

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

Date of decision: 05.04.2022

1. **Criminal Revision No. 2531-2019**

DUO JOU VIREIMIPetitioner

Versus

STATE OF HARYANARespondent

2. **Criminal Miscellaneous No. M-40409-2020**

DUO JOU VIREIMIPetitioner

Versus

STATE OF HARYANARespondent

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

Argued by : Mr. Sandeep Kotla, Advocate
for the petitioner in **CRR-2531-2019**.

Mr. Yashveer Kharb, Advocate
for the petitioner in **CRM-M-40409-2020**

Mr. Gaurav Bansal, AAG, Haryana
for the respondent/State.

SANT PARKASH, J.

1. This judgment shall dispose of aforementioned two petitions as they arise out of same FIR.

2. **Criminal Revision No. 2531-2019** under Section 401 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') has been preferred by the petitioner for setting aside the order dated 30.08.2019

passed by learned Additional Sessions Judge, Panipat whereby

application filed by him for grant of bail in view of Section 167(2) Cr.P.C. has been dismissed in case FIR No. 146 dated 18.02.2019 registered under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') at Police Station City Panipat whereas, **Criminal Miscellaneous No. M-40409-2020** has been filed by the petitioner under Section 439 Cr.P.C. for grant of regular bail pending trial in the aforesaid case.

3. Brief facts of the case is that on 18.02.2019, the police party headed by SI Rajpal were present near Toll Booth, Faridpur Turn, G.T. Road for barricading and checking of passers by vehicles. At that time a foreigner woman carrying a plastic polythene bag in her right hand came towards Toll Tax who was made to stop by SI Rajpal through lady/HC Reena and when she was asked about her name and details, she wrote down her details on a paper in English as the petitioner, presently residing at Vikas Puri Delhi. On suspicion, SI Rajpal through lady/HC Reena got checked her carry bag which was in her(petitioner) hand, in which a packet of corn flakes was found. The said packet was torn and the hand was put in the packet, under the corn flakes a polythene bag of white colour was found and when the polythene bag was opened and checked, three complete ball shaped (*ladoo*) and three balls broke into halves made of white material were found which as per the experience was found to be heroine. Recovery memo of psychotropic substance was prepared. On arrangement of computerized weighing scale when the found heroine was weighed without polythene bag, it was found to be 425 grams.

4. On the basis of these facts and allegations, the present FIR was registered.

5. After completion of the investigation, challan/report under Section 173 Cr.P.C. was presented before the learned Court against the petitioner without receiving the chemical examiner report/FSL.

6. Since the Police did not file the FSL report along with report under Section 173(2) of the Cr.P.C. despite expiry of 180 days, the petitioner/accused filed application for grant of bail on the ground that since the FSL report has not been submitted in the Court and in the absence of the same, it cannot be said that investigation has been completed and the petitioner may be granted bail in view of the provision of Section 167(2) of the Cr.P.C.

7. The above said application was dismissed by learned Additional Sessions Judge, Panipat vide impugned order dated 30.08.2019.

8. Feeling aggrieved, the petitioner has filed present revision petition along with the application as referred to above.

9. I have heard learned counsel for the petitioner as well as learned State counsel and have gone through the record.

10. Learned counsel for the petitioner has contended that complete challan was not presented despite the expiry of statutory period of 180 days from the date of arrest of the petitioner as such the petitioner was entitled to be released on default bail as per the provision of Section 167(2) Cr.P.C. The petitioner was arrested on 18.02.2019 for alleged recovery of 425 grams of heroin which fell in the category of

commercial quantity and on expiry of period of 180 days, submitting an incomplete charge sheet without accompanying the chemical examiner report, the petitioner became entitled to grant of default bail. The bail application has been wrongly dismissed by the learned Additional Sessions Judge, Panipat. In view of the indefeasible right accruing to the petitioner, the petitioner is entitled to grant of default bail and could not be denied bail on the ground of merits of the case not warranting the same. Right of the petitioner to grant of default bail was not even defeated by filing of FSL report subsequently. The impugned order suffers from material illegality. The same could be challenged by filing the revision petition. Therefore, the same may be set aside and the petitioner may be granted default bail under Section 167(2) of the Cr.P.C. In support of his arguments, learned Counsel for the petitioner has placed reliance on judgments passed in case '**Union of India through CBI Versus Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, RCR 2014(3) page 534 (Supreme Court) ; Ravinder @ Binder Versus State of Haryana 2015 Vol. IV, RCR (Criminal) page 441 (Punjab and Haryana High Court)** and judgment passed by Hon'ble Division Bench of this Court in case **Criminal Revision No.4659 of 2018 titled as 'Ajit Singh @ Jitta Versus State of Punjab'**.

11. On the other hand, learned State counsel has contended that the application filed by the petitioner for grant of regular bail had been dismissed. The remedy available to the petitioner was to approach this Court for grant of interim bail till receipt of FSL report. Due to the

recovery effected from the petitioner falling in commercial category, the petitioner is not entitled to grant of default bail. Therefore, the petition may be dismissed.

