

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

**Criminal Misc. No. M-29723 of 2015
Date of decision: 06.01.2016.**

Sanjeev Rai

..Petitioner

Versus

State of Punjab

..Respondent

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

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

Present: Mr. Anil Kumar Bhardwaj, Advocate
for the petitioner.

Mr. Rupam Aggarwal, DAG, Punjab
for the respondent – State.

Daya Chaudhary, J.

The present petition has been filed under Section 439 read with Section 167(2) of the Code of Criminal Procedure for grant of bail to the petitioner in case FIR No.257 dated 18.10.2014 registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Dera Bassi, District Mohali.

Learned counsel for the petitioner submits that the petitioner was arrested on 18.10.2014 and since then he is in custody. The challan has not been presented till date and the period of 180 days has expired on 16.04.2015. Learned counsel further submits that an application was moved by the prosecution on 13.04.2015 for extension of period of 60 days for presentation of challan, which was

allowed by the trial Court on the same day and period of 40 days was granted to the prosecution for presentation of challan. Learned counsel also submits that even after the expiry of aforesaid period of 40 days, the challan was not presented and the total period of 220 days expired on 25.05.2015. Thereafter, one more application was moved by the prosecution for grant of another 60 days time to present the challan, which was allowed and 60 days more time was granted to the prosecution. But even after expiry of period of 280 days (180+40+60), the prosecution did not present the challan. Subsequently, again for the third time, an application was moved for grant of extension of time and that application is still pending. The petitioner has also moved an application under Section 167(2) Cr.P.C. for grant of bail, but the same was rejected by the trial Court on 23.06.2015 on the ground that time for presentation of challan has already been extended vide order dated 25.05.2015. Learned counsel also submits that the prosecution has already availed the benefit under Section 36A (4) on two occasions and still the challan has not been presented before trial Court. The petitioner cannot be kept in custody without filing of the challan for an indefinite period as an indefeasible right has accrued to the petitioner in view of provisions of Section 167(2) Cr.P.C. Learned counsel for the petitioner has relied upon judgment of Hon'ble the Supreme Court in **Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and another, (2013) 3 SCC 77** as well as judgments of this Court in **Sahib Singh vs. State of Punjab and others, Criminal Misc. No. M-16899 of 2014**

decided on 21.07.2014 and Rajinder Pal @ Lovely vs. State of Punjab, 2015(2) Criminal Court Cases 487 (P&H) in support of his contentions.

Learned State counsel opposes the submissions made by learned counsel for the petitioner and submits that the extension was granted on the application moved by the prosecution and there was no reason to grant bail under Section 167(2) Cr.P.C. The application was moved before expiry of period of 180 days and the period was extended twice for presentation of challan. Learned State counsel also submits that the judgment relied upon by learned counsel for the petitioner in **Suresh Kumar Bhikamchand Jain' case (supra)** is not applicable in the present case as it was not a case under NDPS Act.

Heard arguments of learned counsel for the petitioner as well as learned State counsel and have also perused the impugned order as well as other documents available on the file.

The issue in the present case is whether the accused is entitled for bail in view of provisions of Section 167(2) Cr.P.C. when the period has already been extended by the trial Court on the application moved by the prosecution.

For facilitation, Section 167(2) Cr.P.C. is reproduced as under: -

"167. Procedure when investigation cannot be completed in twenty-four hours.

(1) *** ***(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, authorise 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 authorise 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 subsection 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 authorise detention in the custody of the police.

Explanation I. - For the avoidance of doubts, it is hereby declared 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.

Explanation II. - If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

On perusal of aforesaid provisions, it is clear that the Court may authorise the detention of an accused person otherwise than in the custody of the police, beyond a period of 15 days, if he is satisfied that there are adequate grounds/reasons for doing so, but no Court/Magistrate is authorised to detain the accused person in custody for a total period exceeding 90 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 and 60 days where the investigation relates to any other offence. Meaning thereby, if an accused was ready to offer bail and stipulated period for the investigation had completed, then the Magistrate no longer had the authority to extend the period of detention beyond the said period of

90 days and, accordingly, he had no option but to release the accused on bail. On perusal of Sections 167(2)(a)(i) and (ii) it is clear that on the expiry of period of 90 days or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail. The direction upon the learned Magistrate or the Trial Court is mandatory in nature and any detention beyond the said period would be illegal.

