

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CRR 791 of 2016

Date of Decision: April 23, 2016

Gurpal Singh and another

.....Petitioners

Vs.

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr. D.S. Pheruman, Advocate
the petitioner.

Ms. H.K. Athwal, DAG, Punjab.

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M.M.S. BEDI, J.

It is a case of recovery of 6 kgs of opium from possession of petitioner No.2 Jugraj Singh. Report of chemical examiner having not been received within a period of 180 days which expired on 29.1.2016, as an abundant caution, the prosecution agency opted to present challan without report of Chemical Examiner on 23.12.2015. The report of chemical examiner was received on 2.3.2016 and the petitioners have been charged for having committed offence under Section 18 of the NDPS Act on 30.3.2016. The petitioners had opted to file an application for the grant of

bail on 30.1.2016 on the ground that incomplete challan without Chemical Examiner report will not be a legal report under Section 173 (2) Cr.P.C. The application was dismissed vide order dated 3.2.2016 holding that the petitioners will not be entitled to be released under Section 167 (2) Cr.P.C., relying upon the judgment of the Apex Court in *Narendra Kumar Amin Vs. CBI and others, Crl. Appeal No.94 of 2015, (arising out of SLP (Crl.) No.9599 of 2013) decided on 15.1.2015.*

This revision petition challenging the order dated 3.2.2016 was filed on 20.2.2016. The circumstances of the above said case indicate that the prosecution agency had not filed any application under Section 36-A (4) of the NDPS Act, to defeat the indefeasible right accrued to the petitioner under Statute prior to the expiry of the period of 180 days i.e. before 29.1.2016.

The short question which is required to be determined in the present case is whether failure on the part of the prosecution agency in filing application under Section 36-A (4) of the NDPS Act to defeat the right of accused alleged to have been found in possession of commercial quantity of the contraband and presentation of challan without the Chemical Examiner report could have created a circumstance of not having presented the challan within the period of 180 days. In other words, whether challan without the report of chemical examiner presented within a period of 180 days could be said to be a challan as per the legal requirements of Section 173 (2) Cr.P.C.

read with Section 173 (5) Cr.P.C., dis-entitling the accused for the default bail under Section 167 (2) Cr.P.C.

Counsel for the petitioners has placed reliance on the following judgments :-

Raghubirsaran Jain and another Vs. The State and another, 1995 CrL. L. J. 4117;

Sharadchandra Vinayak Dongre and others etc. Vs. State of Maharashtra, 1991 CrL. L. J. 3329;

Sunil Vasantrao Phulbande and another Vs. State of Maharashtra, 2003 (2) RCR (CrL.) 171;

Surinder Joshi Vs. State of Punjab, 2003 (4) RCR (CrL.) 901;

Birendra Kumar Roy and another Vs. Hindustan Fertilizer Corporation Ltd. and another, 1995 (4) Crimes 148;

Matchumari China Venkatareddy and others Vs. State of A.P., 1994 CrL. L.J. 257; and

Ravinder @ Binder Vs. State of Haryana, 2015 (4) RCR (CrL.) 441.

I have heard the learned counsel for the petitioner and gone through the judgments as well as the principles of release of an accused and grant of default bail under Section 167 (2) Cr.P.C. Before taking into consideration the relevant law regarding submission of final report under Section 173 (2) Cr.P.C. on completion of investigation or scope of Section 167 (2) Cr.P.C. and the law regarding taking of cognizance and the report submitted, it is pertinent to observe here that a special provision has been made in the NDPS Act under Section 36 A (4) to defeat the right of an accused in custody for release under Section 167 (2) Cr.P.C. In case the

prosecution agency files an application under Section 36 A (4) of the NDPS Act, prior to the expiry of 180 days, the trial Court can consider the said application as per the statute and extend the period of detention and presentation of challan.

In the present case, the indefeasible right for default of prosecution to present challan was not exercised till January 29, 2016 when 180 days expired but an incomplete challan was submitted in the Court on December 23, 2015 without the report of chemical examiner. The petitioners had filed an application for bail under Section 167 (2) Cr.P.C. on January 30, 2016. The report of chemical examiner indicating the contents of the contraband had not been received even by that date. It is not out of place to mention here that the report had not been filed in the Court even till the date, revision petition was filed before this Court. The revision petition was filed before this Court on February 20, 2016. Investigating Officer was directed to produce the entire record before this Court. A perusal of the record indicates that report of chemical examiner was received on March 2, 2016 and now the charges have been framed by the trial Court on March 30, 2016. An indefeasible right had certainly accrued to the petitioners on January 29, 2016 on expiry of the period of challan as the most important document i.e. the report of chemical examiner was not part of the report under Section 173 (2) Cr.P.C. and the cognizance could not have been taken on the day of presentation of challan under Section 18 of the NDPS Act. The petitioners had exercised their right for release on bail on January 30,

2016 when the Court did not have any material before it to show that offence under Section 18 of the NDPS Act was prima facie made out.

