

the cognizance order and the proceedings, on the ground that the weapon used in the commission of offence could not be described to be a "dangerous weapon" so as to constitute an offence under Section 324 IPC, would be a question of fact to be examined on the basis of evidence and the same cannot be seen at this stage of proceedings.

56. The facts of the present case indicate that pursuant to the registration of the FIR dated 09.11.2020, the matter was investigated and a police report under Section 173 of the Code was submitted. The Magistrate having the advantage of police report and material submitted along with the same has taken cognizance in exercise of powers under Section 190 (1) (b) and the order taking cognizance clearly states that the Magistrate had perused the charge-sheet, the case diary and the materials which had been submitted along with the same and on the basis thereof had held that there was sufficient material to take cognizance and to register the case. The order of cognizance having thereafter been passed by the Magistrate after having advantage of perusing the police report and the materials therewith, the same therefore cannot be assailed only on the ground that it does not give detailed reasons.

57. Having regard to the aforesaid, this Court is not inclined to exercise its inherent jurisdiction under Section 482 CrPC in the facts of the case.

58. The application thus fails and is dismissed accordingly.

-----  
**(2022)01ILR A400**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SIDE**  
**DATED: ALLAHABAD 21.12.2021**  
**BEFORE**

**THE HON'BLE SANJAY KUMAR PACHORI, J.**

Application U/S 482 Cr.P.C. No.15360 of 2021

**Prateek Shukla** **...Applicant**  
**Versus**  
**State of U.P. & Ors.** **...Opposite Parties**

**Counsel for the Applicant:**

Sri Sanjeev Kumar Shukla, Sri Hemant Kumar Sharma, Sri Prem Prakash Yadav(Senior Adv.), Sri Saghir Ahmad

**Counsel for the Opposite Parties:**

A.G.A., Sri Nirbhay Singh, Sri M.D. Shah

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power -Indian Penal Code, 1860 - Sections 302,307 & 504 , Criminal Law (Amendment) Act ,1932 - Section 7 - when an application for *default bail* is filed, the merits of the matter are not to be gone into - It is 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* - while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court has to be included.(Para -17,18 )**

**(B) Criminal Law - The Code of criminal procedure, 1973 - Section 167(2) - indefeasible right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken because in that event the remand of the accused concerned including one who is alleged to have committed an offence is not under Section 167(2) of the Code but under other provisions of the Code. (Para - 21)**

Applicant moved an application for default bail under Section 167 (2) read with Section 209 of Cr.P.C. - ground - charge sheet not filled within 90 days - application rejected by magistrate - instant application filed to set aside

order passed by magistrate - release the applicant under section 167(2) of the code .(Para -1 to 5 )

**HELD:-**Magistrate was justified in its conclusion arrived through the order impugned that the charge-sheet has been filed within time and rightly rejected the application. Therefore, there is no infringement of Section 167(2) of the Code.(Para - 24)

**Application u/s 482 Cr.P.C. dismissed.** (E-7)

**List of Cases cited:-**

1. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67 (Three-Judge)

2. Bikramjit Singh Vs St. of Punj., (2020) 10 SCC 616 (Three-Judge)

3. M. Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence, (2021) SCC 485 (Three-Judge)

4. Sanjay Dutt Vs St. Through CBI (STF) Bombay, (1994) 5 SCC 410

5. Yadav Singh Vs St. of U.P. & 2 Ors. in Application U/S 482 No. - 31498 of 2018 was decided on 11.09.2018 by the Division Bench of this Court

6. Rajendra Singh Yadav @ Raju Jahreela Vs St. of U.P. in Criminal Misc. Bail Application No.- 24132 of 2021 was decided on 16.07.2021 by the Coordinate Bench of this Court

7. Sanjay Dutt Vs St. Through CBI, Bombay, (1994) 5 SCC 410.

8. Uday Mohanlal Acharya Vs St. of Mah., (2001) 5 SCC 453

9. Bikramjit Singh Vs St. of Punj., (2020) 10 SCC 616

10. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

11. Chaganti Satyanarayana Vs St. of A. P., (1986) 3 SCC 141

12. CBI Vs Anupam J. Kulkarni, (1992) 3 SCC 141

13. St. of Mohd. Vs Ashraft Bhat, (1996) 1 SCC 432

14. St. of Mah. Vs Bharati Chandmal Verma, (2002) 2 SCC 121

15. St. of M.P. Vs Rustam, 1995 Supp (3) SCC 221

16. Pragyna Singh Thakur Vs St. of Mah., (2011) 10 SCC 445

17. U.O.I. Vs Thamisharasi, (1995) 4 SCC 190

18. M. Ravindran Vs Directorate of Revenue Intelligence, (2021) 2 SCC 485

19. U.O.I. through CBI Vs Nirala Yadav, (2014) 9 SCC 457

20. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

21. Ravi Prakash Singh Vs St. of Bihar, (2015) 8 SCC 340

22. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

23. S. Kasi Vs St., (2021) 12 SCC 1

24. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. The instant application under Section 482 of the Code of Criminal Procedure (in short "Cr.P.C.") has been filed for quashing the impugned order

