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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 9th November, 2020*

+ **BAIL APPLN. 2868/2020**

CHANDER SHEKHAR

..... Petitioner

Through: Ms Chitra Goswami, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr Amit Gupta, APP for State
with ASI Parmanand, PS
Sultanpuri.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition, *inter alia*, seeking bail in connection with FIR No. 0470/2020 under Section 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) registered with PS Sultanpuri.

2. It is the prosecution's case that on 18.04.2020, Ct. Yogesh and Ct. Jai Bhagwan of PS Sultanpuri were on the patrolling duty. At about 2:15 PM, when they were near P-1 Block, Ganda Nala, Sultanpuri, they noticed the petitioner coming from the direction of

Mangolpuri, Delhi. It is alleged that on seeing them, he turned back and this made the police officials suspicious. They pursued and apprehend him. They made certain inquiries from him but did not receive any satisfactory reply regarding his reason for turning back. Thereafter, both the constables searched the petitioner and it is alleged that they found a polythene containing certain red coloured powder from the right side pocket of his lower apparel. This was reported to the police station and was recorded in DD No.44A. The said DD was marked to ASI Parmanand (IO). He reached the spot and the said police officials, who had apprehended the petitioner, handed the petitioner over to him. They also handed over the polythene knot containing a red coloured substance allegedly recovered from the petitioner.

3. It is stated that although persons from the public were requested to join the proceedings, none of them did so.

4. According to the prosecution, the IO explained the provisions of Section 50 of the NDPS act to the petitioner and informed him of his right to be searched in presence of a Gazetted Officer/Magistrate. However, he expressed his desire not to be searched before them. He was formally searched but no other substance was found on him. The recovered substance was weighed and it is alleged that the same was found to weigh 7 grams. Two samples of one gram each were drawn from the recovered substance. They were placed on two white paper sheets and the same were put in two plastic containers, which were sealed with the seal of PN. The remaining 5 grams of the substance

was placed in another container, which was also sealed. FSL form was also filled at the spot.

5. The samples were sent to FSL and the report is still awaited. It is stated that the investigation is complete and the prosecution believes that the substance recovered is smack.

6. The petitioner was arrested on 18.04.2020 and has been in custody since. The petitioner filed his first bail application on 03.07.2020. In his application, he had claimed that he has been falsely implicated and his signatures were forcefully obtained on blank sheets of papers. He also claims that no notice under Section 50 of the NDPS Act was served on him.

7. The said application was rejected by the Trial Court by an order dated 08.07.2020.

8. The petitioner filed his second application, the same was also dismissed on 04.08.2020. The petitioner filed a third bail application on 20.08.2020, which was also dismissed on 21.08.2020. In his third application, the petitioner also claimed that he was entitled to default bail under provisions of Section 167(2) of the Cr.PC. The said application was opposed on the ground that the petitioner has lost his indefeasible right to default bail under Section 167(2) of the Cr.PC on the chargesheet being filed on 14.07.2020.

9. On a query made by this court, Mr Gupta, learned APP confirms that the substance recovered from the petitioner was not tested on the spot or thereafter. The prosecution has assumed that that the substance recovered is smack but there appears to be no marital to

support the said assumption. This Court finds it difficult to accept that in the circumstances the investigation can be stated to be complete.

10. However, in *Kishan Lal v State: 1989 (39) DLT 392*, the Division Bench of this Court took a somewhat different view. The Division Bench held that the provisions of Section 173 of the Cr.PC must be considered as separate and distinct from Section 190(1)(b) of the Cr.PC. The Court held that the report under Section 173(2) of the Cr.PC would not be incomplete if it is not accompanied by a Chemical Examiner's report as it would be open for the Magistrate not to take cognizance on the offence if the same could not be taken on the basis of the said report. The relevant extract of the said decision is as under:-

“15. We respectfully agree with the earlier decision of this Court in Tej Singh's case (supra). The decision in Hari Chand and Raj Pal v. State (supra) by a Single Judge of this Court wherein it has been held that an “incomplete challan” is not a police report within the ambit of Section 173(2) of the Code does not support the case of the petitioners. From the reported judgment it is not clear where all the witnesses or some of them “acquainted with the circumstances of the case” were yet to be examined when the report was filed. The reason for calling it incomplete is not discernible. But it is safer to assume from the reading of the judgment that the investigation was not complete. Thus the report as envisaged under Section 173(2) of the Code could not have been filed.

