

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**Criminal Revision No.3697 of 2014
Date of decision : 02.02.2015.**

Shivani alias Seema

..Petitioner

Versus

State of Punjab

..Respondent

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspaper may be allowed to see judgment?**
- 2. To be referred to reporters or not?**
- 3. Whether the judgment should be reported in the Digest?**

Present:- Mr. D.K. Bhatti, Advocate
for the petitioner.

Ms. Ritu Punj, Addl. A.G., Punjab.

DAYA CHAUDHARY, J.

The present revision petition has been filed to challenge the order dated 13.10.2014 passed by Judge, Special Court, Jalandhar, whereby, application moved by the petitioner under Section 167(2) Cr.P.C. has been dismissed.

Briefly, the facts of the case are that FIR No.59 dated 13.04.2014 under Section 22 of the Narcotic Drugs and Psychotropic Substances Act (for short 'the Act') was registered against the petitioner. The petitioner was arrested on 13.04.2014. Challan was not presented within the prescribed limit period of 180 days and prior to the expiry of period of 180 days, an application was moved by the

prosecution under Section 36(A) of the Act for extension of period on the ground that the report of Chemical Examiner was not received and without having the report of Chemical Examiner, challan cannot be presented. An application under Section 167(2) Cr.P.C. for grant of bail was also moved by the petitioner after expiry of period of 180 days of date of arrest i.e., 10.10.2014. The application moved by the prosecution was allowed with retrospective date but application for grant of bail moved by the petitioner was dismissed on 13.10.2014.

Learned counsel for the petitioner submits that the application moved by the prosecution has been allowed with retrospective date and an indefeasible right has accrued to the petitioner to be released on bail as per provisions of Section 167(2) Cr.P.C.

Learned State counsel has not disputed the submissions made by learned counsel for the petitioner.

Heard the arguments advanced by learned counsel for the petitioner as well as learned State counsel and have also perused the order passed by the lower Court declining bail.

Admittedly, the petitioner was arrested in the case on 13.04.2014 and the application under Section 36(A) of the Act was moved by the prosecution on 06.10.2014, which was 176th day, meaning thereby , it was presented before expiry of period of 180 days. The petitioner also moved application for grant of bail as per provisions of Sections 167(2) Cr.P.C. as challan could not be

presented within the period of 180 days. The factum of non-filing of challan within 180 days as well as moving of application for extension of time and also moving application for grant of bail as per provisions of Section 167(2) Cr.P.C. has not been disputed by learned State counsel. The period for presentation of challan was extended by the Court whereas application moved by the petitioner for grant of bail under Section 167(2) Cr.P.C. was dismissed. Only reason, which has been mentioned is that the entire challan was ready except the report of Chemical Examiner, which was out of control of the Investigating Officer.

Admittedly, an indefeasible right has accrued to the petitioner to be released on bail as per provisions of Section 167(2) Cr.P.C. as it is a mandatory requirement that in case, the challan is not presented within the prescribed period of 180 days the accused petitioner becomes entitled for grant of bail because of fault of the prosecution in presentation of challan. It is also not disputed that the trial Court did not decide the application moved by the prosecution on the date of presentation but it was decided on 13.10.2014, whereas the application was moved on 06.10.2014.

A Three Judges Bench of Hon'ble the Supreme Court in **Uday Mohanlal Acharya vs. State of Maharashtra, 2001 (2) RCR (Criminal) 452** has examined the issue as to whether on filing of the application, accused is stated to have availed of his indefeasible right for being released on bail and offers to abide by the terms and

conditions of the bail. The Court took the view that to interpret the expression 'availed of' means actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167 (2) Cr.P.C. The relevant extract from the said judgment is reproduced herein below :-

“..... In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167 (2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand.”

Similarly, it was held by Hon'ble the Supreme Court in

Sayed Mohd. Ahmed Kazmi vs. State, GNCTD and others, 2012(4)

RCR (Criminal) 875 that in case the accused moves an application for bail after expiry of statutory period prescribed under Section 167(2) Cr.P.C. and the prosecution thereafter, moves application for extension of time for investigation in the case, the accused has a right to be released on bail forthwith.

Under similar circumstances, Hon'ble the Supreme Court in **Uday Mohanlal Acharya's case (supra)** allowed bail to the accused in view of provisions of Section 167(2) Cr.P.C. The relevant portion of the judgment is in para No.19, which is reproduced as under: -

“It is settled by series of judgments of this Court in the last 25 years that framers of the Code conceived and desired that after expiry of the period prescribed in proviso to Section 167(2) of the Code, an accused has to be released on bail if no challan is filed because after the expiry of the statutory period prescribed therein, there is no power in Magistrate to remand for further custody, but the same proviso prescribes in clause (a)(ii) that ‘the accused person shall be released on bail if he is prepared to and does furnish bail’. To be released on bail because of the default of submission of challan within the statutory period is a valuable right of the accused, but the framers of

the Code have prescribed a condition in that very proviso referred to above that this right to be released on bail can be exercised only on furnishing of bail. Clause (a)(ii) of proviso to Section 167(2) of the Code not only says that the accused 'is prepared to', but also says that the 'accused does furnish bail' and Explanation I to Section 167 (2) of the Code clearly mandates that "notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail". Just to test the scheme of the said provision, can it be conceived that if the accused is prepared to furnish bail but does not furnish the same, even in that eventuality the court concerned shall direct his release from custody only on the ground that the statutory period of filing the challan has expired? Therefore, in my view, for release from custody both the conditions aforesaid, read with the Explanation referred to above, must be fulfilled."

In **Uday Mohanlal Acharya's case (supra)**, the Hon'ble Supreme Court has also culled out six conclusions, which are reproduced below:-

"1. Under sub-section (2) of Section 167, a

Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days 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 by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to

have accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to subsection (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression “if not already availed of” used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.”

In view of the facts and law position as discussed above, the present revision petition is allowed and petitioner-Shivani @ Seema is directed to be released on bail under Section 167 (2) of the Code subject to her furnishing bail/surety bonds to the satisfaction of the trial Court.

02.02.2015
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(DAYA CHAUDHARY)
JUDGE