

GAHC010206622023



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Bail Application No. 3292 of 2023

1. Sahadeb Debnath, age-45 years,
S/o Krishna Hari Debnath,
R/o Rabindranagar,
P.S.-Dulkli,
Dist.- West Tripura, Tripura.

2. Sri Sujit Kar, Age-33 years,
S/o Subhash Kar,
R/o. Dhaleswar Jail Road, Agartala,
P.S.-Agartala, Urban,
District- West Tripura, Tripura.

.....Accused/Petitioners

-Versus-

Union of India,
(Represented by learned P.P.)

.....Respondent.

Advocates for the petitioners : Mr A M Bora, Sr. Advocate

Advocate for the respondent : Mr S C Keyal, SC, DRI.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 11.12.2023
Date of order : 18.12.2023

ORDER

Heard Mr A M Bora, learned Senior Counsel for the petitioners, 1) Sahadeb Debnath and 2) Sri Sujit Kar. Also heard Mr S C Keyal, learned Standing Counsel for the DRI.

2. The petitioners have filed this application under Section 439 CrPC, with prayer for bail, as they are in custody since 23.03.2023 in connection with NDPS Case No. 66/2023, arising out of DRI Case No. 03/CL/NDPS/DRI/Silchar 2022-23, registered under Sections 20 (b) (ii) (C) and 29 of the NDPS Act.

3. It is submitted by the learned Senior Counsel for the petitioners that both the petitioners have earlier applied for bail on 12.09.2023, before completion of 180 days and they were entitled to default bail, as charge sheet was not submitted before completion of 180 days.

4. It is submitted that the petitioner No. 1 is a businessman and has no criminal

antecedents. His father is bedridden and his wife and two minor children has no one to take care of them. The petitioner No. 2 is the driver of the petitioner No. 1 and is the sole breadwinner of his family.

5. The allegation against the petitioners is that on a secret information, the informant along with his staff and Assam Rifles, intercepted one 10-wheeler truck bearing Registration No. BR 01GE-7414 and recovered suspected cannabis. While the driver of the truck managed to escape the helper was apprehended by the DRI team. The DRI team then pursued one Maruti Suzuki Baleno, bearing Registration No. TRO1BM0781, which was intercepted and the driver was apprehended. The petitioner No. 2 has been falsely alleged that he is the helper of the apprehended truck. The petitioner No. 2 was proceeding in the Baleno and not in the truck.

6. It is submitted that there is every possibility that as Section 42 of the NDPS Act has not been complied with, on the light of the decision (dated 20.01.2021) of this Court in Criminal Appeal No. 66/2020 in the case of ***Thounaojam Punima Singh –Vs- Union of India & Anr.***, reported in **2021 (2) GLR 359**, there is every possibility that the petitioners shall be acquitted in this case.

7. The petitioners were not found in conscious possession of the cannabis and there is every possibility that the petitioners shall be acquitted from this case.

8. The petitioner No. 1 is paying equal monthly installments as he purchased his Baleno car on loan. The petitioners are victims of circumstances and they are entitled to bail as they are innocent. They are local residents with sufficient movable and immovable properties and

they are not flight risks.

9. At this juncture, the petitioners are not on the merits of the case. It is submitted on behalf of the petitioners that the offence report was submitted on 13.09.2023, i.e., before completion of 180 days of custody of the petitioners, who were behind bars since 23.03.2023. Their bail applications were submitted on 12.09.2023. The offence report was, however, seen by the Judge on 29.09.2023. As the charge sheet was seen by the Court on 29.09.2023, it thus indicates that charge sheet was officially laid against the present petitioners on 29.09.2023, i.e., after the expiry of 180 days of incarceration, whereas the petitioner had applied for bail before 180 days of custody and they are thus, entitled to default bail. It is submitted that it cannot be accepted that charge sheet has been laid without the initials of the Magistrate or the Presiding Officer concerned. To buttress his submission, the learned Senior Counsel for the petitioners has relied on a decision of a coordinate Bench of this Court in ***Samsun Noor @ Samsul Noor –vs- The State of Assam;*** in Bail Application No. 1958/2022 (07.10.2022).

10. It is further submitted that forwarding the charge sheet cannot be concluded as submission of Final Report in terms of Section 173 (2) of the Code of Criminal Procedure (CrPC, for short). It is only when the Magistrate/the Court competent to take cognizance of the offence puts the initials in the chargesheet as well as in the register maintained with date and seal of the Magistrate/ Court, it would be that date on which date the charge sheet has been deemed to have been submitted to the Magistrate/Court.

