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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 3284 OF 2018

Shrihari Mahadu Valse	..Applicant.
V/s.	
The State of Maharashtra	..Respondent.

Mr.Anand S. Salve for applicant.

Mrs. Rutuja Ambekar, APP for respondent – State.

CORAM : NITIN W. SAMBRE, J.

DATE : FEBRUARY 4, 2019.

P.C. :

This is an application under Section 439 of the Criminal Procedure Code, 1973 ('the Cr. P.C.' for short) for grant of bail in Crime No.210 of 2017 registered with the respondent police station for offences punishable under Sections 8(c) and 20(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short).

2. The prayer for grant of bail moved by the present applicant-accused before the Special Court, Additional Sessions Judge, Khed-Rajgurunagar, District Pune came to be rejected vide order dated November 26, 2018.

3. The only point that was canvassed for release of the

applicant is of extending the benefit of the provisions of section 167 (2) of the Cr.P.C. The submission of learned counsel for the applicant-accused is, the charge-sheet in the matter is filed within the time as prescribed under section 167 of Cr.P.C., however, since the charge-sheet was incomplete as the report of the Chemical Analyser was not placed on record. As such, considering the mandate of sub-section (2) of section 167 of the Cr.P.C., the applicant is entitled to be released on bail.

4. Attention of this Court is also invited to the fact that no prayer for extension to complete the investigation beyond the period of 180 days as provided under section 36(A) of the Cr.P.C. was applied for or was granted by the Special Court. So as to substantiate the contention, learned counsel for the applicant has invited attention of this Court to the judgment of this Court in the matter of *Sunil Vasantrao Phulbande and another V/s. State of Maharashtra*¹. According to him, incomplete charge-sheet for want of report of the Chemical Analyser will attract provisions of sub-section (2) of section 167 of Cr.P.C. as the Magistrate before whom the charge-sheet is submitted is unable to take cognizance pursuant to the provisions of sub-section (5) of section 173 of the Cr. P.C. Learned counsel for the applicant has relied upon the observations made in paragraphs 12, 13, 14 and 15 of the said

¹ 2002 (3) Mh.L.J. 689.

judgment.

5. Learned counsel then, would invite attention of this Court to the order dated February 14, 2018 passed in Bail Application No.65 of 2018 by the Bench at Aurangabad where relying upon the judgment in *Sunil Vasantrao Phulbande* the applicant was released on bail. As such, according to him, the applicant is entitled to be released on bail.

6. Though, learned counsel for the applicant has also tried to canvass on the issue as regards section 42 of the Narcotics Drugs and Psychotropic Substance Act, 1985 ('NDPS Act' for short). However, in absence of material on record justifying the said stand this Court is unable to go into the merits of the said issue.

7. Mrs.Rutuja Ambekar, learned APP while opposing the claim submits that, the fact remains that the charge-sheet was filed within the time stipulated and would invite attention of this Court to the act to the applicant. According to her, even if the report of the Chemical Analyser is filed at a belated stage, that by itself won't attract the provisions of section 167(2) of the Cr. P.C. in favour of the applicant for grant of bail as the charge-sheet filed was a complete one. She would invite attention of this Court to the Full Bench Judgment delivered by High Court of Punjab and Haryana in *State of Haryana V/s. Mehal Singh and another*². According to her, the issue is already covered

² 1978 Cri. L.J. 1810

by the said judgment and as such, sought rejection of the application.

8. Considered rival submissions.

9. It is not in dispute that the charge-sheet was filed by the investigating officer within 180 days from the date of arrest of the applicant. It is also an admitted position and fact that the charge-sheet was not accompanied with the report of the Chemical Analyser, however, same was informed to be submitted subsequent in point of time.

10. In the aforesaid background, this Court is required to analyse the submissions of learned counsel for the applicant so as to find out whether the applicant can be extended the benefit of provisions of section 167(2) of the Cr. P.C. by ordering his release on bail.

11. The Apex Court in the matter of *Tara Singh V/s. The State*³ had an occasion to consider a similar issue pursuant to the provisions of section 173 of the old Criminal Procedure Code, 1898. The Apex Court has proceeded to analyse the effect of supplementary report or non submission of the Expert's report like the one alleged in the present application. The Apex Court in the said judgment in paragraph Nos.11, 12, 13 and 14 has observed thus :-

“11. On the 5th of October, the police put in what they called a complete challan and on the 19th they put in a

3 A.I.R. 1951 Supreme Court 441

supplementary challan. The Magistrate committed the appellant for trial on the 12/11/1949.

