

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL**

**CRIMINAL REVISION No.4874 of 2023**

**Between:-**

**BRIJESH KUMAR MISHRA S/O LATE  
SHYAM DEV MISHRA, AGE ABOUT 42,  
OCCUPATION – LABOUR R/O VILLAGE  
CHANDWAHI P.S.BAHARI DISTRICT  
SIDHI (M.P.).**

**.....APPLICANT**

***(BY SHRI ANUJ PATHAK - ADVOCATE)***

**AND**

**STATE OF MADHYA PRADESH  
THROUGH POLICE STATION BAHARI  
DISTRICT SIDHI (M.P.).**

**.....RESPONDENT**

***(BY SMT. NALINI GURANG – PANEL LAWYER)***

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RESERVED ON : 05.12.2023

PRONOUNCED ON : 20.12.2023

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*This criminal revision coming on for hearing this day,  
Hon'ble Shri Justice Dinesh Kumar Paliwal, passed the  
following:*

**ORDER**

This criminal revision under Section 397/401 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") has been

filed assailing the order dated 03.10.2023 (Annex.A/1) passed by learned Special Judge, NDPS Act, Sidhi in connection with Crime No.294/2023 for commission of offence under section 8,21,22 and 29 of NDPS Act whereby application filed by the applicant under section 167(2) of Cr.P.C for grant of default bail has been rejected on the ground that though charge sheet has not been filed within a period of 90 days but time granted for filing the charge sheet had already been extended to 180 days by the incharge court.

2. As per prosecution story in the intervening night of 17/18-06.2023, 10 gram smack was seized from the possession of the applicant. The seized quantity of contraband was higher than the minimum quantity but less than the commercial quantity.

3. Learned counsel for the applicant has argued that applicant was arrested on 17/18-06.2023 in connection with Crime No.294/2023 of P.S.Bahari District Sidhi for offence punishable under section 8, 21,22 and 29 of NDPS Act. He was produced before the court on 18.06.2023 and since then he is in judicial custody. It was incumbent on the part of the investigating agency to file charge sheet within a period of 60 days i.e on 18.08.2023 but it was not filed. It is contended that applicant made an application under section 167(2) of Cr.P.C on 27.09.2023, seeking default bail on the ground of non-filing of charge sheet within a period of 90 days from the date of police custody of accused but same was dismissed on 03.10.2023 on the ground that time limit for filing the charge sheet has already been extended upto the period of 180 days by the incharge judge by order dated 27.09.2023. As such learned trial court vide impugned order

dated 03.10.2023 dismissed the application for default bail. Hence, this revision.

4. I have heard learned counsel for the applicant as well as learned counsel for the respondent/State at length and perused the case diary.

5. Learned counsel for the State by opposing the bail application submitted that for submission of charge sheet the period is 180 days as per section 36-A of NDPS Act. As learned incharge judge had already extended the time period of filing charge sheet. Therefore, learned Presiding Officer has not committed any error in dismissing the default bail application under section 167(2) of Cr.P.C.

6. Learned counsel appearing for the applicant submitted that applicant is entitled for default bail as investigating agency, in the instant case, has failed to file the charge sheet before the Special Judge within the stipulated period.

7. In order to test merit of the arguments of learned counsel for the parties and the fact that applicant is entitled to default bail or not, it is necessary to examine the provision of section 167(2) of Cr.P.C and section 36-A of NDPS Act, 1985 which are reproduced as under :-

*“Section 167(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, 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;*

*(b) no Magistrate shall authorise detention in any custody 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.*

*36A. Offences triable by Special Courts.—*

*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*

*(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts*

*than one for such area, by such one of them as may be specified in this behalf by the Government;*

*(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that in cases which are triable by the Special Court where such Magistrate considers—*

*(i) when such person is forwarded to him as aforesaid; or*

*(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;*

*(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;*

*(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.*

*(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the*

*Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.*

*(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.*

*(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days": Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.*

*(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]*

8. From perusal of section 167(2) of Cr.P.C, it is apparent that if charge sheet is not filed within the specified period accused is entitled to be enlarged on bail. As per the provision of section 167(2) of Cr.P.C default bail is the right of the accused. The object of the provision of section 167(2) of Cr.P.C is that

investigating agency should file the charge sheet well within time. Right of the accused is statutory right. In this case intermediary quantity of the contraband is alleged to have been recovered from the accused; therefore, the offence for which the accused has been booked is punishable with rigorous imprisonment for a term which may extend to 10 years and fine which may extend to Rs.1 lakh in terms of section 20 of NDPS Act. Having regard to the aforequoted extract of section 167(2) of Cr.P.C the detention of the accused person in custody in the instant case cannot go beyond 60 days. The charge sheet against the applicant/ accused in this case was not filed till 03.10.2023 i.e almost for a period of 104 days while on the expiry of 60 days or 90 days, the applicant was entitled to default bail in terms of section 167(2) of the Cr.P.C.

