

A QAMAR GHANI USMANI

v.

THE STATE OF GUJARAT

(Criminal Appeal Nos. 1045-1046 of 2023)

B APRIL 10, 2023

[M. R. SHAH AND C. T. RAVIKUMAR, JJ.]

- Code of Criminal Procedure, 1973 – s. 167(2) – Default bail – Appellant-accused was arrested on 29.01.2022 – 90 days period u/s. 167 was to expire on 29.04.2022 – On 22.04.2022, IO prayed for extension of time to complete the investigation, Trial Court extended time limit to investigate by 30 days in absence of accused – The accused came to be informed about the extension on 23.04.2022 itself – On 22.05.2022, the IO again prayed for further extension, the same was allowed by 30 days – Second Extension was granted in the presence of the accused – In the meantime, accused submitted the default bail application on 10.05.2022 on the ground that at the time when the first extension was granted, the same was not in the presence of the accused and the accused was not kept present thus first extension was bad in law and therefore, the accused acquired right to get the default bail – Application was rejected by Trial Court – Appeal dismissed by High Court – On appeal, held: At the time when the default bail application was made on 10.05.2022 there was already an extension and even thereafter, also there was a second extension which was in presence of the accused – Neither the first extension nor the second extension came to be challenged by the accused – Chargesheet filed within the period of extension – Accused not entitled to default bail.*

Dismissing the appeals, the Court

- HELD :** 1. Sum and substance of law laid-down by this Court in the cases of Sanjay Dutt and Jigar are that while considering the application by the Investigating Agency for extension of time for completing the investigation beyond the period prescribed under Section 167(2) of the Cr.PC the accused is to be given notice and/or is to be kept present before the Court, so that, the accused had knowledge that the extension is sought and granted.
- H [Para 6.4][832-C-D]

2. In the aforesaid peculiar facts and circumstances of the case, when two extensions granted by the Court which are not challenged and at the time when the default bail application was made on 10.05.2022 there was already an extension and even thereafter, also there was a second extension which was in presence of the accused and thereafter, when the chargesheet has been filed within the period of extension, the accused is not entitled to be released on statutory/default bail as prayed. Therefore, in the facts and circumstances of the case, this court was in agreement with the ultimate conclusion reached by the High Court denying the statutory/default bail to the accused. In view of the above and for the reasons stated above and, in the facts, and circumstances of the case narrated hereinabove, the appellant is not entitled to the benefit of statutory/default bail. [Paras 7, 8][833-D-F]

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Jigar alias Jimmy Pravinchandra Adatiya Vs. State of Gujarat 2022 SCC OnLine SC 1290; Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors. (1994) 4 SCC 602 : [1994] 1 Suppl. SCR 360; Sanjay Dutt Vs. State through CBI, Bombay (II) (1994) 5 SCC 410 : [1994] 3 Suppl. SCR 263; Narender G. Goel Vs. State of Maharashtra (2009) 6 SCC 65 : [2009] 8 SCR 1004 – referred to.

Sayed Mohd. Ahmed Kazmi Vs. State (2012) 12 SCC 1 : [2012] 9 SCR 836; Rambeer Shokeen Vs. State (2018) 4 SCC 405 : [2018] 1 SCR 373 – held inapplicable.

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Case Law Reference

[1994] 1 Suppl. SCR 360	referred to	Para 4.2
[1994] 3 Suppl. SCR 263	referred to	Para 4.2
[2012] 9 SCR 836	held inapplicable	Para 6.2.3
[2018] 1 SCR 373	held inapplicable	Para 6.3
[2009] 8 SCR 1004	referred to	Para 5.2

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A CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1045-1046 of 2023.

From the Judgment and Order dated 23.09.2022 of the High Court of Gujarat at Ahmedabad in CRLA Nos. 1215 and 1216 of 2022.

B Mehmood Pracha, Ms. K. V. Bharathi Upadhyaya, Sanawar Choudhary, Jatin Bhatt, Dhruv Yadav, Advs. for the Appellant.

Tushar Mehta, SG, Rajat Nair, Ms. Swati Ghildiyal, Madhav Sinhal, Ms. Devyani Bhatt, Advs. for the Respondent.

C The Judgment of the Court was delivered by
M. R. SHAH, J.

1. Leave granted.

D 2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 23.09.2022 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 1215/2022 and 1216/2022, by which, the Division Bench of the High Court has dismissed the said appeals and has refused to release the appellant – accused on statutory bail (default bail) under Section 167(2) of the Cr.PC, the original accused has preferred the present appeals.