12. *The first objection taken to the trial is that the Magistrate had no power to take cognizance of the case on the 3rd October. Accordingly, the depositions of the three so-called eye-witnesses which he recorded on the 4rd cannot be received in evidence, and if they are excluded, then, for reasons which I shall set out hereafter, the whole case against the appellant collapses because, according to the learned counsel, there is no other evidence on which the conviction can properly be based.*
13. *This part of the argument is based on section 190, Criminal P.C. It is contended that cognizance of an offence can only be taken in one of ways set out in that section. We are concerned here with the method set out in clause (b) of sub-s. (1), namely "upon a report in writing of such facts made by any police officer." It is contended that the police are not permitted to send in an incomplete report because of the provisions of section 173 (1) which runs as follows :-*

"Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall:

(a) forward to a Magistrate empowered to take cognizance of offence on a police report, a report in the form prescribed etc..... "

I need not express any opinion about this because, in my opinion, the challan which the police referred to as an

incomplete challan, namely, the one of 2-10-1949, was in fact a complete report within the meaning of section 193 (1) (b) Criminal P.C., read with S. 173(1).

14. *When the police drew up their challan of the 2-10-1949 and submitted it to the Court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and the drawing of a sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore, the mere fact that a second challan was put in on the 5th October would not necessarily vitiate the first. All that S.173 (1) (a) requires is that as soon as the police investigation under Chapter 14 of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form "setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case."*

All that appears to have been done in the report of the 2nd October which the police called their incomplete challan. The witnesses named in the second challan of 5th October were not witnesses who were "acquainted with the circumstances of the case." They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were acquainted with the circumstances of the case." Accordingly, the challan which

the police called an incomplete challan was, in fact a completed report of the kind which S.173(1) (a) of the Code contemplates. There is no force in this argument. and we hold that the Magistrate took proper cognizance of the matter. ”

12. Section 36(A) of the NDPS Act enumerates that the offence is triable by a Special Court and the procedures regarding detention of the accused who is produced before the Magistrate. Sub-section (4) of section 36(A) of the NDPS Act contemplates that the Magistrate to whom the accused is forwarded under section 167 of Cr.P.C., the Magistrate has power to consider detention of such person for a period prescribed under the statute. It is then required to be noted that the object of incorporating the provisions of section 167(2) of Cr.P.C. is to ensure that the accused is not kept under detention during investigation for more than 60 days and on expiry of such period, if the investigation is not complete and the inquiry or trial, as the case may be, against the accused is not initiated, the accused is to be released on bail by the Magistrate.

13. A similar issue fell for consideration before the Full Bench of Punjab and Haryana High Court, as is rightly relied by learned APP in the matter of *State of Harayana V/s. Mehal Singh (supra)*. The Full Bench in the said judgment in para 15 has made the following observations, which reads thus :-

“15. Since a report to qualify itself to be a 'police report' is required to contain only such facts as are mentioned in sub--section (2) of S. 173, so if once it is found that the police report contained all those facts, then so far as the investigation is concerned the same has to be considered to have been completed. For this view, we receive authoritative backing from the decision of the Supreme Court in Tara Singh V. The State, AIR 1951 SC 441. That was a case in which the accused was arrested on September 30, on the very day of occurrence, he was produced before a Magistrate. On October 1, the police was granted police remand till October 2. The accused was produced on October 3 before the Magistrate, on which date the police handed over to the Magistrate what they called in 'incomplete challan' dated October 2, 1949, and also produced certain prosecution witnesses. Among the witnesses so produced were witness who were said to have witnessed the occurrence. The Magistrate examined those witnesses and recorded their statements, although the accused at that time was not represented by a counsel. On October 5 the police put in what they called a 'complete challan' and on the 19th they put in a supplementary challan. The Magistrate committed the accused for trial on November 12, 1949.

