi, for Applicant.

Mr. H.S. Venegavkar, P.P a/w Ms. P.P. Shinde, A.P.P, for Respondent – State.

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CORAM : REVATI MOHITE DERE &
PRITHVIRAJ K. CHAVAN, J.J.
RESERVED ON : 7th October, 2024.
PRONOUNCED ON : 19th December, 2024

JUDGMENT : [Per Prithviraj K. Chavan, J.] :-

1. The Hon'ble the Chief Justice has assigned the task of answering a referral order passed by a Single Judge of this Court

(Coram: N.J. Jamadar, J), who, having noticed two conflicting decisions rendered by the learned Single Judges of this Court in case of ***Anil Somdatta Nagpal and Lalit Somdatta Nagpal Vs. The State of Maharashtra***[1] delivered by Hon'ble Mr. Justice Shri S.C. Dharmadhikari (as he then was) and Hon'ble Mr. Justice S. B. Shukre (as he then was) in the case of ***Pankaj Vs. The State of Maharashtra and others***[2] invoked Rule-8 of Chapter-I of the Bombay High Court (Appellate side) Rules, 1960.

2. Justice S.C. Dharmadhikari was of the view that once a charge-sheet is filed under Section 173 (2) of the Code of Criminal Procedure (for short "Code") and the cognizance of the offence thereof has been taken, subsequent arrest of the accused does not entitle him to avail the benefit of default bail as provided in sub-section (2) of Section 167 of the Code. He was of the view that a further report tendered under section 173 (8) of the Code, post arrest and detention of the accused is, essentially, in the nature of further investigation and as such, investigation can be carried out even after forwarding a report under section 173 (2) of the Code. Such further report under section 173 (8) of the Code would not

1 2006 Cri. L.J. 1307
2 Criminal Writ Petition No.475 of 2016

have any bearing on the so-called right of the accused under section 167 (2) of the Code. The learned Judge concluded that once a charge-sheet has been filed, indefeasible right of default bail stands extinguished.

3. On the other hand, Justice S. B. Shukre has taken an altogether different view, albeit without referring to the judgment in the case of ***Anil Somdatta Nagpal*** (supra) holding therein that for ascertaining whether the right of default bail is accrued, the date on which charge-sheet is filed after completion of investigation against the accused becomes relevant. In case, further investigation commenced against the accused arrested after filing of the charge-sheet in which he is shown as absconding, completion of investigation shall be declared only by the act of filing of supplementary charge-sheet in view of Section 173 (8) of the Code against him. If a supplementary charge-sheet against such an accused is not tendered within the stipulated period as provided under section 167 (2) of the Code, Mr. Shukre held that the accused would get an indefeasible right of default bail.

4. Mr. Ponda, learned Senior Counsel, in his usual erudition emphatically argued that the subsequent decision in the case of ***Pankaj*** (supra) promotes the object of the provisions contained in Section 167 of the Code. Mr. Ponda would argue that earlier decision in case of ***Anil Somdatta Nagpal*** (supra) has been dissented by Madras High Court in case of ***Dinesh s/o Rajaram Korku and another Vs. The State of Madhya Pradesh and another***,[3]. Mr. Ponda is of the view that, in any event, tendering a final report under section 173 of the Code, *inter alia*, showing an accused as absconding in view of Section 299 of the Code would not be legally permissible. In the case at hand, a charge-sheet came to be filed on 15th September, 2018, on which date, it cannot be construed that the applicant was in the picture. Therefore, remand of the applicant after his arrest on 28th August, 2021 could not have been under the provisions of section 309 of the Code. It is significant in light of the fact that remand report indicates that it was filed under section 167 and not under Section 309 of the Code. If the applicant was remanded under section 167 of the Code, then the applicant should not and cannot be deprived of his right to default bail, emphasized Mr. Ponda.

3 Criminal Appeal No.5380 of 2022

5. A plethora of judgments has been pressed into service by Mr.Ponda, learned Senior Counsel and also by Mr. Venegavkar, learned Public Prosecutor, eventually, both of them are *ad idem* as regards the ratio decidendi of most of the judgments which accentuate and magnify the view taken by this Court in case of ***Pankaj*** (supra). We shall, in the ensuing paragraphs, deal with those decisions.

