

## **THE PARADOX OF DEFAULT BAIL IN THE ADMINISTRATION OF CRIMINAL JUSTICE**

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### **1. INTRODUCTION**

Bail under section 167(2) Cr.PC, is popularly known as default bail. The right of accused begins the moment he is arrested. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the constitution.<sup>i</sup> Article 22 of Constitution of India provides for the right of accused person to the extent that he has right to be informed of reason for his arrest and he shall be entitled to consult and to be defended by legal practitioner of his choice. The aforesaid right is duly incorporated in **Section 50 of CrPC**. Section 50 of CrPC provides that person arrested must be informed about grounds of arrest and of right to bail.

Besides, Article 22 (2) of Constitution of India further provides that accused must be produced before the nearest magistrate within 24 hours of his arrest. This right is also duly incorporated in Code of Criminal Procedure under Section 57. **Section 57 of CrPC** clearly mentions that a police officer cannot detain an accused person arrested for a longer period than what is reasonable and such period shall not exceed 24 hours. If police considers further detention necessary then they have to obtain permission from the Magistrate in this regard by obtaining special order under section 167 of CrPC. In Hon'ble Supreme Court of India has held that section 167 CrPC is supplementary to section 57 of CrPC<sup>ii</sup>. The object of requiring accused to be produced before Magistrate is to enable Magistrate to see that custody is necessary and also to enable the accused to make representation which he may wish to make

### **2. CONDITIONS FOR OBTAINING THE DEFAULT BAIL UNDER SECTION 167 CrPC**

Section 167 lays down the procedure when investigation cannot be completed within 24 hours and accused is in custody. Conditions required to invoke section 167 CrPC are as

follows;

1. Section 167 is invoked when the accused has not been presented before a magistrate within 24 hours of his detention and his fundamental right as provided by article 22(2) of the Constitution of India, 1950 is violated.
2. Person arrested must be in police custody. Police custody refers to custody of suspect with police in a lock up at police station.
3. It must appear that investigation cannot be completed in 24 hours of his arrest.
4. There are grounds for believing that accusation or information against him is well founded
5. The officer in charge of police station or investigating officer not below the rank of sub-inspector must forward the accused before the nearest magistrate along with case diary.
6. The Judicial Magistrate to whom the accused, is forwarded, whether he has got jurisdiction or not to try the case must authorize the detention of accused in either police custody or judicial custody for a term not exceeding 15 days on the whole.
7. If further detention is necessary then such Magistrate may order the accused to be forwarded to the Magistrate having jurisdiction to try the case.
8. Order for detention beyond 15 days by Magistrate having no jurisdiction is illegal.

An act of directing remand of accused is a fundamentally judicial function. The Magistrate has to satisfy himself whether the material placed before him justifies the remand. It is obligatory on the part of Magistrate to apply its mind and not to pass an order of remand automatically or in a mechanical manner. The grant of order of Police Remand should be an exception and not a rule. Investigating agency is required to make a strong case and must satisfy the Magistrate that without Police custody it would be impossible for police authorities to undertake investigation.<sup>iii</sup>

Hon'ble Apex Court in answered the question *whether nature of custody can be altered by Magistrate*. Hon'ble Supreme Court of India held that the nature of custody can be altered from judicial custody to Police Custody or vice versa during first period of 15 days mentioned under section 167(2) CrPC. After that accused can only be kept in judicial custody or any other custody as ordered by Magistrate but not in

custody of Police<sup>iv</sup>

Section 167(2A) provides that when Judicial Magistrate or Metropolitan Magistrate is not available then accused must be forwarded to nearest Executive Magistrate on whom the powers of Judicial Magistrate are conferred. Executive Magistrate may authorize the detention of accused for the period of seven days in aggregate.

### **3. DETENTION UNDER**

**167CrPC AND DEFAULT**

#### **BAIL UNDER SECTION 167(2) CrPC**

Proviso to section 167(2) CrPC provides that if the detention for a period exceeding 15 days is considered necessary by Magistrate and adequate grounds exist then he may only authorise judicial custody

- a) For a total period not exceeding 90 days where the offence is punishable with death, life imprisonment or imprisonment for a term not less than 10 years, or
- b) for a total period not exceeding 60 days where the offence is any other offence.

The prescribed statutory period of 90 days or 60 days is to be computed from the date when Magistrate authorizes the detention of an accused person. Section 167(2) CrPC makes it mandatory that if investigation is not completed within 90 days or 60 days, *then accused shall be released on bail, if he is prepared to and does furnish bail.* In **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**, the Hon'ble Supreme Court has held that moment the accused files the bail, he must be held to have availed of his right under section 167 (2) CrPC. The court held that on the expiry of period of 90 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 of investigating agency in completion of investigation within prescribed time. Accused is entitled to be released on bail, if he is prepared to and furnishes bail as directed by Magistrate.

