



2024:DHC:5167



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of decision: 11th July, 2024*+ BAIL APPLN. 2132/2024
TUSHAR CHAUDHARYPetitioner

Through: Mr. Kundan Kumar, Adv.

versus

STATE NCT OF DELHIRespondent

Through: Mr. Ajay Vikram Singh,
APP for the StateSI Bharat Singh, PS-
Uttam NagarW/SI Sapana Sharma, PS-
ANC Dwarka**CORAM:****HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J (Oral)**

1. The present application is filed seeking default bail in FIR No. 487/2023 dated 09.08.2023 registered at Police Station Binda Pur for offences under Sections 8/22/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. Brief facts of the case are that a secret information was received on 09.08.2023 at Anti- Narcotics Cell Dwarka that a person namely, Tushar Choudhary, is involved in peddling of 'Amphetamine' drugs and that he would come to deliver the same near Solanki Chowk, Bindapur, Matiyala Road, New Delhi at around 02:00 PM – 2:30 PM.

3. Thereafter, a raiding team was formed and the applicant was apprehended at around 2:18 PM when he came on a scooty and withdrew a yellow card box from the trunk of his scooty.

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4. A notice under Section 50 of the NDPS Act was served to the applicant informing him about his legal right to get his search in front of the Gazetted Officer or a Magistrate. It is alleged that the applicant refused to be searched in the presence of a Magistrate or a Gazetted Officer.

5. It is alleged that after complying with the statutory provisions, the raiding team conducted a cursory search of the box carried by the applicant, wherefrom, a white polythene containing off white colour crystal substance was recovered. The same was tested with the aid of field-testing kit and was confirmed to be 'Amphetamine' weighing 1.024 kg. The present FIR was thereafter registered, and the applicant was subsequently arrested.

6. The chargesheet was thereafter filed on 02.02.2024.

7. The applicant filed an application under Section 167(2) of the CrPC seeking grant of default bail before the learned Special Judge (NDPS) – 01, Dwarka Courts, Delhi on the ground that the chargesheet was incomplete since the same was filed without any FSL report. The application was dismissed by order dated 01.06.2024 on the ground of non-maintainability. It was held that the issue whether chargesheet filed without FSL report is an 'incomplete chargesheet', is pending consideration before the Hon'ble Supreme Court and the Court, in such a circumstance, is bound to follow the law as laid down by the Division Bench of this Court in **Kishan Lal v. State : 1989 SCC OnLine Del 348**.

8. The learned counsel for the accused/applicant submitted that the chargesheet in the present case was filed without FSL



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Report, the chargesheet in such a case would be considered as 'incomplete' and thus, the applicant would be entitled to default bail since, the investigation was not completed within the statutory period as provided under Section 36A (4) of the NDPS Act.

9. The learned counsel submitted that the Hon'ble Apex Court in several recent decisions, including in *Mohd Arbaz & Ors. v. State of NCT of Delhi : SLP (Criminal) No. 6876-6877/2022* and *Suleman v. The State (GNCT of Delhi : SLP (Criminal) No.1929/2023*, has granted interim bail to the accused persons, in cases where FSL report was not filed along with the charge sheet within a period of 180 days.

10. The learned Additional Public Prosecutor (APP) for the State submitted that the present case pertains to recovery of 'Amphetamine' weighing 1.024 kg, which is a commercial quantity, from the possession of accused person who is allegedly involved in trade of narcotic drugs. It is argued that in the case of *Mohd Arbaz & Ors. v. State of NCT of Delhi (supra)*, the Hon'ble Apex Court has only opted to examine the legal issue in detail and for the time being, interim relief has been granted to the accused.

11. The learned APP submitted that mere non-filing of the FSL report does not render the charge sheet incomplete, especially when there is sufficient incriminating material on record to initiate prosecution against the applicants.

12. The learned APP further submitted that the question whether the charge sheet is incomplete or not without the FSL



Analysis

14. The inherent right to personal life and liberty, as enshrined in Article 21 of the Constitution of India, and its interconnection with Section 167(2) of the CrPC, has been unequivocally affirmed over the years through judicial pronouncements by the Hon'ble Apex Court and various High Courts. Section 167(2) of the CrPC is set out below :

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(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:*

l(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



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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;]*
- [(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]*
- (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.*

[Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social

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institution.]”