dated 13.7.2021 passed by Chief Judicial Magistrate, Allahabad, whereby the said court rejected the application under Section 167(2) of Cr.P.C. and enlarge on bail to the applicant under Sections 302, 307, 504 of The Indian Penal Code (hereinafter referred to "IPC") and Section 7 Criminal Law Amendment Act, under Section 167(2) of Cr.P.C.

2. The applicant has filed an application for release on default bail on 7.7.2021 under proviso to Section 167(2) of Cr.P.C. before the Chief Judicial Magistrate, Allahabad, alleging that non-filing of charge-sheet within 90 days, the applicant/accused to be released on bail under Sections 302, 307, 504 under proviso to Section 167(2) of Cr.P.C.

#### **BRIEF FACTS OF THE CASE:**

3. The Prosecution case, in brief is that the First Information Report dated 15.02.2021, has been registered against the applicant under Section 302, 307, 504 of IPC and Section 7 of the Criminal Law (Amendment) Act, 1932 stating therein that on 15.02.2021, at about 12:00 noon, applicant came by his motorcycle bearing registration no. U.P. - 70 FC 3683 (Bajaj Pulsar Blue and Black) to the betel shop of the first informant, which had been opened by the son of the first informant Shobhit @ Bholu at 10:00 A.M. and he was working at his shop, which is situated at Bajrang crossing Allahpur, Police Station - George Town, District Prayagraj. All of sudden, the applicant abuses his son, when his son Shobhit @ Bholu, Satyam, and Raju Kesarwani, who were present there obstructed the applicant, then the applicant shot fired by his revolver to his son and the fired shot hit on his stomach and the second fire made by the applicant hit Satyam and

he has also injured, after that, the applicant fled away from the incident place after firing in the air. Raju Kesarwani informed the first informant, the first informant took Shobhit and Satyam to the Swarup Rani Nehru Hospital, Prayagraj and on the way, Shobhit @ Bholu has died and the treatment of Satyam is going on.

4. The applicant Prateek Shukla was produced before the Chief Judicial Magistrate, Allahabad on 16.2.2021 in connection with Crime No. 60 of 2021 registered at P.S. George Town, Prayagraj, relating to the offences punishable under Sections 302, 307, 504 I.P.C., and Section 7 of the Criminal Law (Amendment) Act. He was remanded to judicial custody till 17.5.2021. His remand was extended under Section 167 of the Code from time to time, and the last remand under the said provision was granted till 17.5.2021. On 17.5.2021, Police Report under Section 173(2) of the Code had been submitted by the Investigating Officer before the concerned Magistrate and cognizance has been taken by the concerned Magistrate. On 7.7.2021, the applicant moved an application under Section 167 (2) read with Section 209 of Cr.P.C. for setting aside the order dated 17.5.2021 before the Chief Judicial Magistrate, Allahabad, and seeking bail on the ground that he was entitled to be released on bail under Section 167(2) of the Code.

5. On 13.7.2021, the aforesaid application has been rejected by the Chief Judicial Magistrate and the case was committed to the Court of Sessions Judge, which is pending in the court of Additional Sessions Judge Court No. 16 Allahabad. Hence, the instant application has been filed to set aside the order dated 13.7.2021 passed by the Chief Judicial Magistrate and

release the applicant under Section 167(2) of the Code.

6. Heard, Sri Prem Prakash Yadav, learned Senior Counsel assisted by Sri Hemant Kumar Srivastava for the applicant, learned counsel for the opp. party no. 2 Sri Nirbhay Singh and Sri Manoj Kumar Dwivedi learned A.G.A. for the State and perused the material on record.

