

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.21326 of 2021**

Arising Out of PS. Case No.-267 Year-2020 Thana- DINARA District- Rohtas

Ram Babu Yadav, Son Of Late Parmeshwar Yadav Resident Of Village -
Korhiya Parsahi, P.S.- Jay Nagar, Distt.- Madhubani.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Subhash Kumar Jha- Advocate

For the Opposite Party/s : Mr. Ram Priya Sharan Singh- A.P.P.

**CORAM: HONOURABLE MR. JUSTICE SATYAVRAT VERMA
ORAL ORDER**

3 02-12-2021 Heard the learned Advocate for the petitioner and the
learned A.P.P. for the State.

The petitioner seeks bail in connection with Dinara
(Bhanas O.P.) P. S. Case No. 267 of 2020 corresponding to
N.D.P.S. Case No.11 of 2020, instituted for the offences under
Sections 8/20(b)(ii)(c)/22/29 of the N.D.P.S. Act.

The learned counsel for the petitioner submits that
from perusal of the allegation as alleged in the F.I.R., it would
manifest that the S.H.O., Bhanas O.P. alleges that on 03.09.2020
at about 12:30 hrs he got secret information that one white
colour Maruti Car bearing Registration No. KA05AG0727 is
parked near a petrol pump in which the smugglers are sitting
with *ganja* and *charas*, further that information was given to the
superior officers and a police team was constituted,



investigation kit was taken and further weighing machine was taken from the sweet shop of one Saroj Gupta. It is further alleged that police proceeded at 12:45 pm from the police station along with the Circle Officer and when the team reached near Bariyarpur Petrol Pump, they saw a white colour Maruti car. It is alleged that on seeing the police the accused persons tried to flee with the car but the car was chased and the accused along with the car were apprehended at village Katiyara at about 1:15 pm. It is alleged that two persons in the age group of 20-25 years were sitting in the car and were nervous and further they disclosed their name as Rambabu Yadav and Monu Kumar. It is further alleged that in presence of two independent witnesses, both the accused persons were searched and in course of search from Rambabu Yadav a blue colour Vivo mobile and Rs. 26,900/- was recovered and from Monu Kumar, one Samsung Android mobile was recovered. Further, from the dickey of the car, one blue colour bag wrapped in a plastic containing *ganja* was recovered and beneath the middle seat of the car, two white colour plastic were recovered in which 23 and 24 pieces of roll was concealed containing *charas* like contraband. It is further alleged that the contraband seized was weighed and the *ganja* was found to be 4.500 kg and the *charas* like narcotic was found



to be 4.700 kg, accordingly the present F.I.R. was instituted.

Learned counsel for the petitioner submits that from perusal of the allegation as alleged in the F.I.R. it would manifest that as far as recovered *ganja* is concerned, the same is less than the commercial quantity and a little more than small quantity but as far as *charas* is concerned, the same is alleged to be of commercial quantity. Learned counsel for the petitioner further submits that F.I.R. itself discloses that the authority who seized the alleged contraband has not alleged with certainty that the recovered contraband was *charas* rather he alleges that the recovered narcotic was *charas* like substance. Learned counsel further submits that since the authority seizing the alleged contraband was himself not sure whether it was *charas* or *charas* like substance then the same had to be certified by an expert body i.e., by F.S.L. but in the present case the I.O. submitted charge-sheet in absence of F.S.L. Learned counsel further submits that even *ganja* is alleged to be *ganja* by the Investigating Officer the same also has not been certified by F.S.L. that the alleged seized material was *ganja* or not.

Learned counsel further submits that N.D.P.S. act is a stringent act and the punishment incorporated in the Act ranges from one year to capital punishment. The learned counsel



further submits that liberty of a person, even if he is an accused, cannot be imperiled in the manner it has been done in the present case, that is, the person who investigated the case himself certified that the alleged contraband was *ganja* and *charas* and thus became a judge of his own.

In view of the submissions made by the learned counsel for the petitioner, this Court on 16.11.2021 had directed the Superintendent of Police, Rohtas to file a counter affidavit clearly stating that as to whether the charge-sheet was submitted after the F.S.L. report was received or it was submitted in absence of F.S.L. report and if the charge sheet was submitted in absence of F.S.L. report then on what basis the I.O. certified that the alleged seized contraband was *charas* and *ganja*.