15. The Hon’ble Apex Court, in ***Dinesh Dalmia v. CBI: (2007) 8 SCC 770***, explained the scope of Section 167(2) *vis-à-vis* Section 173(8) of the CrPC and held as under:

“19. A charge-sheet is a final report within the meaning of sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge-sheet must await the arrest of the accused.

20. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of sub-section (8) of Section 173 is not taken away only because a charge-sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.

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22. It is true that ordinarily all documents accompany the charge-sheet. But, in this case, some documents could not be filed which were not in the possession of CBI and the same were with GEQD. As indicated hereinbefore, the said documents are said to have been filed on 20-1-2006 whereas the appellant was arrested on 12-2-2006. The appellant does not contend that he has been prejudiced by not filing of such documents with the charge-sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge-sheet itself does not become vitiated in law. The charge-sheet has been acted upon as an order of cognizance had been passed on the basis thereof. The appellant has not questioned the said order

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taking cognizance of the offence. Validity of the said charge-sheet is also not in question.

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28. It is now well settled that the court takes cognizance of an offence and not the offender. (See Anil Saran v. State of Bihar [(1995) 6 SCC 142 : 1995 SCC (Cri) 1051] and Popular Muthiah v. State [(2006) 7 SCC 296 : (2006) 3 SCC (Cri) 245] .)

29. The power of a court to direct remand of an accused either in terms of sub-section (2) of Section 167 of the Code or sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.

30. If submission of Mr Rohatgi is to be accepted, the Magistrate was not only required to declare the charge-sheet illegal, he was also required to recall his own order of taking cognizance. Ordinarily, he could not have done so. (See Adalat Prasad v. Rooplal Jindal [(2004) 7 SCC 338 : 2004 SCC (Cri) 1927] , Subramaniam Sethuraman v. State of Maharashtra [(2004) 13 SCC 324 : 2005 SCC (Cri) 242 : (2004) 7 Scale 733] and Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi [(2007) 5 SCC 54 : (2007) 2 SCC (Cri) 444 : JT (2007) 5 SC 529] .) It is also well settled that if a thing cannot be done directly, the same cannot be permitted to be done indirectly. If the order taking cognizance exists, irrespective of the conduct of CBI in treating the investigation to be open or filing applications for remand of the accused to police custody or judicial remand under sub-section (2) of Section 167 of the Code stating that the further investigation was pending, would be of no consequence if in effect and substance such orders were being passed by the court in exercise of its power under sub-section (2) of Section 309 of the Code.

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38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the investigating officer in

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terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code.

39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub-section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code.”

16. The report on completion of investigation is filed in the form of charge sheet under Section 173(2) of the CrPC.

17. The Constitution Bench in ***K. Veeraswami vs. Union of India and Others : (1991) 3 SCC 655*** has explained the scope of Section 173(2) of the CrPC. The relevant paragraph of the said judgment is reproduced as under:

“76. The charge-sheet is nothing but a final report of police officer under Section 173(2) of the CrPC. The Section 173(2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The report must be in the form prescribed by the State Government and stating therein (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested; (f) whether he had been released on his bond and, if so, whether with or without sureties; and (g) whether he has been forwarded in custody under Section 170. As

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observed by this Court in Satya Narain Musadi v. State of Bihar [(1980) 3 SCC 152, 157 : 1980 SCC (Cri) 660] that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the Investigating Officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. In fact, the report under Section 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence.”

18. The principle of law articulated in the aforesaid judgments was reiterated elaborately by the Hon’ble Apex Court in a recent judgment of ***CBI v. Kapil Wadhawan: 2024 SCC OnLine SC 66***, wherein it was held as under:

“22. In view of the above settled legal position, there remains no shadow of doubt that the statutory requirement of the report under Section 173 (2) would be complied with if the various details prescribed therein are included in the report. The report under Section 173 is an intimation to the court that upon investigation into the cognizable offence, the investigating officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175 (5). As settled in the afore-stated case, it is not necessary that all the details of the offence must be stated.