15--A. It was argued in the first instance on behalf of the accused that the Magistrate on October 3 had no power to take cognizance of the case. It was contended that cognizance of an offence could only be taken on a police report of the kind envisaged in Clause (b) of sub--section (1) of S. 190 of the old Code. It was urged, on the strength of the provisions of Section 173(1) of the old Code, which is in the following terms and which is also pari materia with the provisions of sub--section (2) of S. 173 of the new Code, that the

police were not permitted to send in an incomplete report:

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall--

(a) forward to a Magistrate empowered to take cognizance of the offence on a police report, a report, in the form prescribed by the State Government, setting forth the names of the parties the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given."

Vivian Bose, J., who delivered the opinion for the Bench, without going into the question as to whether the police were entitled to submit an incomplete report or not, held that the report dated October 2, 1949, which the police referred to an 'incomplete challan', was, in fact, a complete report within the meaning of S. 190(1)(b) read with S. 173(1) of the old Code. The following observations of his Lordship are instructive on the point (at p. 442):

"When the police drew up their challan of 2-10-1949 and submitted it to the Court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and drawing of the sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore, the mere fact that a second challan was put in on 5th October would not necessarily vitiate

the first. All that S. 173(1)(a) requires is that as soon as the police investigation under Chap. 14 of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form:

"Setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case.'

All that appears to have been done in the report of 2nd October which the police called their incomplete challan. The witnesses named in the second challan of 5th October were not witnesses who were 'acquainted with the circumstances of the case'. They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were 'acquainted with the circumstances of the case'. Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind which S. 173(1) of the Code contemplates. There is no force in this argument, and we hold that the magistrate took proper cognizance of the matter."

The learned counsel for the accused petitioners, however, contended that in the old Code the provisions, like the one contained in sub--section (5) of S. 173 of the new Code, were not there and, therefore the authority of the Supreme Court decision in Tara Singh's case (supra) would not be applicable in the context of the changed situation brought about by the incorporation in the new Code of sub--section (5) of S. 173 thereof. The learned counsel for the accused--petitioners laid emphasis on the fact that the investigation in terms of the definition thereof shall not be considered complete unless the police had collected all the evidence and formed their

opinion thereon and since in cases, where the experts' report was awaited, obviously it could not be said that all evidence had been collected, nor in its absence the investigating officer would be in a position to form an opinion. In order to show that the aforesaid steps are the necessary ingredients of the investigation, reliance has been placed on the following observations of Jagannadhadas, J., who delivered the judgment for the Bench in H.N. Rishbud v. State of Delhi, AIR 1955 SC 196(at p. 201):

"If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his excluding a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefor under S. 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under S. 173 of the Code in the prescribed form furnishing various details.

Thus, under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of 9a) the examination of various persons (including the accused) and the reduction o their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge--sheet under S. 173."

It is no doubt true that the definition of 'investigation' in terms conceives within 'investigation' in terms conceives within its scope the collection of the evidence and formation of the opinion by the investigating officer, but the question arises as to what do we mean by the 'collection of evidence and formation of opinion thereon'. Does the collection of evidence necessarily envisage that the investigating officer must record the statements of the witnesses who are to be cited to prove the prosecution case or must that investigating officer receive the reports of the experts which reports are admissible in evidence by virtue of S. 293 of the old Code? It has been authoritatively held at the highest judicial level in Noor Khan V. State of Rajasthan. AIR 1964 SC, 286, that sub--section (3) of S. 161 does not oblige the police officer to reduce in writing the statements of witnesses examined by him in the course of investigation. In this regard, the following observations can be noticed with advantage (at p. 291):

"The object of Ss. 162, 173(4) and 207A (3) is to enable the accused to obtain a clear picture of the case against him before the commencement of the inquiry. The sections impose an obligation upon the investigating officer to supply before the commencement of the inquiry copies of the statements of witnesses who are intended to be examined at the trial so that the accused may utilize those statements for cross-examining the witnesses to establish such defence as he desire to put up, and also to shake their testimony, Section 161(3) does not require a police officer to record in writing the statements of witnesses examined by him in the course of the investigation, but if he does record in writing any such statements, he is obliged to make copies of those statements available to the accused before the commencement of proceedings in the Court so that the accused may know the details and particulars of the case against him and how the case is intended to be proved.....".

From the above observations of their Lordships of the Supreme Court, it is clearly deducible that it is not incumbent on the investigating officer to reduce in writing the statements of the witnesses--he may merely include their names in the list of witnesses in support of the prosecution case when submitting the charge--sheet. Surely, if the charge--sheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence, there is no rational basis for holding that similar charge--sheet would not be a police report of the requisite kind if the statements of the witnesses although had been recorded under S. 161(3), but either by design or by inadvertence are not appended with the report and that the investigation of the case for that reason alone would be considered to be incomplete thus entitling the accused to claim release on bail in view of the proviso to sub--section (2) of S. 167 of the Code if his detention had exceeded sixty days.

