

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

CRR No.188 of 2023

Date of decision: 21st February, 2023

Vipin @ Sonu

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Ms. Garima Sharma, Advocate for the petitioner.

Mr. Rahul Mohan, Dy. Advocate General, Haryana
for the respondent/State.

MANJARI NEHRU KAUL, J. (ORAL)

Instant revision petition has been filed to impugn the order dated 20.12.2022 passed by learned Additional Sessions Judge, Ambala vide which the prayer of the petitioner to extend the concession of bail under Section 167 (2) Cr.P.C. was declined.

Learned counsel for the petitioner submits that after the petitioner was arrested on 13.02.2022 in case bearing FIR No.90 dated 13.02.2022 under Section 22-C of the Narcotic Drugs and Psychotropic Substances Act, 1985 registered at Police Station Mahesh Nagar, District Ambala, recovery of 2800 capsules of Dicyclomine Hydrochloride, Tramadol Hydrochloride Acetaminophen Capsules weighing 3 kgs 54 gms was shown to have been effected from him. Thereafter, challan was presented in the Court below on 22.04.2022,

however, no FSL report was annexed along with it. Learned counsel submits that no doubt challan was presented within the stipulated 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 the petitioner to the concession of default bail under the provisions of Section 167 (2) Cr.P.C. read with Section 36A(4) of the NDPS Act.

Learned counsel submits that in case challan is presented without a chemical examiner's report, it would be deemed to be an incomplete challan unless of course if an application has been moved by the Investigating Agency/Public Prosecutor before the Court concerned for extension of time. Learned counsel has argued that it is a matter of record that neither any application was moved by the Public Prosecutor before the expiry of the statutory period of 180 days seeking extension of time, nor was the report of FSL been filed even subsequently. She submits that even as on date, no report of the FSL has been filed. In support, learned counsel has placed reliance upon a decision rendered by a Division Bench of this court in '**Ajit Singh @ Jeeta & another vs. State of Punjab**' (CRR-4659-2015), '**Saleem @ Mulla vs. State of Haryana**' CRM-M-11271-2021.

Per contra, learned State counsel while opposing the prayer and submissions made by the learned counsel for the petitioner, has argued that since challan was presented within the prescribed statutory period of 180 days, the petitioner's indefeasible right to default bail

stood extinguished. Learned State counsel has further submitted that a huge recovery of 2880 intoxicant capsules was effected from the conscious possession of the petitioner and thus, he is not entitled to be released on default bail. However, learned State counsel on instructions has not been able to controvert the submissions made by the counsel opposite that the FSL report was neither annexed with the challan nor had it been filed till now even after almost 10 months of the presentation of the challan before the Court concerned.

On a pointed query put to the learned State counsel as to whether any application/report had been moved by the Public Prosecutor seeking extension of time for filing of FSL report, as envisaged under Section 34A(4) of the NDPS Act, learned State counsel on instructions has replied in the negative.

I have heard learned counsel for the parties and perused the relevant material on record.

This Court, in **Saleem @ Mulla's case (ibid)** while dealing with the object behind enacting Section 167(2) Cr.P.C., has held as under:

“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 indefeasible 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.”

Adverting to the case in hand, as per the case of the prosecution, the petitioner was apprehended with 2880 intoxicant capsules. Hence, in the circumstances, it was most crucial to get a definite opinion qua the nature of the substance allegedly recovered. Non-filing of the FSL report along with the challan thus, was indicative that the investigation was still incomplete. The claim of the investigating agency that the recovered substance attracted the mischief of an offence under the NDPS Act, without it being supported by any report of the FSL, 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 the circumstances, amounts to depriving him of his personal liberty.

As already observed hereinabove and also conceded by the learned State counsel, that no report as envisaged under Section 36A(4) of the NDPS Act was ever made to the Court concerned by the Public Prosecutor, this Court has no hesitation in holding that the challan

which was presented, was an incomplete challan and as a result of which the petitioner has now acquired his indefeasible right to default bail.

As a sequel to the above, the petitioner is ordered to be admitted to bail under Section 167(2) Cr.P.C. to the satisfaction of the trial Court/Duty Magistrate concerned. However, it is made clear that anything contained hereinabove shall not be construed to be an expression of opinion on the merits of the case.

This Court would yet again reiterate what had been directed in **Saleem @ Mulla's case (ibid)**.

“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.”

State of Haryana is directed to file a report as to what action has been initiated against the erring officials for non-compliance of the provisions of Section 36A(4) of the NDPS Act and in terms of the observations made by this Court in **Saleem @ Mulla’s case (ibid)**.

(MANJARI NEHRU KAUL)
JUDGE

February 21, 2023
rps

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