

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

212

**CRM-M-11271-2021(O&M)
Decided on : 26.03.2021**

SALEEM @ MULLA

... Petitioner(s)

Versus

STATE OF HARYANA

... Respondent(s)

**CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL
(Through Video Conferencing)**

PRESENT: Mr. A.P.S. Mann, Advocate
for the petitioner.

Ms. Tanushree Gupta, DAG Haryana
assisted by ASI Virender.

MANJARI NEHRU KAUL, J. (Oral)

The instant petition has been filed under Section 439 Cr.P.C., read with Section 167(2) Cr.P.C., for grant of regular bail to the petitioner pending trial in case FIR No.373, dated 10.08.2020 registered at Police Station Nuh [wrongly mentioned as Sadar Nuh in the impugned order (P-2)] District Nuh, under Section 20-C of the NDPS Act [wrongly mentioned as Section 61 in FIR(P-1)].

Brief facts of the case in hand as set up by the prosecution may be noticed thus. In pursuance to receipt of secret information, that the petitioner and co-accused were indulging in sale of narcotic drugs and had stocked *Ganja* in truck bearing No. HR-73A-8465, a raid was conducted on 10.08.2020 by the Police party at the disclosed place. However, co-accused fled from the spot and only the petitioner was apprehended by the police party. After complying with the mandatory provisions of the NDPS Act, the search of the truck was carried out which led to the recovery of 04 bags containing 160 kg of *Ganja patti* and the arrest of the petitioner effected.

Thereafter, investigation was set into motion leading to the presentation of the challan before the trial Court on 30th October, 2020.

Learned counsel submits that no doubt the challan under Section 173 Cr.P.C., was indeed presented within the prescribed statutory period of 180 days however since the FSL report was not part of the challan, it would be deemed to be an incomplete challan thus entitling him to the grant of default bail under the provisions of Section 167(2) Cr.P.C., read with Section 36A(4) of the NDPS Act.

Learned counsel in support of his submissions has placed reliance upon the decision rendered by a Division Bench of this Court in **Ajit Singh @ Jeeta & Anr. Vs. State of Punjab** in **CRR-4659 of 2015** wherein the following question was sent up for consideration :-

“Whether the presentation of report under Section 173(2) Cr.P.C., by the police without the report of the Chemical examiner/Forensic Science Laboratory amounts to incomplete challan and in the absence of any extension of time under Section 36-A(4) of the NDPS Act, the accused is entitled to bail under Section 167(2) Cr.P.C.?”

The Division Bench while answering the reference in the affirmative held that in case challan was presented without the chemical examiner's report, it would be deemed to be an incomplete one thus entitling the accused to the grant of default bail, unless of course if an application had been moved by the investigating agency/Public Prosecutor before the expiry of the statutory prescribed period for extension of time.

In addition, the learned counsel submitted that as per the challan presented, the petitioner was allegedly found to be in possession of 160 kgs *Ganja patti*. The learned counsel invited the attention of this Court to Section 2(iii) of the NDPS Act wherein it was explicitly provided that

cannabis (hemp) would mean only ganja, that is, the flowering or fruiting tops of the cannabis plant, and not the seeds and leaves when not accompanied by the tops. Hence, it was urged that the alleged recovered substance i.e., leaves of Ganja did not attract the mischief of any offence under the NDPS Act.

Per contra, the learned State counsel while opposing the submissions and prayer of the learned counsel argued that since the challan stood presented within the prescribed statutory period of 180 days the petitioners indefeasible right to default bail stood extinguished. She further apprised the Court that the FSL report had since been received and in all likelihood would be filed before the Special Court concerned in the near future. Hence, it was urged that since it was a case of commercial quantity and in the wake of the above development, right of the petitioner to be released on bail under the default clause stood lost.

Heard and perused all the material on record.

Before proceeding further it would be worthwhile to reproduce Section 167(2) Cr.P.C., and notice the object behind the enactment of Section 167(2) Cr.P.C., :-

“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 in any custody under this section unless the accused is produced before him;

(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. 1 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;]. 2 Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

The object behind the enactment of Section 167(2) Cr.P.C., can be traced back to the rampant misuse of Section 344 of the 1898 Code as it would happen more often than not that the investigation could not be completed within the prescribed 15 days as a result of which the

investigating agency would continue to file preliminary reports etc., as a consequence the remand of the accused would continue beyond the prescribed period of 15 days. Resultantly, the accused would keep on languishing in custody while the investigation would continue at its own leisurely pace. It was in this background the aforementioned enactment was brought so as to ensure a free trial, expeditious investigation and for setting down a rationalised procedure that would protect the interest of the society particularly the impoverished lot. It therefore need not be overemphasized that the infeasible right to default bail under Section 167(2) is therefore intrinsically linked to Article 21 of the Constitution of India which provides for personal liberty and as has been held by the Hon'ble Supreme Court in 'S. Kasi Vs. State Through Inspector of Police 2020 Cri.L.R.(SC) 843', that the right of the accused to be set at liberty takes precedence over the right to carry on the investigation and submit the charge-sheet irrespective of the merits of the case against the accused. The legislature in its wisdom thus provided for different statutory time periods depending upon the nature and gravity of the offence as well as the punishment prescribed, for completion of investigation failing which the accused would become entitled to grant of default bail under Section 167(2) Cr.P.C.

It would also be apposite to reproduce Section 36A(4) of the NDPS Act:-

*“In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the 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”

A perusal of the aforementioned Section makes it abundantly clear that if for some reasons the investigation is not completed and challan not presented within the prescribed period of 180 days, the Special Court concerned can extend the said period up to 01 year but that would be subject to a report submitted by the Public Prosecutor with respect to the progress of the investigation made so far and the specific reasons for detaining the accused beyond the prescribed period.

