

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13TH DAY OF JULY 2021

BEFORE

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

CRIMINAL APPEAL No.505 OF 2019

BETWEEN

Sri. Mohan Nayak N.,
Son of Sri. N.Vasudeva Nayak,
Aged about 50 years,
Residing at "Sree" Nivasa,
Mundadka, Sampaje,
Sullia Taluk, D.K. District.

...Appellant

(By Sri. Gautham Bharadwaj, Advocate for
Sri. E.Suyog Hereie, Advocate)

AND

The State of Karnataka
Rajarajeshwarinagara Police Station,
Bengaluru.

(Represented by
The State Public Prosecutor)
High Court of Karnataka
Bengaluru-560 001.

...Respondent

(By Sri. H.S.Chandramouli, Spl.P.P. for respondent,
assisted by Sri B.T.Venkatesh, Adv., for impleading
applicant in I.A.3/2021)

This Criminal Appeal is filed under Section 12 of
Karnataka Control of Organized Crimes Act, 2000, praying
to set aside the order dated 07.02.2019 passed in

Spl.C.C.No.872/2018 on the file of Principal City Civil and Sessions Judge, Bengaluru, and consequently enlarge the appellant on bail in Cr.No.221/2017 of Rajarajeshwari Nagar Police Station for the offence punishable under Section 302, 120(B), 118 and 114 read with 35 of IPC and Section 3 and 25 of the Indian Arms Act and Section 3(i),(ii),3(iii) and 3(iv) of KCOCA Act.

This Criminal Appeal having been heard and reserved on 30.06.2021, coming on for pronouncement this day, the court pronounced the following:

JUDGMENT

This is an appeal under Section 12 of Karnataka Control of Organized Crimes Act, 2000 (KCOCA). Accused No.11 in Spl.C.C.No.872/2018 on the file of the Principal City Civil and Sessions Judge, Bengaluru, is the appellant. The events that have led to filing of this appeal are as follows:

2. In connection with killing of a journalist by name Gowri Lankesh, FIR came to be registered on 5.9.2017 in relation to offences punishable under section 302 IPC and Section 25 of Arms Act. In the FIR, the appellant herein was not arrayed as an

accused; it was against unknown persons. On 29.05.2018, charge sheet was filed against K.T.Naveen Kumar. On 18.07.2018, the appellant was arrested and remanded to custody on 19.07.2018. On 14.8.2018, the offence under Section 3 of KCOCA was invoked in the FIR and later on it was transferred to the Special Court. Within 90 days from the date of remand of the appellant to the custody, additional charge sheet was not filed against him, but on 23.8.2018, the investigating officer made an application to the Special Court under Section 22(2) of KCOCA seeking extension of time by 90 days to file the charge sheet against the accused persons. The said application was allowed on 29.8.2018. The extended time expired on 27.11.2018 and according to the appellant charge sheet had not been filed till that date. Therefore on 28.11.2018, the appellant made an application under Section 167(2) of Cr.P.C.

claiming statutory bail. The Special court dismissed the application by its order dated 7.02.2019 assigning reason that charge sheet had been filed on 23.11.2018 itself. Aggrieved by the said order, accused No.11 has preferred this appeal.

3. I have heard the arguments of Sri. Gowtham Bhardwaj for the appellant and Sri. H.S. Chandramouli, Special Public Prosecutor for the State.

4. Sri. Gowtham Bhardwaj argued as below:

4.1. The appellant was arrested on 18.7.2018 and remanded to custody on 19.7.2018. The investigating officer had filed charge sheet against accused No.1 much before arresting the appellant. After arresting the appellant and other accused, supplementary or additional charge sheet was supposed to be filed within 90 days from the date of remand of the appellant to the custody and this 90

days period expired on 17.10.2018. Till then charge sheet had not been filed against the appellant. The offence under KCOCA was invoked in the FIR on 14.8.2018. When the appellant was in custody, without any notice to him, the investigating officer sought extension of further 90 days time by making an application on 23.8.2018 for filing the charge sheet in relation to offence under KCOCA and other IPC offences and this application was allowed on 29.8.2018 without hearing the appellant. He submitted that an opportunity should have been given to appellant before granting extension. Since the appellant was not notified, the order dated 29.8.2018 is illegal.

