IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-16099-2015
Date of Decision: 06.07.2015

Sukhdev Singh

... Petitioner(s)

Versus

State of Punjab

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

1) Whether Reporters of the local papers may be allowed to see the judgment ?.
2) To be referred to the Reporters or not ?.
3) Whether the judgment should be reported in the Digest ?

Present: Mr. Raj Karan Singh Verka, Advocate,
for the petitioner.

Mr. S.S.Chandumajra, DAG, Punjab.

Paramjeet Singh, J.

Instant petition has been filed under Section 167(2) of the Code of Criminal Procedure (in short, 'the Code') read with Section 36-A (4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'the NDPS Act') read with Section 439 of the Code for grant of regular bail to the petitioner in case arising from FIR No.214 dated 15.09.2014, registered at Police Station Gharinda, Amritsar, under Sections 21/22 of the NDPS Act, Sections 411/414 of the Indian Penal Code, Section 3/34/20 of Indian Passport Act and Section 14 of the Foreigners Act (wrongly not mentioned in head-note of petition).

In brief, facts giving rise to the present petition are to the effect that on the intervening night of 14/15.09.2014, 1.900 kilograms heroin was recovered on Indo-Pak border by the BSF officials. During investigation, petitioner-Sukhdev Singh and Jugraj Singh were arrested. Since source of consignment of heroin and involvement of persons were to be investigated and report of chemical examiner was yet to be received, therefore, learned APP for State moved application under Section 36-A of the NDPS Act for extension of time beyond period of 180 days' custody of the petitioner, to complete investigation. The said application was allowed by the trial Court vide order dated 30.03.2015 and a period of 30 days has been extended to enable the prosecution to complete the investigation. However, the application moved by the petitioner under Section 167(2) of the Code has been dismissed by the trial Court vide order dated 30.03.2015. Hence, this petition.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the petitioner contended that the petitioners have indefeasible right of bail, as challan was not presented within the stipulated period. Learned counsel further contended that though quantity of alleged recovered contraband may be commercial or huge, the default bail is a right. Learned counsel further contended that the petitioner has been behind bars since long and is not required for custodial interrogation.

Per contra, learned State counsel vehemently opposed the contentions of learned counsel for the petitioner and contended that the prosecution filed application for extension of time within the stipulated period of 180 days, therefore, it cannot be considered at fault. Learned counsel further contended that challan has been presented.

I have considered the rival contentions of learned counsel for the parties.

There are serious allegations against the petitioner that he along with Jugraj Singh is indulging in smuggling of narcotic drugs. The contraband was recovered by the BSF authorities and ultimately the petitioner was found to be involved. There is no challenge to the order of extension of time for 30 days. The challan has already been presented in the Court.

Otherwise also, the matter in hand is no more res integra. This case is squarely covered by the judgment of this Court rendered in CRM-M-1753-2015, titled ***'Inderjit Singh and another vs. State of Punjab'***, decided on 13.05.2015 wherein it has been held as under:

> *"The Public Prosecutors moved applications in the present cases for extension of time on the ground that reports of chemical examiner have not been received despite sincere efforts, therefore, challans could not be presented in the concerned Special Court. The said applications were decided by the Special Court prior to the filing of applications by the petitioners under Section 167 (2) of the Code. The Special Courts have rightly accepted the ground taken by the prosecution for extension of time*

that it is a compelling reason for which challans could not be presented to the Special Court and ultimately allowed the applications and extended the time for presentation of challan.

