

2024.PHHC.123938



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1.

CRR-764-2024
Reserved On: 24.05.2024
Pronounced On: AUGUST, 23, 2024
- SANDEEP MASIH @ KALI

.....PETITIONER
- STATE OF PUNJAB

VERSUS

.....RESPONDENT
- AND
2.

CRR-1122-2024
- KULDEEP MASIH @ GAURI

.....PETITIONER
- STATE OF PUNJAB

VERSUS

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Manoj R. Sharma, Advocate
for the petitioner (in CRR-764-2024).

Mr. Amandeep Singh Manaise, Advocate
for the petitioner (in CRR-1122-2024).

Mr. J.S. Rattu, DAG, Punjab.

SANDEEP MOUDGIL, J

1. Vide this common order, I shall be disposing off, both the petitions
together, as common question of law is involved in both the petitions.

To avoid any repetition, the facts are being taken from CRR-764-2024, titled as **“Sandeep Masih @ Kali vs. State of Punjab”**.

RELIEF SOUGHT

2. The instant revision petition has been preferred for setting aside order dated 30.03.2024 passed by Judge Special Court, Gurdaspur vide which the application under Section 167(2) Cr.P.C. seeking default bail in case FIR No.102, dated 30.09.2023, under Sections 21(c), 29 of NDPS Act, 1985, registered at Police Station Sadar Gurdaspur, has been declined.

3. The prosecution story as narrated in the FIR, reads as under:-

“SHO PS Sadar Gurdaspur, Jai Hind. Today myself SI/SHO along with ASI Harjit Singh 25, ASI Ravinder Singh 1291, CT. Navdeep Singh 1092, CT. Amanpreet Singh 36, CT. Ravinder Singh 78 were present on Government vehicle No.PB-06AK-0962 driven by PHC Gurmukh Singh 84 at Nabipur to Babri link road on the drainbridge for patrolling and search of bad elements. Barricading was done and vehicles were being checked. At this, one motorcycle was seen coming from village Babri side, which I indicated to stop with torch light, upon which the motorcyclist slowed down the motorcycle and tried to turn back. Three persons with shorn hair were sitting on the motorcycle and they were apprehended by me SI/SHO with the help of police party on suspicion. The person sitting in the middle of both the persons was holding a black coloured polythene bag in his hand. All three persons were asked to come down from motorcycle and myself SI/SHO disclosed my identity to them and inquired their name and address. The motorcyclist of black Splendor motorcycle No.PB07AY-3102 disclosed his name as Kuldeep Mash @ Gori son of Minda Mash, resident of Babri while the person sitting on the pillion holding a polythene bag in his hand disclosed his name as Sandeep Mash @ Kali son of Elias Mash resident of Lehal and the

third person sitting on the pillion disclosed his name as Raman Mash son of Peter Mash resident of Babri. At this, myself SI/SHO said to three persons that I suspect that you have some intoxicating substance, so your search is required to be conducted but you have a legal right that you can get your search conducted through some Magistrate or some Gazetted Officer. Upon this, they were informed about notice u/s 50 of NDPS Act. In response to this, the above said three persons replied that they want to get their search conducted through some gazetted officer. At this, myself SI/SHO prepared separated dissent memos of the above said three persons. Then myself SI/SHO called from Mobile phone No.98760-19107 at 10:42 PM to Sh. Sukhpal Singh, PPS, DSP, City Gurdaspur on his mobile Phone No.98723-43067 and informed him that three persons have been apprehended on the spot and they are suspected to have some intoxicating substance so you are required to reach the spot. After sometime, Sh. Sukhpal Singh, PPS DSP, City Gurdaspur reached the spot along with personal staff and the above said three persons were produced before him. At this, the DSP disclosed his identity to them and said that I am Sukhpal Singh posted as DSP Sub Division City Gurdaspur and I am gazetted officer of Punjab Police. On inquiry, the motorcyclist disclosed his name as Kuldeep Mash @ Gori and the person sitting on the pillion disclosed his name as Sandeep Mash @ Kali while the third person sitting on the pillion disclosed his name as Raman Mash. The DSP said that you have a legal right that you can get your search conducted through some Magistrate or through me, upon which they replied that we have full faith in you and you may conduct our search and the search of the polythene bag. At this, separate consent memos were prepared. Before conducting the search, effort was made to join some independent witness in the police party but it being dark, nobody got ready. Then on the instructions of DSP, I searched the polythene bag held in the hand of Sandeep Mash @ Kali who was sitting on the pillion, from

which heroin was recovered, which was found to weigh 1 Kg 40 grams including the polythene bag. It was put in the plastic box and parcel was prepared which was sealed with my seal AS and by the DSP with his seal SS and was taken into police possession vide separate memo. Sample seal was prepared separately and seal after use was handed over to ASI Harjit Singh 25 while the DSP retained his seal SS with himself. The DSP left the spot after giving instructions and motorcycle No.PB-07AY-3102 was taken into police possession vide separate memo. Since accused KuldeepMash @ Gori, Sandeep Masih @ Kali and Raman Masih have kept 1 Kg 40 grams of heroin in black polythene bag in their possession, so they have committed offence u/s 210 of NDPS Act. Ruga is being sent by hand through Ct. Amanpreet Singh 36 to police station for registration of case. After lodging the FIR, FIR number be intimated. Special reports be issued and sent to the Illaqa Magistrate and officers concerned. Control room be informed on wireless.”

