



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

Date of decision: 2nd MARCH, 2022

IN THE MATTER OF:

+ **BAIL APPLN. 582/2022**

ASHWANI

..... Petitioner

Through Mr. Kundan Kumar, Advocate

versus

STATE (NCT OF DELHI)

..... Respondent

Through Mr. Amit Chadha, APP for the State
with SI Surender Singh, Special Cell

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This Petition under Section 167(2) Cr.P.C read with Section 482 Cr.P.C has been filed for grant of default bail to the Petitioner in FIR No.252/2020 registered at Police Station Special Cell for offences under Sections 21/29/61/85 NDPS Act.

2. Facts, in brief, leading to this petition are as follows:

- a) On 08.10.2020, at about 11:30 AM, a secret information was received at Police Station Special Cell stating that one Paramjeet, resident of Inderpuri, Delhi, who supplies Heroin, would come near Pusa Institute, Dev Prakash Shastri Marg, Delhi, between 1:00 PM to 2:00 PM on 08.10.2020 to supply a huge consignment of Heroin to the Petitioner herein. The said information was sent to ACP/Spl.Cell/NR, who directed to take



necessary action as per law and also directed to conduct a raid. Compliances under Section 42 of NDPS Act were made and a raiding team was prepared. Public witnesses were asked to join the raiding team but none of them agreed citing genuine reasons. It is stated that the raiding team reached the spot i.e. near Pusa Institute gate on Dev Prakash Shastri Marg at about 12:45 PM. It is stated that at about 01:10 PM a person having green coloured backpack came from Naraina side and stopped 200-250 metres ahead of Pusa Institute Gate on Dev Parkash Shastri Marg, Delhi and started waiting for someone. It is stated that the informer identified him as Paramjeet. It is stated that after five minutes one person came from Todapur side in an Auto-rikshaw and walked to Paramjeet and both of them started talking. It is stated that the second person was identified as Ashwani (the Petitioner herein). It is stated that Paramjeet handed over the backpack to the Petitioner herein and when they started to move they were apprehended by the raiding team. Notice under Section 50 NDPS Act was given to both of them. Both the accused persons refused to be searched in the presence of Gazetted officer or a Magistrate. It is stated that Paramjeet Singh told the raiding party that he is unable to write and hence his refusal was recorded and read over to him. It is stated that the Petitioner herein recorded his refusal in his handwriting and signed it. Information was given to ACP/ Special Cell/NR. It is stated that at about 02.30 PM, ACP/ Special Cell/NR arrived at the spot and both the persons were



searched in his presence. Backpack was checked and two transparent polythenes containing brown coloured powder were recovered from the backpack. The polythenes were marked A & B respectively. The substance of both the polythenes were tested with the testing kit and the substance was found to be Heroin. On weighing, the total substance was found to be 5 Kgs (2.5 Kg each). samples were drawn from each pack. FIR No.252/2020 was registered at Police Station Special Cell for offences under Sections 21/29/61/85 NDPS Act.

- b) Petitioner herein and Paramjeet were arrested at about 08:30 PM and 09:15 PM respectively, on 08.10.2020.
- c) On 12.10.2020, exhibits were deposited in FSL, Rohini for expert opinion vide FSL Receipt No. SESLDLH/7962/CHEM/2274/20. FSL report has confirmed that the exhibits A1 & B1 were found to contain Diacetylmorphine, Caffeine, Morphine, Acetylcodeine, 6 Monoacetylmorphine and Trimethoprim. Exhibits A1 & B1 were found to contain Diacetylmorphine (5.4%) & (5.5%) respectively, which are covered under the NDPS Act.
- d) It is stated that the mobile phones used by the accused were under lawful interception and all calls made on these phones were being intercepted. It is stated that applications for taking voice samples of accused persons were moved before the Court, and the same has been allowed *vide* order dated 31.03.2021.
- e) Charge-sheet was prepared and filed on 31.03.2021.
- f) A perusal of the charge-sheet reveals that Notices under Section



91 Cr.P.C have been given to respective service providers regarding mobile numbers recovered from the accused persons, for obtaining the CDRs of the recovered mobile phones and the mobile phones of the other persons with whom they were in regular touch. Material has been sent to the FSL for obtaining expert opinion on the voice samples which were intercepted and the voice samples taken from the accused to the FSL and their report is awaited.