23. The benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to the offender only when a chargesheet is not filed and the investigation is

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kept pending against him. Once however, a chargesheet is filed, the said right ceases. It may be noted that the right of the investigating officer to pray for further investigation in terms of sub-section (8) of Section 173 is not taken away only because a chargesheet is filed under sub-section (2) thereof against the accused. Though ordinarily all documents relied upon by the prosecution should accompany the chargesheet, nonetheless for some reasons, if all the documents are not filed along with the chargesheet, that reason by itself would not invalidate or vitiate the chargesheet. It is also well settled that the court takes cognizance of the offence and not the offender. Once from the material produced along with the chargesheet, the court is satisfied about the commission of an offence and takes cognizance of the offence allegedly committed by the accused, it is immaterial whether the further investigation in terms of Section 173(8) is pending or not. The pendency of the further investigation qua the other accused or for production of some documents not available at the time of filing of chargesheet would neither vitiate the chargesheet, nor would it entitle the accused to claim right to get default bail on the ground that the chargesheet was an incomplete chargesheet or that the chargesheet was not filed in terms of Section 173(2) of Cr. P.C.

(emphasis supplied)

19. The Division Bench of this Court, in **Syed Maqbool v.**

N.I.A. : 2014 SCC OnLine Del 3966, held as under: —

“31. Concerning the other three appeals, the argument proceeds on the reasoning that the Code of Criminal Procedure, 1973 contemplates investigation of cognizable offences to be completed and a report filed in the Court of competent jurisdiction. The argument is premised on the reason that sub-Section 2 of Section 173 of the Code of Criminal Procedure envisages the filing of the report before a Magistrate empowered to take cognizance of the offence and that the report must be on the completion of the investigation. The forward limb of the argument would be that an incomplete report is no report in the eyes of law. If a complete report is not filed within 180 days, the appellants would be entitled to statutory bail.”

32. Section 173 of the Code of Criminal Procedure reads as under : -

“173. Report of police officer on completion of investigation.—(1) Every investigation under this Chapter shall be completed without unnecessary delay.

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(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

- (a) the names of the parties;
- (b) the nature of the information;
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;
- (d) whether any offence appears to have been committed and, if so, by whom;
- (e) whether the accused has been arrested;
- (f) whether he has been released on his bond and, if so, whether with or without sureties;
- (g) whether he has been forwarded in custody under section 170.

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(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

- (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;
- (b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of

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any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

(emphasis supplied)

20. In light of the observations made in ***Syed Maqbool v. NIA*** (*supra*), it is noted that the charge sheet filed in the present case satisfies the conditions specified in sub-clause (a) to (d) of Section 173(2)(i) of the CrPC. The charge sheet is filed upon completion of the investigation, and after the Investigating Officer has found sufficient evidence to prosecute an accused for offences under which the FIR has been registered. The FSL report, therefore, would only be corroborative in nature to the material collected and filed along with the chargesheet by the Investigating Officer. Hence, report of the FSL if received on a subsequent stage would be covered under Section 173(8) of the CrPC.

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21. The purpose of a further investigation is to bring the true facts before the Court even if they are discovered at a stage subsequent to the primary investigation. Thus, it cannot be said that the complaint filed without the evidence collected at a subsequent stage is to be treated as incomplete. A further investigation is not antithetical to an investigation being completed. [Ref : ***Vinod Tyagi v. Irshad Ali : (2013) 5 SCC 762***]

22. In the case of ***Taj Singh v. State (Delhi Admn) : 1988 CrLJ 1634***, this court held that submitting a challan stating all particulars required by Section 173(2) of the CrPC, but without appending thereto Chemical Examiner's report, is a complete report.