CONTENTIONS

On behalf of the petitioners

4. Learned counsel for the petitioners has submitted that the petitioners are entitled for default bail, as the challan was presented on 28.03.2024, which was beyond the period of 180 days. Moreover, the challan was presented before the Duty Magistrate, who was not even competent to entertain the challan and the filing of report under Section 173 Cr.P.C under the NDPS Act. He further submits that a cognizance can be taken only by a Special Judge under the NDPS Act and there had been no application for grant of extension of time and therefore, a statutory right had vested with petitioners immediately on the expiry of 180 days.

5. The challan in the case of commercial quantity is to be presented directly in the Special Court and not in the Court of a Illaqa Magistrate or a Duty Magistrate. It has been further stated in the report filed by the learned Sessions Judge, Amritsar that even as per the provisions of Section 36A (1) (d) of the NDPS Act, the cognizance is to be taken by the Special Court and not by the Court of a Duty Magistrate. However, the prosecution had presented challan in the Court of Duty Magistrate on 28.03.2024 whereas it was required to be presented before the Special Court.

On behalf of the State

6. Learned State counsel has submitted that the petitioners were arrested on 30.09.2023 under the aforesaid provisions of NDPS Act and the quantity involved in the present case was falling in the category of commercial quantity and the challan was required to be presented within a period of 180 days as per Section 36A (4) of the NDPS Act. He further submitted that since the petitioners were arrested on 30.09.2023, the statutory period of 180 days for presentation of report under Section 173 Cr.P.C was to expire on 28.03.2024 the Investigating Officer presented the report before the Duty Magistrate on 28.03.2024 at 6.00 PM. Thus, the challan stood presented on 28.03.2024 well within time. Accordingly, he prays for dismissal of both the revision petitions.

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

ANALYSIS

8. Before proceeding further, it would be apposite to reproduce Section 167 (2) Cr.P.C.

“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 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;]

9. Section 36-A (4) of the NDPS Act reads as under:-

“36A (4) 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.”

10. A comprehensive examination of the provisions outlined in Section 167(2) Cr.P.C., and Section 36(4) of the NDPS Act underscores the paramount concern of the legislature for concluding investigations. The term “investigation” inherently encompasses all proceedings conducted by the Investigating Agency after the registration of the FIR, with an aim to gather all relevant evidence to enable the Court to ascertain as to whether there has been any commission of an offence.

11. It is also imperative to note the historical context behind the enactment of 167(2) Cr.P.C., which can be traced back to the widespread abuse of Section 344 of the 1898 Code. The latter provision, permitting the remand of accused during investigations, was frequently exploited by investigating agencies, resulting in prolonged custodial detention as investigations often exceeded the prescribed period. Consequently, the accused kept languishing in custody and the investigation proceeded at a sluggish pace. To rectify this injustice and ensure fair trial and expeditious investigation, 167(2) Cr.P.C. was incorporated. This provision thus, aimed at establishing a systematic procedure for investigation, safeguarding the interest of society, especially those economically disadvantaged, by setting guidelines for the duration of detention during investigation, thereby preventing indefinite detention without progress in the case.

12. Hence, the statutory scheme of Section 167(2) Cr.P.C. hinges on periodic progress in the case and completion of investigation. A fine reading of these provisions would also reveal that the right of the accused to default bail would not persist merely because the Court has not taken cognizance, even if the investigation concludes and challan is presented before the expiry of the statutory period. In this regard, it would be relevant to refer to the observations made by Hon'ble the Supreme Court in Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and another, 2013 (3) SCC 77, which are as follows:

“18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of [Section 309 Cr.P.C.](#), it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in [Section 167 Cr.P.C.](#)”

13. The order passed by Judge Special Court, Gurdaspur dated 30.03.2024 has been assailed before this Court on two accounts. Learned counsel for the petitioner has firstly pressed into argument that the challan was presented after expiry of statutory period of 180 days such as FIR was registered on 30.09.2023 whereas challan was presented on 28.03.2024. The said calculation so made is apparently incorrect as one day from either side atleast is to be

deducted from calculation and if precisely the days are calculated from 30.09.2023 onwards, it would be as under:-

Month	Days
October	31
November	30
December	31
January	31
February	29
March	28 (the day on which the challan was presented)
Total	180

14. Accordingly 28th of March, 2024 was the 180th day on which the challan stand presented, after deducting the day on which the FIR was registered i.e. 30.09.2023. Therefore, it can be easily calculated to hold that the challan was presented within stipulated 180 days and as such there is no infirmity or illegality as far as first argument is concerned.