### **4. QUESTIONS POSED BEFORE COURTS WHILE DECIDING BAIL UNDER SECTION 167(2) CrPC**

#### **❖ Meaning of expression "Imprisonment for a term not less than 10 years" in section 167(2)(a)(i) and its meaning**

The expression "Imprisonment for a term of not 10 years as used in section 167 (2) (a) (i)

Hon'ble Supreme Court explained the same in context of section 386 IPC where punishment is imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. It is held that expression "not less than 10 years" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more i.e. minimum sentence should be 10 years or more. By referring to section 386 IPC it is opined that in said section Punishment is imprisonment of either description for a term which may extend to 10 years and fine It is opined that imprisonment varies from *minimum to maximum 10 years* and it cannot be said that imprisonment prescribed is not less than 10 years. *Thus expression not less than 10 years would cover the offences where minimum sentence would be 10 years or more.*<sup>v</sup>

Where minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then section 167(2)(a) (ii) will apply and the accused will be entitled to grant of default bail after 60 days in case chargesheet is not filed. Thus it could be deduced that expression "not less than 10 years" means 10 years and more and would cover only those offences for which Punishment could be imprisonment for a clear period of 10 years or more i.e. minimum sentence is 10 years<sup>vi</sup>.

❖ **Day of remand to be excluded or included in computation of period of 60 /90 days**

In this regard Hon'ble Apex court viewed differently from time to time. In *Ravi Parkash Singh v. State of Bihar (2015 8 SCC 340, State of M.P.v.Rustom and Ors, 1995 (Supp) 3 SCC 221*, it has been held by Hon'ble Supreme Court that date of remand is to be excluded for computing the period of default bail, Whereas in *CBI V. Anupam Kulkarni (1992) 3 SCC 141, State of Maharashtra v. Bharati Chandmal Verma (2002) 2 SCC 121* Hon'ble Supreme Court held that total period of 60 or 90 days start running from date of remand and not from date of arrest. Meaning thereby that date of remand is included.

To resolve this judicial conundrum, a matter has been referred to larger bench in **Enforcement Directorate, Government of India v. Kapil Wadhawan, 2021 SCC Online SC 3136**. Soundless issue is determined, court may decide upon this issue depending upon the judgment which is brought before the court's notice or own understanding of law covering default bail under section 167 (2) (a) (ii) of CrPC.

❖ **Time for Disposal of bail under section 167(2) CrPC**

Application under section 167 (2) CrPC has to be decided on the same day . It is held that if said application is kept pending by court granting time to prosecution not advertent to the application filed on behalf of accused, it would be violation of legislative mandate.<sup>vii</sup>

❖ **Application for default Bail under section 167(2) CrPC and chargesheet are filed on same day.**

To resolve this confusion among courts Hon'ble Justice Gurvinder Singh Gill, Judge Hon'ble Punjab and Haryana High Court in **Nirmal Singh @ Nimma v. State of Punjab , decided on 03.08.2018** has opined that it will be helpful in case Presiding Officer before whom Challan is presented in the first instance mentions the time of receipt of challan so as to rule out any ambiguity and also to ensure that neither any right of accused is defeated nor the prosecution feels prejudiced.

So, in view of aforesaid judgment of Hon'ble Punjab and Haryana High Court it is advisable to mention the time of presentation of challanas well as application when these are presented at first instance before the court. If accused has availed his right prior to presentation of challan then mere filing of chargesheet will not defeat his statutory right. In **Pragya Singh Thakur v. State of Maharashtra (2011) 10 SCC 445 , Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**, the Hon'ble Supreme Court has held that Magistrate is obliged to grant bail to accused under section 167 (2) CrPC even if after filing of application by the accused , a chargesheet is filed by investigating agency.

❖ **Submission of Chargesheet before filing of bail bonds after bail under section 167(2) CrPC**

In **Raghuvir Singh v. State of Bihar (1986) 4 SCC 481**, it is held that an order of bail under section 167(2) CrPC is not to be defeated by lapse of time or filing of charge sheet. In **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**, three Judge bench of Hon'ble Supreme Court and **Constitution bench of Supreme Court in Sanjay Dutt v. State through CBI (1994) 5 SCC 410** has held that if accused is unable to furnish the bail bonds as directed by magistrate even after passing of bail order under section 167 (2) CrPC then his custody will not be unauthorized. In meantime if chargesheet is filed, then this indefeasible right of accused is extinguished.