6. Mr. Ponda would argue that Article 21 of the Constitution of India is intrinsically linked to the history of the enactment of section 167 (2) of the Code and the safeguard of default bail contained in the proviso is nothing but a legislative exposition of the constitutional safeguard that no person shall be denied of his liberty except in accordance with the rule of law. We have, no doubt, in our mind that section 167 (2) of the Code is integrally linked to the constitutional commitment under Article 21 promising the protection of life and personal liberty against an unlawful and arbitrary detention, the section must be interpreted in a manner which serves this purpose.

7. Before we deal with the issue involved, we find it pertinent to mention that in the present case, this Court is not dealing with the merits of the case and as such is not inclined to make any observation regarding the same. Every court, when invoked to exercise it's powers, must be mindful of the relief sought, and must act as a forum confined to such relief. In the case at hand, we are not sitting in appeal, but a court of writ, and, therefore, is inclined to limit its jurisdiction only to the personal liberty of the applicant and the impugned points of law.

8. Mr. Ponda would further argue that it is now well settled in law that a person falling in the category of "wanted accused" may not be aware that he is "wanted" because he may have changed his address voluntarily but unknowingly left the State or the country for better prospects and he would be apprehended as an "absconder". It would be a travesty of justice if he is not provided with the protection of a right under section 167 (2) of the Code as this category of persons includes not only the persons who have absconded but also the persons who are charge-sheeted without knowing that they are "wanted" and in the eyes of agency are termed as "absconders".

9. As such, Mr. Ponda, learned Senior Counsel as well as Mr. Venegavkar, learned Public Prosecutor are on the same page in so far as right under section 167 (2) of the Code being an absolute, indefeasible right which is unconditional. Both are of the firm view that any interpretation which deviates from the principle of the existence of this right as being applicable to only one set of the accused and not to another set of accused, would fall foul of the Constitutional guarantee enshrined in Article 14 of the Constitution of India. As such, learned Senior Counsel as well as learned Public Prosecutor resounded with echoes, *inter alia*, requesting us to re-affirm the view demystified in the various authoritative pronouncements in consonance with the view in the case of **Pankaj** (supra).

10. While putting forth his dexterous argument, Mr. Venegavkar, learned Public Prosecutor has raised following two pertinent points viz: whether investigation carried out post arrest of the petitioner can be said to be further investigation in view of section 173 (8) of the Code or fresh investigation? Secondly, whether the custody of the petitioner who came to be arrested after filing of the charge-

sheet will be governed by section 309 (2) or section 167 (2) of the Code? Answer to these questions, according to Mr. Venegavkar, could be found in the judgment in case of ***Pradeep Ram Vs. State of Jharkhand and another***[4] as well as in case of ***State through CBI Vs. Dawood Ibrahim Kaskar and others,***[5]**.** He would further submit that in view of the ratios laid down by the Supreme Court in the said decisions as well as another several decisions, it has been enunciated that section 309 (2) of the Code empowers granting remand or continuing remand to accused who is in custody after taking cognizance of the offence, but does not refer to granting remand to an accused who was unavailable during investigation and filing of charge-sheet, but having been arrested during further investigation of the same case.

11. In the case of ***State through CBI Vs. Dawood Ibrahim Kaskar and others*** (supra), the Supreme Court has further clarified that the Police who have been empowered to carry out further investigation into the case cannot be deprived of an opportunity to interrogate a person arrested during further investigation merely because section 309 (2) of the Code has become operative. Mr. Venegavkar would

4 (2019) 17 Supreme Court Cases 326
5 (2000) 10 Supreme Court Cases 438

invite our attention to the words in section 309 (2) *"accused, if in custody"*, refer only to an accused who was before the Court when cognizance was taken or when inquiry or trial was held and will definitely not apply to an accused who was subsequently arrested in the course of further investigation. As such, Mr. Venegavkar would further contend that in the event any accused is subsequently or later arrested by the Police during the course of such investigation, then such accused can be taken into Police custody under section 167 (2) of the Code for the purpose of interrogation and investigation. He would place reliance on a decision of the Supreme Court in cases of ***Central Bureau of Investigation, Special Investigation Cell -I, New Delhi Vs. Anupam J Kulkarni***[6] *and* ***Dinesh Dalmia Vs. Central Bureau of Investigation***[7]. Thus, Mr. Venegavkar would conclude by contending that the reference may be answered by holding that the view expressed by this Court in case of ***Pankaj Vs. State of Maharashtra and others*** (supra) is the view which is in consonance with the decisions rendered by the Supreme Court in cases of ***Pradeep Ram Vs. State of Jharkhand and another*** (supra), ***State through CBI Vs. Dawood Ibrahim Kaskar and others*** (supra) ***Central Bureau of Investigation Vs. Anupam J.***

6 AIR 1992 Supreme Court 1768
7 (2007) 8 Supreme Court Cases 770

Kulkarni (supra).

