

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

247

CRR-1909-2023

Date of decision: 13.09.2023

Kulbhushan @ Ajay

.....Petitioner

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present : Mr. Kamal Chaudhary, Advocate
for the petitioner.

Mr. Karan Jindal, AAG, Haryana.

MANJARI NEHRU KAUL, J. (ORAL)

1. The petitioner is impugning the order dated 26.06.2023 passed by learned Additional Sessions Judge, Ambala whereby an application filed by the petitioner for grant of default bail under Section 167(2) of the Cr.P.C. in case FIR No.491 dated 05.12.2022 under Sections 21, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') registered at Police Station Parao, Ambala Cantt., has been dismissed.

2. Learned counsel for the petitioner submits that the petitioner was arrested on 05.12.2022 for being allegedly found in possession of 260 grams of heroin. Though challan was presented within the stipulated period of 180 days on 22.05.2023, however, there was no FSL report annexed with it. Thereafter, on 25.05.2023 an application was moved by the Public Prosecutor as mandated under Section 36A(4) of the NDPS Act for extension of time to file the FSL.

The Trial Court, in view of the report by the Public Prosecutor, granted

30 days more time to file the FSL report. However, the investigating agency even after the expiry of the 30 days extension granted, failed to file the FSL report, so, another application was moved by the investigating agency seeking extension of time. However, the second application was not as per the mandate of Section 36A(4) of the NDPS Act as it had not been filed by the Public Prosecutor but by the investigating agency. Learned counsel has argued that the impugned order granting further extension of 30 days by the Trial court was illegal and in blatant contravention to the provision of Section 36A(4) of the NDPS Act. In support, learned counsel have placed reliance upon *'Hitendra Vishnu Thakur vs. State of Maharashtra' 1994 (4) SCC 602*, wherein it has been held that extension of time for completion of investigation can only be granted on a report made by the Public Prosecutor and not on an application by the Investigating Agency. A prayer has therefore, been made that since there was non-compliance of Section 36A(4) of the NDPS Act, an indefeasible right of default bail had accrued to the petitioner.

3. Per contra, learned State counsel while opposing the prayer made by the counsel opposite, on instructions, has not been able to dispute the submissions made by the counsel opposite. He, however, submits that since the FSL report has now been filed, and charges are likely to be framed on the next date of hearing, the petitioner be not extended the concession of bail under Section 167(2) of the Cr.P.C.

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

5. Before proceeding further, it would be apposite here to

reproduce Section 167(2) Cr.P.C. and Section 36A(4) of the NDPS Act.

Section 167(2) Cr.P.C. reads as follows:-

“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 subsection 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.”

Section 36A(4) of the NDPS Act reads thus:-

“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.”

6. A Division Bench of this Court, in **‘Ajit Singh @ Jeeta & another vs. State of Punjab’ CRR No.4659 of 2015**, has held that challan filed without FSL report with regard to the nature of substance in question, would be deemed to be an incomplete challan.

7. This Court, in **‘Saleem @ Mulla vs. State of Haryana’ CRM-M No.11271 of 2021 d/d 26.03.2021**, has held as under:-

“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.”

8. In the case in hand, the petitioner was arrested on 03.09.2022. It is not disputed by the State that even after expiry of the statutory period of 180 days, investigation remained incomplete as admittedly report of the FSL was not annexed with the challan. No doubt, learned State counsel vehemently argued that prior to the expiry of 180 days, an application seeking extension of time of 30 days had been moved by the prosecution through the Public Prosecutor and which was allowed by the Trial Court, however, it is a matter of record that after expiry of 30 days, since FSL report had still not been received, another application was made for further extension, but as not disputed by the State, it was not by the Public Prosecutor but by the investigating officer.

9. It needs to be reiterated that as per the provisions of Section 36A(4) of the NDPS Act, extension of time beyond the period of 180 days can be granted only on a report made by the Public Prosecutor. Since the application seeking further extension of time for the second time, had been moved by the investigating officer, even if, as claimed by the learned State counsel, it was within the knowledge of

the Public Prosecutor, it would be contrary to the provisions of Section 36A(4) of the NDPS Act. Any application made by an investigating officer for extension of time to file challan/FSL report, as the case may be, as has been done in the instant case, cannot substitute a report of the Public Prosecutor, which is mandated under Section 36A(4) of the NDPS Act. Report of the Public Prosecutor under Section 36A(4) of the NDPS Act, cannot be termed to be a mere formality. Rather, it is a crucial document which enables the Court to decide as to whether extension of time to complete the investigation should be granted or not, and whether detention of an accused beyond the statutory period of 180 days would be justified. A Public Prosecutor certainly cannot be treated as a mere channel by the investigating agency to forward its request for extension of time. Since the personal liberty of the accused is at stake, the Public Prosecutor thus, must necessarily comply with the mandatory provisions of Section 36A(4) of the NDPS Act by submitting his report, after due application of his mind.

10. Hon'ble the Supreme Court, in ***Hitendra Vishnu Thakur's case (supra)***, has held as under:-

“22. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of

the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before Submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "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" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time

under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release hi on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the Justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr Madhava Reddy or the Additional Solicitor General Mr Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report falls in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause

(bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his Indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.”

11. As a sequel to the above discussion and the ratio of law laid down by the Hon’ble Apex Court in ***Hitendra Vishnu Thakur’s case (supra)***, this Court has no hesitation in holding that the impugned order dated 26.06.2023 passed by Additional Sessions Judge, Ambala, whereby the petitioner was declined the concession of default bail under Section 167(2) Cr.P.C. deserves to be set aside. Consequently, the petition is allowed and 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 to be an expression of opinion on the merits of the case.

13.09.2023

Vinay

(MANJARI NEHRU KAUL)
JUDGE

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