12. In ***Ranjit Singh @ Rana Vs. State of Punjab, CRR No.2087 of 2014 decided on 08.11.2016*** it was held by Division Bench of this Court that the final order passed under Section 167(2) of the Cr.P.C. read with Section 36-A(4) of the NDPS Act can be challenged only by way of revision and not by filing a petition under Section 439 of the Cr.P.C. or under Section 482 of the Cr.P.C. and the petitioner has accordingly filed present revision petition under Section 401 read with Section 167(2) of the Cr.P.C.

13. For dwelling upon the contentions raised by learned Counsel for the petitioner and learned State Counsel, it will be apposite to refer to the relevant statutory provisions.

14. Section 167 of the Cr.P.C. lays down the procedure to be followed when investigation cannot be completed in twenty-four hours. Relevant part of Section 167(2) of the Cr.P.C. reads as under:-

"(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;*

15. Section 36-A(4) of the NDPS Act provides as under:-

“36-A(4) In respect of persons accused of an offence punishable under Section 19 of Section 24 or Section 27-A 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 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.”

16. In the present case, the petitioner was apprehended on suspicion on 18.02.2019 and 425 grams of heroin falling in the category of commercial quantity was allegedly recovered from the conscious possession of the petitioner attracting provisions of Section 36-A(4) of the NDPS Act which extends the period for the detention of the accused upto one hundred and eighty days and further 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, were applicable to the present case.

17. Admittedly, the report under Section 173(2) of the Cr.P.C. was filed in the present case on 10.04.2019. However, the said report/challan was filed without accompanying the FSL Report and the same was not filed despite the expiry of 180 days from the date of arrest of the petitioner. On expiry of the period of 180 days indefeasible right to grant of default bail is accrued to the petitioner.

18. In case **Ravinder @ Binder Versus State of Haryana 2015 Vol. IV, RCR (Criminal) 441**, this Court has observed that the police investigating into an offence and submitted report under Section 173 (2) within 90 days but report was not accompanied by chemical examiner report, it was thus incomplete charge-sheet and the Court is not competent to take cognizance of the offence on incomplete charge-sheet and held that the accused has indefeasible right to be released on bail as per the provision of Section 167 (2) Cr.P.C.

19. In case, **Criminal Revision No. 4659 of 2015 titled as Ajit Singh alias Jeeta and another Versus. State of Punjab** decided on **30.11.2018**, Hon'ble Division Bench of this Court on calling upon to answer the question as to 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 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. has held as under :-

“.....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.

20. The application filed by the petitioner/accused was dismissed by learned Additional Sessions Judge, Panipat on the

grounds that as far as non receipt of report of FSL is concerned, the report of FSL is corroborative piece of evidence and as such, it cannot be said that the investigation has not been completed. However, in view of the above referred judicial precedents, this fact is undisputed that report of the Chemical Examiner/FSL is to be included in the report under Section 173 Cr.P.C. and without which it will be termed as 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.

21. The record clearly deciphers that the police/prosecution was failed to submit the Chemical Examiner/Forensic Science Laboratory Report within the statutory period of 180 days from the date of arrest of the petitioner and the Public Prosecutor failed to seek extension from the Court before the expiry of 180 days.

22. There was no justification to reject the application for grant of default bail to the petitioner/accused in view of the provision of Section 167(2) Cr.P.C.

23. As regards Section 167(2) Cr.P.C., it creates an indefeasible right in an accused person, on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for

release on bail under proviso (a) of Section 167(2) Cr.P.C. is generally termed as an “order-on-default” as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged, where the prosecution fails to put up challan against him on completion of the investigation. Thus, in the considered view of this Court, as per Section 167(2) Cr.P.C., an indefeasible right to be enlarged on bail accrues in favour of the accused, if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Cr.P.C.

24. It follows from the above discussion that the impugned order passed by learned Additional Sessions Judge, Panipat suffers from material illegality and is liable to be set aside and the petitioner is entitled to grant of default bail under Section 167 (2) of the Cr.P.C. on the ground of filing an incomplete challan/report under Section 173(2) of the Cr.P.C. by the police on account of not filing the Chemical Examiner/Forensic Science Laboratory Report within the period of 180 days from the date of arrest of the petitioner.

25. In these facts and circumstances of the case, petition is allowed and impugned order 30.08.2019 passed by learned Additional Sessions Judge, Panipat is set aside and the petitioner is ordered to be released on default bail, in the present FIR, on furnishing of bail bonds by her to the satisfaction of the learned trial Court/Chief Judicial

Magistrate concerned.

26. The learned trial Court while releasing the petitioner on default bail shall ensure about the soundness of the surety keeping in view the fact that the present petitioner is resident of foreign country Abidjan and that the petitioner does not escape from the clutches of law during the course of the bail.

27. **Criminal Revision No. 2531-2019** is accordingly disposed of and **Criminal Miscellaneous No. M-40409-2020** for grant of regular bail to the petitioner is also disposed of as having rendered infructuous.

05.04.2022
kavneet singh

(SANT PARKASH)
JUDGE

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