



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 29th November, 2022

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.Rev.P. No.04 of 2022

Petitioner : Anwar Alam

versus

Respondent : State of Sikkim

Application under Sections 397 and 401 read with
Section 482 of the Code of Criminal Procedure, 1973

Appearance

Mr. Shrawan Kumar Prasad, Advocate for the Petitioner.

Mr. S. K. Chettri, Additional Public Prosecutor for the State-
Respondent.

SI Sun Tshering Lepcha, Investigating Officer present in person.

ORDER

Meenakshi Madan Rai, J.

1. The Order of the Learned Special Judge, SADA, 2006, Gangtok, Sikkim, dated 01-10-2022, in Criminal Misc. Case (SADA) Bail No.113 of 2022 (*Anwar Alam vs. State of Sikkim*), is being assailed, whereby, the Petitioner's prayer for grant of default bail under Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") was rejected.

2. On 31-05-2022, an FIR was lodged before the Learned Chief Judicial Magistrate, Gangtok District, Sikkim, by the Station House Officer (SHO), Pakyong Police Station, Sikkim, informing that, credible source information was received that, the Petitioner, was in possession of controlled substances in his rented room at Pakyong. The SHO along with duty personnel and two independent witnesses conducted a search therein, where the Petitioner and one



Amal Sarkar were present. The search led to recovery of twenty-one bottles of cough syrup (*Codeine Phosphate and Chlorpheniramine Maleate Syrup*) and five empty bottles of cough syrup (*Codeine Phosphate and Chlorpheniramine Maleate Syrup/Cetirizine HCL Dextromethorphan HBR and Phenylephrine HCL Syrup*). The Petitioner was arrested on 31-05-2022 under Section 7 of the Sikkim Anti Drugs (Amendment) Act, 2017 read with Section 34 of the Indian Penal Code, 1860 (for short, "IPC") and taken into custody. Amal Sarkar later was released in terms of Section 169 of the Cr.P.C. The Final Report under Section 173 of the Cr.P.C. was filed on 27-07-2022, sans the Chemical Analysis Report, although the Prosecution had forwarded the recovered articles to the Central Forensic Science Laboratory (CFSL), Government of India, Kamrup, Assam, on 18-07-2022.

3. The Appellant filed an application seeking default bail [Criminal Misc. Case (SADA) Bail No.113 of 2022] before the Special Court, SADA, 2006, Gangtok, Sikkim, under Section 167(2) of the Cr.P.C., on the anvil of the contention that an incomplete Charge-Sheet was filed, which was rejected by the Court, relying on various decisions of the Delhi High Court, hence this Petition.

4. Learned Counsel for the Petitioner contended that the Petitioner is entitled to statutory bail under Section 167(2) Cr.P.C. the Prosecution having failed to submit the complete Charge-Sheet inclusive of FSL Report within the statutory period of 60 days, from the date of arrest of the Petitioner. That, the Charge-Sheet filed on 27-07-2022 lacked the FSL Report. That, consequently in the absence of the FSL Report it is unverified as to whether the Petitioner can even be booked under the provisions of the Sikkim



Anti Drugs Act, 2006 (as amended) [hereinafter, "SADA, 2006"] the contents of the seized articles not having been established as controlled substances. Claiming parity with Amal Sarkar who was released by the Police, it is urged that both of them were present at the time of search and seizure, but the Petitioner without evidence, was forwarded to Judicial custody. Relying on the ratio in ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence***¹, in which the Hon'ble Supreme Court referred to its earlier decision in ***Uday Mohanlal Acharya vs. State of Maharashtra***², it was urged that the personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law, in conformity with the provisions thereof. That, in ***Satya Narain Musadi and Others vs. State of Bihar***³, the Hon'ble Supreme Court has held that Section 173(5) of the Cr.P.C. makes it obligatory upon the Police Officer to forward along with the report all documents or relevant extracts thereof, on which the Prosecution proposes to rely and the statements recorded under Section 161 Cr.P.C., of all the persons whom the Prosecution proposes to examine as witnesses at the trial. Despite this observation, the Prosecution has failed to furnish the Forensic Report of the seized articles. That, in ***Mohd. Arbaz and Others vs. State of NCT of Delhi***⁴ filed before the Hon'ble Supreme Court, the question for consideration pertains to the rights of the accused under Section 167(2) of the Cr.P.C. in an NDPS case, where the Challan was filed without CFSL Report. That, pending decision on the question the Petitioners therein were allowed the benefit of

