

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.12355 of 2017

Arising Out of PS.Case No. -102 Year- 2016 Thana -DARBHANGA GRP CASE District-
DARBHANGA

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Mahesh Kumar son of Sri Hari Yadav, resident of village- Chapradhi, P.S.-
Khajauli, District- Madhubani.

.... Petitioner/s

Versus

The State of Bihar.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Manish Kumar No.-13, Advocate

: Mr. Rohit Kumar, Advocate

For the State : Mr. Dr. Mritunjay Kumar Gautam, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 17-07-2017

Heard Mr. Manish Kumar, learned counsel for the petitioner
and Mr. Mritunjay Kumar Gutam, learned Additional Public
Prosecutor for the State.

2. By way of the present application preferred under
Section 482 of the Code of Criminal Procedure (for short 'the CrPC'),
the petitioner has prayed for quashing of the order dated 08.02.2017
passed by the learned 1st Additional Sessions Judge-cum-Special
Judge, Darbhanga in connection with Darbhanga Rail P.S. Case
No.102 of 2016 giving rise to G.O.Case No.22 of 2016 registered for
the offences under Sections 20 and 22 of the Narcotic Drugs and
Psychotropic Substances Act (for short 'the NDPS Act') whereby the



application filed on behalf of the petitioner for compulsive bail has been rejected.

3. The facts of the case, in brief, is that thirteen Kg. ganja is alleged to have been recovered from the possession of the petitioner on 21st November, 2016. He was produced before the court on 22.11.2016 and was remanded to judicial custody on the same day. The period of detention of the petitioner of sixty days in jail expired on 21.01.2017. Thereafter, an application under Section 167(2)(a)(ii) of the CrPC for compulsive bail was filed on behalf of the petitioner on the ground that the investigating agency had failed to submit the police report under Section 173(2) of the CrPC in the court within the statutory period prescribed in law. The learned District and Sessions Judge, Darbhanga after hearing the parties on 23.01.2017, on the application filed under Section 167(2)(a)(ii) of the CrPC, adjourned the matter to 27th January, 2017. In the meantime, on 24.01.2017 at 2 p.m., the investigating officer filed the police report in the court. On 27.01.2017, the learned District and Sessions Judge, Darbhanga after taking cognizance of the offence transferred the case to the court of 1st Additional Sessions Judge-cum-Special Judge, Darbhanga. In the court of 1st Additional Sessions Judge-cum-Special Judge, Darbhanga, the charges were framed against the petitioner on 31st January, 2017. On 3rd February, 2017 the petitioner filed a fresh application whereby



he had requested the court to enlarge him on bail in terms of Section 167(2)(a)(ii) of the CrPC. The said application dated 03.02.2017 was taken up for hearing on 8th February, 2017 and, on that date, after hearing the parties, the learned 1st Additional Sessions Judge-cum-Special Judge, Darbhanga passed the impugned order whereby the application filed on behalf of the petitioner for grant of compulsive bail has been rejected.

4. Mr. Manish Kumar, learned counsel appearing for the petitioner has submitted that since no order was passed by the learned Sessions Judge, Darbhanga on bail application dated 23.01.2017 filed by the petitioner under Section 167(2)(a)(ii) of the CrPC, another application was filed before the transferee court on 03.02.2017 stating the entire facts with a prayer to enlarge the petitioner on bail, as his application filed on 23.01.2017, under Section 167(2)(a)(ii) CrPC, was still pending. He has submitted that as the alleged recovery is of thirteen Kg. ganja, in terms of the provision prescribed under Section 20(b)(ii)(B) of the NDPS Act, the maximum punishment which can be awarded to the petitioner would be ten years. Similarly, for contravention in relation to the offence defined under Section 22 of the NDPS Act involving lesser than commercial quantity but greater than small quantity the maximum punishment which can be awarded is ten years. He has submitted that since the



police failed to submit their report under Section 173(2) of the CrPC within sixty days, on 23rd January, 2017, the petitioner became entitled to be released on bail, as had filed application in the court of Sessions Judge in terms of the provision prescribed under Section 167(2)(a)(ii) of the CrPC.

5. Per contra, learned counsel for the State has submitted that the petitioner had filed the application under Section 167(2)(a)(ii) of the CrPC on 23.01.2017 and the investigation of the case was also over on 23.01.2017 itself. He has submitted that simply because the police report was submitted in the court on 24.01.2017, the petitioner would not be entitled to be released on bail in terms of Section 167(2)(a)(ii) of the CrPC. He has further contended that as no order was passed on the application filed on 23.01.2017, the 1st Additional Sessions Judge-cum-Special Judge, Darbhanga before whom another application was filed on 03.02.2017 could not have granted compulsive bail to the petitioner as much before filing of the second application charge-sheet was already filed in the court.

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

7. I find substance in the arguments of the learned counsel for the petitioner.

8. The alleged offence relates to recovery of thirteen Kg.



ganja from possession of the petitioner. The maximum punishment prescribed under Section 20(b)(ii)(b) of the NDPS Act in case of recovery of illicit contraband involving less than commercial quantity, but greater than small quantity is ten years. In case of ganja, the commercial quantity is twenty Kg. Thus, the alleged recovery from possession of the petitioner is certainly more than small quantity, but less than commercial quantity for which in terms of Section 167(2) CrPC the court would not be authorized to detain the accused beyond sixty days.

