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IN THE COURT OF MCOCA SPECIAL JUDGE AT GREATER BOMBAY

(Exclusive Special Court constituted for the cases under
MCOCA/TADA/POTA AND OTHER SESSIONS CASES
against the accused-Rajendra Sadashiv Nikalje @ Chhota Rajan)

**ORDER BELOW EXH.19 (M.A.)
IN
NIA SPECIAL CASE NO.1090 OF 2021
(CNR NO.MHCC02-011048-2021)**

Sunil D. Mane,

Occupation : Service (Ex-API)

... Applicant/accused no.5

Versus

**NATIONAL INVESTIGATION AGENCY
(FIR RC-01/2021/NIA/MUM)**

(through NIA Police Station, Mumbai), 7th
floor, Cumballa Hill Telephone Exchange,
Peddar Road, Mumbai-400 026.

... Respondent/Prosecution

**CORAM : HIS HONOUR THE 1ST ADDITIONAL
PRINCIPAL JUDGE AND THE SPECIAL
JUDGE, MCOCA/ POTA/ NIA/ TADA
SHRI A.T. WANKHEDE.**

C.R.NO. : 57.

DATE : 22.10.2021.

Ld Adv. Mr. Hemant Ingle for the applicant/accused no.5.
Ld SPP Mr. Gonsalvis for NIA/prosecution/respondent.

ORDER
(DICTATED IN OPEN COURT)

1. This application is filed by the applicant/accused No.5 for furnishing bond and seeking default bail under Section 167(2) of the Code of Criminal Procedure. It is submitted that applicant/accused was arrested on 13.03.2021 and sent to the police custody on 14.03.2021. By an order dated 09.06.2021, time for investigation was extended by 60 days with effect from 09.06.2021. Further, by an order dated 05.08.2021, time for investigation was extended by 30 days with effect from 07.08.2021. The routine remand was extended under Section 167(2) of the Cr.P.C. for 14 days by an order dated 21.08.2021 which was lapsed on 04.09.2021. On 29.08.2021, the NIA filed an application for custody of the applicant which was rejected on 30.08.2021. Further it is submitted that without completing the investigation, charge-sheet was filed by the NIA on 03.09.2021. No cognizance has been taken until 06.09.2021. There was no order for extending the custody of the applicant/accused beyond 04.09.2021. Therefore, the applicant/accused is willing to furnish bonds to the satisfaction of this Court and willing to abide by terms and conditions which may impose. It is prayed to release the applicant/accused on default bail under Section 167(2) of the Cr.P.C. and to accept his bail bond.

2. The prosecution opposed the application by filing reply and submit that on 09.06.2021, this Court was pleased to extend the period of detention and time for completion of the investigation beyond 90 days for a further period of 60 days from the date of order dated 09.06.2021. During investigation, a huge number of data recovered through different gadgets including CDs, DVDs, mobile phones, DVRs, HDDS and CCTV footages recovered and thorough analysis of the same

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was done. Again on 05.08.2021, this Court pleased to extend the period of detention and time for completion of investigation for a further period of 30 days with effect from 07.08.2021. On 03.09.2021, after completion of investigation, the NIA filed a comprehensive final report (charge-sheet) against 10 arrested accused persons along with statement of witnesses and other materials. Further, investigation under Section 173(8) of Cr.P.C. was kept open. On 03.09.2021, remand application No.312/2021, 366/2021, 446/2021 and 624/2021 came to be disposed off and charge-sheet is filed. On 04.09.2021, copies of the charge-sheet served upon 10 arrested accused persons in jail and obtained acknowledgment. On 07.09.2021, the compliance report was submitted to the Court and the Court has taken cognizance of the offences against all 10 arrested accused as per charge-sheet. It is submitted that NIA has filed charge-sheet on 03.09.2021 much prior to the date of default i.e. 06.09.2021. It cannot be said that the investigation is incomplete and NIA has committed default. There is no default on the part of the investigating agency. The applicant/accused is not entitled for default bail. Hence, urged to reject the application.

3. Heard Adv. Mr. Hemant Ingle for the applicant/accused no.5 and SPP Mr. Gonsalvis for NIA/prosecution/respondent at length.

4. Perused the application, reply and other material placed on record, following points arise for determination of this Court and findings to them are given for the reasons stated as under :-

Sr.no.	Points	Findings
1	Do the applicant/accused entitle for default bail under Section 167(2) of the Cr.P.C. ?	No.