A co-joint reading of Section 167(2) Cr.P.C., as well as Section 36A(4) of the NDPS Act reveals that a great deal of emphasis has been laid on completion of '*investigation*'. The moot question which thus arises is as to what would be implied by '*investigation*' which appears in both the aforementioned Sections and as to when '*investigation*' would be deemed to have been completed in cases under the NDPS Act. Section 2(h) of the Cr.P.C., defines investigation as:-

'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;'

Thus, what can be culled from the above definition of '*investigation*' is that it would include within its ambit all proceedings conducted by the investigating agency for collection of all such material and evidence which would help in ascertaining whether an offence has been

committed or not. In other words, investigation would be deemed to have been completed in cases under the NDPS Act only after an opinion has been formed and given by the chemical examiner qua the nature of the articles/substance sent to it by the investigating agency. Therefore, without a doubt in cases under NDPS Act, FSL report would be a decisive document to link the accused with the alleged commission of crime for attracting the mischief of offences under the NDPS Act. It is precisely for this reason that it becomes imperative in cases under the NDPS Act that the challan is mandatorily accompanied by FSL report. Unless and until no definite opinion is given by the chemical examiner qua the nature of the articles etc., sent, it would lead to no other inference but the one that the investigation is still incomplete as 'smell' and 'sight' of the articles/substance seized by the investigating agency cannot be taken to be a conclusive proof of the nature of the articles/substance. Moreover, in the absence of the FSL report not being part of the challan, the Magistrate would be handicapped to proceed further and take cognizance of the offences. FSL report in cases under NDPS Act is an intrinsic part of the investigation and it is for this reason that investigation of cases under the NDPS Act would have to be kept at a pedestal, different from investigation which is carried out in cases under the Indian Penal Code and certain other statutes.

Reverting to the case in hand as per contents of the FIR itself, the police allegedly recovered '*Ganja patti*'. A perusal of Section 2(iii)(b) of NDPS Act, reveals that *Ganja patti* i.e., leaves of *Ganja* are excluded from the definition of cannabis(hemp) and thus would not attract the mischief of an offence under NDPS Act. Yet again in the given circumstances, it was thus most crucial to get a definite opinion qua the nature of the substance

and the non-filing of the FSL report with the charge-sheet indicates that the investigation was still incomplete. The claim of the investigating agency in the challan that the recovered substance attracted the mischief of an offence under NDPS Act without it being supported by the FSL report is nothing but an opinion given by an amateur on the basis of just 'smell' and 'sight' which would undoubtedly be a travesty of justice thereby subjecting the accused to the agony of a trial. The detention of the petitioner in these circumstances amounts to depriving him of his personal liberty.

Still further, on a pointed query to the learned State counsel as to whether any report in terms of Section 36A(4) of the NDPS Act had been made to the Special Court concerned seeking extension of time for filing of the FSL report, she has replied in the negative. Hence, as conceded by the learned State counsel since no report as envisaged under Section 36A(4) NDPS Act was ever made to the Court concerned by the Public Prosecutor, this Court has no hesitation in concluding that the challan which was presented was an incomplete one as a result of which the petitioner has now acquired his indefeasible right to default bail.

No doubt the State counsel did urge before this Court that the FSL report had since been received but admittedly and as conceded by the learned State counsel it was received after the petitioner had approached this Court for the grant of default bail under Section 167(2) Cr.P.C. In the circumstances, as held by the Apex Court in ***Uday Mohanlal Acharya Vs. State of Maharashtra 2001(2) RCR(Criminal) 452*** the prosecution can not now frustrate the object of the petitioner's indefeasible right for default bail.

In the facts and circumstances, the petitioner is ordered to be admitted to bail in terms of Section 167(2) Cr.P.C., to the satisfaction of the

trial Court/Magistrate concerned. However, it is made clear that anything observed hereinabove shall not be construed as an expression of opinion on the merits of the case.

Before parting it would be pertinent to refer to the directions given by the Division Bench of this Court in Ajit Singh's case (supra) wherein the State had been directed to sensitize the investigating officers for moving appropriate application for extension of time in case there was any delay in the procurement of the FSL report within the stipulated time frame of 180 days. However, it is apparent that the said directions given in Ajit Singh's (supra) case are not being adhered to by the Investigating agency.

In the present day scenario when the cases under the NDPS Act are on the rise across the length and breadth of the country and have been wreaking havoc on the society particularly the younger generation, it becomes all the more critical that the provisions of the NDPS Act are complied with, in letter and spirit, so that advertently or inadvertently such lapses on the part of the investigating agency or in some cases even by unscrupulous elements does not enure to the benefit of an accused who may in some cases be also involved in a large number of cases under the NDPS Act. Thus, the directions given in Ajit Singh's case (supra) by the Division Bench of this Court are reiterated that the State should take effective steps to sensitize investigating officers and other officials to comply with the provisions of Section 36A(4) of the NDPS Act, if for some reasons they are unable to present the challan along with the FSL report within the stipulated time of 180 days. In case there is non-compliance by the Investigating Officer, the State should not hesitate to take appropriate action against the erring officials.

A copy of this order be sent to the Chief Secretaries of the States of Punjab and Haryana as well as to the Advisor to the Administrator, UT, Chandigarh for necessary compliance.

(MANJARI NEHRU KAUL)
JUDGE

March 26, 2021

S.Sharma(syr)

Whether speaking/reasoned: *Yes/No*
Whether Reportable: *Yes/No*