The charge-sheet submitted by police officer under Section 173 (2) Cr.P.C. is considered to be a final report of the investigating agency. Section 173 (2) Cr.P.C. provides that on completion of the investigation the police officer investigating into the cognizable offence shall submit a report which should be in the form prescribed by the State Government, stating the names of the parties; the nature of the information; the names of the persons who appear to be acquainted with the circumstances of the case; whether any offence appears to have been committed and, if so, by whom; whether the accused has been arrested; whether he has been released on his bond and, if so, whether with or without sureties; and whether he has been forwarded in custody under Section 170.

In **Satya Narain Musadi and others Vs. State of Bihar**, (1980) 3 SCC 152 it was held that the statutory requirement of the report under Section 173 (2) Cr.P.C. would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the Magistrate that upon investigation into a cognizable offence, the investigating officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. The report under Section 173 (2) Cr.P.C. purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court.

The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 173 (5) Cr.P.C. The investigating officer is not needed to state anything more in the report. The investigating officer is not required to state the details of the offence. The details of the offence are required to be proved to bring home the guilt to the accused at later stage i.e. in the course of trial of the case “adducing acceptable evidence”. The Apex Court has also held in **Satya Narain Musadi’s** case (supra) that report as envisaged by Section 173 (2) Cr.P.C. has to be accompanied as required by Section 173 (5) thereof by all documents and statements of the witnesses therein mentioned and that one cannot divorce the details, which report must contain as required by Section 173 (2) from its accompaniment which are required to be submitted under Section 173 (5) and that the whole of it is submitted as a report to the Court and that it follows that the Court can look at the report in prescribed form, along with the accompaniments, for taking cognizance of the offence. It has been laid down by the Apex Court that charge-sheet is one which is accompanied by the copies thereof to be served on the accused and that mere filing of a police report under Section 173 (2) Cr.P.C. without its accompaniments under Section 173 (5) Cr.P.C. is not a police report at all.

A Division Bench of this Court in **Varinder Singh Sandhu Vs. State of Punjab**, CRR No. 54 of 2015, decided on November 18, 2015, has held that where an application for extension of time is filed by the PP before

the expiry of 180 days for report of FSL having not been received, the accused would not be entitled to the benefit of Section 167 (2) Cr.P.C.

This Court in **Ravinder @ Binder Vs. State of Haryana**, 2015 (4) RCR (Crl.) 441 has granted the default bail under Section 167 (2) Cr.P.C. when the cognizance had been taken by the trial Court without having obtained report of chemical examiner, observing that a report not accompanied by chemical examiner report would be a no charge-sheet. The Andhra Pradesh High Court in **Matchumari China Venkatareddy and others Vs. State of AP**, 1994 Crl.LJ 257, has held that filing of charge sheet under Section 173 (2) Cr.P.C. was not complete unless it is accompanied by the papers contemplated under Section 173 (5) Cr.P.C. The Bombay High Court in **Sunil Vasantrao Phulbande and another Vs. State of Maharashtra**, 2003 (2) RCR (Crl.) 171 has granted benefit of Section 167 (2) Cr.P.C. to accused holding that incomplete charge sheet cannot be treated as police report at all as contemplated under Section 173 (2) Cr.P.C. The Court has observed as follows:-

“12. In the instant case, it is not in dispute that report of Chemical Analyser is the foundation on the basis of which Magistrate can proceed to take cognizance of the offences. The contraband, which is seized in the present case, is Ganja and unless and until sample, which was drawn by the prosecution, conforms with the article, which is seized during investigation, i.e. Ganja, the

Magistrate is not in a position to proceed to take cognizance of the offence. The charge-sheet/report as contemplated under Section 173(5) of the Code, forwarded to the Magistrate should be such that on the basis of which Magistrate should be able to proceed further and take cognizance. The documents, which are required to be accompanied with the charge-sheet/report as contemplated under sub-Section (5) of Section 173 of the Code, therefore, assume importance, without which charge-sheet/report submitted by the Police under Section 173 of the Code would be incomplete and Magistrate also may not be in a position to proceed to take cognizance on the basis of the said report. The concept of filing of charge-sheet by the Police in the Court must fulfil requirement of Section 173(2) and (5) of the Code and it is only after such compliance, report which is filed by the Police in the Court can be construed as complete report under Section 173(2) and (5) of the Code.

13. It is true that in the given case, certain documents which are formal in nature, if not accompanied with the report/charge-sheet may not change the nature of report/charge-sheet contemplated under Section

173(2) and (5) of the Code particularly when material is sufficient for the Magistrate to take cognizance of the offence as per provisions of the Code. However, in the instant case, the Chemical Analyser's report is the basis for deciding whether substance which is seized during raid is Ganja or not, which would determine whether provisions of the Narcotic Drugs and Psychotropic Substances Act are attracted or not. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of complete charge-sheet/report and, therefore, in the present case, the charge-sheet/report which is submitted by the Police in the Court on 4-8-2001 cannot be said to be a charge-sheet/report as contemplated under Section 173(5) of the Code.