2	What order?	Application is rejected.
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REASONS

5. The mainstay of the applicant/accused for pressing this application for releasing him on bail on furnishing bond is that after submission of the charge-sheet by the NIA on 03.09.2021, further detention of the accused was not ordered and there is illegal detention till the time and date of taking cognizance of the offence by the Court on 07.09.2021. It is also the grievance raised by the applicant/accused that charge-sheet is incomplete and therefore, the applicant/accused is entitled to be released on bail. Learned Advocate for the applicant/accused argued that after filing of the charge-sheet by the NIA on 03.09.2021, this Court has taken cognizance of the offence on 07.09.2021 and in between 04.09.2021 to 07.09.2021, no order for any sort of custody passed by the Court, which amounts to illegal detention and makes the accused entitled to be released on bail. Learned Advocate for the applicant/accused argued that till when the cognizance of the offence was to be taken by the Court, provision of Section 167(2) of the Cr.PC. is made applicable and therefore, the applicant/accused rightly moved the application under Section 167(2) of the Cr.PC. for grant of default of bail.

6. On this aspect, the learned Advocate for the applicant/accused relied on the following judgments :-

(i) The Hon'ble Supreme Court in the matter of **Ram Narayan Singh Vs. State of Delhi and others** reported in **AIR 1953 Supreme Court 277**, wherein, observing that there was no any order of remand committing to accused

to further custody till 11.03.2021, it is held that the “petitioners are entitled to be released and they are set at liberty forthwith.” Needless to point out here that these findings are made in the Petition under Article-32 of the Constitution in the nature of Habeas Corpus. Such powers cannot be exercised by this court.

(ii) The Hon’ble Allahabad High Court in the matter of **Raghvendra Singh Vs. State of U.P and others** reported in **1976 SCC Online All 422**. This authority is pertaining to the authorization of the custody of the Petitioner without authority of law and it is held that “under Section 309 of the Code of Criminal Procedure, the custody of an accused can be maintained and continued only by warrant issued by the Magistrate. Without such a warrant, the custody cannot be justified. As there is no warrant of remand issued by a Magistrate directing the continuance of the custody, the custody of the petitioner must be held to be without authority of law and therefore, petitioner is entitled to be released.” This, authority is made applicable to the situation after taking cognizance of the offence under Section 309 Cr.PC. Apparently, this court has taken cognizance of the offence on 07.09.2021 and directed for production of accused on 08.09.2021. As such, this ruling is not made applicable to the facts and circumstances of the case.

(iii) The Hon’ble Allahabad High Court in the matter of **Surendra Tiwari Vs. State of U.P and others** reported in **1992 SCC OnLine All 879**, wherein, it is held that “thus,

considering in the light of the facts and circumstances set forth above and the law laid down by Division Benches of this Court, we find that remand order could not and do not validate the detention which has been made and (sic) in breach of Article 22(2) of the Constitution of India, was void and illegal, and as such, the petitioner is entitled to be released.” This order is also passed by the Hon’ble Allahabad High Court in the Writ of Habeas Corpus.

(iv) The Hon’ble Allahabad High Court in the matter of **Urooj Abbas Vs. State of U.P** reported in **1971 SCC OnLine All 414**, wherein, it is held that, “in the absence of any other order on the record remanding the accused, that the so-called warrant was not a warrant as required under Section 344, Criminal P.C. and therefore the detention of the accused petitioner was illegal.” This order is also passed by the Hon’ble Allahabad High Court in their Writ jurisdiction.

(v) The Hon’ble Rajasthan High court in the matter of **Manohari Vs. The State of Rajasthan (123)** reported in **RLW 1983 549**, it held in paragraph no.6 that :-

“6. Next question is whether any previous illegality in granting remand can make the present detention of the accused illegal even though thereafter a valid remand has been granted? Learned Public Prosecutor in this regard has placed reliance on certain cases of habeas corpus. The consideration in those cases stands on a different footing. In cases of habeas corpus it has to be seen on the day of passing of the order by the Court whether the detention