4.2. The appellant filed a writ petition to this court in W.P.9717/2019 challenging the invoking of the offence under KCOCA against him, and the said writ petition was allowed on 22.04.2021 quashing the

FIR in relation to offence under KCOCA. Therefore the appellant cannot be charged for the offence under KCOCA. For this reason the charge sheet against the appellant should have been filed before expiry of 90 days from the date of his arrest and remand to the judicial custody. Admittedly there was no charge sheet and hence he would become entitled to statutory bail under Section 167(2) of Cr.P.C.

4.3. Actually charge sheet was not filed till 27.11.2018, but in the order sheet there is interpolation of date to show that it was filed on 23.11.2018 itself. The date, 23.11.2018 was deliberately inserted in the order sheet to deprive the appellant of his right to claim statutory bail.

4.4. Rule 10 of Chapter V of the Karnataka Criminal Rules of Practice states that as soon as a Magistrate receives the charge sheet, he shall put his

initials on the same together with the date of its receipt. That means cognizance must be taken on the day or as soon as the charge sheet is filed. In the instant case even assuming that charge sheet was filed on 23.11.2018, the Special Judge did not take cognizance on that day. He took cognizance on 17.12.2018 as can be made out from the order sheet. Therefore the detention of the appellant from the date of filing of charge sheet till 17.12.2018 was illegal. Once cognizance is taken, remand of an accused to custody can be made only under section 309 of Cr.P.C. After filing of the charge sheet, the Special Judge cannot remand the accused to custody under section 167(1) Cr.P.C and hence the detention of the appellant in between the dates from 23.11.2018 and 17.12.2018, was illegal. In a circumstance like this, the appellant would be entitled to be released according to section 167(2) Cr.P.C.

5. Sri H.S.Chandramouli, the learned Special Public Prosecutor, assisted by Sri B.T.Venkatesh, learned counsel for the first informant, argued as below : -

5.1. The appellant cannot dispute the order sheet maintained by the trial court, there is no interpolation of date to show that the charge sheet was filed on 23.11.2018. The chief investigating officer has put the date 23.11.2018 below his signature in the charge sheet. For having submitted the charge sheet on 23.11.2018, the Deputy Registrar of the City Civil Court has put up an office note that he received the charge sheet on 23.11.2018. Therefore the charge sheet was filed on 23.11.2018 and not on a later date. The appellant filed the application under Section 167(2) Cr.P.C. on 28.11.2018 and by that time the charge sheet had

already been filed. Taking note of all these aspects the Special Judge rightly dismissed the application.

5.2. So far as the investigating officer is concerned, his duty is to file charge sheet and he is not concerned with what transpires thereafter in the court. In this case the charge sheet consists of about 10,000 pages and probably the office of the court might have taken some time for scrutinizing the charge sheet papers and place it before the Judge. This could be the reason for delay in taking the cognizance. The accused cannot take benefit of this to claim bail under Section 167(2) of Cr.P.C. The moment charge sheet was filed into court, the accused loses his right to claim bail in case he had not filed the application before filing of the charge sheet. In the case on hand since charge sheet had been filed before the appellant made the application, he is not entitled to be released on bail.

5.3. In W.P.9717/2019, invoking of offence under KCOCA might have been quashed. The State has now preferred an appeal to the Supreme Court. Therefore the appellant cannot base his right on the order in the writ petition to claim bail under Section 167(2) Cr.P.C. Even assuming that only the offences under IPC remain by virtue of the order in the writ petition, the appellant is still not entitled to claim bail because after expiry of 90 days from the date of remand of the appellant to judicial custody, he did not file application under Section 167(2) Cr.P.C. Therefore there are no merits in the appeal and it has to be dismissed.