E 3. The facts leading to the present appeals in a nutshell are as under: -

F 3.1 That the accused came to be arrested on 29.01.2022. The 90 days period as provided under Section 167 of the Cr.PC, therefore, was to expire on 29.04.2022. However, on 22.04.2022, the Investigating Officer prayed for extension of time to complete the investigation which

G came to be granted by the learned Trial Court by granting extension of 30 days period. The accused came to be informed about the extension on 23.04.2022 itself. On 22.05.2022, the Investigating Officer again prayed for further extension which came to be allowed by the learned

H Trial Court on 22.05.2022. At this stage, it is required to be noted that on 22.05.2022, the second extension was granted in the presence of the accused. In the meantime, the accused submitted the default bail application on 10.05.2022 on the ground that at the time when the first extension was granted on 22.04.2022, the same was not in the presence of the accused and the accused was not kept present and therefore, first

extension was bad in law and therefore, the accused acquired right to get the default bail on 10.05.2022. The learned Trial Court rejected the said application(s). The Division Bench of the High Court by the impugned judgment and order has dismissed the appeals. Hence, the present appeals at the instance of the original accused.

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4. Shri Mehmod Pracha, learned counsel has appeared on behalf of the appellant and Shri Tushar Mehta, learned Solicitor General has appeared on behalf of the respondent – State of Gujarat.

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4.1 Shri Pracha, learned counsel appearing on behalf of the accused has vehemently submitted that as such the judgment and order which has been relied upon by the Division Bench of the High Court has been subsequently set aside by this Court in the case of **Jigar alias Jimmy Pravinchandra Adatiya Vs. State of Gujarat 2022 SCC OnLine SC 1290.**

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4.2 It is further submitted by Shri Pracha, learned counsel appearing on behalf of the accused that it is admitted by the prosecution that the appellant was not produced before the learned Trial Court at the time of consideration of application for first extension of period of investigation. It is submitted that in the case of **Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors. (1994) 4 SCC 602** and in the case of **Sanjay Dutt Vs. State through CBI, Bombay (II) (1994) 5 SCC 410**, notice to the accused at the time of consideration of application for extension of period of investigation has been held to be mandatory. It is submitted that in the case of **Sanjay Dutt (supra)**, this Court has further interpreted to mean that a written notice is not mandatory but the presence of the accused suffices. It is submitted that therefore, even as per the law laid-down by this Court in the case of **Sanjay Dutt (supra)** at the time of consideration of application for extension of period of investigation, the presence of the accused is must. It is submitted that therefore, in the present case when the first extension was granted on 22.04.2022 admittedly the accused was not produced before the learned Trial Court, the first extension before itself is illegal and not an extension in the eye of law and therefore, thereafter when the accused filed the application(s) under Section 167(2) of the Cr.PC for default bail/statutory bail, the accused had acquired a indefeasible right for release on statutory bail as by the time 90 days period was over and the first extension is to be ignored.

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- A 4.3 It is further submitted by learned counsel appearing on behalf of the accused that as observed and held by this Court in the case of **Sayed Mohd. Ahmed Kazmi Vs. State (2012) 12 SCC 1** extension of period of investigation from retrospective effect, after the initial order has been set aside, is not permissible.
- B 4.4 It is further submitted by learned counsel appearing on behalf of the accused that recently in the case of **Jigar (supra)** this Court after taking into consideration the decisions of this Court in the cases of **Hitendra Vishnu Thakur (supra)** and **Sanjay Dutt (supra)**, has specifically reiterated the proposition that failure to produce the accused at the time of extension of period of investigation renders such extension bad in law and entitles the accused to statutory bail.
- C 4.5 Making the above submissions and heavily relying upon the decisions of this Court in the cases of **Hitendra Vishnu Thakur (supra)**; **Sayed Mohd. Ahmed Kazmi (supra)**; **Sanjay Dutt (supra)** and **Jigar (supra)**, it is prayed to allow the present appeals and direct the respondent to release the appellant – accused on statutory bail.
- D 5. While opposing the present appeals, Shri Tushar Mehta, learned Solicitor General appearing on behalf of the State has vehemently submitted that as such the decision of this Court in the case of **Hitendra Vishnu Thakur (supra)** has been subsequently watered down by this Court in the case of **Sanjay Dutt (supra)**. It is submitted that the view taken by this Court in the case of **Hitendra Vishnu Thakur (supra)** that at the time of extension of time for investigation, a notice to the accused is required to be given by the Designated Court before it grants any extension is no longer a good law in view of the subsequent decision of this Court in the case of **Sanjay Dutt (supra)**. It is submitted that in the case of **Sanjay Dutt (supra)** this Court has explained the decision in the case of **Hitendra Vishnu Thakur (supra)** and has observed and held that the only requirement is the production of the accused before the Court in accordance with Section 167(1) of the Cr.PC and that the accused is not entitled to written notice giving reasons for the extension.
- E 5.1 Now so far as the reliance placed upon the decision of this Court in the case of **Jigar (supra)** is concerned, it is vehemently submitted that as such the said decision requires reconsideration by the Larger Bench as in the said decision this Court has not taken into consideration Section 465 of the Cr.PC. It is submitted that this Court
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has failed to consider the law laid-down by this Court in the case of **Rambeer Shokeen Vs. State (2018) 4 SCC 405**, in which it was categorically held that the accused persons are entitled to the right of the default bail only after rejection of the application for extension of time period for investigation or when the chargesheet is not filed within the prescribed time.