9. Under the proviso to sub-section (2) of Section 167, a Magistrate may authorize detention of accused for a total period not exceeding 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. However, clause (ii) of proviso (a) to Section 167(2) CrPC clearly states that where investigation relates to any other offence, the court will have no power to detain the accused beyond sixty days if an accused is prepared to furnish bail and the investigation is not completed.

10. At this juncture, it would be relevant to note that in respect of the offences under the NDPS Act, in terms of Section 36A(4) of the NDPS Act, in respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27A or for



offences involving commercial quantity the reference in sub-section (2) of Section 167 of the CrPC to “ninety days” where they occur is to be construed as reference to “one hundred and eighty days”. Proviso to clause (4) of Section 36A of the NDPS Act further stipulates that the Special Court may extend the said period of one hundred and eighty days upto one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

11. As the present case is not of Section 19 or Section 24 or Section 27A of the NDPS Act or for any offence involving commercial quantity of contraband there would be no applicability of the provisions prescribed under Section 36A(4) of the NDPS Act.

12. Coming back to the facts of the present case, there is no dispute to the fact that on 23.01.2017, when the petitioner had filed the application for bail and had offered to furnish sureties to the satisfaction of the court, he had remained in custody for more than sixty days and till then the police had not submitted their report in the court. It would also be evident from the order dated 23.01.2017 passed by the learned Sessions Judge that the petitioner did press the application filed on 23.01.2017, but the learned Sessions Judge adjourned the matter to 27.01.2017 without passing any order on the



application of the petitioner.

13. In the background of the facts noted above, the order passed by the court below rejecting the application of the petitioner under Section 167(2)(a)(ii) CrPC is wholly illegal, as the petitioner had availed of the indefeasible right prior to the filing of the police report in the court. Subsequent filing of the charge-sheet by the police on 24.01.2017 would be of no consequence, in view of the ratio laid down by the Constitution Bench of the Supreme Court in the matter of **Sanjay Dutt vs. State through C.B.I., Bombay** since reported in **(1994)5 SCC 410** as also in two other three-Judge Bench decisions of the Supreme Court in the matter of **Uday Mohanlal Acharya vs. State of Maharashtra** since reported in **(2001)5 SCC 453** and **Syed Mohd. Ahmad Kazmi vs. State (Govt. of NCT of Delhi) and Ors.** since reported in **(2012)12 SCC 1** which has been followed by this Court in the matter of **Vikram Pal vs. State of Bihar** since reported in **2016(1) PLJR 321**.

14. In **Sanjay Dutt** (supra), the Constitution Bench of the Supreme Court while dealing with Section 167(2) CrPC observed in paragraph 48 as under:

“48. The indefeasible right accruing to the accused in such situation is enforceable only prior to filing of the Challan and it does not survive or remain enforceable on the Challan being filed, if



already not “availed of”.

15. The aforesaid observation of the Supreme Court clearly means that ordinarily the indefeasible right accruing to the accused will not survive or remain enforceable on the charge-sheet being filed but if the indefeasible right has been ‘availed of’ prior to filing of charge-sheet then the said right will survive or remain enforceable even upon filing of the charge-sheet.

16. In **Uday Mohanlal Acharya** (supra) elaborating and explaining the conclusion arrived at in **Sanjay Dutt** case (supra) the Supreme Court held that if the charge-sheet is filed subsequent to the “availing of” indefeasible right by the accused then that right would not stand frustrated or extinguished. It held that if an accused is entitled to be released on bail by application of the proviso to sub-section (2) of Section 167 and makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby and, on the other hand, the accused has to be released on bail.

17. It would, thus, be evident that if an accused before filing of charge sheet has applied for bail and has offered to comply



with the terms and conditions of bail, then it will be deemed that he has “availed of” his indefeasible right to be released on bail under the proviso (a)(ii) to Section 167(2) CrPC and it will remain enforceable even upon filing of the charge sheet. It is well settled that if charge sheet is filed during consideration of bail application then it will not defeat the right of the accused to be released on bail under proviso (a)(ii) to Section 167(2) CrPC.

18. In this case, the petitioner was taken into custody on 21.11.2016. He was produced before the court on 22.11.2016 and was remanded to judicial custody on the same day. The statutory period of sixty days applicable in the case of petitioner expired on 21st January, 2017. He filed an application for bail under Section 167(2)(a)(ii) of the CrPC on 23rd January, 2017. However, his application was kept pending and was ultimately rejected on 08.02.2017 on erroneous ground that charge-sheet had already been filed and no order was passed on the application filed on 23.01.2017.

19. In my considered opinion, the subsequent filing of the charge-sheet would not defeat the indefeasible right of the petitioner which he had already “availed of” on 23.01.2017.

20. Accordingly, the impugned order dated 08.02.2017 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Darbhanga in connection with Darbhanga Rail P.S. Case



No.102 of 2016 giving rise to G.O. Case No.22 of 2016 is set aside. .

The petitioner is directed to be released on bail on furnishing bail bond and sureties to the satisfaction of the court.

21. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

AFR/NAFR	NAFR
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