

Karnataka High Court Central Bureau Of Investigation vs Kenche Mahesh Kumar on 21 July, 2015 Author: Mohan M. R.B. R IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF JULY 2015

PRESENT

THE HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR

AND

THE HON'BLE MR. JUSTICE BUDIHAL R.B.

CRIMINAL PETITION NO.1697/2014

BETWEEN:

Central Bureau of Investigation No. 36, Bellary Road Ganganagar Bangalore-560032 Represented by Inspector of Police CBI:ACB:Bangalore .. Petitioner (By Sri C.H.Jadhav, Senior counsel for Sri D.G. Hegde, Adv.)

AND :

Kenche Mahesh Kumar @ Karapudi Mahesh S/o K. Nagraj Aged: Major R/o Ward No.21 2

Near Katta Nanjappa School J.P. Nagar, Near Bellary Road Circle Hospet-583201 ..Respondent (By Sri Hashmath Pasha, Adv.,) This Criminal Petition is filed under Section 439(2) of Cr.P.C praying to cancel the order of bail granted to the respondent/accused No.4 vide order dated 30.11.2013 by the XLVI Addl. City Civil and Sessions Judge for CBI cases at Bangalore CITY (CCH-47) in Crime No. RC 13(A)/2012 registered for the offences punishable under Sections 120-B, 409, 420, 379, 411 and 447 of Indian Penal Code; Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988; and under Section 21 r/w 4(1), 4(1)(A) and 23 of MMDR Act, 1957 and under Section 24 of Karnataka Forest Act, 1963. A point is raised in this Criminal Petition as to whether the computation of 90 days, as contemplated under Section 167 of the Cr.PC., would commence from the date the body warrant is served on the jail authorities or whether it should be taken as commencing from the date on which the accused is produced before the Court. This Criminal Petition having been reserved for orders on the point raised, coming on for pronouncement of order on the point raised and for final disposal, this day, MOHAN M. SHANTANAGOUDAR .J., made the following. ORDER ON THE POINT RAISED The point to be considered in this Criminal Petition is as under: "Whether the computation of 90 days, as contemplated under Section 167 of the Cr.PC., would commence from the date the body warrant is served on the jail authorities or whether it should

be taken as commencing from the date on which the accused is produced before the Court ?” 2. Brief facts relevant for deciding the aforementioned point are as under: Respondent herein is one of the accused in RC No.15(A)/2012 (Now numbered as Spl. CC No.135/2013). He was arrested and remanded to custody on 2.3.2013 in the said case. The petitioner - Central Bureau of Investigation (‘CBI’ for short) was also investigating RC No.13(A)/2012. The Court below allowed the prayer of the Investigating Officer by order dated 29.5.2013 to array the respondent herein as an additional accused in RC No.13(A)/2012. After arraying the respondent as an additional accused in RC No.13(A)/2012, the Investigating Officer conducted investigation to certain extent. The material collected during investigation prima facie established nexus between the respondent and the crime. As the presence of the respondent was needed for custodial investigation, the Investigating Officer of CBI filed an application seeking production of the respondent in RC No.13(A)/2012 and for the purpose of effecting formal arrest inasmuch as the respondent was already under judicial custody in RC No.15(A)/2012. Considering the material on record, the Special Judge for CBI cases by the order dated 30.8.2013 directed to issue body warrant to the concerned Prison Authorities to produce the respondent before the Court below on 2.9.2013. The body warrant so issued by the Court below was served on the concerned Prison Authorities on 31.8.2013. The respondent was produced before the Special Judge trying CBI cases in RC No.13(A)/2012 on 2.9.2013. On the very day, the custody of the respondent was handed over to the Investigating Officer of CBI for custodial investigation. Subsequently, the petitioner - CBI filed the charge sheet in RC No.13(A)/2012 on 30.11.2013. Application came to be filed by the respondent in RC No.13(A)/2012 before the Court below seeking enlargement on bail on the ground that the charge sheet is filed in RC No.13(A)/2012 after 90 days from the date of service of body warrant on the Jail authorities i.e., after 90 days from 31.8.2013. According to the respondent, the charge sheet was filed on 92nd day after the service of body warrant and not on or before 90 days. The trial Court accepting the contention of the respondent enlarged the respondent on bail by imposing certain conditions. Hence, the only point as mentioned supra has arisen for consideration. 3. Sri C.H. Jadhav, learned senior advocate appearing on behalf of the CBI taking us through the material on record submits that the law nowhere prescribes that the day of service of body warrant on the Jail authorities should be taken as the starting point to calculate 60 days or 90 days as the case may be prescribed under Section 167(2) of Cr.PC for the purpose of filing the charge sheet. He submits that the date on which the concerned Presiding Officer has first authorized detention of the accused should be taken as the starting point to calculate 60 days or 90 days as prescribed under Section 167 of Cr.PC while deciding the bail application. He further submits that the respondent/ accused was already in detention in a different case i.e., RC No.15(A)/2012 and such detention in RC No.15(A)/2012 continued till the formal order of detention was made by the Presiding Officer of the Court below in RC No.13(A)/2012. Consequently, it cannot be said that the respondent herein was detained in RC No.13(A)/2012 at any time prior to actual date of production of the accused before the Court