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5.2 It is further submitted that even otherwise as observed and held by this Court in the case of **Narender G. Goel Vs. State of Maharashtra (2009) 6 SCC 65** the accused has no right to be heard at the stage of investigation and more particularly, at the stage of extension of period for investigation. It is submitted that as observed and held by this Court, the accused is not entitled to have the reasonings for extension of period of investigation because accused has no right to be heard at the stage of investigation.

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5.3 It is further submitted by Shri Tushar Mehta, learned Solicitor General appearing on behalf of the State that even otherwise, in the facts and circumstances of the case, the appellant is not entitled to any relief(s) as prayed, more particularly, the statutory bail. It is submitted that the first extension was granted by the learned Trial Court on 22.04.2022. The accused was informed about extension of time for investigation immediately on the very next day i.e., 23.04.2022. It is submitted that nothing was done by the accused even on 29.04.2022 (when the 90 days period was over). It is submitted that though the accused was informed about the extension of time for investigation on 23.04.2022, till 10.05.2022 he did not challenge the extension of time for investigation for a further period of 30 days granted on 22.04.2022. It is submitted that even thereafter when the second extension was sought and granted on 22.05.2022 on which date the accused was present and in whose presence the extension was granted, no grievance was made by the accused on the legality and validity of earlier order dated 22.04.2022 granting the extension for a further period of 30 days. It is submitted that therefore, once the accused failed to challenge the first order of extension dated 22.04.2022 on whatever grounds available and allowed the period of extension and thereafter at the time when the second extension was granted the accused was present and he did not make any grievance with respect to the first extension granted on 22.04.2022, thereafter, it is not open for the accused to make any grievance on the grant of first extension granted on 22.04.2022.

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- A 5.4 It is submitted that therefore, at the time when the accused preferred application(s) for statutory/default bail on 10.05.2022, there was already an extension of time for investigation by the learned Trial Court vide order dated 22.04.2022, which was not challenged by the accused and therefore, the application(s) for default/statutory bail during the period of extension would not be maintainable at all as the said application(s) were made during the period of extension for investigation. It is submitted by Shri Mehta, learned Solicitor General that even in the application(s) for default/statutory bail preferred on 10.05.2022, the accused did not even disclose that the learned Trial Court had granted the extension for investigation vide order dated 22.04.2022 which as such was communicated to the accused on 23.04.2022. It is submitted that therefore, in view of the above facts, none of the decisions of this Court relied upon on behalf of the accused shall be applicable to the facts of the case on hand. It is submitted that so far as the reliance placed upon the decision of this Court in the case of **Sayed Mohd. Ahmed Kazmi (supra)** is concerned, it is submitted by learned Solicitor General that on facts the said decision shall not be applicable to the facts of the case on hand. It is submitted that in the case before this Court, in fact the extension was challenged before the Sessions Court and the extension was held to be bad in law.
- E 5.5 Making the above submissions, it is prayed to dismiss the present appeals.
6. We have heard Shri Mehmood Pracha, learned counsel appearing on behalf of the accused – appellant and Shri Tushar Mehta, learned Solicitor General appearing on behalf of the State of Gujarat.
- F 6.1 The short question which is posed for the consideration of this Court is whether in the facts and circumstances of the case, the appellant shall be entitled to the statutory/default bail under Section 167(2) of the Cr.PC on the ground that at the time when the extension of time for completing the investigation was prayed by the investigating agency and granted by the Trial Court the accused was not kept present?
- G 6.2 Learned counsel appearing on behalf of the appellant – accused has heavily relied upon the decisions of this Court in the cases of **Hitendra Vishnu Thakur (supra); Sanjay Dutt (supra); Sayed Mohd. Ahmed Kazmi (supra)** and on the recent decision of this Court in the case of **Jigar (supra)**.
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6.2.1 In the case of **Hitendra Vishnu Thakur (supra)**, this Court observed and held that when a report is submitted by the Public Prosecutor to the Designated Court for grant of extension, its notice should be issued to the accused before granting such an extension so that the accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him.

