

IN THE HIGH COURT AT CALCUTTA
(Criminal Miscellaneous Jurisdiction)

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.M 5346 of 2021

State

Vs

Ebrahim Hossain (a) Ripon Hossain Anr.

For the State/ Petitioner

: Mr. Sabir Ahmed

For the Opposite Party

: Mr. Imtiaz Ahmed

Ms. Ghazala Fordous

Mr. Mofakkerul Islam

Ms. Smita Saha

Mr. Sk. Saidullah

Ms. Arunima Mukhoopadhyay

Mr. Debopam Roy

Heard on

: February 3, 2022

Judgment on

: February 23, 2022

Bibhas Ranjan De, J.:-

Preface:

1. This is an application for cancellation for bail under Section 439 (2) of the Code of Criminal Procedure, 1973, challenging the order dated 11.02.2021 and 23.02.2021 passed by the Ld. Special Judge, Bench 1, **Narcotic Drugs and Psychotropic Substances Act, 1985**, (hereinafter referred to as NDPS Act, 1985), City Sessions Court at Calcutta in connection with NDPS case no. 25 of 2019 arising out of **Special Task Force** (hereinafter referred to as STF) police station case no.24 of 2019 dated 26.07.2019 under Section 22(c)/29 of NDPS Act.

Brief Facts :

2. On 25.07.2019 in the afternoon S.I. John Karthak of STF, Kolkata received credible information that a vehicle bearing No. WB-94 B2309 was approaching Kolkata from Murshidabad to deliver a consignment of huge amount of Amphetamine tablets commonly known as 'YABA' somewhere in the Basanti Express Highway. The raiding team ambushed and intercepted the said vehicle and found 9.931 Kgs pink coloured 'YABA' tablets and arrested the opposite parties. Accordingly, complaint was lodged with the STF Police Station and an FIR was initiated being STF Police Station case no. 24 of 2019 dated 26.07.2019 under Section 22(c)/29 of NDPS Act, 1985. Opposite parties were produced before the Ld. Special Judge, Bench 1, NDPS Act, City Sessions Court at Calcutta on 26.07. 2019 and the Ld.

Judge allowed the prayer for police custody of the opposite parties on 17.01.2021. Ld. Judge, directed sending the samples to CFSL for examination and expert opinions. After completion of investigation charge sheet being No. 01 of 2020 dated 20.01.2020 under Sections 22(c)/29 of NDPS Act, 1985, was submitted against opposite parties, without chemical report, with a prayer for further investigation with a view to submit supplementary charge sheet after receiving chemical report but that charge sheet was kept in the record by the order dated 20.01.2020. On 07.07.2020 record was put up by an application filed by Ld. Public Prosecutor stating inter alia that I.O intended to submit supplementary charge sheet. Prayer was allowed and supplementary charge sheet was filed being no.34 of 2020 dated 06.07.2020 against accused namely Ripon Hossain alias Ebrahim Hossain and Ripon Sk. under Section 22(c)/29 of the NDPS Act, 1985, along with the copy of the chemical report and cognizance was taken.

Order assailed :

3. On 11.02.2021 Ld. Judge, before granting interim bail to the petitioner, Ripon Hossain, made an observation as under:

“ After going through the decisions and guideline in connection with the cases as referred above, it appears that petition U/S 36A(4) of the NDPS Act needs to be filed before expiry of initial period of 180 days by the public prosecutor for extension of time and get the benefit of section 173(8) Cr.P.C in filing supplementary charge sheet.

In the present case no such petition was filed U/s 36A (4) of NDPS Act by the public prosecutor for extension of time to continue the investigation and filing supplementary charge sheet U/s 173(8) Cr.P.C. The supplementary charge sheet was filed

on 07.07.2020 i.e after the statutory period of 180 days without having any order in favour of the I.O for extension of time to continue the investigation.

That apart, the accused is in J.C since 26.07.2019 and till this date trial has not begun.

