IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
SHRI JUSTICE SUJOY PAUL
ON THE 18th OF AUGUST, 2022

M.Cr.C. No. 35379 OF 2022

Between :-

KHILAN SINGH S/O KODU SINGH, AGED ABOUT 42 YEARS, OCCUPATION: MAJDOORI (AADESH PATRIKA ME TYPING KI TRUTI SE KOI SEEG LIKHA HUYA HAI) NIVASI GRAM LALPUR POLICE STATION JABERA DISTRICT DAMOH M.P.

…APPLICANT

(*BY SHRI SANDEEP KUMAR JAIN, ADVOCATE*)

AND

THE STATE OF MADHYA PRADESH THROUGH POLICE STATION NOHTA DISTRICT DAMOH (M.P.)

….RESPONDENT

(*BY VIVEK LAKHERA ,GOVERNMENT ADVOCATE*)

This M.Cr.C. coming on for hearing this day, ***Justice Sujoy Paul,*** *passed the following :*

O R D E R

This is second bail application filed under Section 439 of Cr.P.C. for grant of bail on behalf of applicant -Khilan Singh in connection with Crime No.283/2022, registered at Police Station -Nohata, District Damoh (M.P.) for offences under Section 8/20

NDPS Act, 1985 and Section 130, 177 (3) Motor Vehicles Act. His first bail application (M.Cr.C. No. 24354/2022) was dismissed as withdrawn vide order dated 09. 06.2022.

2. In this application, the singular and pivotal question raised by applicant is that while filing the challan, the prosecution could not file the report of Forensic Science Laboratory (FSL) regarding the substance recovered from the applicant, thus the applicant became entitled to get the benefit of default bail under Section 167(2) of the Criminal Procedure Code.

3. To elaborate, Shri Sandeep Kumar Jain, learned counsel for the applicant submits that the medium quantity of opium (3 kg 580 gm) was allegedly recovered from the applicant. The maximum sentence in the event of conviction in a case of this nature is 10 years. Thus, complete challan should have been filed within 60 days. The challan has not been filed within aforesaid time and therefore, in view of orders of **Punjab & Haryana High Court** in **Criminal Revisions No. 4659/2015 (Ajit Singh alias Jeeta and another v. State of Punjab) decided on 30.11.2018** and **CRM-M-25600-2021 (State of Haryana Vs. Dildar Ram @ Dari)** decided on 15.07.2021, the applicant is entitled to get the benefit of default bail. Shri Jain urged that FSL report regarding the nature of substance is inseparable part of the challan. Since it is not filed within the statutory time limit, the applicant deserves default bail. This is an enforceable right which applicant deserve to enjoy.

4. Sounding a *contra* note, Shri Vivek Lakhera, learned G.A. opposed the same and prayed for rejection of the bail application.

5. No other point is pressed by the parties.

6. I have heard the parties at length.

7. No doubt, in the case of **Ajit Singh and Dildarram (supra),** the Punjab & Haryana High Court has granted benefit of default bail on the ground that the chemical examiner's report is an essential, integral and inherent part of investigation under the NDPS Act. It is like the foundation of an accused's culpability without which a Magistrate would not be able to form an opinion and take cognizance of accused's involvement in the commission of crime under the said Act.

8. The argument based on the said two judgments on the first blush appears to be attractive but lost its complete shine when examined in the teeth of relevant statutory provisions and judgments delivered by various other High Courts.

9. The Rajasthan High Court considered the similar aspect and considered the order of Punjab & Haryana High Court in the case of **Manmohan Singh @ Goldi.** The Rajasthan High Court in **Gaurav Vs. State of Rajasthan, 2013 SCC Online Rajasthan 3865** opined as under:

> "**8.** When the Hon'ble Single Judge of the **Punjab and Haryana High Court** was considering the case of ***Manmohan Singh @ Goldi*** he was not made aware of the earlier Full Bench Judgment of the Punjab and Haryana High Court rendered in *Mehal Singh's case* (supra), wherein the Hon'ble Full Bench of Punjab and Haryana High Court held as below :-
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> "15. Since a report to qualify itself to be a 'police report' is required to contain only such facts as are mentioned in sub-section (2) of S. 173, so if once it is found that the police report contained all those facts, then so far as the investigation is concerned the name has to be considered to have been completed. For this view, we receive authoritative backing from the decision of the Supreme Court in *Tara Singh* v. *The State*, AIR 1951 SC 441. That was a case in which the accused was arrested on

September 30, on the very day of occurrence, he was produced before a Magistrate. On October 1, the police was granted police remand till October 2. The accused was produced on October 3 before the Magistrate, on which date the police handed over to the Magistrate what they called in 'incomplete challan' dated October 2, 1949, and also produced certain prosecution witnesses. Amount the witnesses so produced were witness who were said to have witnessed the occurrence. The Magistrate examined those witnesses and recorded their statements, although the accused at that time was not represented by a counsel. On October 5 the police put in what they called a 'complete challan' and on the 19th they put in a supplementary challan. The Magistrate committed the accused for trial on November 12, 1949.