- g) Petitioner moved an application under Section 167(2) Cr.P.C. contending that the charge-sheet has been filed without obtaining the FSL report regarding the voice samples and, therefore, the charge-sheet is incomplete and the petitioner is, therefore, entitled to default bail. The same was dismissed by the learned Special Judge, NDPS, New Delhi, *vide* order dated 11.02.2022.

3. Mr. Kundan Kumar, learned Counsel appearing for the Petitioner, states that the admitted facts reveal that the charge-sheet which has been filed does not contain the FSL Report regarding voice samples and, therefore, the charge-sheet, being incomplete, cannot be taken as a valid charge-sheet and, therefore, the Petitioner should be granted default bail. He places reliance on the judgment dated 15.03.2021 passed by the Supreme Court in Fakhrey Alam v. The State of Uttar Pradesh, (CRL.A.319/2021) and on the judgment dated 26.10.2020 passed by the Supreme Court in M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485. It is stated by the learned counsel for the Petitioner that an incomplete charge-sheet cannot be taken as sufficient compliance of



Section 36A(4) of the NDPS Act.

4. *Per contra*, Mr. Amit Chadha, learned APP for the State, contends that the case is squarely covered by various judgments of this Court. He contends that the charge-sheet has been filed within the period of 180 days as prescribed under Section 36A(4) of the NDPS Act. He states that the Police report is complete and cognizance can be taken on the police report as filed in the Court. He states that the contraband which has been recovered from the Petitioner and the co-accused - Paramjeet Singh, has been sent to the FSL and has been found to be heroin. He states that there is sufficient material for the prosecution to proceed ahead with the case. He states that the voice sample report is only required for further corroboration. He further states that the Police does not have any control over the FSL so as to ensure that the report of the voice sample is received before the prescribed period.

5. Heard Mr. Kundan Kumar, learned Counsel appearing for the Petitioner, Mr. Amit Chadha, learned APP for the State, and perused the material on record.

6. The Petitioner was arrested on 08.10.2020. Five Kilograms of contraband substance was recovered from the Petitioner and the co-accused - Paramjeet. The recovered substance was sent to the FSL and the FSL has confirmed that the material recovered from the Petitioner and the co-accused is Heroin.

7. The short question which arises for consideration is whether the charge-sheet, without a report from the FSL regarding voice sample, would be a complete charge-sheet or not.

8. It is well settled that if the ingredients of offence can be sustained on the basis of which the charge-sheet is filed and the Magistrate can take



cognizance of that material, then Police report is complete in all respects.

9. In Kishan Lal v. State, **1989 SCC OnLine Del 348**, a Division Bench of this Court has observed 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 admit of Section 173 (2) of the Code does not support the case of the petitioners. From the reported judgment it is not clear whether 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 no 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 counsel in support of their plea 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 a 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.

18. As far as the expert's report is concerned, we may note that by virtue of Subsection (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." (emphasis supplied)

10. Another coordinate Bench of this Court in Mohd. Arbaz, Abdul Rashid & Mohd. Nazim v. State of NCT of Delhi, **275 (2020) DLT 323**, has observed as under:

"9. It is apparent from above that there are divergent opinions whether a report under Section 173(2) of the Cr.PC could be considered as a complete report in absence of the Chemical Examiner's Report/FSL Report. There appears to be no dispute that absence of the Chemical Examiner's Report/FSL Report or an Expert's report does not render the report under Section 173(2) of the Cr.PC an inchoate report, incapable of being considered as such, in cases where the prosecution's case is not founded on recovery of contraband. In such cases, such expert report may not be central to the prosecution's case. However, in cases of offences under the NDPS Act, where the prosecution's case rests on recovery of an illicit substance, the Chemical Examiner's Report evidencing the nature of the substance allegedly recovered would undoubtedly be at the core of the prosecution's case. It is in this context that certain courts have held that a report under Section 173(2) of the Cr.PC would be incomplete if it is not accompanied by a Chemical Examiner's Report identifying the substance recovered.