9. Learned counsel for the applicant has submitted that the maximum punishment for the offence under section 22(b) of the Act is upto 10 years and no life imprisonment has been prescribed, therefore, maximum period for filing of charge sheet would be 60 days.

10. On the other hand, learned counsel for the respondent/State has submitted that maximum period for filing of charge sheet is 180 days under NDPS Act, therefore, the impugned order passed by the trial court is within four corners of law and warrant no interference by this court. Section 22(b) of NDPS Act read as under :-

*“22(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;*

11. From perusal of the case diary, it is apparent that offence under section 22(b) of the NDPS Act has been alleged against the applicant and the sentence for a term which may extend to 10 years when the maximum punishment is not death, life imprisonment or imprisonment for a term not less than ten years then section 167(2)(a)(ii) of the Act will apply and the accused will be entitled for grant of default bail after 60 days in case charge sheet is not filed. In case of ***Rakesh Kumar Paul Vs. State of Assam-(2017) 15 SCC 67***, it was held as under :-

*“...However, in all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then Section 167(2)(a)(ii) will apply and the accused will be entitled to grant of ‘default bail’ after 60 days in case charge-sheet is not filed.”*

*...The right to get this bail is an indefeasible right and this right must be exercised by the accused by offering to furnish bail.*

In the case in hand, it is necessary to mention that default bail under section 167(2) of Cr.P.C was filed on 27.09.2023. Time was given to the State to file reply and matter was fixed for 29.09.2023. Again, adjournment was granted and on 30.09.2023, the matter was fixed for 03.10.2023. Default bail application which was filed almost after a period of 103 days was not decided and time was granted. As such, it is apparent that in the case in hand learned Special Judge not only avoided to release the applicant on default bail but also not considered the plea of the accused in this behalf by rejecting the bail application.



12. In this case on 27.09.2023 when bail application under section 167(2) of Cr.P.C was filed, prosecution moved an application for extension of time from 60 days to 180 days and same was extended upto 180 days without giving any opportunity of hearing to the accused about extension of time.

13. In the case of *Uday Mohanlal Acharya Vs. State of Maharashtra-(2001) 5 SCC 453* while considering the provisions contained in Section 167(2) of Cr.P.C in the light of fundamental right to personal liberty of the person and the effect of deprivation of the same, the Hon'ble Apex Court observed as under :-

*“25 Out of the three Constitution Bench decisions of this Court referred to above and relied upon in the case of Sanjay Dutt, in the case of Naranjan Singh Nathawan & Ors. vs. State of Punjab, AIR 1952 SC 106, Patanjali Sastri, C.J., as he then was, speaking for himself, M.C.Mahajan, B.K. Mukherjea, S.R. Das and Chandrasekhara Aiyar, JJ., while considering an application for issuance of writ of habeas corpus whereby order of detention issued under Section 3 of the Preventive Detention Act, 1950 was challenged, laid down the law at page 108 as follows:-*

*This is undoubtedly true and this Court had occasion in the recent case of Makhan Singh v. State of Punjab, Petn. No. 308 of 1951: (AIR (39) 1952 S.C.27) to observe :*

*`it cannot too often be emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.*

*This proposition, however, applied with equal force to cases of preventive detention before the commencement of the Constitution, and it is difficult to see what difference the Constitution makes in regard to the position. Indeed, the position is now*

*made more clear by the express provisions of S.13 of the Act which provides that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order under S. 3 against the same person. Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.*

In para-13 of the aforesaid judgment, the majority view has been summarised which is reproduced as under :-

*“ 13..... On the aforesaid premises, we would record our conclusions as follows:*

*1. Under subsection (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.*

*2. Under the proviso to the aforesaid subsection (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.*

*3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being*

*released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.*

*4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no chargesheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.*

*5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of explanation I and the proviso to subsection (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the chargesheet is filed then the so-called indefeasible right of the accused would stand extinguished.*

