

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

106

**CRR-765-2020 (O&M)
Date of decision: 13.03.2020**

Azuka

.....Petitioner

Versus

State of U.T., Chandigarh

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Ashish Pal Kaushal, Advocate
for the petitioner.

Mr. Kuldeep Tiwari, Addl. P.P., U.T., Chandigarh
for the respondent.

ARUN KUMAR TYAGI, J (ORAL)

1. The petitioner has filed the present petition under Section 401 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.") for quashing of order dated 28.02.2020 passed by learned Additional Sessions Judge, Chandigarh on bail application No.329 of 2020 titled as 'Azuka Vs. State of U.T., Chandigarh' whereby application for grant of bail under Section 167(2) of the Cr.P.C. in case FIR No.442 dated 05.12.2019 under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') was dismissed.

2. Briefly stated, the facts relevant for disposal of the present petition are that on recovery of 211 grams of heroin from possession of the petitioner on 05.12.2019 above-said FIR was registered and the petitioner was arrested on that date. On completion of investigation, report under Section 173(2) of the Cr.P.C. was filed on 01.02.2020 within period of 60 days without CFSL report which was awaited. The

petitioner filed application for grant of bail under Section 167(2) of the Cr.P.C. which was dismissed by learned Additional Sessions Judge, Chandigarh in view of the judgments of this Court in ***CRR-1731-2019 titled Akash Kumar @ Sunny decided on 16.10.2019*** and ***CRM-M-44412-2019 titled Shankar Vs. State of Haryana, decided on 20.12.2019***.

3. Feeling aggrieved, the petitioner has filed the present petition for setting aside of the above said order.

4. Notice of motion.

5. Mr. Kuldeep Tiwari, Addl. P.P., U.T., Chandigarh who is present in Court has accepted the notice on behalf of the respondent-U.T., Chandigarh.

6. I have heard learned counsel for the petitioner and learned Addl. P.P., U.T., Chandigarh and gone through the record.

7. Mr. Ashish Pal Kaushal, learned Counsel for the petitioner has argued that the petitioner was arrested on 05.12.2019 and incomplete report under Section 173(2) of the Cr.P.C. was filed on 01.02.2020 without the CFSL report. In view of Section 173 (5) of the Cr.P.C. the above-said report could not be said to be complete the CFSL report. The CFSL report is the foundation on the basis of which the Judge, Special Court can proceed to take cognizance of the offence. The Judge, Special Court could not take cognizance of the offence on the basis of report under Section 173(2) of the Cr.P.C. filed on 01.02.2020 without the CFSL report. The petitioner is entitled to grant of default bail under Section 167(2) of the Cr.P.C.. The impugned order

suffers from material illegality. Therefore, the petition may be allowed, impugned order may be set aside and the petitioner may be ordered to be released on bail under Section 167(2) of the Cr.P.C. accordingly. In support of his arguments, learned Counsel for the petitioner has placed reliance on the judgments of Hon'ble Supreme Court in ***Achpal @ Ramswaroop and another Vs. State of Rajasthan 2018 (4) RCR (Criminal) 433***; the Division Bench of this Court in ***CRR No.4659 of 2015*** titled as ***Ajit Singh @ Jeeta and another Vs. State of Punjab decided on 30.11.2018.***; Hon'ble Bombay High Court in ***Sunil Vasantrao Phullbande and another Vs. State of Maharashtra 2003 (2) Criminal 171*** and Hon'ble Patna High Court in ***Mahesh Kumar Vs. The State of Bihar 2018 CriLJ 50.***

8. On the other hand, Mr. Kuldeep Tiwari, learned Addl. P.P., U.T., Chandigarh has argued that report under Section 173 (2) of the Cr.P.C. was filed before expiry of the period of 60 days. The report could not be said to be incomplete due to non-attachment of the CFSL report. The petitioner is not entitled to grant of default bail under Section 167(2) of the Cr.P.C. Therefore, the petition may be dismissed. In support of his arguments, learned State Counsel has placed reliance on judgments of Hon'ble Supreme Court in ***Suresh Kumar Bhikamchand Jain v. State of Maharashtra (SC) : 2013 (2) R.C.R. (Criminal) 170*** and this Court in ***Akash Kumar @ Sunny in CRR-1731-2019 decided on 16.10.2019*** and ***Shankar Vs. State of Haryana, CRM-M-44412-2019 decided on 20.12.2019.***

9. A reference to relevant statutory provisions is essential for

determination of the questions involved in the present case.