12. A few facts germane for answering the reference are encapsulated as follows.

13. The petitioner has been arraigned in C.R. No.244 of 2018 registered with Pandharpur Police station for the offences punishable under sections 120B, 302, 303, 201, 143, 147, 148 and 149 of the Indian Penal Code (for short "I.P.C"), sections 3,4,5, 25 and 27 of the Arms Act, 1959, section 135 of the Maharashtra Police Act, 1951 and sections 3 (1) (i) (ii), 3 (2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (for short "MCOC Act, 1999"). The petitioner has been shown as accused No.25 and his status was that of an absconder. One Gopal Bajirao Ankushrao – accused No.18 is the henchman of an organized syndicate known as "Sirji' Gang. A criminal conspiracy was hatched on 18th March, 2018 wherein 26 accused including a child-in-conflict with law, who were members of an organized crime syndicate of Gopal Bajirao Ankushrao committed murder of one Sandeep Pawar who was then a municipal councilor by shooting and

assaulting him by means of deadly weapons at Shriram Bhojanalay, Station Road, Pandharpur. An F.I.R was registered on 19th March, 2018. A charge-sheet was filed on 15th September, 2018 against the co-accused wherein the petitioner has been arraigned as accused No.25 and was shown absconding.

14. The petitioner was arrested on 28th August, 2021, however, charge-sheet purportedly lodged *qua* him by invoking section 299 of the Code. He was produced before the Special Court constituted under MCOC on 29th August, 2021 and was remanded to Police custody till 6th September, 2021. The remand further extended till 9th September, 2021. The petitioner moved an application under Section 167 (2) of the Code on 28th February, 2022 which came to be rejected by the concerned Court by an order dated 11th March, 2022. A supplementary charge-sheet came to be filed against the petitioner under section 173 (8) of the Code subsequently on 28th February, 2022 itself.

15. The learned Special Judge, MCOC, Pandharpur rejected the application precisely on the premise that charge-sheet has already been submitted against the petitioner and other co-accused on 15th

September, 2018 and, the subsequent arrest of the petitioner was only on the basis of the additional evidence collected by the Investigating Agency in the form of supplementary charge-sheet under section 173 (8) of the Code. He, therefore, was of the opinion that the petitioner was not entitled to default bail. The learned Judge, *inter alia,* observed that investigation for the offence under the Special Statute was not new investigation but further investigation in respect of the offences which came to be registered at the beginning. Since charge-sheet has already been filed on 15th September, 2018 and cognizance of the offence had already been taken by the Special Court, MCOC, no indefeasible right accrued to the petitioner under section 167 (2) of the Code though statutory period of 180 days elapsed since the date of remand of the applicant post his arrest on 28th August, 2021.

16. The law of liberty is often the battle of principles of procedural protection; but great principles seldom escape working injustice in particular things. Article 21 of the Constitution of India is intrinsically linked to the history of the enactment of section 167 (2) of the Code and the safeguard of default bail contained in the proviso is nothing but a legislative exposition of the constitutional

safeguard that no person shall be denied his liberty except in accordance with the rule of law.

17. The statement and Objects in the 41st Report of the Law Commission with respect to section 167 (2) of the Code is an important aid of construction. Section 167 (2) has to be interpreted keeping in mind threefold objectives which are subsets of the overarching fundamental right guaranteed under Article 21, namely, expeditious investigation and trial, fair trial and setting down a rationalized procedure to protect the interests of indigent sections of society. The three Judge Bench of the Supreme Court in it's well-known decision in case of ***M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence,***[8] delved deep, extensively on the aspect of interplay between "right to default bail" and "fundamental right to life and personal liberty" with regard to the question of applicability of the provisions contained in Section 167(2) of the Code. It would be apposite to extract the observations in paragraphs 17.1, 17.2, 17.7, 17.10 and 17.11, which read as under;

> ***"17.1. Article 21 of the Constitution of India provides that "no person shall be deprived***

8 (2021) 2 Supreme Court Cases 485

of his life or personal liberty except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2), CrPC and 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.