23. This Court, while considering the plea of default bail on a similar ground, in case of ***Arif Khan v. State (NCT of Delhi): 2023 SCC OnLine Del 2374***, had made the following observations, while dismissing the petition:

"9. ...Learned counsel for the petitioner had primarily relied upon the decision in Mohd. Arbaz (supra) where the Hon'ble Apex Court has been pleased to observe as under: "In all these petitions the question that arises for consideration is relating to the completeness of the charge sheet in accordance with law if the same is filed without the CFSL Report. The matter would require detailed consideration. In the meantime, all parties to complete their pleadings. For the present, though the issue of default bail is to be considered in the petitions since it would require some time, without reference to that aspect of the matter, keeping in view that the petitioners in SLP (Crl.) Nos. 6876-6877/2022, SLP (Crl.) No. 532/2022 and SLP (Crl.) No. 5190/2022 are still in custody, we order that they be released on bail subject to the conditions to be imposed by the concerned trial courts.

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While indicating so we also take note of the objection put forth by learned counsel for the respondent-State in SLP (Crl.) No. 2666/2022 who objects to the grant of bail since the petitioner therein has not surrendered despite the bail being cancelled by the High Court. Though in a normal circumstances we would have taken a serious view of the matter keeping in view the fact that the petitioner has approached this Court immediately after cancellation of the bail and the petition has been tagged alongwith similar matters and could not be taken up, we allow the benefit of bail to the petitioner. Hence, the order cancelling bail which is impugned in SLP (Crl.) No. 2666/2022 shall remain stayed. List all these petitions on 17.01.2023.

10. In the aforesaid case, the Hon'ble Supreme Court has been pleased to grant bail to the petitioners therein, however, it has been clearly mentioned that bail was granted without 'reference to that aspect of the matter'. It is, thus, clear that bail in the said case was not granted with reference to the question of completeness of chargesheet in accordance with law, if the same is filed without FSL report. Therefore, the contention of learned counsel for the petitioner that since the Hon'ble Supreme Court has granted bail in the case of Mohd. Arbaz (supra), the present petitioner is also entitled to same relief is devoid of merit."

24. Thus, it has been held by this Court in plethora of decisions that non-filing of FSL report along with the charge sheet does not render it as 'incomplete charge sheet' and, accordingly, no right of default bail accrues in favour of the accused.

25. Though in case of ***Mohd Arbaz & Ors. v. State of NCT of Delhi*** (supra), as well as in other subsequent cases filed assailing the orders of refusal of grant of default bail, the accused persons have been enlarged on interim bail by the Hon'ble Apex Court,

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the said relief however has been granted to the accused persons on the ground of pendency of larger issue i.e. whether charge sheet filed without FSL report is incomplete charge sheet. However, neither the decisions challenged before the Hon'ble Apex Court have been stayed, nor any directions have been given to the Courts to release the accused persons on interim bail if the charge sheet is filed without FSL report.

26. Thus, the judicial discipline mandates this Court to decide the matters on the basis of the law as it stands and the pendency of any reference would not mean that the other proceedings involving the similar issue would remain stayed. This Court is, therefore, bound by the decision of the Division Bench of this Court in ***Kishan Lal v. State*** (*supra*) and cannot refuse to follow a judgment on the ground that the issue is now pending consideration before the Hon'ble Apex Court.

27. The Hon'ble Apex Court in ***Union Territory of Ladakh v. Jammu & Kashmir National Conference : 2023 SCC OnLine SC 1140*** held as under :

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a

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judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it.”

28. This court while considering the plea of default bail on the ground that charge sheet filed under Section 173(2) of the CrPC is incomplete if not accompanied with FSL report in the case of **Satish Kumar & Anr. v. State : 2024: DHC:1258**, concurred with the view taken by the Coordinate Bench of this Court in **Arif Khan v. State (NCT of Delhi)** (*supra*) and the law laid down by the Division Bench in **Kishan Lal v. State** (*supra*), and dismissed the petition. This Court held that mere non-filing of FSL Report along with the charge sheet is not sufficient to arrive at the conclusion that the charge sheet filed was incomplete. It was further observed that the said report can be filed by way of a supplementary charge sheet and in any case, FSL report is only a corroborative piece of evidence.

29. In view of the above, the present application is dismissed. Pending application, if any, also stand disposed of.

30. It is made clear that the present application is limited to the issue of default bail and nothing stated hereinabove is an opinion on the merits of the case.

AMIT MAHAJAN, J

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