10. Section 167 of the Cr.P.C., which lays down the procedure to be followed when investigation cannot be completed in 24 hours, reads as under:-

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

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 authorise 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 sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise 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."

11. Section 36A (4) of the NDPS Act, which modifies the provisions of Section 167 (2) of the Cr.P.C. in respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity, reads as under:-

“36A(4) 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 references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to 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.”

12. Section 309 of the Cr.P.C., which empowers the Court to postpone or adjourn the proceedings, reads as under:-

“309. Power to postpone or adjourn proceedings.-

(1) In every inquiry or trial the proceedings 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 section 376, section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA or section 376-DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

(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.”

13. The expression 'investigation' is defined by section 2(h) of the Cr.P.C. in the following terms :

"2. In this Code, unless the context otherwise requires :-

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(h) 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

14. Section 173 of the Cr.P.C., which envisages the submission of a report to the Magistrate after the completion of the investigation for the purpose of enabling him to take cognizance of the offence is as follows :

"173. Report of police officer on completion of investigation. –

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1-A) The investigation in relation to an offence under

sections 376, 376-A, 376-AB, section 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the officer-in-charge of the police station.

(2) (i) As soon as it is completed, the officer incharge of the police station shall 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 stating -

- (a) the names of the parties;*
- (b) the nature of the information;*
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;*
- (d) whether any offence appears to have been committed and, if so by whom;*
- (e) whether the accused has been arrested;*
- (f) whether he has been released on his bond and, if so, whether with or without sureties;*
- (g) whether he has been forwarded in custody under section 170.*
- (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or section 376-E of the Indian Penal Code (45 of 1860).*

(ii) The officer shall also 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.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case

in which the State by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police office shall forward to the Magistrate along with the report,

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution propose to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and where upon such investigation, the officer-in-charge of the police station obtains further evidence,

oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

15. Section 190 of the Cr.P.C., which prescribes three different modes of taking cognizance of an offence, reads as under:

"190. Cognizance of offences by Magistrates. –

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

- (a) upon receiving a complaint of facts which constitute such offence;*
- (b) upon a police report of such facts;*
- (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

16. Clause (b) of sub-section (1) of section 190 of the Cr.P.C. envisages the taking of cognizance of an offence by the Magistrate on a police report. The expression 'police report' is defined by section 2(r) of the Cr.P.C. as follows :

"2. In this Code, unless the context otherwise requires -

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(r) 'police report' means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173."

17. Section 193 of the Cr.P.C., which provides for taking of cognizance of offences by Courts of Session, reads as under:-

“193. Cognizance of offences by Courts of Session:-

Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.”

18. It may be observed at the very outset that the present case does not involve any offence punishable under Section 19 or Section 24 or Section 27A of the NDPS Act or offence involving commercial quantity of contraband. Therefore, the provisions of Section 36A(4) of the NDPS Act are not applicable and the report under Section 173 (2) of the Cr.P.C. was required to be filed within 60 days. The crucial question which arises in the present case is as to whether report filed by the police without the CFSL report can be said to be complete and meet the requirements of law.

19. In **Tara Singh v. The State, AIR 1951 Supreme Court 441** the accused was arrested on 30.09.1949, on the very day of occurrence, he was produced before the Magistrate on 01.10.1949. The police was granted police remand till 02.10.1949. The accused was produced on 03.10.1949 before the Magistrate, on which date the police handed over the Magistrate report dated 02.10.1949 which they called an 'incomplete challan' and also produced certain prosecution witnesses. Among the witnesses so produced were witnesses 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 counsel. On 05.10.1949, the police put in report which they called a 'complete challan' and on 19.10.1949 police filed supplementary challan. The Magistrate committed the accused for trial on 12.11.1949. It was argued in the first instance on behalf of the accused that the Magistrate on 03.10.1949 had no power to take cognizance of the cases. 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 section 190 of the old Cr.P.C. It was urged, on the strength of the provisions of section 173(1) of the old Cr.P.C., which is pari materia with the provisions of sub-section (2) of section 173 of the new Cr.P.C., that the police were not permitted to send in an incomplete report. 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 02.10.1949, which the police referred to as an incomplete challan, was in fact a complete report within the meaning of section 190(1) (b) read with section 173(1)(b) of the old Cr.P.C. The following observations of his Lordship are instructive on the point :-

"14. 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 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 5th October, would not necessarily vitiate the first. All that section 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 section 173(1)(a) of the Code contemplates. There is no force in this argument, and we hold that the Magistrate took proper cognisance of the matter."