15-A. It was argued in the first instance on behalf of the accused that the Magistrate on October 3 had no power to take cognizance of the case. It was contended that cognizance of an offence could only be taken on a police report of the kind envisaged in Clause (b) of sub-section (1) of S. 190 of the old Code. It was urged, on the strength of the provisions of Section 173(1) of the old Code, which is in the following terms and which is also **pari materia** with the provisions of sub-section (2) of 173 of the new Code, that the police were not permitted to send in an incomplete report:

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall

(a) 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, setting forth the names of the, parties the nature of the information and the names of the persons who appears to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the State Government, the action

taken by him to the person, if any, by whom thee information relating to the commission of the offence was first given."

Vivian Bose, J., who delivered the opinion for the Bench, without going into the question as to whether the police were entitled to submit an **incomplete report** or not, held that the report dated October 2, 1949, which the police referred to an **'incomplete challan'**, was, in fact, a complete report within the meaning of S. 190(1)(b) read with S. 173(1) of the old Code. The following observations of his Lordship are instructive on the point (at P. 442):

"When the police drew up their challan of 2.10.1949 and submitted it to the Court on the 3rd, they had in fact completed their investigation except for the **report of the Imperial Serologist** and drawing of the sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore, the mere fact that a second challan was put in on 5th October **would not necessarily vitiate the first**. All that S. 173(1)(a) requires is that as soon as the police investigation under Chap. 14 of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form:

"Setting forth the names of the parties, the nature of the information and the names of the persons who appears to be acquainted with the circumstances of the case."

All that appears to have been done in the report of 2nd October which the police called their incomplete challan. The witnesses named in the second challan of 5th October were not witnesses who were 'acquainted with the circumstances of the case.' They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were 'acquainted with the circumstances of the case'. Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind

which S. 173(1) of the Code contemplates. There is no force in this argument, and we hold that the magistrate took proper cognizance of the matter."

The learned counsel for the accused petitioners, however, contended that in the old Code the provisions, like the one contained in sub-section (5) of S. 173 of the new Code, were not there and, therefore the authority of the Supreme Court decision in *Tara Singh's case* (supra) would not be applicable in the context of the changed situation brought about by the incorporation in the new Code of sub-section (5) of S. 173 thereof. The learned counsel for the accused-petitioners laid emphasis on the fact that the investigation in terms of the definition thereof shall not be considered complete unless the police had collected all the evidence and formed their opinion thereon and since in cases, where the experts' report was awaited, obviously it could not be said that all evidence had been collected, nor in its absence the investigating officer would be in a position to form an opinion. In order to show that the aforesaid steps are the necessary ingredients of the investigation, reliance has been placed on the following observations of Jagannadhadas, J., who delivered the judgment for the Bench in *H.N. Rishbud* v. *State of Delhi*, AIR 1955 SC 196 (at p. 201):

"If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his excluding a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefor under S. 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under S. 173 of the Code in the prescribed form furnishing various details.

Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest

of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of 9a) the examination of various persons (including the accused) and the reduction or their statements into writing, if the officer thinks fit, (b) the search of places or seizure of thinks considered necessary for the investigation and to be produced at the trial and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under S. 173."

It is no doubt true that the definition of 'investigation' in terms conceives within 'investigation' in terms conceives within its scope the collection of the evidence and formation of the opinion by the investigating officer, but the question arises as to what do we mean by the 'collection of evidence and formation of opinion thereon.' Does the collection of evidence necessarily envisage that the investigating officer must record the statements of the witnesses who are to be cited to prove the prosecution case or must that investigating officer receive the reports of the experts which reports are admissible in evidence by virtue of S. 293 of the old Code? It has been authoritatively held at the highest judicial level in *Noor Khan* v. *State of Rajasthan*, AIR 1964 SC, 286, that sub-section (3) of S. 161 does not oblige the police officer to reduce in writing the statements of witnesses examined by him in the course of the investigation, but if he does record in writing any such statements, he is obliged to make copies of those statements available to the accused before the commencement of proceedings in the Court so that the accused may know the details and particulars of the case against him and how the case is intended to be proved…."