inasmuch as he was already under detention in RC No.15(A)/2012. Since the respondent was already detained in RC No.15(A)/2012, a formal order was passed by the Court below on 2.9.2013 authorizing detention of the respondent in RC No.13(A)/2012. Thus according to him, the starting date to reckon 90 days shall be the date on which the Court below has first authorized detention of the accused in RC No.13(A)/2012 i.e., 2.9.2013 and not any date prior thereto. Sri Hashmath Pasha, learned advocate appearing for the respondent per contra argued that liberty of the respondent was curtailed as soon as the body warrant was served on the Jail authorities; merely because the respondent was produced before the Special Court on 2.9.2013 by the Jail Authorities and merely because the custody of the respondent was handed over to the petitioner on 2.9.2013 in RC No.13(A)/2012, the period of 90 days as prescribed under Section 167 of Cr.PC will not commence from that date. On the other hand, the period of 90 days shall be calculated from the date on which the body warrant was served on the Jail authorities i.e., from 31.8.2013 in the matter on hand. According to him, since the body warrant was served on 31.8.2013, it is incumbent on the part of the Prison Authorities to retain the presence of the respondent in Prison till he is produced before the Court below on 2.9.2013 and therefore the respondent's liberty to that extent is curtailed from 31.8.2013 itself and consequently, he is deemed to be in detention in RC No.13(A)/2012 from 31.8.2013.

4. Before proceeding further, it would be beneficial to note the relevant provisions of Section 167 of Cr.PC for deciding the aforementioned point: 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, authorize 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 authorize the detention of the accused person, otherwise than in the 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 authorize 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 authorize 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 authorize detention in the custody of the police. 5. It is by now well settled that the body warrant/production warrant cannot be equated to the warrant of arrest. The order issuing the body warrant/production warrant cannot be construed to be an authorization for detaining the person. Body warrant would be issued only for the purpose of securing the person who is already detained in custody in another case. The body warrant cannot mean that the same shall be an authorization to curtail the liberty of a person and to keep him in custody till the date on which the production is ordered for. If the prisoner who is already detained in 'A' case gets an order of bail and complies with all the conditions of the bail order, he shall have to be released pursuant to such bail order, even if the body warrant is issued to the said prisoner in another case i.e., 'B' case in the meanwhile. The Prison Authorities in such case cannot treat the body warrant in 'B' case as an authorization to detain the prisoner till he is produced before the 'B' Court. Thus merely because the body warrant was served on the Jail authorities for production of the detainee who was already detained in RC No.15(A)/2012, it cannot be said that such prisoner was deemed to have been detained in RC No.13(A)/2012 also. Since warrant of arrest was not issued by the Court in RC No.13(A)/2012 for arresting the respondent, the accused/respondent could not have been arrested and produced before the Court below in RC No.13(A)/2012. On the other hand, because of body warrant, the respondent/accused had to be taken from the prison premises to the Court before which RC No.13(A)/2012 is pending merely for production before the said Court. Thereafter it was always open for the Presiding Officer of the Court below to decide as to whether the custody of the respondent should be given to the Investigating Officer in RC No.13(A)/2012 or not. Under given circumstances, if the Court feels that it is not a fit case for granting custody of the Prisoner to the Investigating officer for custodial investigation, it may even refuse to do so. Only if the Court were to decide that it is necessary to have the respondent in the custody of the Investigating Officer for custodial investigation, the custody of the respondent would be given to the Investigating Officer. Therefore the detention of the respondent in RC No.13(A)/2012 would begin only after the Presiding Officer of the Court below passed an order directing handing over of custody of the respondent to the Investigating Officer in RC No.13(A)/2012 and not earlier thereto. 6. The Apex Court in the case of STATE OF W.B. .vs. DINESH DALMIA reported in (2007)5 SCC 773 has observed that the reading of Sections 167(1) and 167(2) of Cr.PC with proviso clearly transpires that the accused should be in fact under the detention of Police