11. It is submitted that there is a receipt of Final Report dated 13.09.2023. The learned

Senior Counsel for the petitioners and the learned Standing Counsel for the respondent, have submitted that the Final Report/charge sheet was submitted on 13.09.2023.

12. The learned Standing Counsel for the respondent relied on the decision of Hon'ble the Supreme Court in ***Amritlal –Vs- Shantilal Soni & Ors.; 2022 4 Supreme 124***, wherein it has been held and observed that-

“7. The Constitution Bench answered the aforesaid questions as follows: -

51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale [Bharat Damodar Kale v. State of A.P., (2003) 8 SCC 559] which is followed in Japani Sahoo [Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394] lays down the correct law. Krishna Pillai [Krishna Pillai v. T.A. Rajendran, 1990 Supp SCC 121 : 1990 SCC (Cri) 646] will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC. (emphasis supplied)

8. Therefore, the enunciations and declaration of law by the Constitution Bench do not admit of any doubt that for the purpose of

computing the period of limitation under Section 468 CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence. The High Court has made a fundamental error in assuming that the date of taking cognizance i.e., 04.12.2012 is decisive of the matter, while ignoring the fact that the written complaint was indeed filed by the appellant on 10.07.2012, well within the period of limitation of 3 years with reference to the date of commission of offence i.e., 04.10.2009.”

13. The learned Standing Counsel for the DRI has prayed to reject the petition with prayer for bail.

14. I have considered the submissions at the Bar with circumspection.

15. Seen the scanned copies of the entire LCR.

16. The LCR reveals that the charge sheet was received on 13.09.2023. No initials or seal of the Sessions Judge is to be found in the charge sheet/Final Report of the scanned copies of the LCR. The LCR also reveals that vide order dated 29.09.2023, the case was transferred to the Court of learned Additional Sessions Judge (FTC).

17. Now, the core question is whether it can be accepted that without the initials or signature of the Sessions Judge, that charge sheet has been laid on 13.09.2023 or whether charge sheet has been laid on 29.09.2023, when the case was transferred for disposal.

18. There is not an iota of doubt that the Final Report was forwarded on 13.09.2023, but no initial or signature of the Sessions Judge appears on the scanned copies of the Final Report under Section 173(2) CrPC. The LCR reveals that the first order passed in NDPS Case No. 66/20223 was on 29.09.2023. Assuming that if the Final Report was brought to the notice of the Court on 29.09.2023,

i) does the petitioners have a right to default bail?

ii) will their indefeasible right be infringed if their prayer for default bail is rejected solely because the challan-Final Report was forwarded on 13.09.2023, but the Final Report was not seen by the Court?

19. It is clear that the order of transfer on 29.09.2023 reveals the signature of the Court, but prior to that, no signature of the trial Court or the Court taking cognizance, appears on record. It is true that the Right to Liberty cannot be curtailed when in an adroit manner, a charge sheet or Final Report is forwarded with the sole object to deter the accused from being released on bail. This is the reason why it has been held in ***Samsun Noor @ Samsul Noor (supra)***, that-

“37. This aspect of the matter can be looked from another angle. The judgment of the Supreme Court in the case of M. Ravindran (supra) and the relevant paragraphs quoted hereinabove clearly shows that [Section 167\(2\)](#) of the Code is integrally linked with [Article 21](#) of the Constitution of India and an obligation is cast upon the State under [Article 21](#) of the Constitution of India to follow a fair, just and reasonable procedure prior to depriving any

person of his personal liberty. This valuable right under [Section 167\(2\)](#) of the Code cannot be made nugatory at the hands of the Office of the Magistrate/the Court. It is also relevant herein to take note of allowing the Office of the Magistrate/the Court to receive on behalf of the Magistrate/the Court may lead to manipulations which would affect the rights of the prosecution as well as the accused as the case may be. It is therefore, the Magistrate/the Court competent to take cognizance of the offence who is required under law to put the initial with date and the seal of the Court on the register maintained in terms with the Assam Police Manual so that there is no scope of any manipulation.