In **Mohammad Javed Ali v. State of U.T Chandigarh , 2023 (3) PLR 728 (P&H)** it is held by Hon'ble Punjab and Haryana High Court that when bail under section 167 (2) CrPC is

granted then no impractical , unreasonable and onerous time limit can be imposed for furnishing of bail bonds. Any condition imposed should not defeat the order of bail itself. Thus from aforesaid discussion it could be concluded that no unreasonable and impractical conditions as to time limit for filing bail bonds can be imposed while deciding application under section 167 (2) CrPC. However in case bail is decided and bail bonds are not furnished and in meantime chargesheet is filed then indefeasible right of accused stands extinguished.

❖ **Bail under section 167(2) CrPC after submission of charge sheet during the pendency of proceedings before higher forum against the magisterial order rejecting the application under section 167(2) CrPC**

In **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**, the Hon'ble Supreme Court has held that where the application of accused has been erroneously rejected by the magistrate under section 167 (2) CrPC and accused moves to higher forum against said order and if during pendency of matter before higher forum chargesheet is filed, then indefeasible right of accused is not affected. However if accused fails to file bail as directed by magistrate then his right is extinguished.

❖ **Cancellation of bail under section 167(2) CrPC**

Section 167 (2) CrPC does not empower the cancellation of bail. However bail under section 167 (2) CrPC shall be deemed to be bail granted under chapter XXXIII of CrPC dealing with bails. So provisions of said chapters shall apply to person released on bail under section 167(2) CrPC. In **Venkatesan Balasubramanian v. The Intelligence Officer, D.R.I Bangalore**, Hon'ble Supreme Court held that bail under section 167 (2) CrPC can be cancelled under section 439 (2) of the code. The proviso to section 167 clarifies that every person released on bail under section 167 (2) shall be deemed to be so released under chapter XXXIII of the code. If a person is illegally or erroneously released on bail under section 167 (2) , his bail can be canceled under section 439 (2) by passing appropriate order by a High Court or Court of Session.

❖ **Situation When complete set of documents not filed along with chargesheet filed on 90th day**

When police report is filed on last day and accused claims bail under section 167(2) CrPC on ground that IO had not filed complete set of documents . To this situation it has been held by

Hon'ble Supreme Court in **Narendra Kumar Amin v. CBI, (2015) 3 SCC417** that on the said grounds accused is not entitled to concession of bail under section 167 (2) CrPC particularly when cognizance taking order on such report is not challenged by accused . It is held that provision requiring filing complete set of documents with police report / charge-sheet is only directory and not mandatory

❖ **If Application under section 167(2) CrPC has to be in writing**

In **Bikramjit Singh v. State of Punjab (2020) 10 SCC 616**, it is held by Hon'ble Supreme Court that court is to inform the accused of his right of being released on bail and enable him to make application in this regard. In **Rakesh Kumar Paul v. State of Assam (2017) 15 SCC67**, it is held by hon'ble Supreme Court that application under section 167 (2) CrPC can be oral or written.

❖ **Extension of period of investigation**

The provisions of CrPC do not empower anyone to extend the period within which investigation must be completed .However there are special enactments like Terrorist and Disruptive Activities (Prevention) Act 1985 which clearly contemplates the extension of time . To that extent these enactments have modified the provisions of CrPC including section 167. In **Achpal @ Ramswaroop v.State of Rajasthan (2019) 14 SCC 599** it is held that in absence of any similar provision empowering the court to extend time , no court could either directly or indirectly extend such time.when prayer is made for extension of time, then it is duty of the court to consider the application for extension of period for filing charge sheet in the first instance. Only in case it is rejected then prayer for grant of statutory bail is to be taken forward.

## 5. CONCLUSION:

So, in view of above discussion, It is clear that law provides safeguard against the abuse. However , for implementation of these safeguards it is necessary magistrates must pass order with great scrutiny. Accused need to be made aware about his rights. Then only justice will prevail in true sense.



## References

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- <sup>i</sup>Sumit Mehta v. State (NCT of Delhi),(2013) 15 SCC 570.  
<sup>ii</sup>Uday MohanLalAcharya v.State of Maharashtra (2001)5 SCC453.  
<sup>iii</sup>ManubhaiRatilal Patel v. State of Gujarat AIR 2013 SC313.  
<sup>iv</sup> CBI v. Anupam Kulkarni (1992) 3 SCC 141  
<sup>v</sup>Rajeev Chaudhary v.State (NCT) of Delhi,AIR 2001 SC 2369.  
<sup>vi</sup>Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC67.  
<sup>vii</sup>Union of India v. NiralaYadav(2014) 9 SCC 457.