20. In **State of Haryana v. Mehal Singh and others (Punjab and Haryana) (FB) AIR 1978 (Punjab) 341** Full Bench of this Court considered the question as to whether investigation of an offence would be considered complete in terms of Section 173(2) of the Cr.P.C. although the police officer investigating the case had not received the reports of such experts as the Chemical Examiner, the Serologist, the Ballistic Expert or the Finger Print Expert, etc. whose reports are made admissible in law under section 293 of the Cr.P.C. without these being proved by the said experts in the witness-box; and whether charge-sheet minus the aforesaid documents, when submitted to a Magistrate would

qualify to be termed a police report in terms of section 190(1)(b) of the Cr.P.C. and enable the Magistrate to take cognizance of the offence disposed therein. It was not in dispute in the cases referred that the charge-sheet, which was being termed as 'incomplete charge-sheet' on behalf of the accused, had in all cases been submitted to the Magistrates empowered to take cognizance of the offences in question within the period of sixty days from the date of arrest and that the report by one or of the other kind of the expert has either not been submitted or came to be submitted after the expiry of the period of sixty days from the date of the arrest of the accused-petitioners in all these cases. The Bench, while relying on the decision of Hon'ble Supreme Court in **Tara Singh v. The State, AIR 1951 Supreme Court 441**, held that 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 section 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. In that case the learned counsel for the accused-petitioners contended that in the old Cr.P.C. the provisions like the one contained in sub-section (5) of section 173 of the new Cr.P.C., 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 of sub-section (5) of section 173 of the Cr.P.C. The learned counsel for the petitioner further contended 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. Since in the cases the expert's 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. Reliance in support of the arguments was placed on the observations of Jagannadhadas, J., who delivered the judgment for the Bench in **H.N. Rishbud and another v. State of Delhi, AIR 1955 Supreme Court 196**. It was held that in the new Cr.P.C. the incorporation of sub-section (5) in section 173 of the Cr.P.C. has in no manner changed or affected the content or concept of the 'police report' envisaged in the unamended Cr.P.C. by sub-section (1) of section 173 and therefore, the ratio of **Tara Singh's case (supra)** applied to the facts of the cases referred with full force. The question was answered by observing that the investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-section (2) of section 173 of the Cr.P.C. to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under section 161 of the Cr.P.C., although these were available with him when he submitted the police report to the Magistrate.

21. In **Central Bureau of Investigation v. R.S. Pai & Anr., 2002(2) R.C.R.(Criminal) 536** three Judge Bench of Hon'ble Supreme Court referred to the relevant parts of Section 173 of the Cr.P.C. and observed regarding required documents to be submitted at the time of

filing of charge sheet 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 Andhra Pradesh [(1958) SCR 283 at 293] and it was held that the word 'shall' occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207A 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 investigation. In such cases, there can not be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained."

22. In **Narendra Kumar Amin v. CBI (SC) : 2015 (1) R.C.R. (criminal) 566** the Police filed charge-sheet which contained all the necessary details required under Section 173 (2) of the Cr.P.C. within 90 days but all documents were not attached there with. The accused were held to be not entitled to default bail under Section 167 (2) of the Cr.P.C. on that ground. Hon'ble Supreme Court observed as under:-

"16. The observation made at para 76 of the constitution Bench judgment of this Court in the case of K. Veeraswamy (supra) that the report is complete if it is accompanied by all documents and statement of witnesses as required under Section 173(5) of Cr.P.C. cannot be construed as the statement of law, since it was not made in the context of the police report under Section 2 (r) read with Section 173 (2) (5) and (8) of Cr.P.C. On the contrary, the three Judge Bench of this Court in the decision in Central Bureau of Investigation v. R.S. Pai's case (supra), after referring to the earlier judgment of the coordinate Bench in Narayan Rao's case (supra) categorically held that the word "shall" used in sub-Section (5) cannot be interpreted as mandatory, but directory. The said statement of law is made after considering the provisions of Section 2(r) read with Section 173 (5) and (8) of Cr.P.C. Therefore, filing of police report containing the particulars as mentioned under Section 173 (2) amounted to completion of filing of the report before the learned ACJM, cognizance is taken and registered the same. The contention of the appellant

that the police report filed in this case is not as per the legal requirement under Section 173 (2) & (5) of Cr.P.C. Which entitled him for default bail is rightly rejected by the High Court and does not call for any interference by this Court.”