17.2. Under Section 167 of the Code of Criminal Procedure, 1898 ('1898 Code') which was in force prior to the enactment of the Cr.P.C, 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 investigating 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 the 1898 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 758-760) 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.

17.7. 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. In this regard we find it useful to refer to the decision of the three - Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67, which laid down certain seminal principles as to the interpretation of Section 167(2) CrPC though the questions of law involved were somewhat different from the present case. The questions before the three - Judge Bench in Rakesh Kumar Paul were whether, firstly, the 90 day remand extension under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90 day limit is only available in respect of offences where a minimum ten year's imprisonment period is stipulated, and that the

oral arguments for default bail made by the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the Court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: (SCC pp.95-96&99, paras 29,32 & 41)

> *"29. Notwithstanding this, the basic legislative intent of completing investigations within twenty four hours and also within an otherwise time - bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature....*
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> ** * **
>
> *32...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an accused person is not*

unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

* * *

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."

(emphasis supplied)

Therefore, the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

> *17.10. With respect to the CrPC particularly, the Statement of Objects and Reasons (supra) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the three fold objectives expressed by the legislature, namely, ensuring a fair trial, expeditious investigation and trial, and setting down a rationalized procedure that protects the interests of indigent sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed under Article 21.*
>
> *17.11. Hence, it is from the perspective of upholding the fundamental right to life and personal liberty under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2) for the purpose of resolving the dilemma that has arisen in the present case?."*

The Supreme Court in the aforesaid decision elucidated the right to default bail as an important facet of the constitutional guarantee under Article 21, *inter alia*, observing that section 167(2) of the Code is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with the rule of law.

18. Mr. Ponda, has thereafter invited our attention to a decision in the case of **State through CBI Vs. Dawood Ibrahim Kaskar and others** (supra). A series of bomb explosions took pace in and around the city of Mumbai on the fateful day of 12th March, 1993

which resulted in the death of 257 persons, injuries to 713 persons as well as causing damage to properties worth Rs.27 crores approximately. Over the explosions, 27 criminal cases were registered and on completion of investigation a composite charge-sheet was forwarded to the Designated Court, Greater Bombay on 4th November, 1993 against 198 accused persons, showing 45 of them as absconders, for commission of various offences punishable under the Indian Penal Code, the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA" for short), Arms Act, 1959, Explosive Substances Act, 1908 and other Acts. On that charge-sheet, the Designated Court took cognizance and the case registered thereon was numbered as BBC (Bombay Blast Case) No.1 of 1993. Without adverting to the other details, observations of three Judge Bench of the Supreme Court can be deciphered in paragraphs 10 and 11 in respect of the provisions of Sections 173 (8) and 309 (2) of the Code. Paras 10 and 11 are extracted below for ready reference;

> *"10. In keeping with the provisions of Section 173(8) and the above quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance on an offence, to authorise the detention of a*

person, who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry of trial and sub-section (2) thereof reads as follows:

> *"309 (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:*
>
> *Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time:"*

11. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after

cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri 1994, Cr.LJ 1854 Bom. to mean that after the Court takes cognizance of an offence it cannot exercises its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are, therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which has taken cognizance of the offence

> *may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167."*

19. The Supreme Court has authoritatively propounded the scope and interplay between sections 167, 309 (2) and 173 (8) of the Code by observing that even after taking cognizance of an offence, the Court can authorize detention of an accused in police custody arrested during further investigation. The emphasis was on the words "accused if in custody" in section 309 (2) which, according to the Supreme Court, does not refer to a person who is arrested in course of further investigation. Remand and custody referred in the first proviso to section 309 relates to post cognizance stage and can only be to judicial custody.

20. In order to reinforce his argument, Mr. Ponda has pressed into service a recent decision of the Supreme Court in case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and another***,[9]. Paragraph 39 is reproduced below;

> *39. Section 167 (2) was introduced in the year 1978 giving emphasis to the maximum period of time to complete the investigation. This provision*

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has got laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society. This is also another limb of Article 21. Presumption of innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the investigating agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, inuring to the benefit of suspect".