14. There is another dimension to the issue in question. In the given set of circumstances, Police may submit a charge-sheet in the Court though incomplete, but within a stipulated period as contemplated under Section 167(2) of the Code, i.e. sixty days or ninety days, if all the relevant documents are filed in the Court as contemplated under Section 173(5) of the Code, in that event, the accused cannot seek bail in view of

provisions of Section 167(2) of the Code. However, in the instant case, Chemical Analyser's report was filed in the Court beyond the period of ninety days, i.e. on 9.11.2001 and, therefore, prosecution in the present case cannot take any advantage in this regard. It is needless to mention that if the Police fails to file charge-sheet/report contemplated under Section 173 of the Code within the stipulated period of sixty days or ninety days, a right is accrued to the accused to seek release on bail and Courts in such situation are expected to dispose of such applications forthwith without granting time to prosecution to fill up the lacuna.

15. In the instant case, the trial Court ought to have disposed of forthwith the application of the applicants whereby release was sought in view of provisions of Section 167(2) of the Code, without granting further time to the prosecution. In any case, prosecution, in the instant case, did not file all material documents within the stipulated period and, therefore, report/charge-sheet which is filed by the prosecution is not in conformity with Section 173(5) of the Code. The applicants, in my opinion, are entitled to be released on bail since prosecution failed to file charge-sheet/report within the

stipulated period as contemplated under Section 167(2) of the Code.”

Following the judgment of Apex Court in **Satya Narain Musadi’s** case (supra) which has been followed by the High Court of Andhra Pradesh in **Matchumari China’s** case (supra), and by Calcutta High Court in **Raghubirsaran Jain and another Vs. State and another**, 1995 Cr.LJ 4117, I am of the considered opinion that the petitioners herein should have been released, in peculiar circumstances of this case, as indefeasible right had accrued to them under Section 167 (2) Cr.P.C. on presentation of incomplete challan without the report of chemical examiner and the prosecution agency having not availed the benefit of Section 36 A (4) of the NDPS Act within a period of 180 days. In a case under the NDPS Act, a right of bail under Section 167 (2) Cr.P.C. of an accused can be defeated by the prosecution agency by availing the remedy under Section 36 A (4) of the NDPS Act subject to the fulfillment of the statutory requirement of Section 36 A (4) of the NDPS Act which is to be considered in each case on individual merits by the concerned trial Court/ Special Judge. The right under Section 167 (2) Cr.P.C. cannot be defeated by merely filing an incomplete challan. It is pertinent to observe here that all observations made in this judgment are in context to the offences under the NDPS Act.

It is not out of place to observe here that the judgment of **Narendra Kumar Amin’s** case (supra) relied upon by the trial Court is not applicable to the facts of the present case. In **Narendra Kumar Amin’s**

case (supra), default bail under Section 167 (2) Cr.P.C. had been declined by the CBI Court as well as by the Gujarat High Court, as the challan had been presented on the last date of expiry of 90 days. In the said case, the prosecution had sought extension of detention for custody prior to the expiry of 90 days and period of remand had been extended beyond the period of 90 days. In the said case, the period of remand was extended till July 5, 2013 and the challan had been presented on July 3, 2013. The Apex Court had held that filing of the police report as required under Section 173 (2) Cr.P.C. was within the period of 90 days. So far as the material which forms part of the report under Section 173 (2) Cr.P.C. is concerned, the High Court had observed in para 10.1 of its judgment that the contents of the charge sheet set in its prefatory details, showed the revelations in the investigation. The Investigating Officer mentioned the role played by the accused persons and he opined on the basis of the material collected by him during the investigation that the prima-facie commission of offence in his view was made out. The High Court had observed that it was evidently clear that the charge sheet as presented, incorporated all the necessary details required under Section 173 (2) including that whether offence was committed and by whom, which was in terms of clause (d) of Section 173 (2).

The facts and circumstances of **Narendra Kumar Amin's case** (supra) are not applicable to the facts of the present case as the challan presented in the said case fulfilled all the requirements of Section 173 (2) Cr.P.C. In the present case, without availing the remedy under Section 36

A (4) of the NDPS Act, an attempt had been made by the prosecution agency to defeat the rights of the petitioner by presenting challan within a period of 180 days without the report of chemical examiner which report had not been received even till the date of filing of the present revision petition.

In view of the above circumstances, this petition is allowed. The order passed by the Special Judge, Ludhiana dated February 3, 2016 dismissing the application under Section 167 (2) Cr.P.C. is hereby set aside. Petitioners are ordered to be released on bail on their furnishing bail bonds/ surety bonds to the satisfaction of the trial Court.

April 23, 2016
sanjay

(M.M.S.BEDI)
JUDGE