### **SUBMISSIONS OF THE PARTIES:**

7. Learned counsel for the applicant submits that the charge-sheet has been submitted on 17.05.2021 by the Investigating Officer after the expiry of 90 days and the investigation could not be completed in time. It has been further submitted that the period of 90 days for filing of charge-sheet was completed on 16.5.2021 on the next day i.e. 17.5.2021 the charge-sheet was filed before the concerned Magistrate. The cognizance order dated 17.5.2021 has been passed by the concerned Magistrate without considering the provision of Section 167(2) of Cr.P.C.. The concerned Magistrate illegally condoned one day delay under Section 471 of Cr.P.C. The judicial custody/remand of the applicant after 16.5.2021 is illegal.

8. Learned counsel for the applicant further submitted that the cognizance order dated 17.5.2021 has been passed without considering the provision of Section 167(2) of Cr.P.C. which is beyond his jurisdiction and also in violation of Article 21 of the Constitution of India and rejected the application of the applicant dated 7.7.2021 vide order dated 13.7.2021 and wrongly calculated the time and condoned of one

day delay under Section 471 of Cr.P.C. illegally. The judicial custody/remand of the applicant after 17.5.2021 is illegal. According to the learned counsel for the applicant, the expression "shall be released on bail" in the proviso to sub-section (2) of Section 167 of the Code not only confers an indefeasible right on the accused but also casts duty/obligation on the Magistrate, since the Magistrate will not be entitled to remand the accused any further. In support of his submission he has placed reliance upon the following judgments of the Apex Court as well as This Court:

*1. Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 (Three-Judge).*

*2. Bikramjit Singh v. State of Punjab, (2020) 10 SCC 616 (Three-Judge).*

*3. M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence, (2021) SCC 485 (Three-Judge).*

*4. Sanjay Dutt v. State Through CBI (STF) Bombay, (1994) 5 SCC 410.*

*5. Yadav Singh v. State of U.P. And 2 Others in Application U/S 482 No. - 31498 of 2018 was decided on 11.09.2018 by the Division Bench of this Court.*

*6. Rajendra Singh Yadav @ Raju Jahreela v. State of U.P. in Criminal Misc. Bail Application No.- 24132 of 2021 was decided on 16.07.2021 by the Coordinate Bench of this Court.*

9. Learned A.G.A. has vehemently opposed the prayer of the applicant and submitted that on 16.05.2021 was Sunday, the court was closed due to Covid -19

pandemic therefore the charge sheet has been submitted by the investigating officer before the concerned Magistrate on 17.5.2021, the charge-sheet has been submitted within 90 days, the concerned Magistrate has rightly refused the bail application under Section 167(2) of Cr.P.C. In support of his submission learned A.G.A. has placed reliance upon the Apex Court judgment in the case of *Sanjay Dutt v. State Through CBI, Bombay, (1994) 5 SCC 410*.

10. Admittedly, in the present case the applicant is taken into judicial custody on 16.2.2021 by the Chief Judicial Magistrate. On 17.5.2021, Police Report under Section 173(2) of the Code has been submitted by the investigating officer before the concerned Magistrate, and cognizance has been taken. On 7.7.2021, the applicant moved an application under Section 167(2) of Cr.P.C. for set-aside the order dated 17.5.2021 before the Chief Judicial Magistrate, Allahabad and seeking bail under Section 167(2) of the Code.

11. Thus the foremost questions to be decided in the present case are:

*(a) Whether the charge sheet dated 17.5.2021 has been filed by the investigating officer against the applicant after the prescribed period of ninety days?*

*(b) Whether the applicant filed an application for grant of default bail on expiry of the period of ninety days before a charge-sheet is filed?*

12. The Code of Criminal Procedure deals with the investigation of offence by the police under Chapter XII. Section 167(2) Cr.P.C. under Chapter XII. It will be

useful to refer the section 167(2) of Cr.P.C., which provides:

**"Section 167. Procedure when investigation cannot be completed in twenty-four hours.-** (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that,-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

**Explanation I.-** For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

**Explanation II.-** If any question arises whether an accused person was

produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

(Sub- Sections 2A, 3, 4, 5 and 6, Sub-clauses (b) and (c) of the proviso are not relevant now and hence they are not mentioned)

13. The proviso (a) (i) to sub-section (2) of Section 167 of the Code provides that the Magistrate shall not authorise the detention of an accused in custody in which the investigation relates to the offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and if the investigation is not completed within ninety days, the accused shall be entitled to be released on bail. Proviso (a) further provides that the accused person shall be released on bail if he is prepared to and does furnish bail. There cannot be any dispute that on expiry of the period indicated in the proviso (a) to sub-section (2) of Section 167 of the Code the accused has to be released on bail if he is prepared to and does furnish the bail.