for investigation. It is further observed that if the accused himself voluntarily surrenders before the Magistrate and no physical custody of the accused was given by the Court to the Police for investigation, it cannot be said that the accused was in custody for the purpose of investigation. The whole purpose of Section 57 r/w Section 167 of Cr.PC is that the accused should not be detained for more than 24 hours and subject to 15 days' Police remand, it can further be extended up to 60 days or 90 days as the case may be. But the custody of Police for investigation purpose cannot be treated as judicial custody/detention in another case. The Police custody means, the Police custody in a particular case for investigation and not judicial custody in another case. A notorious criminal may have number of cases pending in various Police Stations in a city or outside the city. If the notional surrender or detention in one pending case is counted in respect of another pending case, then the Police will not get the opportunity to get custodial investigation. The period of detention before the Magistrate in such matters can be treated as device to avoid granting of physical custody of the accused to the Police and claim the benefit of proviso to sub-section (2) of Section 167 of Cr.PC and to get released on bail. This kind of device cannot be permitted under Section 167 of Cr.PC. From the aforementioned observations of the Apex Court, it needs to be concluded that the date on which the accused has voluntarily surrendered himself in another case or the date on which the body warrant was served on Prison Authorities in RC No.13(A)/2012 cannot be taken as the starting point for statutory period as envisaged in proviso to sub-section (2) of Section 167 Cr.P.C. 7. The similar point as mentioned supra was considered by the High Court of Gujarat in Special Criminal Application No.550/2011 in the case of KAPILESH NAVINDCHANDRA DAFTARY .vs. STATE OF GUJARAT decided on 13.6.2011. The High Court of Gujarat in the said matter relying upon various Judgments of the Apex Court concluded that the statutory period as envisaged in proviso to sub-section (2) of Section 167 of Cr.PC would commence only from the date when the accused was produced before the Magistrate and was ordered for custody in second matter and not earlier thereto. In the said matter also, the transfer warrant was issued by the Magistrate for transporting the prisoner who was detained in one case to cooperate during investigation in second case. It is also observed in the said matter that even the initial period of custody of an arrested person till he is produced before the Magistrate i.e., till the period of 24 hours as contemplated under Section 57 of Cr.PC is neither referable to nor in pursuance of an order of remand passed by the Magistrate and such period when the accused was in the custody of the Police officer in exercise of the powers under Section 57 of Cr.PC stands excluded from the statutory period of 90 days or 60 days as the case may be and it will begin to run from the date of order of remand. While observing so, Gujarat High Court has also relied upon the dictum laid down by the Apex Court in the case of CHAGANTI SATYANARAYANA AND OTHERS .vs. STATE OF ANDHRA PRADESH reported in (1986)3 SCC 141. 8. In the case Chaganti Satyanarayana cited supra, the Apex Court has concluded thus: 24. xxxx xxx xxx We must bear in mind that significant changes have been made in Section 167 as well as to the proviso by Act 45 of 1978 such as

increasing the period for investigation in grave cases from 60 to 90 days, conferring of powers of remand on Executive Magistrates in certain situations etc. Therefore, it can be legitimately contended that the words occurring in proviso (a) should be construed within the frame-work of the proviso itself without any reference to Section 167(2). If such a construction is made, it may be seen that the proviso forbids the extension of remands only beyond a total period of 90 days under clause (i) and beyond a total period of 60 days under clause (ii). Thus if proviso (a) is treated as a separate paragraph it necessarily follows that the period of 90 days or 60 days as the case may be, will commence running only from the date of remand and not from any anterior date, in spite of the fact that the accused may have been taken into custody earlier by a police officer and deprived of his liberty. 25. Thus in any view of the matter i.e., construing proviso (a) either in conjunction with sub-section (2) of Section 167 or as an independent paragraph, we find that the total period of 90 days under clause (i) and the total period of 60 days under clause (ii) has to be calculated only from the date of remand and not from the date of arrest. (Emphasis Supplied) While concluding as mentioned supra, the Apex Court has observed that if the initial order of remand is to be made with reference to the date of arrest, then the order will have retrospective coverage for the period of custody prior to the production of the accused before the Magistrate i.e., the period of 24 hours' custody which a police officer is entitled to have under Section 57 besides the time taken for the journey. Such a construction will not only be in discord with the terms of Section 57 but will also be at variance with the terms of sub-section (2) of Section 167 of Cr.PC itself. If the contention of Sri Hashmath Pasha is to be accepted, then the words in sub-section (2) viz., "no Magistrate shall authorize the detention of the accused ... for a total period exceeding 90 days" will have to be read differently insofar as the first order of remand is concerned so as to read as "for a term not exceeding 90 days in the whole from the date of arrest". Hence it is clear that the contention of respondent's counsel would definitely necessitate the adding of more words to the section than what the Legislature has provided. 10. Thus, the Apex Court has made it clear that the period of 90 days or 60 days contemplated under Section 167(2) of Cr.PC., will commence running only from the date of remand and not from any anterior date inspite of the fact that the accused may have been taken into custody earlier by a Police Officer and deprived of his liberty. The observations made in the case of Chaganti Satyanarayana cited supra fully answer the arguments of Mr. Hashmath Pasha. 11. It is also beneficial to refer to the Judgment of this Court in the case of DORAI AND ANOTHER .vs. STATE OF KARNATAKA reported in 1994 CrLJ 2987 wherein this Court after considering almost all the Judgments prior to delivery of the said Judgment, has concluded thus: 30. A careful consideration of the provisions of S.167 and the law laid down by the Supreme Court in Lakshmi Brahman's case (AIR 1983 SC 439) and the decision of the Full Benches of Gujarat, Patna and Rajasthan High Courts makes it clear that an accused is entitled as of right to bail under the proviso to S. 167(2) only if the charge-sheet is not filed within 90 days or 60 days as the case may be, from the date the Magistrate first authorized detention of the accused and that