Considering all such aspects including the observation and guideline of the Hon'ble High Court, Calcutta, Hon'ble High Court, Punjab and Hariyana and hon'ble Supreme Court of India, accused may find interim bail till 17.04.2021 on furnishing bond of Rs. 20,000/- with two sureties of Rs. 10,000/- each of whom one must be local having good reputation and landed property along with R.O.R (L.R) subject to the satisfaction of Ld. Chief Metropolitan Magistrate, Calcutta on further condition to meet O.C, STF PS once in a week until further order and not to intimidate the witnesses and tamper the evidence I.D to J.C till date.

If on bail to date for appearance.

CD be returned.

Bail petition stands disposed of.

Copy of this order be forwarded to the Court of Ld. Chief Metropolitan Magistrate, Calcutta and O.C, STF Ps, Calcutta for intimation."

4. From the aforesaid order passed by the Ld. Judge, it appears that Ld. Judge allowed interim bail till 17.04.2021 on the ground that supplementary charge sheet was filed on 07.07.2020 i.e after statutory period of 180 days without having any order in favour of I.O for extension of time to continue the investigation within the meaning of provision of Section 36A (4) of the NDPS Act, 1985. From that order it further appears that, bail application dated 04.02.2021 on behalf of petitioner Ripon Hossain was taken up for hearing on the same date and after going through the record Ld. Judge allowed the prayer for statutory bail on the ground that though charge sheet was submitted prior to filling of the bail application i.e on

20.01.2020 but cognizance was not taken as no chemical expert report of alleged contraband articles was filed and ultimately chemical report was filed on 07.07.2020 with a supplementary charge sheet. Ld. Judge also passed an order on 23.02.2021 in respect of the bail application filed on behalf of petitioner Ripon Sk. on 18.02.2021 and allowed the bail application with the same reasons as given in the order dated 11.02.2021.

Argument advanced:

5. Mr. Sabir Ahmed, Ld. Counsel, appearing on behalf of the state submitted that charge sheet has already been submitted and therefore no question of right to default bail arises. Such right to default bail cannot be extended to the accused/ opposite parties whether or not cognizance of the same has been taken. Mr. Ahmed assailed the impugned orders and contended that while charge sheet has already been submitted within statutory period, there is no question of filing petition for extension of time under Section 36A (4) of the NDPS Act, 1985. Assailing the impugned order it is further contended that Ld. Trial Court has failed to appreciate that statutory restriction depicted in the Section 37 of the NDPS Act, and came to his erroneous finding. Accordingly, he prayed for cancellation of bail within the meaning of Section 439 (2) of the Criminal Procedure Code 1973 and to set aside the order dated 11.02.2021 and 23.02.2021. In support of his contention he relied on the case ***M. Ravindran vs. Intelligence Officer Directorate of Revenue Intelligence (2021) 2 SCC 485*** and ***Krishan Lal vs. State 1989 (39) DLT 392***.

6. In opposition to that, Mr. Imtiaz Ahmed, Ld. Counsel appearing on behalf of the opposite Parties submitted that though charge sheet was filed within the statutory period but without chemical examination report showing the seized articles to be contraband article within the meaning of the provision under the NDPS Act. According to Mr. Ahmed, the charge sheet without chemical examination report cannot be considered as charge sheet within the meaning of the Act as Court cannot take cognizance of the offence alleged in this case unless supported by any chemical examination report. In support of his contention he referred to a case of ***Sanjay Kumar Kedia alias Sanjay Kedia vs. Intelligence Officer Narcotics Control Bureau and another (2009) 17 SCC 631***. He further relied on the observations of this Court in ***CRM No. 7847/2020 and CRM No. 3929/2020***.

Point for Consideration:

7. In our case, only point for consideration is as to whether charge sheet without chemical examination report submitted within the statutory period can be considered as charge sheet within the meaning of Section 173 of Criminal Procedure Code.

Decisions with reasons.