21. The Supreme Court, while elucidating the scope of section 167 (2) has succinctly made following observations in paragraph 40 and 41 which read as under;

"40. Such a right cannot be taken away even during any unforeseen circumstances, such as the recent pandemic, as held by this court in M. Ravindran v. Directorate of Revenue Intelligence, (2021) 2 SCC 485: (SCC pp.502-06, para 17)

"II. Section 167(2) and the Fundamental Right to Life and Personal Liberty

17. Before we proceed to expand upon the parameters of the right to default bail under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] on the fundamental right to personal liberty of the person

and the effect of deprivation of the same as follows: (SCC p. 472, para 13)

> *"13. … Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution."*

"17.1. Article 21 of the Constitution of India provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2), Cr.P.C. and 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.

17.2. Under Section 167 of the Code of Criminal Procedure, 1898 ('1898 Code') which was in force prior to the enactment of the Cr.P.C, 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 investigating 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 the 1898 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 758-760) 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.

17.3. 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.

17.4. 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, pp. 76-77). The Law Commission re-emphasised 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.

17.5. 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 Cr.PC. The Statement of Objects and Reasons of the Cr PC 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.'

17.6. It was in this backdrop that Section 167(2) was enacted within the present day Cr PC 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.

17.7. 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. In this regard we find it useful to refer to the decision of the three - Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67, which laid down certain seminal principles as to the interpretation of

Section 167(2) CrPC though the questions of law involved were somewhat different from the present case. The questions before the three - Judge Bench in Rakesh Kumar Paul were whether, firstly, the 90 day remand extension under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90 day limit is only available in respect of offences where a minimum ten year's imprisonment period is stipulated, and that the oral arguments for default bail made by the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the Court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: (SCC pp.95-96&99, paras 29,32 & 41)

> *"29. Notwithstanding this, the basic legislative intent of completing investigations within twenty four hours and also within an otherwise time - bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down*

by the legislature....

* * *

32...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

* * *

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."

(emphasis supplied)

Therefore, the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

17.8. We may also refer with benefit to the recent judgment of this Court in S. Kasi v. State (2021) 12

SCC 1, wherein it was observed that the indefeasible right to default bail under Section 167 (2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasised that 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.

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.

17.10. With respect to the Cr.P.C. particularly, the Statement of Objects and Reasons (supra) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the three fold objectives expressed by the legislature, namely, ensuring a fair trial, expeditious investigation and trial, and setting down a rationalized procedure that protects the interests of indigent sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed under Article 21.

17.11. Hence, it is from the perspective of upholding the fundamental right to life and personal liberty under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2)

for the purpose of resolving the dilemma that has arisen in the present case.

(emphasis in original and supplied)

41. As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an accused gets the benefit of Section 167 (2)."

22. In the case of ***Pradeep Ram Vs. State of Jharkhand*** (supra), the Supreme Court reiterated that even after taking cognizance when an accused is subsequently arrested during further investigation, he can be remanded under section 167 (2) of the Code. On the contrary, when cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only under section 309 (2) of the Code. The relevant paragraphs of the said decision are reproduced herein below;

"64. After having noticed, the relevant provisions of Section 167(2) and Section 309 Cr.P.C and law laid down by this Court, we arrive at the following conclusions:

64.1. The accused can be remanded under Section 167(2) Cr.P.C during investigation till cognizance has not been taken by the Court.

64.2. That even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded under Section 167(2) Cr.P.C.

64.3. When cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only under Section 309(2) Cr.P.C."

23. The Supreme Court in case of ***Pradeep Ram Vs. State of Jharkhand*** (supra) has referred a three Judge bench judgment in the case of ***State through CBI Vs. Dawood Ibrahim Kaskar and others*** (supra). It is thus clear that section 309 (2) of the Code does not refer to an accused who is subsequently arrested in course of further investigation. It has been clearly held that even after cognizance is taken of an offence, the police has a power to investigate into it further and there is no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation.