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6.2.2 However, thereafter, the decision of this Court in the case of **Hitendra Vishnu Thakur (supra)** fell for consideration before this Court in the case of **Sanjay Dutt (supra)** and the view taken by this Court in the case of **Hitendra Vishnu Thakur (supra)** as above, has not been accepted by the Constitution Bench of this Court and it is observed and held in the case of **Sanjay Dutt (supra)** that a notice to the accused is not required to be given by the Designated Court before it grants any extension for completing the investigation. Meaning thereby, the accused is to be kept present before the Court when it grants any extension for completing the investigation. The view taken by this Court in the case of **Hitendra Vishnu Thakur (supra)** that a notice is to be given to the accused so that he can oppose the extension has not been accepted by the Constitution Bench of this Court in the case of **Sanjay Dutt (supra)**. As such under the Scheme of Cr.PC and on the report submitted by the Investigating Agency, prayer for extension of time for completing investigation is subject to the satisfaction of the concerned Court whether to grant further extension or not. The Court is to be satisfied on the grounds on which the extension is sought.

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6.2.3 Now so far as the reliance placed upon the decision of this Court in the case of **Sayed Mohd. Ahmed Kazmi (supra)** by learned counsel appearing on behalf of the appellant is concerned, at the outset, it is required to be noted that the said decision shall not be applicable to the facts of the case on hand. In the case before this Court, in fact, the extension granted by the learned Chief Metropolitan Magistrate was challenged on the ground that the learned Chief Metropolitan Magistrate had no competence to extend the judicial custody of the accused. The learned Additional Sessions Judge accepted the same. However, thereafter, a fresh extension was sought which was beyond the period prescribed under Section 167 of the Cr.PC and therefore, this Court observed and held that extension for period of investigation from retrospective effect shall not be permissible.

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- A 6.3 Similarly, even the decision of this Court in the case of **Rambeer Shokeen (supra)** relied upon by learned Solicitor General shall also not be applicable to the facts of the case on hand. In the case of **Rambeer Shokeen (supra)** pending application by the Investigating Agency for extension of time for completing the investigation, the accused made an application for statutory/default bail and to that this Court observed and held that the application filed by the Investigating Agency for extension of time for completing the investigation which was prayed in time kept pending ought to be decided first by the Court.
- B 6.4 Thus, sum and substance of law laid-down by this Court in the cases of **Sanjay Dutt (supra)** and **Jigar (supra)** are that while considering the application by the Investigating Agency for extension of time for completing the investigation beyond the period prescribed under Section 167(2) of the Cr.PC the accused is to be given notice and/or is to be kept present before the Court, so that, the accused had knowledge that the extension is sought and granted.
- C 6.5 However, in the facts and circumstances of the case, we are of the view that the appellant is not entitled to the relief of statutory/default bail. In the present case the facts are glaring which are as under: -
- E The accused was arrested on 29.01.2022. The 90 days provided under Section 167 Cr.PC thus would expire on 29.04.2022. Within the period of 90 days i.e., on 22.04.2022, the IO submitted the report and prayed for extension of time for completing the investigation which came to be allowed by the learned Trial Court by granting extension of 30 days period. It is true that for whatever reason, the accused was not kept present at the time when the learned Trial Court considered the report submitted by the IO for extension of time for completing the investigation. However, the accused came to be informed about the extension on the very next day i.e., 23.04.2022. The accused did not challenge the extension on any ground which may be available to him and/or did not make any grievance that such an extension is illegal and/or contrary to law. On 10.05.2022, he made the present application for default bail/statutory bail on the ground that the chargesheet has not been filed within the period of 90 days. At this stage, it is required to be noted that at the time when the present application for default/statutory bail was made on

10.05.2022, there was already an extension of time by the learned Trial Court which as such was in existence and the extension was up to 22.05.2022. At this stage, it is required to be noted that though informed on 23.04.2022 about the extension of time for completing the investigation, the accused did not disclose the same in the application for default bail/statutory bail submitted on 10.05.2022. That thereafter, on 22.05.2022, IO again submitted the report for further extension of time for completing the investigation which came to be allowed/granted by the learned Trial Court which as such was in the presence of the accused and at that time, the accused remained present. Neither the first extension nor the second extension came to be challenged by the accused.” A
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7. Therefore, in the aforesaid peculiar facts and circumstances of the case, when two extensions granted by the Court which are not challenged and at the time when the default bail application was made on 10.05.2022 there was already an extension and even thereafter, also there was a second extension which was in presence of the accused and thereafter, when the chargesheet has been filed within the period of extension, the accused is not entitled to be released on statutory/default bail as prayed. Therefore, in the facts and circumstances of the case, we are in agreement with the ultimate conclusion reached by the High Court denying the statutory/default bail to the accused. D
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8. In view of the above and for the reasons stated above and, in the facts, and circumstances of the case narrated hereinabove, the appellant is not entitled to the benefit of statutory/default bail. Under the circumstances, the present appeals deserve to be dismissed and are accordingly dismissed. However, it will be open for the accused to prayer for regular bail which may be considered in accordance with law and on its own merits. Present appeals stand dismissed accordingly. F