In ***State of Haryana vs. Mehal Singh and others*** *1978 PLR 480, a Full Bench of this Court has held under:*

> *"16. In view of the above conclusion, the accused would be on still a weaker ground in canvassing that the report, which did not include the report of the experts such as Chemical Analyst, Serologist, Ballistic Expert, finger Print Expert etc., would not be a complete police report envisaged in sub-section (2) of section 173 of the Code, which in terms is prepared and submitted only after the completion of the investigation. So far as the investigation part of the job of the investigating officer is concerned, it is complete if he has collected all evidence and facts that are detailed in sub-section (2) of section 173 of the Code and from the evidence thus collected he is satisfied that the case deserves to be initiated against the accused. And, even if the investigating officer had not received the report of the expert, so far as his job of collecting of the evidence is concerned, that is over the moment he dispatches the material for the opinion of the expert and incidentally cites him as a witness if he relies on his testimony.*
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> *17. xxxx*
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> *18. xxxx*
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> *19. It would be thereafter, at the discretion of the Court whether to permit the prosecutor to adduce in evidence the reports of the experts of the kind. If the Court permits the prosecutor to do so, then a copy thereof shall have to be furnished to the accused. The Court, under section 91 of the Code (which is reproduced below) has to determine whether to call for a document from a witness on the application of the police officer.*
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> > *"91. (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such*

Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed -

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872, or the Banker's Books Act, 1891 or.

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or thing in the telegraph authority."

And the provisions of section 91 of the Code further envisage that such a person need not appear before the Court in person. He may send the document directly to the Court through some other person. The Court has also the power under section 311 of the Code to permit production of the additional evidence if it is considered in the interest of justice. However, in the exercise of its discretion the Court has always to balance the interest of the accused in that he should not remain incarcerated for unduly long period as the concern on the part of the legislature to spare him from unduly delayed incarceration is apparent from the provisions of the proviso to sub-section (2) of section 167 of the Code. However, the interest of justice has always to be kept in view and no prosecution evidence, which have a vital bearing on the case should be shut out.

20. For the reasons stated, I hold that the investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-section (2) of section 173 of the Code to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by

> *design, he failed to append to the police report such documents or the statements under section 161 of the Code, although these were available with him when he submitted the police report to the Magistrate."*

In ***Abdul Azeez P.V. And others vs. National Investigation Agency*** *2015 (1) RCR (Criminal) 239, the Hon'ble Supreme Court has held as under:*

> *3. The petitioners filed Criminal M.C. No. 100 of 2013 on 22.10.2013 before the learned Special Court, NIA Cases submitting that they were entitled to get statutory bail under Section 167(2) of the Code of Criminal Procedure (for short "Cr.P.C.") inasmuch as the investigating agency had failed to file the final report within 180 days. It was further submitted that the bank account details and mobile phone call details of the petitioners, as stated in the charge-sheet itself, were yet to be verified and that the charge-sheet filed on 19.10.2013 was not a final report as contemplated under Section 173(2) Cr.P.C. The submissions were negated by the learned Special Court by its order dated 04.11.2013 holding that the petitioners were not entitled to statutory bail under Section 167(2) Cr.P.C., which view was challenged by filing Criminal Appeal No. 1711 of 2013 in the High Court of Kerala at Ernakulam. The High Court went through paragraph Nos. 17.1., 17.2, 17.3 and 17.8 of the charge-sheet and found that the materials so disclosed and adverted to in the charge-sheet did show that it was a final report. The High Court, thus, dismissed the appeal. The present special leave petition has been filed to challenge the view taken by the High Court.*
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> *4. Having gone through the charge-sheet, we are not persuaded to take a different view. The materials adverted to show that it was a final report on the facets investigated into by the investigating agency. Furthermore, the requisite sanctions as required under Sections 18 and 18A of the UAPA and so also under Section 7 of the Explosive Substances Act were also accorded by the concerned authorities. The charge-sheet so filed before the learned Special Court was complete in all respects so as to enable the learned Special Court to take cognizance in the matter. Merely because certain facets of the matter called for further investigation it does not deem such*

> *report anything other than a final report. In our opinion Section 167(2) of Cr.P.C. stood fully complied with and as such the petitioners are not entitled to statutory bail under Section 167(2) of Cr.P.C."*