¹ (2021) 2 SCC 485

² (2001) 5 SCC 453

³ (1980) 3 SCC 152

⁴ Order dated 09-11-2022 of the Supreme Court in Petitions for Special Leave to Appeal (Crl.) Nos.8164-8166/2021



bail. Urging this Court to take a similar view it was contended that deprivation of the personal liberty of the accused be considered on account of the non-filing of the FSL Report. Contending that the Petitioner is entitled to default bail in light of the above facts, strength was garnered from a plethora of Judgments, i.e., ***Ajit Singh alias Jeeta and Another vs. State of Punjab***⁵; ***Jiyaur Rahman Barhuiya vs. State of Manipur represented by the Chief Secretary (Home), Govt. of Manipur and Others***⁶; ***Inspector of Customs vs. MS Daphira Wallang***⁷; ***Nishanth C. vs. State of Kerala, Represented by the Public Prosecutor and Another***⁸; ***Babu vs. The State (GNCT of Delhi)***⁹ and ***Mohd. Arbaz vs. State of NCT of Delhi***¹⁰. That, in the circumstances enumerated above, the Order of the Learned Special Judge, SADA, 2006, be set aside and the Petitioner be enlarged on bail in terms of Section 167(2) of the Cr.P.C.

5. Objecting to the prayers advanced, Learned Additional Public Prosecutor put forth the arguments that the recovered controlled substances were in large quantity as defined in Section 2(i) of the SADA, 2006. That, the Petitioner is from Kishanganj, Bihar. Explaining the non-filing of the Chemical Analysis Report along with the Charge-Sheet, it was submitted that the concerned Scientific Officer at the Regional Forensic Science Laboratory, Government of Sikkim, Saramsa, Ranipool, Gangtok District, had proceeded on maternity leave from 01-06-2022 and would be on leave till 30-11-2022. Samples of the controlled substances for Chemical Analysis were forwarded to the RFSL on 09-06-2022, by

⁵ Order dated 30-11-2018 of the High Court of Punjab & Haryana in Criminal Revision No.4659 of 2015

⁶ 2019 SCC OnLine Mani 199

⁷ ILR 2010 Kar 190

⁸ 2021 SCC OnLine Ker 2870

⁹ Order dated 25-09-2020 of the High Court of Delhi in Bail Appln. No.2075 of 2020

¹⁰ Order dated 03-11-2020 of the High Court of Delhi in Crl. Rev. P. No.1219/2019 & Crl.M.A. No.10252/2020



which time the Officer was already on leave. Thereafter, on receiving the information of such leave, it was again forwarded to the Central Forensic Science Laboratory, Government of India, Kamrup, Assam, on 18-07-2022 from where the Report is awaited and will be filed immediately on receipt. That, merely because the RFSL Report has not been filed, it does not entitle the Petitioner the statutory bail in terms of Section 167(2) of the Cr.P.C., as the Charge-Sheet was filed within the statutory period of sixty days. To buttress this submission, reliance was placed on **Suleman** vs. **State (NCT of Delhi)**¹¹. That, Amal Sarkar was released by the Police in terms of Section 169 Cr.P.C. due to lack of evidence, hence the Petition be dismissed.

6. The rival contentions of Learned Counsel were heard *in extenso*. I have perused the documents annexed to the Petition and the Judgments/Orders of the various High Courts, the Order of the Hon'ble Supreme Court in **Mohd. Arbaz** (*supra*) relied on by the Petitioner and the Judgment in **Suleman** (*supra*) relied on by Learned Additional Public Prosecutor.

7(i). For clarity in the matter, the provision of Section 167(2) of the Cr.P.C. is extracted herein below;

"167. Procedure when investigation cannot be completed in twenty four hours.—(1)

(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:

Provided that,—

(a) the Magistrate may authorise the detention of the accused person,

¹¹ 2022 SCC OnLine Del 2346



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 sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

.....”

(ii) The law extracted above reveals *inter alia* the terms with regard to grant of statutory bail. In **Ajit Singh** (*supra*) relied on by the Petitioner, the Division Bench of the Punjab & Haryana High Court while considering a matter pertaining to non-inclusion of Chemical Examiner’s opinion in the Report under Section 173 Cr.P.C. in an NDPS case, observed *inter alia* that, non-inclusion of the Chemical Examiner’s opinion in the report under Section 173 Cr.P.C. would expose the accused to unfounded dangers, imperiling and endangering his liberty, since, the provisions of the of the Narcotic Drugs and Psychotropic Substances Act, 2012 (hereinafter, “NDPS Act”), is stringent its applicability to a trial and in its consequence. That, for this reason as well, it was essential that the Report of the Chemical Examiner be included in the Report under Section 173 Cr.P.C., without which, it can best be termed to be an incomplete Challan, depriving the Magistrate of relevant




materials to take cognizance. That, if it is not submitted within the requisite 180 days it would result in default bail to the accused, unless an application is moved by the Investigating Agency apprising the Court of the State of investigation, with the prayer for extension of time to the satisfaction of the Court.