14. The Constitution Bench of the Supreme Court explained the meaning of the expression "indefeasible right" of the accused and considered the scope of Section 167(2) of the Code in **Sanjay Dutt v. State through CBI, Bombay, (1994) 5**

**SCC 410**, has observed as under: [SCC p. 442 - 444 para 48, 53, 53(2)(b)]

"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 filing 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<sup>1</sup>, Ram Narayan Singh v. State of Delhi<sup>2</sup> and A.K. Gopalan v. Government of India<sup>3</sup>)*

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

53.2(b). The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) 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<sup>4</sup> is a right which enures to, and is enforceable by the accused only from the time of default till the filing 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 only by the provisions relating to the grant of bail applicable at that stage."

(Emphasis added)

15. Majority opinion of a three Judge Bench of the Supreme Court in the case of **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453** by observing thus: (SCC p. 469 para 13)

*"13.....A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that the indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt case<sup>5</sup>. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret*

*the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M. P. v. Rustom<sup>6</sup> setting aside the order of grant of*



*bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of" used by the Constitution Bench in Sanjay Dutt<sup>7</sup>. We would be failing in our duty if we do not notice the decisions mentioned by the Constitution Bench in Sanjay Dutt case which decisions according to the learned counsel, appearing for the State, clinch the issue.....*

*.....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. There is no provision in the Criminal Procedure Code authoring detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and*

*then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:*

- 1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.*

- 2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days*

where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that

period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in *Sanjay Dutt* case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

(Emphasis added)

16. In the decision rendered by three-Judge Bench of the Supreme Court in the case of **Bikramjit Singh v. State of Punjab**, (2020) 10 SCC 616, after extensively referring to **Rakesh Kumar Paul v. State of Assam**<sup>8</sup>, majority opinion of a three Judge Bench it is held as under: (SCC p. 648-51, para 33, 36, 37)

"33. In a fairly recent judgment reported as *Rakesh Kumar Paul v. State of Assam*<sup>9</sup>, a three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge-sheet is filed by the police, default bail must be

granted. This was stated in Lokur, J.'s judgment as follows: (SCC pp. 98-99 and 101-102, paras 37-41, 45-47 & 49)

"37. This Court had occasion to review the entire case law on the subject in *Union of India v. Nirala Yadav*<sup>10</sup>. In that decision, reference was made to *Uday Mohanlal Acharaya v. State of Maharashtra*<sup>11</sup> and the conclusion arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (*Nirala Yadav case*, SCC p. 472, para 24)

"24..."<sup>13</sup>. (3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by Magistrate." (*Uday Mohanlal case*<sup>12</sup>, SCC, p. 473, para 13)

38. This Court also dealt with the decision rendered in *Sanjay Dutt*<sup>13</sup> and noted that the principle laid down by 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 *Mohd. Iqbal Madar Sheikh v. State of Maharashtra*<sup>14</sup> wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet of 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 the 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 been filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High

*Court<sup>15</sup> 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 can not 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 on no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.*

*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.*

#### **Application of the law to the petitioner**

*45. On 11.1.2017 Rakesh Kumar Paul v. State of Assam<sup>16</sup>, when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of "default bail" since the statutory period of 60 days*

*for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24.1.2017) and the petitioner had orally applied for "default bail". Under these circumstances, the only course open to the High Court on 11.1.2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him "default bail" on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.*

*46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to "default bail" but must apply for regular bail - the "default bail" chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4.1.2017 and 24.1.2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of "default bail". It would have been another matter altogether if the petitioner had not applied for "default bail" for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that it is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for "default bail" during the interregnum between 4.1.2017 and 24.1.2017 as is evident from the decision of the High Court*

*rendered on 11.1.2017. On the contrary, he had availed of his right to "default bail" which could not have been defeated on 11.1.2017 and which we are today compelled to acknowledge and enforce.*

*47. Consequently, we are of the opinion that the petitioner had satisfied all the requirement of obtaining "default bail" which is that on 11.1.2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.*

### **Conclusion**

*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."*

*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. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.3.2019 as an application was filed by the appellant on 26.3.2019, the appellant is not entitled to default bail. ... We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right of default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."*

*17. The relevant date of counting 90 days or 60 days for filing the charge-sheet is the date of the first order of remand and not the date of arrest. The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. (Vide: **Chaganti Satyanarayana v. State of A. P.**<sup>17</sup>, **CBI v.***

**Anupam J. Kulkarni<sup>18</sup>, State of Mohd. Ashraft Bhat<sup>19</sup>, State of Maharashtra v. Bharati Chandmal Verma<sup>20</sup>, State of M.P. v. Rustam<sup>21</sup> and Pragyna Singh Thakur v. State of Maharashtra<sup>22</sup>**). It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. (Vide: **Union of India v. Thamisharasi<sup>23</sup> and M. Ravindran v. Directorate of Revenue Intelligence<sup>24</sup>**). It is 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. (Vide: **Union of India through CBI v. Nirala Yadav<sup>25</sup> and Rakesh Kumar Paul v. State of Assam<sup>26</sup>**).