was illegal or not. Thus in such cases if the detention could be shown, under a lawful authority even on the day when the matter comes up for consideration before the Court, the detention can be held to be valid. In cases of grant of bail, the validity of the earlier orders of remand can certainly be taken into consideration. In such cases if there was illegality in the earlier orders of remand, it cannot be validated, by a subsequent valid order of remand, Kudal J. in [Rati Ram v. State of Rajasthan](#) (2) has held "once an order of remand expires and a fresh order of remand is not passed then the detention becomes illegal. The liberty of an individual is guaranteed under the provisions of the Constitution. By a subsequent order of remand for a subsequent period, the previous order of detention which was patently illegal cannot be cured. The detention of the accused persons cannot be justified under any provision of law. Thus, they are entitled to be enlarged on bail", K.D. Sharma, Chief Justice in [Narayan v. State of Rajasthan](#) (3) has also taken the view that once period of 90 days expired before taking cognizance of offences by Court, accused obtained absolute right to be released on bail and their detention after such period, held clearly illegal and it cannot be validated by a subsequent order of remand under [Section 309\(2\)](#), Cr. P. C. We also subscribe the view already taken by two learned single Judges of this Court, and this answers question No. 3 referred by the learned single Judge."

7. Placing reliance on the aforecited judgment, it is argued by the learned Advocate for the applicant/accused that after filing of the charge-sheet by NIA on 03.09.2021, there was no order of extending the custody of the accused for the subsequent period till taking the cognizance of the offence on 07.09.2021 and therefore, the detention of the accused for the period from 04.09.2021 till 07.09.2021 is illegal and

the accused are entitled to be enlarged on bail.

8. Per contra, the learned SPP Mr.Gonsalves strenuously argued that application under Section 167(2) of the Cr.P.C. itself is not tenable. The parameters of default bail under Section 167(2) of the Cr.P.C. are not made out. The NIA has filed the charge-sheet within stipulated time. Merely, because request of NIA for PCR of the accused is rejected, it cannot be said that the investigation is incomplete. It is argued that the NIA has filed this charge-sheet within stipulated time on 03.09.2021. The detention of the accused was already extended till 06.09.2021. Due to administrative difficulty, the charge-sheet could not be assigned to any Court before 06.09.2021. The custody of the accused start from 03.09.2021 under Section 309 of the Cr.P.C. The record is voluminous and took time for scrutiny. The NIA has followed the mandate of law. It is argued that the Court has rightly taken cognizance of the offence on 07.09.2021 after assignment of the matter.

9. From the submissions advanced by the Ld. Advocate for the applicant/accused, it reveals that they want to take advantage of not taking cognizance of the offence on 03.09.2021 itself and giving further date to the accused for production. It is canvassed that as no further lawful detention was ordered by the Court, custody of the applicant/accused for the period 04.09.2021 to 07.09.2021 is illegal. In the backdrop of this submission, it is necessary to scrutinize whether there is any illegal detention of the applicant/accused from 04.09.2021 till taking of the cognizance by the Court on 07.09.2021 and whether the accused could take benefit of the same for asking default bail under Section 167(2) of the Cr.P.C.

10. Apparently, the NIA has submitted the charge-sheet against the 10 arrested accused on 03.09.2021. There before by the order dated 05.08.2021, the period of detention of the accused was extended with effect from 07.08.2021 till 06.09.2021. On 21.08.2021 and 23.08.2021, the judicial custody of the applicant/accused and other co-accused extended till 04.09.2021 and 06.09.2021 respectively. Before that, the NIA submitted the charge-sheet on 03.09.2021. The remand court disposed off remand application no.312/2021, 366/2021, 446/2021 and 624/2021 and forwarded the charge-sheet for scrutiny to the Sessions Department. Needless to point out here that the charge-sheet is a voluminous record running into more than 6,000 pages. May be for the reason that the detention period is going to be expired on 06.09.2021, further date for production of the accused was not given and it is directed to place all the pending applications in the remand application before the concerned court to whom the matter will be assigned. After scrutiny of the charge-sheet on 06.09.2021 the same was assigned to this Court and this Court received the papers on 07.09.2021 and took cognizance of the offence against the accused. Even on 06.09.2021, the Sessions Department posted the date 08.09.2021 in CIS in this matter. Prior to this and as per directions of the remand court, the NIA provided the copy of the charge-sheet to the accused persons in jail and submitted the report.

11. It is argued by the learned SPP that after filling of the charge-sheet the scope of Sec.167(2) of Cr.P.C. comes to an end and the custody then converted under section 309 of Cr.P.C. On the contrary, the ld. Advocate for the applicant/accused argued that till when the Court has not taken cognizance of the offence and made compliance as per Sections 207, 209 of the Cr.P.C., the accused is entitled to move the

application under Section 167(2) of the Cr.P.C. In fact, even though the charge-sheet is not filed within stipulated period of 60 or 90 days and in this case the extended period of 180 days, further detention of the accused beyond this period by itself is not illegal or void. However, it gives infeasible rights to the accused for default bail under Section 167(2) of the Cr.P.C. The provision of Section 167(2) of the Cr.P.C. gives right to the accused if the investigation is not completed by the Investigating Agency within a period of 60 or 90 days. There is no provision to ask for default bail in case of illegal detention or even on the ground of incomplete charge-sheet.