(iii) In ***Inspector of Customs*** (*supra*) also relied on by the Petitioner, the Karnataka High Court while considering the non-filing of Charge-Sheet in an NDPS case agreed with the Learned Trial Court that, the Petitioner therein was entitled to default bail as no Chemical Analysis Report or Charge-Sheet was filed during the statutory period.

(iv) In ***Nishanth C.*** (*supra*) an Order of the Kerala High Court relied on by the Petitioner, the Final Report was filed sans Chemical Examination Report. The Petitioner who had been in custody for more than a year was found entitled to statutory bail under Section 36A(4) of the NDPS Act.

(v) In ***Jiyaur Rahman Barhuiya*** (*supra*) adverted to by Learned Counsel for the Petitioner, the Petitioner therein was booked under various Sections of the NDPS Act for being in possession of some psychotropic and controlled substances, in the vehicle, used by the accused persons including the Petitioner. Claiming that the statutory period of 180 days as per Section 167(2) of the Cr.P.C. was over, the Petitioner claimed the right to default bail having been in custody for more than 300 days, and filed bail applications which were rejected by the Special Judge. Default Bail was granted by the Single Judge of the High Court on the non-filing of the Charge-sheet, besides which the Prosecution admittedly had failed to file an application under Section 36A(4) of



the NDPS Act, seeking extension of time as the FSL Report was awaited.

(vi) In **Babu** (*supra*) the Petitioner was found to be in possession of 50 gms. of Heroin on 06-12-2019. The Charge-Sheet was not filed till 04-02-2020, hence Petitioner claimed default bail under Section 167(2) Cr.P.C. Charge-Sheet came to be filed on 13-02-2020 without the FSL Report. The FSL Report was submitted on 03-09-2020, by which time the Trial Court had rejected the Petitioner's application for regular bail on 22-07-2020 and the Petitioner was then before the Delhi High Court. The matter was heard on 04-09-2020. A distinction was drawn by the Learned Single Judge between cases relating to offences under the IPC and NDPS Act for the reason that a Charge-Sheet without an FSL in an NDPS case would not be able to indicate that the recovery from the accused was prohibited under the provisions of NDPS Act. However, considering that the decision of the Division Bench of the Delhi High Court in **Kishan Lal** vs. **State**¹² had held that the Petitioner was not entitled to grant of bail under Section 167(2) Cr.P.C. when Charge-Sheet was filed unaccompanied by the FSL Report, the decision was adhered to. Besides, the Court also found no ground to grant the Petitioner's bail on merits, as the drug recovered was Heroin and no procedural infirmity had been pointed out.

(vii) In **Mohd. Arbaz** (*supra*) referred and relied on by the Petitioner, a Single Judge of the Delhi High Court was considering a claim for default bail on a Prosecution under Sections 21 and 29 of the NDPS Act, premised on the assertion that the Investigating

¹² 1989 SCC OnLine Del 348



Agency had failed to file a complete Police Report under Section 173(2) of the Cr.P.C. within the stipulated period of one hundred and eighty days, although undisputedly a Report unaccompanied by the Chemical Analysis Report was filed within the stipulated period. The Petitioners were arrested on 16-12-2018 on recovery of Heroin from them and the vehicle in which they were travelling. On 17-12-2018 the FIR under Section NDPS Act was lodged. On 27-05-2019 a Police Report under Section 173(2) Cr.P.C. was filed before the Special Court sans the Chemical Examiner's Report. The statutory period of one hundred and eighty days for completion of investigation had expired on 15-06-2019. On 29-07-2019 statutory bail was filed under Section 167(2) of the Cr.P.C. on the ground that the Investigating Agency had failed to file the complete Report, as it was devoid of the Chemical Examiner's Report. The Single Judge observed that undisputedly the absence of an FSL Report does not render the Report under Section 173(2) of the Cr.P.C. an inchoate Report, incapable of being considered in cases where the Prosecution's Report is not founded on recovery of contraband. However, in NDPS cases the Prosecution case rests on recovery of an illicit substance and the Chemical Examiner's Report evidencing the nature of the substance allegedly recovered, which would undoubtedly be at the core of the Prosecution case. It was further observed that certain Courts have held that a Report under Section 173(2) of the Cr.P.C. would be incomplete if unaccompanied by the FSL Report identifying the recovered substance. Reference was made to plethora of decisions of various High Courts on the point. The Court however concurred with the views expressed by the Coordinate Bench of the same High Court



in **Babu** (*supra*), which had referred to the decision of the Division Bench of the same High Court in **Kishan Lal** (*supra*) and although being of the opinion that an FSL Report in an NDPS case was indispensable and ought to accompany the Charge-Sheet, observed as hereunder;