In view of the law laid down in ***Mehal Singh (supra)*** *and* ***Abdul Azeez P.V. (supra)****, I am not persuaded to take a view different from the one taken by the Special Courts. Merely non-filing of report of chemical examiner with report under Section 173 of the Code cannot be treated as an incomplete challan. There is a provision in the Code for submitting supplementary challan also in which other documents can also be brought on the record which may be collected by the investigating agency during further investigation. In this regard, it may be apposite to observe here that it appears that the prosecution and the investigating agency were not handling the matter properly as challan could have been filed even without report of the chemical examiners which can be submitted subsequently. The investigating agency can submit other evidence by way of supplementary challan. It appears that the persons defending on behalf of the State are not updating themselves about the settled position of law. The investigating agency as well as the prosecuting agency are aware of the statutory provisions that delay in completing investigation and delay in filing the challan entitle the accused for statutory bail under Section 167 (2) of the Code. When the cases are of serious nature, it becomes the duty of the investigating agency as well as the senior officers having control over them to see that the investigating officers are performing their duty with due diligence and are not swayed by other reasons.*

Furthermore, the Public Prosecutors moved *applications for extension of time within the stipulated period of 180 days, therefore, the prosecution or investigating agency is not responsible for any delay on the part of the Special Courts for not deciding the application well within time. It is not within the control of the prosecution or investigating agency to decide the application, rather it is the function of the Court, therefore, they cannot be held responsible for the delay caused in not deciding the application and the petitioners are not entitled for benefit of the same. In this regard, reliance can placed upon* ***Japani Sahoo vs. Chandra Sekhar Mohanty*** *2007(3) R.C.R.(Criminal) 912 wherein it has been held as under: -*

> *"50. We are unable to uphold the contention. We are equally not impressed by the argument of the learned counsel for the accused that the decision in Bharat Damodar is per incuriam. We have gone through the said decision. We have also extracted hereinabove paragraph 10 wherein the contention of the accused had been dealt with by this Court and negatived. It is true that in that case, the Court observed that taking clue from Chapter Heading (Chapter XXXVI : Limitation for taking cognizance of certain offences), an argument was advanced that if cognizance is not taken by the Court within the period prescribed by Section 468(2) of the Code, the complaint must be held barred by limitation. But, it is not true that this Court rejected the said argument on that ground. The Court considered the relevant provisions of the Code and negatived the contention on 'cumulative reading of various provisions".*
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> *The Court noted that so far as cognizance of an offence is concerned, it is an act of Court over which neither the prosecuting agency nor the complainant has control. The Court also referred to the well-known maxim "actus curiae neminem gravabit" (an act of Court shall prejudice none). It is the cumulative effect of all considerations on which the Court concluded that the relevant date for deciding whether the complaint is barred by limitation is the date of the filing of complaint and not issuance of process or taking of cognizance by Court.*

51. We are in agreement with the law laid down in Bharat Damodar. In our judgment, the High Court of Bombay was also right in taking into account certain circumstances, such as, filing of complaint by the complainant on the last date of limitation, non availability of Magistrate, or he being busy with other work, paucity of time on the part of the Magistrate/Court in applying mind to the allegations levelled in the complaint, postponement of issuance of process by ordering investigation under sub-section (3) of Section 156 or Section 202 of the Code, no control of complainant or prosecuting agency on taking cognizance or issuing process, etc. To us, two things, namely; (1) filing of complaint or initiation of criminal proceedings; and (2) taking cognizance or issuing process are totally different, distinct and independent. So far as complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter, to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over those proceedings. Because of several reasons (some of them have been referred to in the aforesaid decisions, which are merely illustrative cases and not exhaustive in nature), it may not be possible for the Court or the Magistrate to issue process or take cognizance. But a complainant cannot be penalized for such delay on the part of the Court nor he can be non suited because of failure or omission by the Magistrate in taking appropriate action under the Code. No criminal proceeding can be abruptly terminated when a complainant approaches the Court well within the time prescribed by law. In such cases, the doctrine "actus curiae neminem gravabit" (an act of Court shall prejudice none) would indeed apply. [Vide ***Alexander Rodger v. Comptoir D'Escompte, (1871) 3 LR PC 465****]. One of the first and highest duties of all Courts is to take care that an act of Court does no harm to suitors. The Code imposes an obligation on the aggrieved party to take recourse to appropriate forum within the period provided by law and once he takes such action, it would be wholly unreasonable and inequitable if he is told that his grievance would not* *be ventilated as the Court had not taken an action within the period of limitation. Such interpretation of law, instead of promoting justice would lead to perpetuate injustice and defeat the primary object of procedural law.*

52. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article of the Constitution.

