

the magistrate under on the ground that the challan has not been filed within 60 days from the date of arrest; hence they are entitled for release on bail. The learned trial Court has rejected the application on the ground that 20 Kgs 'Ganja' was recovered from the petitioners which is a commercial quantity and under the provisions of Section 36(A)(4) of the NDPS Act and the period u/s. 167(2) of Cr.P.C. for filing the challan is 180 days which can be extended up to one year.

4. After rejection of the application by order dated 28.5.2019, the petitioners approached this Court by way of application u/s. 439 of Cr.P.C. (M.Cr.C. No.24989/2019) for grant of bail on the ground of 167(2) of Cr.P.C. Vide order dated 25.6.2019, this Court rejected the application as the petitioners did not file regular bail application u/s. 439 of Cr.P.C. before the Sessions Court before approaching this Court and observed that if they are aggrieved by order dated 28.05.2019 then they have a remedy of challenging order dated 28.5.2019 by way of a revision. Therefore, they have filed the present revision before this Court. It is made clear that they have not filed the application u/s. 439 of Cr.P.C. for grant of bail so far.

5. I have heard the learned counsel appearing for the parties and perused case-diary and the material available on record.

6. Shri Sanjay Sharma, learned counsel appearing for the petitioner, submitted that as per prosecution story, 20 Kg. of 'Ganja' was recovered from the possession of the petitioners, which is less than commercial quantity, therefore, the prosecution ought to have filed the challan within 60 days from the date of arrest. The petitioners were arrested on 28.3.2019 and

61 days in the custody were completed on 27.5.2019, thereafter, challan was filed on 9.6.2019, therefore, they rightly filed an application u/s. 167(2) of the Cr.P.C. Learned Special Judge has wrongly rejected the application on 28.5.2019. Learned Special Judge has wrongly rejected the application on the ground that 20 Kg. of 'Ganja' commercial quantity. He submits the word "commercial quantity" is defined in Section 2 (vii-a) of the NDPS Act and according to which, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. The Central Government had issued notification dated 19.10.2001, in which, commercial quantity is mentioned as 20 Kg., therefore, u/s. 36-A(4) for the offences punishable u/s. 19, 24 and 27A of the Act of 1985 involving commercial quantity, the period of filing challan is 180 days, hence the petitioners are entitled to be released on bail u/s. 167(2) of the Cr.P.C. In support of his contention, he has placed on the judgment of Full Bench of High Court of Himanchal Pradesh in the case of **Katto V/s. The State of Himanchal Pradesh : LAWS (HPH) 2003-6-2.**

7. Learned counsel for the petitioners further stated that as the alleged recovery of 20 Kg. 'Ganja' in terms of provisions prescribed in Section 20 (b) (B) of the Act of 1985, the maximum punishment can be awarded to the petitioners up to 10 years. Since the Police has failed to submit the final report u/s. 173 (2) of Cr.P.C. within 60 days, therefore the petitioners have now become entitled to be released on bail in terms of the provisions prescribed in Section 167(2) of the Cr.P.C. He further relied on the judgment of apex Court in the case of **Rajeev**

Choudhary V/s. State (N.C.T.) of Delhi : 2001 Cr.L.R. [SC] 452, because offence u/s. 386 of IPC the punishment could be for 10 years or less.

8. *Per contra*, Shri Yogesh Gupta, learned Govt. Advocate appearing for the respondent/State, argued that the petitioners had filed an application u/s. 167(2) of the Cr.P.C. on 27.5.2019 i.e. on 61st day of their arrest, which had been rejected by learned Special Judge on 28.5.2019 and thereafter, they remained silent and the prosecution filed the challan on 9.6.2019. Thereafter, they approached this Court on 12.6.2019 by way of M.Cr.C. No.24989/2019 u/s. 439 of Cr.P.C. for grant of bail on the ground of violation of Section 167(2) of the Cr.P.C. which has been dismissed by this Court as not maintainable. Now the petitioners have approached this Court by way of present revision but the right to get bail u/s. 167(2) of the Cr.P.C. does not survive and extinguished for the release on bail because the challan had already been filed. In support of his contention he has placed reliance over the judgment of Constitutional Bench of apex Court in the case of **Sanjay Dutt V/s. State through CBI, Bombay : (1994) 5 SCC 410**.

Appreciation & Conclusion....