23. In **Suresh Kumar Bhikamchand Jain v. State of Maharashtra (SC) : 2013 (2) R.C.R. (Criminal) 170** where the charge sheet was filed within the permitted period but without obtaining sanction to prosecute the accused and the Special Court could not take cognizance for want of sanction the accused was held to be not entitled to default bail under Section 167 (2) of the Cr.P.C. on that ground. Hon'ble Supreme Court observed as under:-

“16. At this juncture, we may refer to certain dates which are relevant to the facts of this case, namely :

(a) 11.03.2012 - Petitioner arrested and remanded to police custody;

(b) 25.04.2012 - First charge-sheet filed against the four accused;

(c) 1.06.2012 Supplementary charge-sheet filed in which the Petitioner is named;

(d) 30.07.2012 - The Trial Court rejected the Petitioner's prayer for grant of bail;

(e) 13.09.2012 - The High Court confirmed the order of the Trial Court;

(f) 2.10.2012 - Application filed under Section 167(2) Criminal Procedure Code before the Trial Court;

(g) 5.10.2012 - Trial Court rejected the application under Section 167(2) Cr.P.C.

17. From the above dates, it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the

*Petitioner's arrest and remand to police custody. **It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to noncompliance of the provisions of Section 167(2) Criminal Procedure Code is the question with which we are confronted.** In our view, grant of sanction is nowhere contemplated under Section 167 Criminal Procedure Code. What the said Section contemplates is 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 to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences 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 authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, 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 cases, such as the ones referred to hereinbefore. Both the decisions in Natabar Parida's case(supra) and in Sanjay Dutt's case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Criminal Procedure Code and an application having been made for grant of bail prior to the filing of charge-sheet,*

this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

*18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. **As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2) (a) (ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Criminal Procedure Code is concerned.** The right which may have accrued to the Petitioner, had chargesheet not been filed, is not attracted to the facts of this case. **Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Criminal Procedure Code, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Criminal Procedure Code.** The scheme of the Criminal Procedure Code is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Criminal Procedure Code, the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to*

file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the, custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Criminal Procedure Code. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

19. Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) Criminal Procedure Code. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings.” (emphasis supplied)

24. In **Abdul Azeez P.V. v. National Investigation Agency (SC) 2015 (1) R.C.R. (criminal) 239** where charge-sheet was submitted within 180 days pending further investigation it was held by Hon'ble Supreme Court that merely because certain facets of the matter called for further investigation did not deem such report anything other than a final report and the accused was held to be not entitled for bail under Section 167(2) of the Cr.P.C. on the ground that the investigating agency had failed to file the final report within 180 days.

25. In **Siya Ram Vs. State (U.T. Chandigarh) 2009 (1) RCR**

(criminal) 58; Sukhchain Singh Vs. State of Punjab CRM-M-15041-2014 decided on 18.07.2014 2015(4) RCR (criminal) 518; Gurpal Singh and others Vs. State of Punjab CRR No. 791 of 2016 and Ravinder Vs. State of Haryana CRM-M-28367-2014 decided on 26.09.2014, Single Benches of this court took the view that report under section 173 (2) of the Cr.P.C. submitted without the chemical Examiner's report would be inconclusive and after the expiry of the statutory period the accused would be entitled to the benefit of bail under section 167 (2) of the Cr.P.C. However a contrary view was taken by Single Benches of this Court in Nirmal Singh alias Kala Vs. State of Punjab criminal miscellaneous No. 9411 of 2015 and Kulwinder Singh Vs. State of Punjab criminal miscellaneous No. 23782 of 2015.