24. Last but not the least is the decision in the case of ***Dinesh Dalmia Vs. CBI*** (supra), wherein the Supreme Court having meticulously surveyed the earlier decisions in case of ***State through CBI Vs. Dawood Ibrahim Kaskar and others*** (supra) and ***C.B.I Vs. Anupam Kulkarni*** (supra) enunciated the scope and applicability of

section 167 (2) and 309 (2) of the Code as well as preconditions for availability and effect of filing of charge-sheet while the accused was absconding and yet to be arrested. It would be advantageous to refer the relevant paragraphs which read as under:

> *"19. A charge sheet is a final report within the meaning of sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge-sheet must await the arrest of the accused.*
>
> *20. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of Sub-section (8) of Section 173 is not taken away only because a charge sheet under Sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.*

24. Concededly, the investigating agency is required to complete investigation within a reasonable time. The ideal period therefor would be 24 hours, but, in some cases, it may not be practically possible to do so. Parliament, therefore, thought it fit that remand of the accused can be sought for in the event investigation is not completed within 60 or 90 days, as the case may be. But, if the same is not done with the stipulated period, the same would not be detrimental to the accused and, thus, he, on the expiry thereof would be entitled to apply for bail, subject to fulfilling the conditions prescribed therefor.

25. Such a right of bail although is a valuable right but the same is a conditional one; the condition precedent being pendency of the investigation. Whether an investigation in fact has remained pending and the investigating officer has submitted the charge-sheet only with a view to curtail the right of the accused would essentially be a question of fact. Such a question strictly does not arise in this case inasmuch as, according to the CBI, sufficient materials are already available for prosecution of the appellant. According to it, further investigation would be inter alia necessary on certain vital points including end use of the funds.

38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by the Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the

> *investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge sheet is not filed within the meaning of Sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of Sub-section (8) of Section 173 of the Code.*
>
> *39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under Sub-section (2) of Section 173 and further investigation contemplated under Sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to Sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Sub-section (8) of Section 173 of the Code".*

25. Turning back to the facts of the case at hand, when the charge-sheet was filed on 15th September, 2018, the petitioner was neither in custody nor any inquiry or trial had commenced, albeit he was shown as an absconder, till the time he came to be arrested on 28th August, 2021. In light of the aforesaid facts, indefeasible right of the petitioner will have to be viewed in context of the spirit

and the legislative mandate upholding fundamental right to life and personal liberty enshrined in Article 21 as has been authoritatively assimilated by various decisions of the Supreme Court discussed hereinbefore, more particularly, in cases of ***M. Ravindran*** *(supra),* ***State through C.B.I Vs. Dawood Ibrahim Kaskar*** (supra), ***Dinesh Dalmia Vs. CBI*** (supra) and ***Satender Kumar Antil Vs. Central Bureau of Investigation and another*** (supra).

26. Having juxtaposed the decisions of two learned Single Judges of this Court in cases of ***Pankaj*** (supra) and ***Anil Nagpal*** (supra), we, in light of the discussion made hereinabove hold that the decision in case of ***Pankaj*** (supra) is appropriate and felicitous with the object of Section 167 (2) of the Code. The decision in the case of ***Anil Nagpal*** (supra) rendered by another Single Judge of this Court is incongruous, which is neither in consonance with the object of section 167 (2) of the Code nor in conformity with the views of the Supreme Court as enunciated hereinabove.

27. Last but not the least, it cannot be said that there is cleavage of judicial opinion in the aforesaid two decisions, in the sense, there was no occasion to notice, consider and explain the view taken by

another Single Judge in case of ***Anil Nagpal*** (supra), albeit, these two decisions, though antipodal, yet the decision in the case of ***Pankaj*** (supra), in our humble opinion, is in consonance with the decisions and the law propounded by the Supreme Court in the aforesaid decisions.

28. Corollary of the aforesaid deliberation made hereinabove is that the decision in case of ***Pankaj*** (supra) would prevail. As such, the reference is answered accordingly.

29. Before parting with the judgment, we record our candour appreciation for the able assistance rendered by Mr. Ponda, the learned Senior Counsel and Mr. Venegavkar, the learned Special Public Prosecutor.

30. In view of the answer to the reference, Registry is directed to now place the matter before the appropriate Bench dealing with the said assignment.

[PRITHVIRAJ K. CHAVAN, J.] **[REVATI MOHITE DERE, J.]**