The power of remand is vested in the Court at the very initial stage before taking of cognizance under Section 167(2) Cr.P.C. Once cognizance is taken, the power to remand shifts to the provisions of Section 309 Cr.P.C., under which the Trial Court is empowered to postpone or adjourn proceedings and, for the said purpose, to extend the period of detention from time to time. Section 309(2) Cr.P.C. contemplates a situation where if the Court after taking cognizance of an offence or commencement of trial finds it necessary to postpone the commencement of, or adjourn, any inquiry or trial, it may, for reasons to be recorded, postpone or adjourn the inquiry or trial on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody, for a period of fifteen days at a time. Although, the provisions of Section 309 Cr.P.C. may not have any application to the facts of this case, but still it is necessary to understand the issue in case at hand, which is reproduced as under: -

“309. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial the

proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Provided that when the inquiry or trial relates to an offence under Sections 376 to Section 376 D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an

accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit

dispensing with the examination-in-chief or cross examination of the witness, as the case may be.

Explanation 1 – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand.

Explanation 2 – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.”

Section 167 Cr.P.C. contemplates the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities. The scheme of the provisions relating to remand of an accused is first during the stage of investigation and, thereafter, after taking cognizance. It indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and in case, the offences are punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating agency, the accused acquires an indefeasible right to be granted bail, if he/she offers to furnish bail. Meaning

thereby, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various judgments of this Court as well as Hon'ble the Apex Court.

Hon'ble Supreme Court in **Union of India through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, 2014(3) Criminal Court Cases 308 (SC)** has held that Court is obliged to deal with the application filed by the accused as required under Section 167(2) Cr.P.C. on the day it is moved. Such procrastination frustrates the legislative mandate and a Court cannot act to extinguish the right of an accused if the law so confers on him. It has specifically been held that the prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused.

Right of the accused to be released on bail accrued on the default of the prosecution in filing the challan within the stipulated period and furthermore, in case, the application has been moved for extension of time before the expiry of the stipulated period on the very same day when the application for bail has been moved by the accused for grant of bail or even before expiry of stipulated period, the accused becomes entitled to bail as per provisions of Section 167(2) Cr.P.C.

Even in case of NDPS, the recovery can be huge but the same is irrelevant as the Court cannot delve upon the issue on the basis of quantity recovered by considering the indefeasible right,

which has been accrued to the petitioner. Hon'ble the Supreme Court has given specific observations in **Nirala Yadav's case (supra)**. Even in case, the accused-petitioner is involved in number of cases, then also it is not a sufficient ground to defeat the indefeasible right of the accused to be released on bail in case, the challan is not presented within the stipulated period.

The issue in dispute is squarely covered by three Judge Bench judgment of Hon'ble the Apex Court in **Central Bureau of Investigation vs. R.S. Pai and another, 2002(2) RCR (Criminal) 536**, wherein it has been held as under: -

“7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the

*documents or the relevant extracts thereof on which the prosecution proposes to rely, the word “shall” used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in **Narayan Rao v. State of A.P.** (SCR at p. 293) and it was held that the word “shall” occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207-A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the*

investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.”

In the said decision, it has been held that in case, some mistake has been committed in not producing the relevant documents at the time of submitting the report, it is always open to the Investigating Officer to produce the same with the permission of the Court.

In the present case, the petitioner was arrested on 18.10.2014 and was produced before the Illaqa Magistrate on 19.10.2014 and since then, he is in custody. The challan has not been presented by the prosecution till date whereas the statutory period of 180 days has expired on 16.04.2015. Although, the prosecution moved an application for extension of time on 13.04.2015 for grant of further 60 days time, which was allowed on the same day and period of 40 days was granted to the prosecution to present the challan. Even after expiry of period of further 40 days, the challan was not presented and one more application was moved for grant of further 60 days time for presentation of challan, which was allowed and again period of 60 days was extended for presentation of challan. Even after lapse of 280 days (180+40+60), the prosecution did not present the challan along with the report of Chemical Examiner. On the third occasion, another application was moved on 04.07.2015 for grant of extension of time and the same has yet not been decided by the trial

Court. Meanwhile, an application was moved by the petitioner for grant of bail under Section 167(2) Cr.P.C., which was rejected by the trial Court on the ground that the investigation has yet not completed and period has been extended for presentation of challan vide order dated 25.05.2015. But in spite of availing various opportunities, after getting benefit of Section 36A (4) on two occasions, the challan has not been presented and as such, the prosecution cannot take benefit of Section 36A (4) for an indefinite period as it is the duty of the prosecution to act with promptness to submit the challan before the Court and the accused-petitioner should not suffer due to faulty investigation or slow pace of the prosecution.

The delay has occurred due to the fault of the prosecution as the challan has not been presented even after expiry of 280 days and an indefeasible right has accrued to the petitioner in view of the provisions of Section 167(2) Cr.P.C.

Accordingly, in view of the facts and law position as discussed above, the present petition is allowed and the petitioner is directed to be released on bail in view of the provisions of Section 167 (2) Cr.P.C. to the satisfaction of the trial Court.

06.01.2016
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(DAYA CHAUDHARY)
JUDGE