38. In view of the above, this Court is of the opinion that submission of the charge sheet before the Office of the Magistrate/the Court would not be sufficient compliance in terms with [Section 173\(2\)](#) of the Code read Page No.# 41/43 with Rule 38 and 69 of the Assam Police Manual Part-IV and it is only when the Magistrate/the Court competent to take cognizance of the offence, puts the initials in the charge-sheet as well as in the Register maintained with date and seal of the Magistrate/the Court, it would be that date on which the charge sheet has been deemed to have been submitted to the Magistrate/Court.”

20. It was the opinion in ***Samsun Noor’s case (supra)***, that charge sheet before the office of the Magistrate/the Court would not be sufficient compliance in terms of Section 173(2) of the Code, read with Rule 38 and Rule 69 of the Assam Police Manual Part-IV and it

is only when the Magistrate/the Court competent to take cognizance of the offence, puts the initials in the charge sheet, it would be that date when charge sheet has been deemed to have been submitted.

21. Law has not been laid down by the decision in ***Samsun Noor's case (supra)***, that submission of charge sheet has to be confirmed by the initials of the Magistrate/the Court taking cognizance after the charge sheet-Final Report-Challan has been forwarded to the Court.

22. “*Opinion*” as described in the Cambridge Dictionary is – a thought or belief about some thing or some one.

23. The learned Standing Counsel for the respondent, Mr S C Keyal has submitted that the decision in ***Samsun Noor's case (supra)***, is an *obiter dicta*.

24. Refuting this submission, the learned Senior Counsel for the petitioners has submitted that in that case, this matter may be placed before a larger Bench if the decision in ***Samsun Noor's case (supra)*** is not in consonance to the decision of Hon'ble the Supreme Court in ***Amritlal's case (supra)***. It is submitted that the case may be placed before a larger Bench if it is considered that the decision is *per incuriam* .

25. The learned Standing Counsel for the respondent has submitted that it has been made clear by Hon'ble the Supreme Court in ***Amritlal's case (supra)***, that-

“8. Therefore, the enunciations and declaration of law by the

Constitution Bench do not admit of any doubt that for the purpose of computing the period of limitation under 64 Section 468 CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence. The High Court has made a fundamental error in assuming that the date of taking cognizance i.e., 04.12.2012 is decisive of the matter, while ignoring the fact that the written complaint was indeed filed by the appellant on 10.07.2012, well within the period of limitation of 3 years with reference to the date of commission of offence i.e., 04.10.2009.”

26. It has also been submitted by the learned Standing Counsel for the respondent that as soon as the challan was forwarded on 13.09.2023, the indefeasible right under Section 167(2) of the Code becomes unenforceable.

27. It has been held by Hon’ble the Supreme Court in ***Serious Fraud Investigation Office –Vs- Rahul Modi***; reported in **2022 (2) Supreme 606**, that-

“10. It is clear from the judgment of this Court in Bhikamchand Jain (supra) that filing of a charge-sheet is sufficient compliance with the provisions of Section 167, CrPC and that an accused cannot demand release on default bail under Section 167(2) on the ground that cognizance has not been taken before the expiry of 60 days. The accused continues to be in the custody of the Magistrate till such time cognizance is taken by the court trying the offence, which assumes custody of the accused for the purpose of

remand after cognizance is taken. The conclusion of the High Court that the accused cannot be remanded beyond the period of 60 days under Section 167 and that further remand could only be at the post-cognizance stage, is not correct in view of the judgment of this Court in Bhikamchand Jain (supra).

13.....This Court repeated the findings recorded in Mohamed Iqbal Madar Sheikh & Ors. v. State of Maharashtra, (1996) 1 SCC 722, that the right to bail cannot be exercised once the charge-sheet has been submitted and cognizance has been taken. As stated above, the said conclusion in Madar Sheikh (supra) was arrived at with reference to the facts of the case.

28. Thereafter, the order of the High Court of Judicature at Punjab and Haryana, granting bail to the respondent was set aside.

29. In the instant case, the petitioners were forwarded to custody on 23.03.2023 and the charge sheet was submitted on 13.09.2023, well within the expiry of the statutory period. Although the case was transferred for disposal on 29.09.2023, I am constrained to hold that the charge sheet was submitted and forwarded before the expiry of the statutory period.

30. In the light of the decision of Hon'ble the Supreme Court in ***Rahul Modi's case (supra)***, the petition with prayer for bail is rejected at this stage. Even if the merits of this case is considered, the petitioner is not entitled to bail, at this juncture. The embargo under

Section 37 of the NDPS Act does not entitle the petitioner to bail at this stage.

31. Bail Application stands disposed of.

JUDGE

Comparing Assistant