26. In view of the conflict reference was made to Larger Bench in **Ajit Singh @ Jeeta and another Vs. State of Punjab and others** CRR No.4659 of 2015 decided on 30.11.2018. On that reference Division Bench of this Court considered the question **“Whether the presentation of report under Section 173 (2) Cr.P.C. by the police without the report of Chemical Examiner/Forensic Science Laboratory amounts to incomplete challan and in the absence of an extension of time under Section 36-A (4) of the N.D.P.S. Act , the accused is entitled to bail under Section 167 (2) Cr.P.C.?”** The Division Bench referred to judgment of Hon'ble Supreme Court in **Tara Singh's case** and judgment of full bench of this court in **Mahal Singh's case** and held that the above said cases interpreted the provisions and

scope of the Cr.P.C. in the backdrop of general offences confined to the IPC or some other statutes but was not seized of a special Act as the NDPS Act which brings out the same conflict in view of certain provisions contained therein but is lending a new dimension that demands an answer through an incisive insight to the provisions of the Act despite the above referred authoritative pronouncements. On detailed analysis of the statutory provisions and while referring to judgments of Hon'ble Supreme Court in **State of West Bengal and another Vs. Mohd. Khalid 1995 (1) SCC 684** and **State of Maharashtra Vs. Sharadchandra Vinayak Dongre and others 1995 (1) SCC 42** interpreting the word cognizance, the Division Bench observed as under:-

“What flows from the above is that when a report is submitted by the police to the Magistrate, he ought to apply his mind to see whether it discloses the commission of an offence, so as to enable it to subject the accused to the rigors of a trial.

What would also necessarily flow from this, would be a prima facie opinion by the Court of the commission of an offence which under the N.D.P.S. Act would revolve around establishing the possession of contraband, its nature, content and extent.

With respect to the question posed by the learned Single Judge regarding some of the contraband being identifiable through naked eye, inspection based on experience and knowledge, would be a great fallacy and we would respectfully state that it would be grossly unsafe to rely upon such an opinion based on naked eye inspection backed by experience or knowledge to arrive at a prima facie opinion of the commission of an offence to

submit an accused to the rigors of trial by the Magistrate in the exercise of its powers under Section 190 Cr.P.C.

The only way that it can be done is to establish the nature of contraband on the basis of the Chemical Examiner's report and for this reason, the Chemical Examiner's report assumes an immense significance for the trial Court, to formulate an opinion as the very cognizance of an offence would depend on it. Non-inclusion of the Chemical Examiner's opinion in the report under Section 173 Cr.P.C. would expose the accused to unfounded dangers imperiling and endangering his liberty since the provisions of the N.D.P.S. Act in its applicability to a trial and conclusion are stringent in consequence.

For this reason as well, it is essential that the report of the Chemical Examiner be included in the report under Section 173 Cr.P.C. and without which it can at best be termed to be an incomplete challan depriving the Magistrate of relevant material take cognizance and if it is not submitted within the requisite period of 180 days, it would essentially result in a default benefit to the accused unless an application is moved by the Investigating Agency apprising the Court of status of investigation with a prayer for extension of time to the satisfaction of the Court.

We emphasize on the stringent aspect of the N.D.P.S. Act which would compellingly persuade us to take the aforesaid view. Without determining the nature and content of the contraband, it would be draconian to propel an accused into the throes of a trial. The liberty of an individual would constantly be imperiled at the hands of dubious officials of the police who may venture to falsely implicate a person.

It is for this reason that we would unhesitatingly conclude that the Chemical Examiner's report is an essential ; integral and inherent part of the investigation

under the N.D.P.S. Act as it would lay the foundation of an accused's culpability without which a Magistrate would not be enabled to form an opinion and take cognizance of the accused's involvement in the commission of offence under the Act.”

27. In **Akash Kumar @ Sunny Vs. State of Haryana CRR-1731-2019 (O&M)** decided on 16.10.2019 it was held by Single Bench of this Court that judgment passed by the Division Bench of this Court in **Ajit Singh @ Jeeta's case** is per incuriam as attention of the Division Bench was not drawn to judgments of Hon'ble Supreme Court in **Narendra Kumar Amin's case** and **Abdul Azeez's case**.

28. In **Shankar Vs. State of Haryana, CRM-M-44412-2019 decided on 20.12.2019** this Court while agreeing with the view taken in **Akash Kumar @ Sunny's case (supra)** observed as under:-

“26. In view of the observations made by Hon'ble Supreme Court in **Tara Singh's case, R.S. Pai's case, Narendra Kumar Amin's case, Abdul Azeez's case and Suresh Kumar Bhikamchand Jain's case and Full Bench of this Court in Mehal Singh's case** referred to above, report under Section 173 (2) of the Cr.P.C. filed by the police without the report of Chemical Examiner/Forensic Science Laboratory cannot be said to be incomplete report so as to entitle the accused to grant of default bail under Section 167(2) of the Cr.P.C. on expiry of the prescribed period of 60, 90 or 180 days as the case may be in case of non-receipt of the report of Chemical Examiner/Forensic

Science Laboratory within such period.