Discussion

6. There is no dispute about the fact that initially charge sheet was filed only against accused no.1 on 29.05.2018. The appellant was arrested on 18.7.2018 and remanded to judicial custody. It is also not in

dispute that when the appellant was arrested, the prosecution had not invoked the offence under Section 3 of KCOCA, he was arrested in connection with offences punishable under Section 302 IPC and Section 25 of the Arms Act. It was on 14.8.2018 that KCOCA offence was invoked. Now if 90 days time is calculated from the date of remand of the appellant to custody, it would end on 17.10.2018. There is no dispute that the investigating officer had not filed additional or supplementary charge sheet till 17.10.2018. The reason was that on 23.8.2018 itself, an application had been made under Section 22(2)(b) of KCOCA seeking extension of time by 90 days to file the charge sheet and the court below granted extension by passing an order on 29.08.2018. If according to appellant until 28.11.2018, the last day when the extended period of 90 days ended, additional charge sheet had not been filed, the

prosecution contends that the charge had been filed on 23.11.2018 itself. The contention of the learned counsel for the appellant that there is interpolation of date in the order sheet to give an impression that the charge sheet had been filed before the expiry of 180 days, cannot be accepted. It is true that in the office note found in the order sheet, the date 23.11.2018 appears to have been inserted, it cannot be the sole reason for disbelieving the proceedings of the court. Sanctity is attached to the marginal office note and whatever a judge writes in the order sheet. It cannot be so lightly attacked. It is very apparent in the charge sheet itself that the chief investigating officer marked the date 23.11.2018 below his signature. There is another reference to the fact that the office of the court below received the charge sheet on 23.11.2018. This argument is therefore not worthy of acceptance.

7. The right that accrues to an accused to claim bail under Section 167(2) Cr.P.C. is indefeasible. The learned counsel for the appellant has placed reliance on some of the judgments of the Supreme Court in the cases of (1). ***Fakhrey Alam vs The State of Uttar Pradesh – (Crl.A.No.319/2021)***, (2). ***M. Ravindran vs Intelligence Officer, Directorate of Revenue Intelligence [2021 (2) SCC 485]***, (3). ***Bikramjit Singh vs State of Punjab [(2020) 10 SCC 616]***, (4). ***Achpal @ Ramswaroop vs State of Rajasthan [(2019) 14 SCC 599]***, (5). ***Rakesh Kumar Paul vs. State of Assam [(2017) 15 SCC 67]*** and (6). ***Hitendra Vishnu Thakur and Others vs State of Maharashtra [(1994) 4 SCC 602]***.

8. In order to maintain the brevity of the order, I do not think it necessary to refer to all the rulings; the conspectus of the rulings is that the indefeasible

right available to an accused under Section 167(2) Cr.P.C. arises the moment the investigating agency fails to file charge sheet into court within the prescribed time, the charge sheet must be complete in all respects. In the event charge is filed, but it is found to be defective, the accused can avail benefit under section 167(2) Cr.P.C.

9. In the case on hand, it is evident that charge sheet was filed on 23.11.2018, before expiry of extended period of 90 days on 27.11.2018. The court below rejected the application of the appellant made under section 167(2) Cr.P.C. just by noting the relevant dates. I do not find any infirmity in the impugned order. But the learned counsel for the appellant raised certain other grounds, which he did not take before the trial court for claiming statutory bail. Therefore these grounds are to be dealt with now.