8. Before us the order no. 39 dated 11.02.2021 and order no 42 dated 23.02.2021 passed by Ld. Judge, Bench 1, NDPS Act, City Sessions Court, Calcutta have been challenged. On careful scrutiny of the order dated 11.02.2021 it is found that charge sheet under Section 22(c)/29 NDPS Act, has been filed on 20.01.2020 i.e. well within statutory period, with a further

prayer for continuation of investigation with a view to submit supplementary charge sheet under Section 173(8) Cr.P.C. It is seen from that order that 20.01.2020 when charge sheet was submitted Ld. Judge did not take cognizance of the offence in absence of report of chemical expert. Ld. Judge further opined that under the NDPS Act extension of period of investigation can only be prayed for within the meaning of Section 36A (4) of the NDPS Act to get benefit of Section 173(8) of Criminal Procedure Code in filing supplementary charge sheet. Thereby, Ld. Judge allowed the interim bail to the accused Ripon Hossain/opposite party no.1 on 23.02.2021 by the order no. 42. Ld. Judge again allowed the interim bail to the accused Ripon Sk./opposite party no. 2 assigning the same reason given in the order dt. 11.02.2021.

9. At the outset, we come to the case of ***M. Ravindran (supra)*** wherein we find that Hon'ble Apex Court clearly explained the meaning of 'default bail' under Section 167(2) of Criminal Procedure Code and it was observed that once the right to default bail has become indefeasible by filling application when right accrues, it continues, irrespective of pendency of bail application, or subsequent filling of charge sheet, additional complaint or public prosecutor's report seeking extension of time. Thereby, it has been observed that when right to default bail accrues and bail petition is filed, subsequent filling of charge sheet or prayer for extension of time under Section 36A (4) NDPS Act, cannot stand in the way of granting default bail even if charge sheet or prayer for extension of time under Section 36A (4) of the NDPS Act is filed pending application for default bail. On the other hand, Hon'ble Apex

Court held that when right to default bail accrues but petition for bail is not filed and subsequently charge sheet or report seeking extension of time is granted by the Court, right to default bail would be extinguished.

Observations of the Hon'ble Apex Court is set out below:-

“ 25.2. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.”

25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.”

10. The case of **Sanjay Kedia (supra)** specially dealt with the provision of Section 36A(4) of the NDPS Act, 1985. The observations of Hon'ble Apex Court runs below:-

“ 10. It will be seen that Section 167 does not envisage an extension of the period of detention of an accused in custody beyond the specified periods.

a. The legislature, however, thought in its wisdom, that certain special categories or situations required that the investigating agencies should be given more time to

investigate a matter and to file their complaint or charge-sheets and such provisions have been made under special statutes. The Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called "the TADA") and the Act are two such special legislations.

- b. 11. Section 36-A(4) of the Act insofar as it is relevant, reads as under:

"36-A. Offences triable by special Courts. –
(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a)-(d)	*	*	*
(2)-(3)	*	*	*

- c. (4) In respect of persons accused of an offence punishable under Section

19 or Section or 24 Section 27-4 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':

d. 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.

(5)	*	*	**
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e. 12. The maximum period of 90 days fixed under Section 167(2) of the Code has been increased to 180 days for several categories of offences under the Act but the proviso authorises a yet further period of detention which may in total go up to one year, provided the stringent conditions provided therein are satisfied and are complied with. The Conditions provided are:

- (1) a report of the Public Prosecutor,

(2) which indicated the progress of the investigation, and

(3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and

(4) after notice to the accused."

11. In CRM No. 3929 of 2020 of this Court Hon'ble Division Bench only dealt with one application for extension of period of filling charge sheet and that was not even heard by the Ld. Judge even after expiry of the period of 180 days. Therefore, in that case charge sheet has not been filed within the statutory period and even petition for extension of period of filling charge sheet could not be heard within the statutory period. Therefore, the facts of that case is not *pari materia* with that of ours.

12. In CRM no. 7847/2020, we also find that Hon'ble Bench came across the fact where prosecution did not file any prayer for extension even after the expiry of extended period of 180 days. In that case petitioner/accused filed an application claiming statutory bail before the Ld. Judge. The fact of this case is also not identical to that of ours.