16. It is unnecessary for us to notice other judgments cited by the learned Counsels in support of their plea CRL.REV.P.1219/2019 & Other Connected Matters Page 22 of 47 that the investigation in a case like the

present is to be held to be incomplete. In our view the Supreme Court decision in Tara Singh's case (supra) holding, inter alia, that a police report which is not accompanied by the expert's opinion, is to be held to be complete report as long as the witnesses who are acquainted with the circumstances of the case have been examined, continues to be law in spite of amendments in Section 173 of the Code.

17. Now to advert to the main plea. It is contended that for offences under the NDPS Act, the report under Section 173(2) of the Code, which in law is complete (the Investigating Officer having carried out all his mandatory duties), is to be considered "incomplete" in the absence of the opinion of the expert. In our view the submission is entirely misconceived. Apparently the power of the Magistrate to take cognizance of offences upon police report is being related to the duty of the S.H.O. to forward a report on completion of investigation. The duty of the Investigating Officer under the Code is to complete the investigation without unnecessary delay. On its completion which necessarily means that the witnesses acquainted with the circumstances of the case have been examined, the officer incharge of the police station has to forward a police report in a prescribed form to a Magistrate empowered to take cognizance of the offence. However, no duty is cast on the Magistrate to take cognizance of the offence on a report which although complete except for the expert's opinion, does not make out an offence. While exercising his judicial discretion it is open to the Magistrate to seek a copy of the expert's opinion. There may even be cases under the NDPS Act where no public witnesses have been cited but that fact by itself would not show that till such time the Government expert's opinion is received, the investigation is incomplete. The police report if filed in accordance with the provisions of Section 173(2)

of the Code would be complete report but the Magistrate in his judicial discretion may not take cognizance of the offence. Thus the provisions of Section 173(2) of the Code have to be considered separate and distinct from Section 190(1)(b) of the Code.”

11. The question whether cognizance can be taken on the basis of the chargesheet, which is neither accompanied by a Chemical Examiner’s report nor any material to establish the recovered substance was a prohibited substance smack, is a matter to be considered by the concerned court. In view of the above, this Court is refraining from giving any further observations. It would be for the concerned Trial Court to examine the report and ascertain whether any cognizance can be taken on the basis of the chargesheet.

12. There was no question of issuing notice under Section 50 of the NDPS Act by the IO considering that two police officials had already searched the petitioner and had allegedly recovered 7 grams of the prohibited substance. Admittedly, on no independent witnesses had joined the said proceedings.

13. Considering the facts and circumstances of this case, this Court considers it apposite to allow the present petition.

14. This Court is also of the view that the petitioner was entitled to default bail as he had moved an application for the same on 03.07.2020. The petitioner was arrested on 18.04.2020 and the period of sixty days as stipulated under Section 167(2) Cr. PC elapsed on 17.06.2020. And, the chargesheet had not been filed till that date.

Although the petitioner had moved his bail application under Section 439 of the Cr.P, this Court is of the view that the same ought to have been considered by the concerned court. This is considering that it was the court's obligation to inform the petitioner of his right to bail under Section 167(2) of the Cr.PC. The question whether his application for bail substantially complied with the Proviso(a) of Section 167(2) of the Cr.PC has been considered by this Court in a recent decision in ***Subhash Bahadur @ Upender v. The State (N.C.T. of Delhi: BAIL APPLN. 3141/2020 decided on 06.11.2020.***

15. The petitioner is directed to be released on bail on his furnishing a Personal Bond in the sum of ₹5,000/- with one surety of the like amount to the satisfaction of the concerned Trial Court/Duty Magistrate/CMM. This is also subject to the following further conditions:-

- a) the petitioner shall provide his contact number to the concerned SHO/IO and ensure that he is reachable on it at all times;
- b) the petitioner shall not leave the National Capital Territory of Delhi without prior information to the concerned SHO/IO.

16. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

NOVEMBER 9, 2020/MK