15. The second leg of argument raised by the petitioner is that the challan presented before the Duty Magistrate is without jurisdiction as he has no competency to entertain the challan/final report under Section 173 Cr.P.C. in a case under NDPS Act which ought to have been filed before the Judge, Special Court dealing with NDPS cases being a designated Court. His argument is that it was presented at 6:00 p.m. on 28.03.2024 which was otherwise a working day and Judge, Special Court has conducted the Court and as such, it might have been filed by 5:00 p.m. during the normal working hours, and, in fact it is an attempt on the part of investigating agency to divest the petitioner of his indefeasible right of default bail by invoking Section 167(2) Cr.P.C. The said challan was also ordered by the Duty Magistrate to be forwarded to concerned

Court on 30.03.2024 since 29th March was a Gazetted holiday and as such the challan would be deemed to have been presented in Court on 30.03.2024 i.e. beyond the statutory period of 180 days.

16. In this way, the case set up by the petitioner is that it was actually 182nd day on which the challan would be considered to have been presented before the competent Court and on that account he is entitled to bail since no application for extension of time for investigation was moved by the investigating officer in any Court.

17. The petitioner admittedly moved an application seeking default bail under Section 167(2) Cr.P.C. on 30.03.2024 asserting that the challan has been presented on 30.03.2024 after expiry of statutory period of 180 days which was dismissed on the same day itself by the Judge, Special Court.

18. To analyse and reach to a conclusion it is imperative for this Court to ascertain the jurisdiction and powers vested with the Duty Magistrate which strictly speaking do not find any mention in the Code of Criminal Procedure.

19. It is a situation wherein the term “Duty Magistrate” has been defined separately than that of a Magistrate in the Court.

20. However, Vol. III Chapter 30 in Part A of the Punjab and Haryana High Court Rules and Orders, Volume III to some extent described and elaborated powers of criminal Court stating that the term “Magistrate” is used without qualification, which includes all persons exercising all or any of the powers of a Magistrate. Further vide Section 2(32) of the Punjab General Clauses Act, 1898 or Section 3(32) of the General Clauses Act, 1877, the general powers which Magistrates are entitled to exercise in addition to those conferred

upon them by Sections 32 and 33 of the Cr.P.C. are found in 3rd and 4th schedules of the Code. All Magistrates are empowered to take cognizance of offences upon complaint or police report under Section 190 specifically.

21. A single Bench of this High Court in “*Nirmal Singh versus State of Punjab, 1983(2) RCR (Criminal) 169*”, it was observed that expression “Duty Magistrate” has come to acquire a practical meaning in procedural law to mean “the Magistrate having all comprehensive jurisdiction of the area for the day, to meet of situation and eventualities of the day”. In that case as well the final report was submitted on 30.01.1983 before the Duty Magistrate which was held to have the jurisdiction to inquire into the matter.

22. However, the much stress has been laid on behalf of the petitioner to the fact that since the Duty Magistrate forwarded the challan in the present case to be sent to Judge, Special court for 30.03.2024, the cognizance would be deemed to have been taken only on 30.03.2024 that Court being the competent Court and, therefore, in any case it cannot be said that challan was presented within the stipulated period before the Duty Magistrate which was without jurisdiction, also do not carry any weight in the light of issue decided in Suresh Kumar Bhikamchand Jain (supra) taking cognizance is of no relevance but the essence and spirit of Section 167(2) qua presentation of challan within the stipulated period.

23. After having gone through the record and discussion made hereinabove, I am of the clear view that Duty Magistrate does acquire in procedural law the meaning in real sense that Duty Magistrate is competent having all comprehensive jurisdiction of the area for the day, to meet all

situations and eventualities. Meaning thereby, he is also competent to receive the challan and since a day consists of 24 hours which would come to an end at 12:00 mid night the acceptance of challan at 6:00 p.m. by him would not make it redundant and particularly in the light of the fact that the petitioner was put at notice for the said purpose who came present in Court of Duty Magistrate on 28.03.2024 but opted not to file any application for bail under Section 167(2) Cr.P.C. on that date.

24. The instant plea raised on behalf of the petitioner is actually an attempt to cover up the failure on his own part who moved the application for default bail only on 30.03.2024 before the Judge Special Court alone.

DECISION

25. Adverting to the instant case, the argument of the learned counsel for the petitioners that they are entitled to the concession of default bail because the learned Duty Magistrate did not have the power to take cognizance of the police report under Section 173(2) Cr.PC/Challan is devoid of merit in the light of the settled law in ***Suresh Kumar Bhikamchand Jain's case(supra)***.

26. In the light of above discussion, this Court has no hesitation and in fact there is no doubt with the end result of above discussion to hold that the challan was presented before the Duty Magistrate on 28.03.2024 on 180th day i.e. within the stipulated period and as such filing of the same before the Duty Magistrate is legal and does not suffer from any infirmity or perversity.

27. Hence, the instant petition fails and is accordingly ordered to be dismissed being devoid of any merit.

28. However, it is made clear that observations made hereinabove shall

have no bearings on the merits of the case.

AUGUST 23, 2024
Poonam negi

(SANDEEP MOUDGIL)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No