once the charge-sheet is filed within that period S. 167 ceases to apply and the accused cannot seek bail by virtue of proviso to S. 167(2) on any other ground. In the present case the fact that though the charge-sheet was filed within the period of 90 days the Magistrate had not passed an order taking cognizance within that period does not entitle the accused to seek bail under proviso to S. 167 (2) without reference to the merits of the case. (Emphasis Supplied) 12. In the matter on hand, undisputedly the Presiding Officer of the Court below authorized detention of the respondent for the first time on 2.9.2013 in R.C. No.13(A)/2012 and not earlier thereto. On the very date, the custody of the respondent was handed over to the petitioner - CBI for investigation. Consequently, the respondent was in custody of the petitioner from 2.9.2013 in RC No.13(A)/2012 and not earlier thereto. It is not in dispute that the petitioner has filed the charge sheet in RC No.13(A)/2012 on 30.11.2013. It is also not disputed by Sri Hashmath Pasha that in case if the starting point of 90 days (in the matter on hand) is reckoned from 2.9.2013, then the charge sheet is filed within 90 days. The legal position as mentioned supra as well as our aforementioned discussion leads us to the only conclusion that the period of 90 days contemplated under Section 167(2) of Cr.PC will commence running only from 2.9.2013 i.e., the date on which the respondent was produced before the Special Judge and was handed over to the custody of the petitioner for investigation and not from any anterior date. 13. The contention of Sri Hashmath Pasha that liberty of the respondent was curtailed from the date of service of body warrant on Jail Authorities and that he was taken to the Court from the Prison premises under the Police surveillance should be deemed that he was in custody of the Police in RC 13(A)/2012, is unacceptable in view of the specific observations made by the Apex Court in the case of Chaganti Satyanarayana mentioned supra. 14. The Court below while passing the order dated 30.11.2013 in RC No.13(A)/2012 enlarging the respondent on bail has relied upon the Judgment of this Court in the case of VIJAY KUMAR @ KAVLA & OTHERS .vs. STATE BY ANEKAL POLICE reported in ILR 2009 KAR 327. While deciding the said matter, all the aforementioned Judgments relied upon by us were not brought to the notice of the Court and consequently the said Judgments were not adverted to by the learned Judge. Even otherwise, the question as raised in this case was not specifically raised, consequently was not specifically dealt in detail and decided in the said matter. This Court in Vijay Kumar's case was mainly concentrating on the question relating to release on bail under Section 167(2) of Cr.PC. The Division Bench in Vijay Kumar's case has ruled that if the charge sheet is not filed within 90 days, he/she has got right to be released on bail and even if there is one day delay in filing the charge sheet after 90 days, the same would enure to the benefit of the accused. Be that as it may, in the light of the definite dictum laid down by the Apex Court in Chaganti Satyanarayana's case and Dinesh Dalmia's case mentioned supra, the date on which the accused was remanded to custody shall be taken as the date of starting point for computing 90 days or 60 days as the case may be for deciding the bail application filed under Section 167(2) of Cr.PC. Accordingly, the point raised in this Criminal Petition is answered as under: "The computation of 90 days as contemplated under Section

167 of Cr.PC., would commence from the date on which the detention of the accused is authorized in such custody as the Magistrate/Sessions Judge deems fit and not from the date, on which the body warrant was served on the Jail authorities". Sd/- JUDGE Sd/- JUDGE gss/- MSGJ/BRBJ: 21.7.2015 ORDER We had heard the learned advocates on the point raised in the criminal petition on 8.7.2015 and had reserved for orders. Today, we have pronounced the order in the Court on the aforesaid point. 2. After pronouncing the order, we have heard the learned advocates. From the submissions made at the Bar, we find that no other point needs to be decided in this Criminal Petition. In view of the above, the order of XLVI Additional City Civil and Sessions Judge & Special Judge for CBI Cases, Bangalore city (CCH-47) dated 30th November 2013 in R.C.No.13(A)/2012 is liable to be set aside. Accordingly, the same stands set aside. Further proceedings shall be taken against respondent/accused No.4 as per law. Criminal petition is allowed accordingly. Sd/- JUDGE Sd/- JUDGE gss/-