



2025:DHC:498



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Judgment delivered on: 29.01.2025*+ **BAIL APPLN. 4140/2024****OM PRAKASH @ FAUJI**

.....Petitioner

Through: Mr. Yogesh Verma, Mr. Bhavtosh Sharma, Mr. Prem Narain and Mr. Ramesh Kumar Srivastava, Advocates

versus

**THE STATE GOVT OF NCT OF DELHI** .....Respondent

Through: Mr. Rahul Tyagi, ASC for the State with Ms. Priya Rai, Mr. Sangeet Sibou, Mr. Amit Rohila and Mr. Aniket Kumar Singh, Advocates with Inspector Jaswinder Singh, P.S. Special Cell.

**CORAM:****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****SWARANA KANTA SHARMA, J.**

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 [hereafter '*Cr.P.C.*'] / Section 483 of Bharatiya Nagarik Suraksha Sanhita, 2023 [hereafter '*BNSS*'] has been filed on behalf of the applicants, seeking grant of regular bail in case arising out of FIR No. 67/2023, registered at Police Station Special Cell, Delhi, for offence punishable under Section 18/29 of the



Narcotic Drugs and Psychotropic Substances Act, 1985 [hereafter '*NDPS Act*'].

2. Briefly stated, the facts of the case are that on 13.03.2023, at about 02:00 PM, a secret informer had approached the office of Special Cell and informed Inspector Satvinder that a person named Onkar Singh, engaged in the supply of narcotic drugs, would be arriving in the Sarita Vihar area, Delhi, in a truck bearing registration number RJ-10GB-7417 to deliver a consignment of narcotics. The information was recorded and conveyed to ACP Attar Singh, who had directed appropriate legal action. A DD entry No. 101A dated 13.03.2023 was registered, and a raiding team was constituted. Subsequently, on the same day at about 06:00 PM, the raiding team had apprehended Onkar Mal, aged 52 years, along with the said truck at the pointed location. After completing necessary legal formalities, a search was conducted, but no contraband was found initially. Upon interrogation, Onkar Mal had disclosed that the opium was concealed in a secret cavity inside the truck. A mechanic was called, and upon cutting open the cavity, 63 packets containing 70.308 kg of opium were recovered. A field testing kit had confirmed the substance as opium. Consequently, the present FIR was registered, and the investigation was initiated.

3. During the course of the investigation, on 15.03.2023 at about 08:20 PM, at the instance of accused Onkar Mal, two persons, namely Om Prakash @ Fauzi (present applicant) and Vikas Pareek, were apprehended along with an Ertiga car bearing registration No.



HR-69D-1395. After completing legal formalities, a search of the vehicle had led to the recovery of 31 packets containing 30.03 kg of opium, which had been concealed beneath the backseat and inside the plastic interior of the vehicle. The seized substance had also tested positive for opium using a field testing kit. Upon interrogation, the accused, Om Prakash and Vikas Pareek, disclosed that they had procured the contraband from an individual named Kuki in Imphal, Manipur, at the behest of one Sahiram. They had further revealed that Onkar Mal had been instructed to deliver 63 packets – 30 packets to Sarita Vihar and the remaining to Sahiram in Jodhpur, Rajasthan. The applicants had also stated that they had arrived in Delhi to deliver 31 packets on the instructions of Sahiram when they were apprehended. Despite efforts, the co-accused Sahiram and Kuki could not be traced due to the lack of specific details regarding their identity and address. Samples from the seized opium had been placed before the concerned Court and deposited at FSL, Rohini, New Delhi, for FSL report, which is still awaited. The chargesheet against the accused persons, including the present applicant, was filed before the concerned Court on 31.08.2023.

4. The bail applications filed by the applicant were dismissed by learned Sessions Court on 12.01.2024. Further, the bail application filed before this Court was withdrawn by the applicant on 09.07.2024.

5. The learned counsel appearing for the applicant argues that though the charge sheet has been filed against the accused persons,



the FSL Report has not been filed alongwith the same, and therefore, the chargesheet is not complete. It is also stated that even the cognizance has not been taken in this matter and remand orders have been passed by the learned Sessions Court. It is further contended that in absence of FSL report, it cannot be said that recovery of contraband in this matter was more than .02% of Morphine, which is essential to proceed with the case against the present accused. It is also argued that the applicant was not arrested from the place from where he is shown in the chargesheet. Therefore, it is prayed that the applicant be granted bail.

6. On the other hand, the learned ASC for the State highlights the gravity of the offence, and argues that the chargesheet in the case had been filed on 31.08.2023, and the FSL report is awaited. He however submits that as per the letter received from Director, FSL, the FSL report is expected to be received by 31.01.2025. It is contended that the contraband in question was found positive for 'opium' when tested by the field testing kit at the spot. Therefore, it is *prima facie* clear that the present case involves recovery of commercial quantities of opium. It is thus prayed that the bail application be dismissed.