10. In regard to his argument based on the order in W.P.9717/2019, it is not in dispute that the State has approached Hon'ble Supreme Court. Through Sri. H.S.Chandramouli, put forward an argument that the coordinate bench of this court has not correctly applied the law with regard to invocation of offence under KCOCA, and that there is no impediment for examining that aspect of the matter, I do not think it appropriate to make that venture, any way the Hon'ble Supreme Court is seized of that matter. But until the Supreme Court decides the appeal, the order in the writ petition has the effect of effacing the offence under KCOCA from the FIR since the date of inception as against the appellant, and therefore the offence under Section 302 IPC and Section 25 of the Arms Act remain in FIR. The charge sheet should have been filed within 90 days from the date of remand of the appellant to custody. It was for

this reason that the appellant's counsel argued that the appellant would be entitled to claim bail under section 167(2) Cr.P.C., as according to him, charge sheet had not been filed within 90 days from 19.07.2018, i.e., date of his remand to custody. Of course, this argument is possible, but it may be noted here that the appellant did not file the application under section 167(2) Cr.P.C. soon after expiry of 90 days, he got the application filed on 28.11.2018. It is true that the investigating officer made an application under section 22(2) of KCOCA on 23.08.2018 itself, seeking extension of time to file charge sheet, and referring to these dates the learned counsel for appellant argued that the application was made deliberately to deprive the appellant of his right to avail the right under section 167(2) Cr.P.C. This argument cannot be accepted because the investigating officer might have thought of seeking

extension in view of invoking the offence under KCOCA. Assuming that the appellant would have been entitled to bail in a situation hypothetically pointed by the appellant's counsel, still it may be stated that he rendered himself disentitled to claim bail. In connection with offence under section 302 IPC, he had not filed the application for bail under section 167(2) Cr.P.C., soon after completion of 90 days. Law is that the application from accused for claiming statutory bail must precede the date of filing charge sheet.

11. The next point of argument of appellant's counsel was about granting extension of time to file charge sheet. The learned counsel has placed reliance on the judgment of the Supreme Court in the case of ***Hitendra Vishnu Thakur and Others vs State of Maharashtra [(1994) 4 SCC 602]***. In para 21, it is held,

"21. Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon....."

12. The coordinate bench of this court in the case of ***Muzammil Pasha and others vs National Investigating Agency (W.P.1417/2021 and connected writ petitions)***, while dealing with an identical situation held as below :

"21. In my considered opinion, the judgment of the Hon'ble Supreme Court in the case of Hitendra Thakur and in the case of Sanjay Dutt would be applicable to the facts of the present case. Since the petitioners were not given an opportunity of being heard before passing an order on the application filed by the prosecution for extension of time for completion of the investigation and since the petitioners were not kept present before the court when the application filed by the prosecution for extension of time for completion of the investigation was being considered and since the petitioners were not notified that such an application filed by the prosecution

was being considered by the court for the purpose of extending the time for completion of investigation, I am of the considered opinion that the order passed by the trial court on the application filed by the prosecution under the first proviso to Section 43-D(2)(b) of the Act of 1967 extending the time to complete the investigation is legally unsustainable and accordingly, the point No.1 for consideration is answered in the negative."

13. Thus the position becomes clear that whenever the investigator seeks extension of time to file charge sheet in case the law provides for seeking extension, the accused needs to be notified about the application for extension in order to afford an opportunity to him to oppose the application on any of the grounds available to him. But the appellant cannot lay stress on infraction of this procedure for, if his interest was really affected by extension of time on

the application of the investigator, he should have challenged the said order. Rather he kept quite. It is only in this appeal, this point is raised for the first time. In W.P.1417/2021 and connected matters, the accused questioned the order of granting extension of time without hearing them. The coordinate bench, noticing the principle setout in **Hitendra Vishnu Thakur**, set aside the order granting extension to complete the investigation. Since the appellant did not challenge the order of the special court extending the time to complete investigation, he cannot urge that point now. This argument therefore fails.