9. Undisputedly, as per prosecution story, quantity of 20 Kg. of 'Ganja' was recovered from the conscious possession of the present petitioners. They were arrested on 25.3.2019 and sent to judicial custody by the Special Judge on 28.3.2019. On completion of 61 days in custody, on 27.5.2019, they filed an application u/s. 167(2) of the Cr.P.C. Learned Special Judge has rejected the application vide order dated 28.5.2019 as the time for filing of challan is 90 days because the seized quantity of

contraband is commercial quantity. The word “commercial quantity” is defined in Section 2(vii-a) of the Act of 1985, which is reproduced below :

“**2(vii-a).** - “**commercial quantity**”, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette.”

According to the aforesaid definition, in relation to narcotic drug and psychotropic substances, any quantity greater than the quantity specified by the Central Government is a commercial quantity. The Central Government published the notification for small quantity and commercial quantity of narcotic drugs and psychotropic substances on 19.10.2001. Column 5 and 6 of the said table provides the quantity in accordance with articles mentioned in Column 2 to 4 of the said table. Entry 55 relates to 'Ganja', which is reproduced below :

Sl.No.	Name of Narcotic Drug and psychotropic substance (International non-proprietary name (INN))	Other non-proprietary name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
55	Ganja			1000	20 kg.

10. According to the aforesaid table, small quantity is 1000 gms. and the commercial quantity is 20 kg. Any quantity of Ganja between these two figure would be non-commercial quantity as per definition given in Section 2 (vii-a) of the Act of 1985. It is correct that as per aforesaid definition, the commercial quantity would be any quantity greater than the quantity specified by the Central Government by way of notification in the Official Gazette and the commercial quantity is specified it as 20 kg., therefore, the commercial quantity

would be more than 20 kg. of 'Ganja'. It appears that under bonafide belief that 20 Kg ganja is Commercial Quantity , the prosecution did not file charge sheet within 60 days. If the quantity of seized contraband is less than the commercial quantity, but greater than the small quantity, as per Section 22(b), same would be punishable by rigorous imprisonment for a term which may extend to 10 years and with fine. It means, the punishment would be 10 years or less than 10 years and according to, u/s. 36-A(4) for the offence punishable u/s. 19, 24 or 27A, the period of filing challan u/s. 167(2) of Cr.P.C. would be 180 days.

11. Under the proviso to Section 167(2) of the Cr.P.C., the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police, beyond the period of 15 days, but no Magistrate shall authorise detention of the accused in custody for the period exceeding 90 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. Therefore, this case is covered by the provisions contained in proviso (a)(ii) to Section 167(2) of Cr.P.C.

12. The only question which requires consideration by this Court is, whether at this stage, the petitioners are liable to be released from the custody on bail when the challan has already been filed on 9.6.2019. This issue came up for consideration before the Constitution Bench of apex Court in the case of **Sanjay Dutt** (supra), in which, it has been held that the infeasible right of the accused does not survive or remain enforceable on the challan being filed, if already not availed of.

Para 48 is reproduce below:-

48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and 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. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith.

13. In the case of **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**, the Supreme Court of India has held as under:-

With the aforesaid interpretation of the expression “availed of” if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of

cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra

14. In case of *Sayed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)*, (2012) 12 SCC 1, again the Supreme Court of India has retreated as under:-

26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.

15. Again, this issue came up for consideration before the Three Judges Bench of apex Court in the case of **Rambeer Shokeen V/s. State (NCT of Delhi) : (2018) 4 SCC 405**, in which, the law laid down in the case of Sanjay Dutt (supra) has been followed and held that no right had accrued to the appellant before filing of the charge-sheet; at best, it was an inchoate right, if the prayer for extension of period of filing the challan is pending and expressly rejected by the Court. Finally, the apex Court has held that the right to grant statutory bail would have enured to the accused only after rejection of the request for extension of time prayed by the Addl. Public Prosecutor

16. In the present case, learned Magistrate has rejected the application filed u/s. 16(2) of Cr.P.C. on 28.5.2019 and

thereafter, prosecution filed the challan on 9.6.2019 . Hence the petitioners are entitled for bail because the challan is filed on 9.6.2019 beyond the period of 60 days, therefore, the right u/s. 167(2) of Cr.P.C. is not to be treated to be extinguished or frustrated.

Hence the revision petition is allowed the impugned order dated 28.5.2019 whereby application filed u/s. 167(2) of Cr.P.C. has been rejected, is hereby quashed. That the applicants should be released on bail on such terms and conditions to the satisfaction of the learned Special Judge, and further the Special Judge would be entitled to deal with the applicants in accordance with law, since the charge-sheet has already been filed.

**(VIVEK RUSIA)
JUDGE**

Alok/-