53. In view of the above, we hold that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court. We, therefore, overrule all decisions in which it has been held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/Court and not of filing of complaint or initiation of criminal proceedings."

It is the sorry state of affairs that in the State of Punjab specifically in the drug cases, the investigating *agency is not following the mandatory provisions of law. The investigating agency could not answer as to why the challans without the reports of chemical examiners could not be presented in the Court. The State of Punjab which was known as one of the country's "crown jewels" is now in the grip of a drug epidemic of enormous dimensions and is at such a high risk of drug diseases which has literally shattered the physical and mental health of the youth. Due to the undue delay caused in conducting the test of narcotic drugs and not filing the reports under Section 173 of the Code to the Special Courts Court well within time or even during the extended period granted by the courts, the habitual offenders are repeatedly indulging in the narcotic cases. The case law cited by learned counsel for the petitioners is distinguishable to the facts and circumstances of the present case. Learned counsel for the petitioners mainly relied upon* ***Sanjay Kumar Kedia's case (supra)****. In that case, application for extension of time was filed by the investigating officer and the Hon'ble Supreme Court came to the conclusion that it does not indicate even any application of mind on the part of the Public Prosecutor. Similarly, the situation was with regard to second application for extension of time and the Hon'ble Supreme Court held as under:*

> *"13. Mr. Bhattacharjee has, however, pointed out that the applications for extension filed by the public prosecutor Section 36A (4) of the Act did satisfy the aforesaid conditions and merely because an independent report had not been tendered would not change the nature of the application. We reproduce herein the application dated 2nd August, 2007 for extension of time in extenso:*
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> *XXXXXXX*
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> *14. A bare perusal of this application shows that it has been filed by the investigating officer of*

respondent No.1 and does not indicate even remotely any application of mind on the part of the public prosecutor. It further does not indicate the progress of the investigation, nor the compelling reasons which required an extension of custody beyond 180 days. This application was allowed by the Special Judge on 2nd August, 2007 i.e. on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in Court on that day.

15. The second application dated 30th January, 2008 is even more incomprehensible. We reproduce the same hereinbelow :

XXXXX

A bare perusal of this unsigned application would reveal that it does not even remotely satisfy the tests laid down in Vishnu Thakur's case. The Special Judge allowed this application as well on the day it was filed by a cryptic order and without notice to the accused in the following terms :

"Accd. Sanjay Kedia is produced from J/C. Accd. Filed a vakalatnama. Prosecutor files Hazira. Prosecution also files a petition praying for time. Considered prayer for time is allowed to 13.2.2008 for production of the accd & report from I.O."

16. We are, therefore, of the opinion that the extensions granted to the investigating department under the proviso to Section 36A (4) did not satisfy the conditions laid down therein and both the extensions, therefore, being contrary to law, must be struck down accordingly."

In those circumstances, the Hon'ble Supreme Court came to the conclusion that application moved by the prosecution was not an independent application of mind of the Public Prosecutor whereas in the present case, the applications, itself, have been moved by the Public Prosecutors after applying their mind and the same has been done keeping in view the fact that due to heavy rush before the Forensic

Science Labs for testing of the samples and the time was sought. It is not a case where the Public Prosecutor has not applied his mind and the application is moved by the investigating agency, rather in the present case, the applications have been filed, itself, by the Public Prosecutors. In such circumstances, ***Sanjay Kumar Kedia's case (supra)*** *is not applicable to the facts of the present case."*

Since the matter in hand is squarely covered by the judgment rendered in ***Inderjit Singh and another (supra)*** and also keeping in view the allegations against the petitioner, the petitioner is not entitled for bail.

Dismissed.

06.07.2015 **(Paramjeet Singh)**
parveen kumar **Judge**