12. The Learned SPP relied on the unreported judgment of the Hon'ble Supreme Court in the matter of **Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and another** in **Special Leave Petition (Crl.) No.147 of 2013 dated 13.02.2013**, wherein, it is held in paragraph no.18 that

“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 herein above, 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. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of [Section 309](#) Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in [Section 167](#) Cr.P.C. The scheme of the [Cr.P.C.](#) is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of

investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under [Section 167\(2\)](#) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of [Section 309](#) Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.”

13. The learned SPP further relied on the recent judgment of Hon'ble High Court in the matter of **Wasudeo Vs. State of Maharashtra reported in 2021 SCC OnLine BOM 250**, wherein, it is held that “whether a cognizance is taken or not, is not material as far as Section 167 of the Code is concerned. The Supreme Court articulates that once a charge-sheet is filed within stipulated time, the question of grant of default or compulsive bail does not arise.”. It is further held that “the legislative intent is that the investigation shall be completed within the maximum time prescribed and in default, the accused shall be entitled to compulsive or statutory bail, if such right is availed. The emphasis is on completion of investigation and not on the learned Judge taking cognizance of the final report or charge-sheet.”

14. In view of above pronouncement, after filling of the charge-sheet,

only right left to the applicant/accused to apply for grant of bail on merits. Once, the charge-sheet is filed by the NIA, it amounts to sufficient compliance with the provisions of Section 167(2)(a)(ii) of the Cr.P.C. Whether the cognizance is taken or not is not material as far as Section 167 of Cr.P.C. is concerned. Moreover, the accused continues to remain in the custody of the court till when the cognizance of the offence is taken by the court. Thus the scope of section 167(2) of Cr.P.C. comes to an end after submission of the charge-sheet. Consequently, application under Section 167(2) of the Cr.P.C. filed by the applicant/accused for default bail will not fall within the purview/ingredients of said section. There is no provision for granting default bail in the case of illegal detention and filing of incomplete charge-sheet.

15. Learned Advocate for the applicant/accused argued that the charge-sheet is incomplete and pointed out that on 29.08.2021, the NIA applied for custody of the applicant/accused which was rejected by order dated 30.08.2021 and then immediately, submitted charge-sheet on 03.09.2021 without completing the investigation. Needless to point out here that the custody of the applicant/accused was sought by the NIA through Misc. Application no.1102 of 2021, in order to confront the applicant/accused and other arrested accused regarding certain points of investigation. However, this request of the NIA turned down by the remand Court by the order dated 30.08.2021. Thereafter, the charge-sheet came to be filed after 3 to 4 days. Merely, because the request of the NIA turned down by the Court, it cannot be said that an incomplete charge-sheet was filed by the NIA. Even, otherwise this ground also cannot be made available for the applicant/accused for asking default bail under Section 167(2) of the Cr.P.C. Fact remains that on the ground

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of illegal detention and incomplete charge-sheet, the application for default bail under Section 167(2) of the Cr.P.C. is not maintainable. Consequently, this application do not deserve any consideration and liable to be rejected. Hence, I answer point no.1 in the negative and proceed to pass the following order :-

ORDER

Application (Exh.19) is rejected and disposed off accordingly.

(A.T. WANKHEDE)

SPECIAL JUDGE

Date : 22.10.2021

Place : Mumbai.

Exclusive Special Court constituted for the cases
under MCOCA/TADA/POTA AND OTHER SESSIONS CASES
against the accused-Rajendra Sadashiv Nikalje @ Chhota Rajan

Dictated on : 22.10.2021.
Transcribed on : 23.10.2021.
Signed on : 23.10.2021.

CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL
SIGNED JUDGMENT/ORDER"

DATE : 25.10.2021, AT 03.20 P.M.

M.K. SAKHARKAR
STENOGRAPHER GRADE-I

UPLOAD DATE AND TIME

NAME OF STENOGRAPHER

Name of the Judge (with Court no.) : SHRI A.T.WANKHEDE. C.R.NO.57.

Date of pronouncement of judgment/order : 22.10.2021.

Judgment/order signed by the P.O. on : 23.10.2021.

Judgment/order uploaded on : 25.10.2021, AT 03.20 P.M.