In view of the order dated 16.11.2021, learned A.P.P. for the State, Shri Ram Priya Sharan Singh submits that he has filed a copy of the counter affidavit personally sworn by the Superintendent of Police, Rohtas on 30.11.2021 through e-mail but the learned A.P.P. further files a copy of the counter affidavit in the Court which is taken on record. The learned A.P.P submits that from perusal of the counter affidavit it would manifest that the Superintendent of Police at para '5' has pleaded – "That A report was called for from Vijaya Kumar, S.I., the then I.O. of



the case, who has submitted his report in 28.11.2020 stating that he had sent the seized items to the Forensic Laboratory, Patna and made constant efforts to get the report from there, but the report was not made available and he could not enter the same in the case Diary by mistake. F.I.R. accused were in judicial custody, the period of which was going to be completed. If the Charge-sheet should not have been submitted within time, they might have got the benefit of Sec. 167(2). So, he presuming the seized items as 'Ganja' and 'Charas' considering their Colour/smell, he submitted Charge-sheet No. 240/2020 dated 25.11.2020 against the accused persons".

The learned A.P.P. fairly submits that in view of the pleadings made in the counter affidavit it is clear that charge-sheet was submitted in absence of F.S.L. report.

The learned counsel for the petitioner while replying the contention of the learned A.P.P. submits that from perusal of the F.I.R. it would manifest that F.I.R. was instituted on 03.09.2020 and the charge-sheet came to be submitted on 25.11.2020 i.e. within 82 days. Learned counsel submits that from bare perusal of Section 36A(4) of the N.D.P.S. Act it would manifest that it clearly records that - "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 thereof to 90 days, where they occur, shall be construed as reference to 180 days;

Provided that, if it is not possible to complete the investigation within the said period of 180 days, the Special Court may extend the said period 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 180 days.

Learned counsel thus submits that from bare perusal of the aforesaid Section it would manifest that offences punishable under Section 19 or Section 24 or Section 27A of the N.D.P.S. Act or for offences involving commercial quantity, the period of investigation is 180 days and if within those 180 days investigation cannot be completed, then on an application by the learned Public Prosecutor, the Special Court may extend the said period upto 1 year. The learned counsel submits that this provision in the N.D.P.S. Act amply demonstrates that measures have been incorporated to ensure that culprits who are involved in cases relating to narcotics don't go scot-free rather the investigating agency should have ample time to investigate the



case from all the perspective.

Learned counsel further submits that in the F.I.R. the alleged recovered *charas* is of commercial quantity as such the period of investigation in view of Section 36A(4) was upto 180 days, but the police could have submitted a charge-sheet prior to 180 days provided the investigation would have been completed in all respect, but in the present case even without the investigation being completed, the police in haste submitted the charge-sheet in absence of F.S.L. only with a view to ensure that the accused is not granted the privilege of default bail under Section 167(2) of the Cr.P.C. Learned counsel submits that the manner in which the police has investigated and submitted the charge-sheet in haste completely offends Article 21 of the Constitution of India as Right to Life and Liberty is a Fundamental Right given to it's citizen and liberty of a person, even if he is an accused in a case, cannot be imperiled except in accordance with the procedure established by law. The mere fact that the counter affidavit records, accepting, that in absence of F.S.L. the charge-sheet was submitted only with a view to keep the accused behind bar reflects the mindset of the police. The learned counsel submits that even cognizance, based on such charge-sheet, has been taken which amply demonstrates that the



cognizance was taken in a mechanical manner in absence of any material on record to even remotely suggest that the seized contraband was *charas* or *ganja* in absence of F.S.L. Learned counsel submits that the police merely by seeing or feeling cannot come to a conclusion that the seized material was *charas* or *ganja* or else there would have been no requirement of F.S.L. report.