*6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to subsection (2) of Section 167 if the accused files an application for bail and offers*

*also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.*

*With the aforesaid interpretation of the expression “availed of” if the chargesheet 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 subsection (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 chargesheet 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 [(1996) 1 SCC 722 : 1996 SCC (Cri) 202].”*

14. In the case of **Jigar @ Jimmy Pravinchandra Adatiya Vs. State of Gujarat—(2023) 6 SCC 484**, the Hon’ble Apex Court held as under :-

“44. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt to the decision in the case of Hitendra Vishnu Thakur is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of Sanjay Dutt held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to subsection (2) of section 167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by subsection (2) of Section 20 of the 2015 Act to subsection (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

51. The orders passed by the Special Court of extending the period of investigation are rendered illegal on account of the failure of the respondents to produce the accused before the Special Court either physically or virtually

*when the prayer for grant of extension made by the Public Prosecutor was considered. It was the duty of the Special Court to ensure that this important procedural safeguard was followed. Moreover, the oral notice, as contemplated by this Court in the case of Sanjay Dutt, was also not given to the accused.*

*52. Once we hold that the orders granting extension to complete investigation are illegal and stand vitiated, it follows that the appellants are entitled to default bail.”*

15. In this case the application for extension of time for filing charge sheet was filed after expiry of 60/90 days which is the initial period for filing the charge sheet. It is to be noted that in this case the prosecution within the said period neither filed the charge sheet nor filed any application for extension and when application for extension was filed almost after 100 days then no opportunity of hearing was given to the accused. As such, extension of time by learned Judge on the basis of application filed by the prosecution defeats the provision engrafted under provision of sub section 2 of section 167 of Cr.P.C.

16. The argument of learned counsel for the State that as per section 36-A of the NDPS Act the extended period for filing of charge sheet is 180 days and as such, application filed by the applicant has rightly been rejected by the learned trial court being beyond logic and law, is not tenable. For invoking of the provision of 36-A of the NDPS Act offences be punishable under section 19 or section 24 or section 27-A or offence must be involving commercial quantity whereas present case is related to offence under section 22(b) of the Act as the quantity seized from the

applicant is less than the commercial quantity. As such, the contention raised by learned counsel for the respondent/State being unacceptable, is rejected.

17. A perusal of the provision of section 22(b) and section 36(A) of NDPS Act and the facts of the case, it can be said that the quantity seized from the applicant is less than commercial quantity. As such, provision of section 36-A of NDPS Act is not applicable.

18. Thus, on the basis of above examination of the facts and legal position, it is apparent that in this case charge sheet was required to be filed within a period of 60 days and not in a period of 90 or 180 days. In this case, application for default bail under section 167(2) of Cr.P.C was filed on 27.09.2023 i.e almost after 100 days of the judicial custody and when application for extension of time was filed, no notice either oral or written was given to the accused about filing of the application for extension of period of filing of charge sheet. As charge sheet was not filed within 60 days and applicant filed the application almost after 90 days, the trial court was required to allow the application and dispose of the same on the same day. Thus, on screening the material on record, it is crystal clear that charge sheet was not filed within maximum period of 60 days. As per the law laid down by the Hon'ble Apex Court "*the right to get this bail is an indefeasible right*" which cannot be defeated by the prosecution after completion of the period as per provision of section 167(2) of Cr.P.C.

19. Thus, in view of the above discussion, the impugned order dated 03.10.2023 (Annex.A/1) passed by the learned trial court is not sustainable in law. Consequently, this revision petition is **allowed**. The impugned order dated 03.10.2023 (Annex.A/1) passed by learned Special Judge, NDPS Act, Sidhi in connection with Crime No.294/2023 for commission of offence under section 8,21,22 and 29 of NDPS Act, is set aside. It is directed that applicant – **Brijesh Kumar Mishra** be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- (Rupees Fifty thousand only) with one solvent surety in the like amount to the satisfaction of the trial Court, for his regular appearance before the trial Court during trial with a condition that he shall remain present before the concerned Court on all the dates fixed by it during trial. He shall abide by all the conditions enumerated under Section 437(3) of Cr.P.C. This order shall be effective till the end of the trial. However, in case of bail jump and breach of any of the conditions of bail, it shall become ineffective.

**(DINESH KUMAR PALIWAL)**  
**JUDGE**