7. This Court has **heard** arguments advanced on behalf of both the parties and has perused the case file.

8. In the present case, co-accused Onkar Mal was apprehended with 70.308 kg of opium. At his instance, the present applicant and co-accused were apprehended, and a recovery of 30.03 kg of opium was also made from them. The recovered substance was found



‘opium’ as per the field testing kit. Concededly, the recovery of narcotic substance in this case is of commercial quantity and therefore, the twin conditions under Section 37 of the NDPS Act will have to be satisfied by the applicant so as to be entitled to grant of bail, which *inter alia* mandates that there should be reasonable grounds for believing that the accused has not committed the offence in question. The Hon’ble Apex Court in ***Narcotics Control Bureau v. Mohit Aggarwal***: 2022 SCC Online SC 891, while explaining the meaning of ‘reasonable grounds’ under Section 37(1)(b) of NDPS Act, has held as under:

“14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.”

9. The recovery of 30.03 kg of opium was allegedly affected from the possession of present applicant. Therefore, *prima facie*, there are no reasonable grounds for believing that the offence in question was not committed by him.

10. However, during the course of arguments, the main emphasis of the learned counsel for the applicant was on two issues. First, that the cognizance in this case has yet not been taken and therefore, the learned Sessions Court could have not remanded the accused persons



to custody. In this regard, the learned ASC for the State had drawn this Court's attention to the decision of Hon'ble Supreme Court in case of *Suresh Kumar Bhikamchand Jain v. State of Maharashtra and Ors.*: (2013) 3 SCC 77, wherein it was held as under:

“19. 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. **The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced.** During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. **In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court...**”

(Emphasis added)



11. In view of the aforesaid ratio, the argument of the learned counsel for the applicant cannot be accepted at this stage. In any case, if the applicant is aggrieved by any specific order of the learned Sessions Court, he may challenge such an order by taking appropriate recourse to law.

12. Second, the learned counsel for the applicant contended that in absence of FSL report, it could not be concluded that the opium recovered in this case contained more than 0.2% of morphine, which is essential to prosecute an accused for offence under the NDPS Act. It was also argued that a chargesheet without an FSL report in case of narcotic substances should be categorized as an incomplete chargesheet and therefore, on this ground alone, the applicant should be granted bail. Insofar as this contention is concerned, 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.

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.”

(Emphasis supplied)

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 charge-sheet 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.

11. Further, in one of the petitions i.e.SLP (Crl.) No. 2666/2022 before the Hon'ble Supreme Court in the aforesaid case, the petitioner had not surrendered despite the bail being cancelled by the High Court. It is also clearly mentioned in the order of the Hon'ble Supreme Court that the petition for grant of bail of the said petitioner had been tagged along with similar matters dealing with the question of law mentioned above and could not be taken up and thus, benefit of bail was being granted to the petitioner. It is also to be noted that in facts of the said case, the quantity of contraband recovered were not placed before the Court, also as to whether it was a case of commercial quantity of recovery of contraband or not.

12. It is, thus, clear that no general directions have been passed by the Hon'ble Supreme Court for grant of default bail in case of charge-sheet being filed without FSL report in NDPS cases.



13. On the issue in question, this Bench in *Suleman v. State (NCT of Delhi)*, (2022) 5 HCC (Del) 108 : 2022 SCC OnLine Del 2346 had observed that non-filing of FSL report along with the chargesheet does not fall within the ambit of Section 173(2) Cr. P.C. so as to consider it as “incomplete chargesheet” and the same does not give any right of default bail to the accused...”

13. This Bench, as well as Co-ordinate Benches of this Court, in several decisions, has already held that non-filing of FSL report alongwith the chargesheet does not render it as an “incomplete chargesheet” and accordingly, no right of bail accrues in favour of the accused on this ground.

14. Though in some cases filed before the Hon’ble Supreme Court, assailing the orders of refusal of default bail on this ground, the accused persons have been enlarged on bail by the Hon’ble Supreme Court, the said relief however has been granted on the ground of pendency of larger issue i.e. whether chargesheet filed without an FSL report is incomplete chargesheet, before the Hon’ble Apex Court in a batch of petitions. However, neither the decisions challenged before the Hon’ble Apex Court have been stayed, nor any general directions have been given to the Courts to release the accused persons on bail if the chargesheet is filed without an FSL report.

15. Therefore, in view of the reasons recorded hereinabove, this Court finds no ground to grant regular bail to the present accused/applicant.

16. Accordingly, the bail application is dismissed.

17. Nothing expressed hereinabove shall tantamount to an



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expression of opinion on the merits of the case.

18. The judgment be uploaded on the website forthwith.

**SWARANA KANTA SHARMA, J**

**JANUARY 29, 2025/ns**