18. The Supreme Court in a catena of judgments has ruled that while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court has to be included. (Vide: **Chaganti Satyanarayana** (supra), **State of M.P. v. Rustam** (supra), **Ravi Prakash Singh v. State of Bihar<sup>27</sup>** and **M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence<sup>28</sup>**). 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. (Vide: **S. Kasi v. State<sup>29</sup>**).

19. In reference to the aforesaid subject, it can be said that the law has been settled by three-Judge Bench of the Supreme Court on 26.10.2020 in the recent decision of case of **M. Ravindran** (supra) while considering two points; (a) Whether

the indefeasible right accruing to the appellant under Section 167(2) Cr.P.C. gets extinguished by subsequent filing of an additional complaint by the investigating agency; (b) Whether the Court should take into consideration the time of filing of the application for bail, based on default of the investigating agency or the time of disposal of the application for bail while answering (a).

20. In **M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485**, the Supreme Court after referring various judgments in case of *Uday Mohanlal Acharya v. State of Maharashtra<sup>30</sup>*, *Rakesh Kumar Paul v. State of Assam<sup>31</sup>*, *S. Kashi v. State through the Inspector<sup>32</sup>*, *Sanjay Dutt v. State<sup>33</sup>*, *Hitendra Vishnu Thakur v. State of Maharashtra<sup>34</sup>*, *Mohd. Iqbal Madar Sheikh v. State of Maharashtra<sup>35</sup>*, *Bipin Shantilal Panchal v. State of Gujarat<sup>36</sup>*, *State v. Mohd. Ashraft Bhat<sup>37</sup>*, *Attef Nasir Mulla v. State of Maharashtra<sup>38</sup>*, *Mustaq Ahmed Mohammed Isak v. State of Maharashtra<sup>39</sup>*, *Sayed Mohd. Ahmed Kazmi v. State (NCT of Delhi)<sup>40</sup>*, *Union of India v. Nirala Yadav<sup>41</sup>*, *Pragyna Singh Thakur v. State of Maharashtra<sup>42</sup>*, *Bikramjit Singh v. State of Punjab<sup>43</sup>*, has observed as under: (SCC p. 517-18, para 24, 24.1, 24.2, 25, 25.1, 25.2, 25.3, 25.4)

"24. In the present case, admittedly the appellant-accused had exercised his option to obtain bail by filing the application at 10.30 a.m. on the 181st day of his arrest i.e. immediately after the court opened, on 1.2.2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to

31.1.2019 or prior to 10.30 a.m. on 1.2.2019. The Public Prosecutor participated in the arguments on the bail application till 4.25 p.m. on the day it was filed. It was only thereafter that the additional complaint came to be lodged against the appellant. Therefore, applying the aforementioned principles, the appellant-accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order i.e. at 10.30 a.m. on 1.2.2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

24.1. It is clear that in the case on hand, the State/the investigating agency has, in order to defeat the indefeasible right of the accused to be released on bail, filed an additional complaint before the court concerned subsequent to the conclusion of the arguments of the appellant on the bail application. If such a practice is allowed, the right under Section 167(2) would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently file an additional complaint including the name of the accused as soon as the application for bail is taken up for disposal. Such complaint may be on flimsy grounds or motivated merely to keep the accused detained in custody, though we refrain from commenting on the merits of the additional complaint in the present case. Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints merely to circumvent the application for default bail is, in our view, an improper strategy. Hence, in our considered opinion, the High Court was not

justified in setting aside the judgment and order of the trial court releasing the accused on default bail.

24.2. We also find that the High Court has wrongly entered into merits of the matter while coming to the conclusion. The reasons assigned and the conclusions arrived at by the High Court are unacceptable.

25. Therefore, in conclusion:

25.1. Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have "availed of" or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigating agency.