27. *Observations of Division Bench of this Court in CRR No.4659 of 2015 titled as Ajit Singh @ Jeeta and another Vs. State of Punjab decided on 30.11.2018 and Single Benches of this Court in Baltej Singh @ Chiri Vs. State of Haryana, 2019 (4) R.C.R. (Criminal) 744, CRR-1347-2017 titled 'Ravi Dutt Sharma Vs. State of Haryana' decided on 19.07.2017; CRR-3146-2016 titled 'Jagtar Singh & another Vs. State of Punjab' decided on 19.12.2016 and CRR-4855-2017 titled 'Vikram @ Dhillu Vs. State of Haryana' decided on 17.02.2018 having been made per incuriam to and being in conflict with observations made by Hon'ble Supreme Court in Narendra Kumar Amin's case, Abdul Azeez's case and Suresh Kumar Bhikamchand Jain's case have to be for that reason ignored as not laying down the correct position of law and are, therefore, not of any help to the petitioner."*

29. In the present case the petitioner was arrested on 05.12.2019 and report under section 173 (2) of the Cr.P.C. was filed by the police on 01.02.2020 before expiry of the period of 60 days without the CFSL report which cannot be said to be incomplete and the accused is not entitled to bail under Section 167 (2) of the Cr.P.C. on the ground of filing of incomplete report.

30. In *Sunil Vasantrao Phullbande and another Vs. State of*

Maharashtra 2003 (2) R.C.R. (Criminal) 171 relied upon by learned Counsel for the petitioner charge-sheet filed without Chemical Examiner's report was held to be incomplete and to be no charge-sheet within the meaning of Section 173(5) of the Cr.P.C. so as to enable the Magistrate to take cognizance of the offence and the accused was ordered to be released on bail under Section 167(2) of the Cr.P.C. but the observations therein are also not in consonance with judgments of Hon'ble Supreme Court in **Narendra Kumar Amin's case**, **Abdul Azeez's case** and **Suresh Kumar Bhikamchand Jain's case** and have to be for that reason ignored as not laying down the correct position of law and are, therefore, not of any help to the petitioner.

31. The facts of the present case are also different from those of **Achpal @ Ramswaroop's case (Supra)** and **Mahesh Kumar's case (Supra)** relied upon by learned Counsel for the petitioner. In **Achpal @ Ramswaroop's case (Supra)** the appellants were in custody in case registered under Sections 143, 341, 323, 452, 336, 302 read with section 149 of the IPC from 08.04.2018. In terms of section 167 of the Cr.P.C. investigation had to be completed by 07.07.2018. On 05.07.2018 a report under Section 173 of the Cr.P.C. was filed by the police before the concerned Judicial Magistrate. Since said report was filed by a police officer lower in rank than ASP and was contrary to the order passed by the High Court on 03.07.2018, the Magistrate returned the charge-sheet to the police for compliance with order dated 03.07.2018. Consequently, as on the expiry of 90th day on 07.07.2018 there was no report under Section 173 of the Cr.P.C. with the

Magistrate. The appellants filed application for grant of default bail under Section 167 (2) of the Cr.P.C. which was dismissed by the Trial Court and the order of dismissal was upheld by the High Court. Hon'ble Supreme Court held that the period of 90 days could not be extended by order dated 03.07.2018 passed by the High Court and in view of default in completion of investigation and filing of report under Section 173 (2) of the Cr.P.C. the appellants were entitled to grant of bail under section 167 (2) of the Cr.P.C. without there being any prohibition to arrest or re-arrest on cogent grounds and filing of petition for grant of regular bail in such eventuality. In **Mahesh Kumar's case (Supra)** the petitioner was granted bail under section 167 (2) of the Cr.P.C. as report under Section 173 (2) of the Cr.P.C. was not filed within the prescribed period of 60 days. Therefore, observations in above referred cases relied upon by learned Counsel for the petitioner are not of any help to the petitioner.

32. It follows from the above discussion that the impugned order does not suffer from any illegality to warrant interference by this Court in exercise of powers under Section 401 of the Cr.P.C. for setting aside of the same.

33. Accordingly, the petition being devoid of any merit is dismissed.

13.03.2020

Vinay/Kavneet Singh

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No