From the above observations of their Lordships of the Supreme Court, it is clearly deducible that it is not incumbent on the investigating officer to reduce in writing the statements of the witnesses- he may merely include their names in the list of witnesses in support of the prosecution case when submitting the charge - sheet. Surely, if the charge-

> sheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence, there is no rational basis for holding that similar charge-sheet would not be a police report of the requisite kind if the statements of the witnesses although had been recorded under S. 161(3), but either by design or by inadvertence are not appended with the report and that the investigation of the case for that reason alone would be considered to be incomplete thus entitling the accused to claim release on bail in view of the proviso to sub-section (2) of S. 167 of the Code if his detention had exceeded sixty days.
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> 20. For the reasons stated, I hold that the investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-section (2) of S. 173 of the Code to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under S. 161 of the Code, although these were available with him when he submitted the police report to the Magistrate."
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> **[Emphasis supplied]**

10. In para 10 of the judgment of **Gaurav** (Supra), the Rajasthan High Court opined that view taken in **Manmohan Singh @ Goldi** by Punjab & Haryana High Court is *per incuriam* and is in total contravention of view taken by the Full Bench of the same High Court in **Mehal Singh's** case. The Rajasthan High Court recorded its conclusion as under :-

> "14. This Court is also of the opinion that Section 173(8) of the Cr.P.C. permits the prosecution to file documents and evidence in addition to what has already been submitted alongwith the charge-sheet under Section 173(2) of the Cr.P.C. when a document in the nature of FSL report is filed by the learned Public Prosecutor under Section 173(8) Cr.P.C., it need not even be supplemented by an additional charge-sheet. The

> document in the nature of FSL report is otherwise also admissible in evidence under Section 293 of the Cr.P.C. Thus, no additional charge-sheet is needed to file such a document in the Court. The Court itself is empowered to summon the expert's report at any stage of the trial.
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> **15.** In view of the aforesaid discussion, this Court is of the opinion that as charge-sheets have been filed in these cases within the permissible period as provided in Section 36A(4) of the Cr.P.C. (*sic* N.D.P.S. Act), therefore, the right of the accused to be released on bail under Section 167(2) Cr.P.C. on ground of charge-sheet not having been filed within the statutory period does not survive."
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> **[Emphasis supplied]**

11. Pausing here for a moment, it is noteworthy that in the instant case, the challan has been filed within statutory time limit of 60 days. But it does not contain the FSL report regarding the nature of substance. Interestingly, the same question came up for consideration before a Division Bench of **Bombay High Court at Goa**, reported in **2021 SCC Online Bombay 2955 (Manas Krishna T.K. vs. State)** decided on September, 17, 2021.

12. Pertinently, the Full Bench judgment of Punjab and Haryana High Court in **Mehal Singh and others (AIR 1978 PLR 480)** was also considered by the Bombay High Court in **Manas Krishana T.K (supra)**. After considering the said judgment and other Supreme Court Judgments, the Bombay High Court poignantly held as under :-

> **25.** The above precise contention has already been rejected by the Hon'ble Supreme Court in Narendra Kumar Amin (supra), CBI v. R.S. Pai (supra), and Narayan Rao (supra). **These decisions, in terms, hold that the provisions of Section 173(5) are only directory notwithstanding the use of the expression**

> **"shall" therein.** This means that even if there is any omission or failure on the part of the police officer to forward the documents and statements as contemplated by Section 173(5) along with the police report under Section 173(2), there is no scope to hold that the police report under Section 173(2) is either incomplete or that the same was filed without the completion of investigations by the police officer.
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> 27. The Hon'ble Supreme Court upon analyzing the provisions in Sections 173, 190, and 309 rejected the aforesaid contention of the accused. The Court enumerated the information that must be detailed in the police report forwarded to the magistrate by the Investigating Officer as provided under Section 173(2). The Court then noted that even Section 190(1) (b) Cr.PC refers only to a police report under 173(2) for taking cognizance. The Court then referred to the three-judge bench judgment in CBI v. R.S. Pai (supra) wherein it was held that omission in not producing relevant documents at the time of submitting the police report can always be made good by the police officer after seeking leave to produce the same. In R.S. Pai (supra), **the three-judge bench had proceeded to observe that if further investigation is not precluded under Section 173(8), then, there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation and the word 'shall' used in Section 173(5) cannot be regarded as mandatory but is only directory.**
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> **[Emphasis supplied]**