23. In Babu v. State: Bail Appln. No. 2075 of 2020, decided on 25.09.2020, a Coordinate Bench of this Court had referred to the aforesaid decision and observed as under:

“18. Though this Court is of the view that the decision of the Division Bench of the Punjab and Haryana High Court is an appropriate opinion in relation to cognizance of an offence under NDPS Act without the FSL report being an illegality, however, bound by the Division Bench decision of this Court, judicial discipline mandates this Court to follow the same. Consequently, in view of the decision of the Division Bench of this Court in Kishan Lal v. State (supra), it is held that the petitioner is not entitled to grant of bail under Section 167(2) CrPC for non-filing of the FSL report along with the charge sheet.”

24. This Court concurs with the view expressed by the Coordinate Bench of this Court in Babu (supra). Thus, the view expressed by the Division Bench of Punjab and Haryana High Court in Ajit Singh @Jeeta (supra) and the view expressed by the Bombay High Court in Sunil Vasant Rao Phulbande (supra), convinced this Court that the view of the Division Bench in Kishan Lal (supra) is binding.

25. In view of the above, the petitioners' contention that the report submitted on 27.05.2019 could not be construed as a report under Section 173(2) of the Cr.PC must be rejected. The first question is, thus, answered in the negative.”

11. Another coordinate Bench of this Court in Mehabub Rehman @ Empha v. State Through Spl Cell, Delhi Police (CRL. REV. P. 340/2020),



while considering the case regarding non-filing of the FSL report pertaining to voice sample has observed as under:

"19. Applying the ratio of decision in Kishan Lal (Supra) to the present case, I find that the learned trial court has rightly dismissed petitioner's bail application while holding that though the FSL report has been filed after filing of bail application and after completion of 180 days of investigation, but the charge-sheet cannot be held to be incomplete because of the pendency of FSL report over voice sample, as preparation of report on voice sample is not in the hands of IO. It cannot be lost sight of the fact that immediately after petitioner's arrest on 13.03.2020, prosecution filed an application seeking permission to obtain voice sample of petitioner/accused which was allowed on 20.03.2020 and on the same day voice samples were taken, but thereafter, because of lockdown due to covid pandemic, report could be obtained only on 26.09.2020.

20. Moreover, in the impugned order, the learned trial court has taken note of the fact that the case of the prosecution rests upon alleged call interception and petitioner is allegedly the main member of syndicate whose mobile was intercepted. It has been brought to the notice of this court that nonailable warrants were issued against the petitioner and he was arrested in FIR No. 91/2020, registered at police station Kalichak, Malda, West Bengal for the offence under Section 21 of NDPS Act and after issuance of production warrants, he was arrested in this case. Pertinently, 10.5 kg of heroin was recovered from his associates in the present case. Whether or not petitioner is involved in the offence in question is a matter of trial and cannot be gone into at this stage. Accordingly, I am not inclined to grant relief to the petitioner." (emphasis supplied)



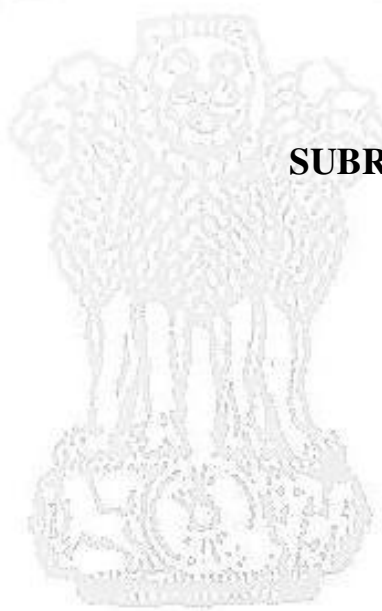
12. As stated above, the Police report is not dependent only on the FSL report pertaining to the voice samples. The Police Report also takes into account the FSL report which had confirmed that the substance, seized from the Petitioner herein and the co-accused Paramjeet, was Heroin and, therefore, the Police Report can be stated to be completed. The Petitioner is, therefore, not entitled to default bail.

13. With the above observations, the instant petition is dismissed, along with pending application(s), if any.

MARCH 02, 2022

Rahul

SUBRAMONIUM PRASAD, J.



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