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 Except, Finger Print Expert etc., would not be a complete police report as envisaged in sub--section (2) of S. 173 of the Code which in terms is prepared and submitted only after the completion of the investigation.

16A. So far as the investigation part of the job of the investigating officer is concerned, it is in our opinion complete the moment he had collected all evidence and facts that are detailed in sub--section (2) of S. 173 of the code and from the evidence thus collected he is satisfied that the case deserves to be initiated against the accused. And, further 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 despatches the material for the opinion of the expert and incidentally cites

him as a witness if he relies on his testimony.

17. In the new Code the incorporation of sub--section (5) in S. 173 of the Code has in no manner changed or affected the content or concept of the 'police report' envisaged in the unamended Code in sub--section (1) of S. 173 and, therefore, the ratio of Tara Singh's case (AIR 1951 SC 441) (supra) applies to the facts of the present case with full force. The incorporation of sub--section (5) of S. 173 of the amended Code was necessitated by the fact that under S. 207 of the amended Code a duty was cast additionally on the Magistrate to make available to the accused free of cost copies of the 'police report' and, inter alia, the documents and statements referred to in sub-section (5) of S. 173 of the Code. In the unamended Code sub--section (4) of S. 173 cast that duty on the police. The object of such provisions, whether the duty is cast on the police or on the Magistrate, is merely to see that the accused has in his hand the copies of statements and documents which were going to be produced or referred to in evidence against him so that he can offer whatever explanation or defence that he has to the incriminating material against him. If such statements and documents that are referred to in sub-section (5) of S. 173 of the Code are not appended to the 'police report', the result would be that at a later stage if they are sought to be produced, then apart from the fact that copies of such statements and documents shall have to be made available to the accused, it would be purely in the discretion of the Magistrate whether to allow such documents and statements to be produced or not and the prosecution cannot, as a matter of right, have them placed on the record. About this aspect a little more at an appropriate place in the later part of the judgment.

18. The object of the proviso to sub--section (2) of S. 167 was merely to ensure that an accused is not kept under detention during the investigation

more than sixty days and that on the expiry of the said period if the investigation is not completed and the enquiry or the trial, as the case may be, against the accused is not initiated, then the accused is to be released on bail by the Magistrate, as after sixty days the Magistrate would have no jurisdiction to remand him to the judicial custody during investigation. In other words, it can be said that if the Magistrate cannot legally take cognizance of the offence after the expiry of the period of sixty days, he has no opinion but to order the release of the accused; but where the Magistrate can legally take cognizance of the offence and start with the enquiry or the trial, then he acquires jurisdiction to detail the accused as an under-trial to face the enquiry or the trial if it is considered necessary, and the accused can be remanded to judicial custody in accordance with the provisions of S. 309 of the Code which is in the following terms:

"309. (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.

(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.

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."

14. The Full Bench of Punjab and Haryana High Court in *State of Harayana V/s. Mehal Singh (supra)* has followed the law laid down by the Apex Court in *Tara Singh (supra)* and has ruled that investigation for an offence cannot be considered to be inconclusive merely for the reason that the investigating officer when submitted the report or challan in terms of section 173 (2) of the Cr. P.C., the report of the expert is failed to be appended to the police report even if such a report was available with the investigating officer. The Full Bench had gone to the extent of observing that even if a charge-sheet is submitted without the report of expert within the time prescribed under section 167(2), the said accused is not entitled to be released on bail by sounding such challan as incomplete.

15. In the aforesaid background, admittedly the charge-sheet

in the matter in the case in hand is submitted within the time stipulated, may be without the copy of the report of the chemical analyser. However, that by itself will not entitle the applicant to seek bail pursuant to the provisions of section 167(2) of the Cr. P.C., having regard to the law laid down by the Apex Court in *Tara Singh (supra)* as discussed hereinabove and also the Full Bench judgment of the Punjab and Haryana High Court in *State of Harayana (supra)*.

16. As such, the present application fails and stands rejected.

(NITIN W.SAMBRE, J.)