13. The conclusion drawn by the Bombay High Court is recorded in para-42 which reads thus :-

> **42.** Therefore, on the analysis of the statutory provisions, as also the decisions that have analyzed various shades of such statutory provisions, we believe that a police report or a charge sheet containing the details specified in Section 173(2), if filed within the period prescribed under Section 167(2) is not vitiated or incomplete simply because the same was not accompanied by a CA/FSL report

> and, based thereon, there is no question of the accused insisting on default bail.
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> **[Emphasis supplied]**

14. The Delhi High Court in **Sandeep v. State (NCT of Delhi), 2022 SCC OnLine Del 2317** on the same issue recently opined as under :-

> **9.** The present case, the petitioner has been arrested on 07.09.2021. The issue whether a person is entitled to default bail on account of the charge sheet having been filed without FSL report is still yet to be determined by the Hon'ble Supreme Court.
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> **10.** This Court in Mehabub Rehman (supra) has taken a view which reads as under:
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> "19. Applying the ratio of decision in Kishan Lal (Supra) to the present case, I find that the learned trial court has rightly dismissed petitioner's bail application while holding that though the FSL report has been filed after filing of bail application and after completion of 180 days of investigation, but the charge-sheet cannot be held to be incomplete because of the pendency of FSL report over voice sample, as preparation of report on voice sample is not in the hands of IO…."
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> **11.** For the above reasons, I am of the view that the petitioner does not automatically gets a right of default bail in the absence of FSL report accompanying charge sheet. The same has also been made clear by the judgments of Mehabub Rehman(supra).
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> **[Emphasis supplied]**

15. The Gujrat High Court in **Narendra K. Amin v. Central Bureau of Investigation, 2013 SCC OnLine Guj 8611** also considered an aspect relating to release of applicant on default bail under Section 167 (2) of the Cr.P.C. The High Court recorded its finding as under :-

7.7 **In Dinesh Dalamiya v. CBI [(2007) 8 SCC 770]**, the Supreme Court while dealing with question of right to bail under Section 167(2) proviso in a situation where the accused was absconding and was yet to be arrested, held that investigating agency was within his right to submit charge-sheet notwithstanding the pendency of further investigation under Section 173(8). The Apex Court stated,

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

It was further observed that,

"The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under subsection (2) of Section 173 and further investigation contemplated under subsection (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.

12. The presentation of challan on 03.07.2013, took care of the observed of statutory time limit contemplated for investigation. While right to investigate further is not closed as

> observed inDinesh Dalamiya(supra), the juncture marked end of investigation phase, hence, operation of Section 167(2) and taking of cognizance of offence by the Magistrate. Resultantly, right of the applicant-accused to seek default bail under the said provision no more remained alive. The challan was filed within 90 days which was a due compliance as discussed above. After 90 days, Section 167(2) proviso ceased to govern the rights of the accused and the matter went out of the province of said Section. The challan filed was "a police report acted upon" in terms of Section 173 of the Cr.P.C. Non-availability of accompaniments being the documents or extracts thereof mentioned in the police report on 03.07.2013 did not in any way invalidated the filing of the charge-sheet. It was a charge-sheet well filed in law as required for the purpose of Section 167(2) of the Code.

16. This judgment of Gujarat High Court was affirmed by the Supreme Court in **Narendra K. Amin v. Central Bureau of Investigation (2015) 3 SCC 417.**

17. In view of **(2008) 14 SCC 283 (Pradip J. Mehta v. CIT),** the judgment of another High Court as such is not binding on this High Court but all the same they have persuasive value. I have carefully gone through Section 173(2) and 173 (5) and Section 190 of Cr.P.C.

18. In the considered opinion of this Court, the word 'shall' employed in Section 173 (5) of the Cr.P.C. is only directory in nature in view of the judgment of Supreme Court in **Narendra K. Amin (supra).** A conjoint reading of the provisions aforesaid does not lead this Court to the conclusion that non-filing of FSL report with the challan either vitiates the challan or makes the applicant entitled for the default bail. Thus, I am in agreement with the view taken by Rajasthan, Gujarat and Bombay High Court in above mentioned

cases and unable to pursuade myself with the view taken by the Panjab and Haryana High Court.

19. As a result of aforesaid discussion, no case is made out for grant of default/mandatory bail to the applicant.

20. Resultantly, this bail application is **dismissed.**

(SUJOY PAUL)
JUDGE

Akanksha/Ahd