“18. Though this Court is of the view that the decision of the Division Bench of the Punjab and Haryana High Court is an appropriate opinion in relation to cognizance of an offence under NDPS Act without the FSL report being an illegality, **however, bound by the Division Bench decision of this Court, judicial discipline mandates this Court to follow the same. Consequently, in view of the decision of the Division Bench of this Court in Kishan Lal Vs. State** (*supra*), it is held that the petitioner is not entitled to grant of bail under Section 167(2) CrPC for non-filing of the FSL report along with the charge sheet.”

[emphasis supplied]

(viii) In **Suleman** (*supra*) relied on by the State-Respondent, the Petitioner was in custody under Sections 21 and 29 of the NDPS Act. On completion of investigation, the Charge-Sheet was filed on 03-03-2021 without the Forensic Report. The Charge-Sheet already filed mentioned that the Supplementary Charge-Sheet would be filed on receipt of the Report from the Forensic Laboratory. The Petitioner filed default bail which the Learned Trial Court rejected on the ground that Charge-Sheet had indeed been filed albeit sans Chemical Report. The Single Judge of the Delhi High Court before whom the Order came to be assailed concurred with the decision in **Kishan Lal** (*supra*) and reasoned *inter alia* that the decision of **Babu** (*supra*) and **Mohd. Arbaz** (*supra*) had also observed that the accused should not be entitled to default bail as the Charge-Sheet was already filed.

(ix) In **Mohd. Arbaz** (*supra*), aggrieved by the Order of the Learned Single Judge of the High Court, the Petitioners were before the Hon’ble Supreme Court, which vide its Order dated 09-11-



2022, observed that 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. That, the matter would require detailed consideration, in the meanwhile the Petitioners were ordered to be released on bail subject to the conditions imposed by the concerned Trial Court. Relevantly, it may be noted that vide the Order dated 13-12-2021, the Hon'ble Supreme Court in **Mohd. Arbaz** (*supra*) took into consideration the fact that the Petitioners had suffered incarceration for a period of more than two years and eleven months, hence interim bail was granted to them for a period of three months subject to the terms and conditions imposed by the Learned Court.

(x) Thus, the question as to, Whether a Charge-Sheet in an NDPS case would be considered incomplete on the non-filing of Chemical Analysis Report along with the Challan, is pending decision of the Hon'ble Supreme Court.

8. In the instant case, the Petitioner is in Judicial custody since 08-06-2022. Indubitably, the Charge-Sheet was filed within the statutory period of sixty days, as provided in Section 167(2) of the Cr.P.C., the SADA, 2006, not having prescribed the specific period for completion of investigation. The Petitioner alleges that the Charge-Sheet is incomplete on account of non-filing of CFSL Report. The Hon'ble Supreme Court is yet to determine the question reflected *supra* in **Mohd. Arbaz** (*supra*) and is therefore seised of the matter. Appositely, I desist from delving into a detailed discussion and opinion on the question pending consideration and what the provisions of Section 167(2), Section 173 and Section 190 of the Cr.P.C. entails. Suffice it at this



juncture to notice that in ***Sanjay Dutt vs. State through CBI, Bombay (II)***¹³ the Hon'ble Supreme Court held that the indefeasible right to bail under Section 167(2) of the Cr.P.C. enures to the accused and is enforceable only prior to filing of the Charge-Sheet. That, it does not survive or remain enforceable on the Challan being filed, if already not availed of. Once the Challan has been filed the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused, after the filing of the Challan.

9. On the bedrock of the above order, Charge-Sheet having been filed in the instant case within the statutory period regardless of the admitted fact of absence of FSL Report, on due consideration of the facts and circumstances placed before me, I find no reason to interfere with the finding and conclusion of the Learned Trial Court in the assailed Order.

10. Consequently, the Petition is rejected and disposed of accordingly.

11. The observations above shall not be construed as findings on the merits of the matter. The Learned Trial Court shall without the impediment of the above observations arrive at its independent findings on completion of trial.

12. Copy of this Order be forwarded to the Learned Trial Court for information.

13. Pending applications, if any, stand also disposed of.

(Meenakshi Madan Rai)
Judge

29-11-2022

Approved for reporting : **Yes**

¹³ (1994) 5 SCC 410