The learned counsel for the petitioner has drawn the attention of the Court to order dated 30.11.2018 in Cr. Revision no. 4659 of 2015 (O&M) (Ajit Singh alias Jeeta and Anr.) and analogous cases passed by the Hon'ble Punjab and Haryana High Court (herein after referred as the Court) wherein the Hon'ble Division Bench of the Court based on the question framed by the learned Single Judge that:

(i) 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 absence of any extension of time under Section 36A(4) of the N.D.P.S. Act, the accused is entitled to bail under Section 167(2) Cr.P.C and

(ii) If the reply is in the affirmative, then what is the position regarding commonly used substance like opium and poppy husk etc., which can be easily identified by the police officer from visual inspection, smell or taste



was called upon to answer whether the presentation of report under Section 173(2) Cr.P.C. by the police without the report of chemical examiner/FSL amounts to incomplete challan and in absence of any extension of time under Section 36A(4) of the N.D.P.S. Act, the accused is entitled to bail under Section 167(2) Cr.P.C.

The learned counsel for the petitioner submits that the Hon'ble Division Bench of the Court after considering the provisions of the N.D.P.S. Act and Cr.P.C. and considering various orders of the Court and judgment of the Hon'ble Supreme Court held that the report of F.S.L. with regard to the nature of the recovered substance would go to the root of the matter and, therefore, challan filed without F.S.L. report with regard to the nature of the substance would be an incomplete challan and would not satisfy the requirement envisaged under Section 167(2) Cr.P.C. The accused, in such circumstances, would be entitled to be released on default bail.

The learned counsel for the petitioner after making his submission draws the attention of this Court to the relevant paragraph of the judgment dated 30.11.2018. The relevant extracts of the judgment is reproduced below:-

“With respect to the question posed by the learned Single Judge regarding some of the contrabands 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, 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 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 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."

The learned A.P.P. submits that as far as the learned counsel for the petitioner has made his submission with regard to cognizance, that is not within the jurisdiction of this Court to be adjudicated upon, the petitioner can raise these grounds before an appropriate forum.

Further, it is submitted by the learned A.P.P. for the State that the case on which the learned counsel has placed reliance is with respect to default bail under Section 167(2) Cr.P.C. but in the present case charge-sheet has been submitted, further the petitioner is not raising the plea of default bail. The learned A.P.P. further submits that the judgment relied upon by



the learned counsel for the petitioner does not have a binding effect on this Court, nor it can be treated as a precedent.

The learned counsel for the petitioner in reply to the contention of the learned A.P.P. submits that as far as the first contention of the learned A.P.P., with respect to the issue of taking cognizance is concerned, the same will be challenged before an appropriate jurisdiction, but as far as the second contention raised by the learned A.P.P. with regard to the fact that charge-sheet in the case has been submitted and that issue of default bail has not been raised in the present case is untenable for the reason that the ratio decided by the Division Bench of the Hon'ble Punjab and Haryana High Court is to the effect that challan submitted in absence of F.S.L. is an incomplete challan and it would be draconian to propel an accused into throes of trial without determining the nature and contents of the contraband i.e. challan in absence of F.S.L. is an incomplete challan and thus the court below in absence of relevant material, would not be enabled to form an opinion. The learned counsel further submits that it is true that the aforesaid judgment of the Punjab and Haryana High Court is not binding but definitely has a persuasive value. Learned counsel further submits that petitioner is a person with clean antecedent and as



such it can be safely presumed that petitioner would not indulge in future in such cases.

Considering the submissions of the parties, the Court finds considerable force in the contention raised by the learned counsel for the petitioner that though the present case is not with regard to default bail, but then charge-sheet came to be submitted in absence of F.S.L., merely because the Investigating Officer felt that the accused would get the benefit of default bail under Section 167(2) of the Cr.P.C. amply reflects that the Investigating Officer was not aware of the provisions relating to N.D.P.S. Act and was completely oblivious of Section 36A(4) of the N.D.P.S. Act as such mere filing of charge-sheet in absence of F.S.L. does not justify the incarceration of the petitioner in custody as such for the present, for the purposes of bail, without expressing any opinion on merits of the case, the petitioner is directed to be enlarged on bail on furnishing bail bond of Rs. 25,000/- (Rupees Twenty Five Thousand only) with two sureties of the like amount each to the satisfaction of learned Additional District and Sessions Judge-10, Sasaram, Rohtas in connection with Dinara (Bhanas O.P.) P. S. Case No. 267 of 2020 corresponding to N.D.P.S. Case No. 11 of 2020 subject to the condition as laid down under Section 437(3) Cr.P.C.



Let this order be communicated to the Superintendent
of Police, Rohtas.

(Satyavrat Verma, J)

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