13. In our case, petitioners were arrested on 25.07.2019 for the offence of recovery of contraband articles of commercial quantity. Petitioners were produced before the Ld. Judge on 26.07.2019. Investigating agency after completion of investigation submitted charge sheet on 20.01.2020 well within the statutory period of the 180 days. But chemical report was not filed along with the charge sheet though prayer in the charge sheet itself for further investigation and filing of supplementary charge sheet after receiving chemical report has been mentioned but the Ld. Judge did not pass any order to that effect.

14. In our case the only point of dispute is whether the charge sheet without chemical report can be taken into account at the time of considering bail

application submitted by the petitioners after filing of the charge sheet well within statutory period.

15. In ***Krishan Lal's case (supra)*** the Hon'ble Division Bench held that the provisions of section 173 of the Cr.P.C must be considered as separate and distinct from Section 190(1)(b) of the Criminal Procedure Code. The Court held that the report under Section 173(2) of the Cr.P.C 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. It is relevant to note that the said decision was rendered in the context of the NDPS Act. The relevant extract of said decision is as under:

“ 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 Investigation 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(l)(b) of the Code.

18. As far as the expert's report is concerned, we may note that by virtue of Sub-section (4) of Section 293 of the Code, any document purporting to be report under the hand of the Director or a Deputy Director or Assistant Director of a Central Forensic Science Laboratory or State Forensic Science Laboratory can be used as evidence in any inquiry, trial or other proceedings under the Code. It is true that it is open to the Court where it thinks fit to summon and examine the Government scientific expert. But he is not a formal witness and, therefore, no duty is cast upon the Investigating Officer to cite him as a witness.

19. We 'thus' hold that under Section 173(2) of the Code there is no mandate that a police report must enclose the document purporting to be a report under the hand of a Government Scientific Expert. In the present cases, as cognizance of the offences taken by the Magistrate was proper and valid, no order releasing the petitioners on bail under Section 167(2) of the Code was required to be passed."

16. In view of the above, the petitioner contention that the charge sheet submitted on 20.01.2020 could not be construed as a report under Section 173(2) of the Criminal Procedure Code cannot be accepted.

17. In our case charge sheet was filed on 20.01.2020 well within statutory period and bail application was filed on 04.02.2021. Ld. Judge did not take cognizance of the charge sheet which was filed without chemical expert report. Supplementary charge sheet along with chemical expert report was

filed only on 07.07.2020. The bail application was filed subsequent thereto on 14.02.2021. The defaults, if any, no longer existed on the date of the filing of the application for bail on 14.02.2021. So, petitioners did not avail of the right of default bail before filing of supplementary charge sheet along with the chemical expert report.

18. It is true, that ratio of the decision of ***M. Ravindran's case (supra)*** once the right to default bail has become infeasible by filing application when right accrues, it continuous irrespective of pendency of the bail application or subsequent filing of charge sheet or Public Prosecutor's report seeking extension of time. But in our case bail application was filed claiming default bail long after the statutory period was over even after filing charge sheet well within the statutory period and also after filing supplementary charge sheet with chemical experts report.

19. It is needless to mention that Ld. Judge before granting bail to the opposite parties eventually ignored the mandatory restrictions prescribed under Section 37 of the NDPS Act, 1985. It has become now a trite law that before granting bail to any accused involving an offence under Section 19, 24 or Section 27A and also for the offence involving commercial quantity, Ld. Judge has to satisfy in his order regarding restrictions envisaged in Section 37 of the NDPS Act, 1985. From that point of view impugned orders are also not sustainable.

20. In view of the discussions above, we allow the application for cancellation of bail under Section 439(2) of the Criminal Procedure Code. Petitioners are directed to surrender to custody within one week of the date

of this order, failing which the jurisdictional Court will take appropriate steps for their arrest.

21. CRM 5346 of 2021 stands disposed of accordingly.

[BIBHAS RANJAN DE, J.]

22. I Agree.

[DEBANGSU BASAK, J.]