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

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

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

21. On expiry of the period indicated in the proviso to sub-section (2) of Section 167 of Cr.P.C. the accused has to be released on bail if he is prepared to and does furnish the bail but such furnishing of bail has to be in accordance with the order passed by the Magistrate. It is now settled that indefeasible right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken because in that event the remand of the accused concerned including one who is alleged to have committed an offence is not under Section 167(2) of the Code but under other provisions of the Code.

### **DISCUSSION:**

22. Coming to the facts of the instant case, I find that it has not been disputed by the applicant that the applicant was remanded to judicial custody on 16.2.2021 and the charge-sheet has been filed before the Chief Judicial Magistrate on 17.5.2021. In the present case the mandatory period of 90 days is prescribed for filing of charge-sheet under proviso (a) to Section 167(2) of the Code. After excluding the date of the first remand i.e. 16.2.2021 and including the date of filing of the charge-sheet 17.5.2021, 90 days time limit was completed on 17.5.2021. This is made clear by the calculation of days as per Gregorian calendar as under:

February 2021 (from 17.2.2021 to 28.2.2021)	12 days
March 2021	31 days
April 2021	30 days
May 2021 (17.5.2021)	17 days
<b>Total</b>	<b>90 days</b>

23. Keeping in mind the position of law, as above, and applying the same to the fact and circumstances of the present case, it appears that prescribed period under para (a) of the proviso to sub-section (2) of Section 167 of the Code the period of ninety days for completing the investigation was to expire on 17.5.2021 and the investigating officer has filed the charge-sheet (challan/police report) on 17.5.2021 before the conclusion of 90 days stipulated time before the Chief Judicial Magistrate. Cognizance has also been taken on 17.5.2021 by the concerned Magistrate. Thereafter on 7.7.2021, the accused filed an application for being released on bail and offered to furnish the default bail. As such



now it is not open to the applicant to claim bail under proviso (a) to Section 167(2) of the Code and he is custody on the basis of orders of remand passed under other provisions of the Code and at this stage proviso (a) to Section 167(2) shall not be applicable. Formulated questions are decided in negative.

24. The Magistrate, however, without excluding the day of the first remand reached the conclusion that the charge-sheet has been submitted within 90 days of the first remand as provided under proviso (a) of Section 167(2) of the Code. Therefore, if all these aspects are kept in view, I am of the considered view that in the present facts, the Chief Judicial Magistrate, Allahabad was justified in its conclusion arrived through the order dated 13.7.2021 impugned herein that the charge-sheet has been filed within time and rightly rejected the application. Therefore, there is no infringement of Section 167(2) of the Code.

25. The result of the above discussion, I do not find any merits in the instant application under Section 482 of the Code and the same is liable to be dismissed. Therefore, the application is **dismissed**.

-----  
**(2022)01ILR A416**

**ORIGINAL JURISDICTION  
CRIMINAL SIDE**

**DATED: ALLAHABAD 01.12.2021**

**BEFORE**

**THE HON'BLE DR. YOGENDRA KUMAR  
SRIVASTAVA, J.**

Application U/S 482 Cr.P.C. No. 17371 of 2020

**Mahendra Kumar Chaudhary & Ors.**  
**...Applicants**  
**Versus**

**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**

Sri Amit Kumar Singh, Sri S.N. Mishra, Sri S.P. Pandey, Sri Balram Mishra

**Counsel for the Opposite Parties:**

A.G.A.

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Sections 154,155(2),156,173(2),190,200, 202 & 205 Section 2(d) - Complaint - Section 2(d) Explanation - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant - Indian Penal Code, 1860 - Section 323,504 -**

Proceedings initiated with registration of an NCR - relating to non-cognizable offence - investigation carried out by police - pursuant to an order of the Magistrate under Section 155(2) of the Code - police report under Section 173(2) disclosing non-cognizable offence - cognizance taken by the Magistrate - Application for quashing entire proceeding.

**HELD:-**In view of the set of facts, the same would not be covered within the purview of the explanation to Section 2(d) to bring it within the ambit of the term "complaint". Magistrate has rightly taken cognizance.(Para - 47)

**Application u/s 482 Cr.P.C. dismissed. (E-7)**

**List of Cases cited:-**

1. Ghanshyam Dubey @ Litile & ors. Vs St. of U.P. & anr., 2013 (4) ADJ 474
2. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr., 2007 (9) ADJ 478
3. Alok Kumar Shukla Vs St. of U.P. & anr., Application u/s 482 Cr.P.C No. 42698 of 2013, decided on 26.11.2013