14. Now, another point of argument of appellant's counsel is considered, it is about delay in taking cognizance. Indeed the order sheet of the Special Court in Spl.C.C.872/2018, shows that the charge sheet was filed on 23.11.2018 and that the court took cognizance on 17.12.2018. There was

delay. But does it enure to the benefit of appellant to claim statutory bail under section 167(2) Cr.P.C.? Appellant's counsel referred to Rule 10 of Chapter V of The Karnataka Criminal Rules of Practice which reads below:-

*"10. **Charge Sheet:-** (1) As soon as a charge sheet is received by a Magistrate, he shall put his initials on the same together with the date of its receipt. The same shall be entered in Register No.I. The entries in the said Register shall show the number and names of the accused persons and the offences mentioned in the charge sheet. It shall be the responsibility of the Chief Ministerial Officer of the Court to see that such entries are made immediately after the charge sheet is initialled by the Magistrate.*

(2) The charge sheet shall be examined and the Magistrate shall ascertain and take steps to secure, if not already produced,-

- (i) the documents referred to in the charge sheet or certified extracts there of in the case of books or Registers in the custody of Public Officers;*
- (ii) the property seized in the case; and*
- (iii) the report under Section 154 of the Code.*

(3) When the Magistrate sees sufficient grounds to proceed with the case and issues process to the accused the charge sheet shall be entered in the Register of Criminal Cases (Register No.III)."

15. Rule 10 contemplates that the Magistrate has to put his initials on the charge sheet for having received it on a particular date. The rule also speaks about some ministerial work to be attended by the office of the court. Rule 10 does not contemplate taking of cognizance on the same day of filing charge

sheet. Though generally cognizance has to be taken on the date of filing of charge sheet, sometimes, it may not be possible if the charge sheet is voluminous. In the instant case, as submitted by Sri. H.S.Chandramouli, charge sheet consists of 10,000 pages. Unless charge sheet is verified by the office of the court to ascertain that it is complete and defect free, the Magistrate, or the Special Judge, as the case may be cannot apply his mind to decide as to taking cognizance. In case charge is found to be defective, it has to be returned. These are empirical aspects. The argument of appellant's counsel is too hyper technical, it cannot be accepted at all.

16. The learned counsel for appellant raised another technical point, of course he withdrew that point of argument, but I think it necessary to delve on it. His argument was that detention of the appellant between the period 23.11.2018 and 17.12.2018 was

illegal. Because once charge sheet was filed, subsequent remand of an accused to custody must be under Section 309 Cr.P.C. only, there cannot be a remand order under section 167(1) Cr.P.C. The special judge did not take cognizance until 17.12.2018 and therefore there was no remand either under section 167(1) Cr.P.C. or 309 Cr.P.C. after filing of the charge sheet. Sri. Chandramouli argued that the responsibility of the investigator ends with the filing of charge sheet. If the court does not take cognizance immediately after filing charge sheet, the accused cannot insist that he should be released on bail under section 167(2) Cr.P.C. and in support of his argument, he placed reliance on the judgment of the Supreme Court in the case of **Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another [(2013) 3 SCC 77]**.

17. The argument of appellant's counsel is difficult to be accepted. What section 167(2) Cr.P.C. contemplates is filing of charge sheet within specified time. It is true that there are two stages of remand of an accused to custody, one according to section 167(1) Cr.P.C. and another under section 309(2) Cr.P.C. Failure to take cognizance immediately after filing of charge sheet does not make the detention illegal. The Supreme Court in the case of **Suresh Kumar Bhikamchand Jain**, has made this position clear as below :

"18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or

not is not material as far as Section 167 Cr.P.C. is concerned.....”

18. The position of law thus being clear, the appellant cannot take the benefit of delay in taking cognizance in order to claim statutory bail.

19. The foregoing discussion takes me to conclude that the appeal has to fail. Accordingly appeal is dismissed.

20. Application filed by the respondent/State under Section 9 of the Karnataka High Court Act does not survive, it is dismissed.

**Sd/-
JUDGE**

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