

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
SRINAGAR**

Reserved on: 15.04.2022

Pronounced on: 20.04.2022

Bail App No.24/2022

ABDUL MAJEED BHAT

...PETITIONER(S)

Through: Mr. Aarif Javaid Khan, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

*Through: Mr. Sajad Ashraf, GA, vice
Mr. M. A. Chashoo, AAG.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has invoked jurisdiction of this Court under Section 439 of J&K Cr. P. C seeking bail in a case arising out of FIR No.68/2021 for offences under Section 8/15, 18 of the Narcotic Drugs and Psychotropic Substances, Act, (for short 'the NDPS Act') registered with Police Station, Srigufwara.

2) It is averred in the petition that the petitioner was arrested on 28.07.2021 in connection with alleged recovery of 89 kgs of Poppy straw. The charge sheet against the petitioner is stated to have been filed before the Court of Principal Sessions Judge, Anantnag, on 7th October, 2021 but at the relevant time, the FSL report was not accompanying the charge sheet. It is averred that despite directions extended from time to time by the learned Sessions Judge, the FSL report was not filed even after the

expiry of 180 days of arrest of the petitioner. On this ground, it is urged that because there was an incomplete and defective charge sheet before the learned Sessions Judge, as such, the petitioner had become entitled to default bail. It is averred that after the expiry of 180 days of his arrest, the petitioner applied for default bail before the learned Sessions Judge but the same has been rejected by the learned Sessions Judge vide his order dated 08.03.2022.

3) I have heard learned counsel for the parties and perused the material on record.

4) Certain admitted facts are required to be noticed. The petitioner is alleged to have been found in possession of commercial quantity of Poppy Straw. It is also an admitted fact that the report of FSL has not been filed by the prosecution before learned Sessions Judge along with the charge sheet and, in fact, it has not been filed within 180 days of arrest of the petitioner. It is also an admitted position that the charge sheet without FSL report was filed by the investigating agency well within the period of 180 days of arrest of the petitioner. The question that is required to be answered is whether a charge sheet filed without FSL report qualifies to be a defective charge sheet and if so, whether an accused, who has been in custody for more than 180 days prior to the filing of FSL report before the Court, is entitled to default bail.

5) For answering the aforesaid issue, it is necessary to have a look at the provisions contained in Section 36A of NDPS Act which provides for

modified application of the provisions contained in Section 167 of Cr. P.

C. It reads as under:

“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."

6) Before proceeding further, it would also be profitable to notice the provisions contained in Section 167 of Cr. P. C. It reads as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary

hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 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 of the accused in custody of the police 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.

[Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

[Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where no order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation

to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

7) From a conjoint reading of Section 36A of NDPS Act and Section 167 of Cr. P. C, it becomes clear that if an accused has been detained in connection with investigation of a case for a period of more than 180 days in an offence under NDPS Act, he is entitled to be released on bail if he is prepared to and does furnish bail unless the Special Court has extended the period of detention during investigation of the case beyond 180 days. In the instant case, detention of the petitioner has not been extended by the learned Sessions Judge beyond 180 days.

8) In the instant case, the charge sheet without FSL report has been filed within the statutory period of 180 days. The question whether a final report presented before the Court in terms of Section 173 of Cr. P. C is incomplete or defective without the opinion of the FSL expert is required to be considered in the light of the provisions contained in Section 173 of the Cr. P.C so as to determine whether the petitioner is entitled to default bail. Section 173 of the Cr. P.C provides that officer incharge of the police station has to forward to the Magistrate empowered to take cognizance of the offence, the report of the police after completion of the investigation. Sub-Section (2) provides the particulars which are required to be mentioned in the final report. Sub-section (8) of Section 173 clearly states that the investigating agency is not precluded from undertaking further investigation of the case and to forward further reports regarding evidence which may be collected during further investigation.

9) Thus, it is not that after completion of investigation of the case and presentation of final report before the Magistrate the investigating agency is precluded from collecting further evidence and producing it before the competent court. In these circumstances it may not be correct to hold that merely because certain report of expert is not accompanying with the final report, the said report is defective or incomplete. On the analysis of the statutory provisions of Section 173 and 167 of Cr. P. C, it can safely be stated that a charge sheet containing details specified in Section 173 of the Cr. P. C, if filed within the period prescribed under Section 167(2) is not vitiated or incomplete simply because the same was not accompanied by the FSL report.

10) The learned counsel for the petitioner has relied upon two judgments of Punjab & Haryana High Court in the case of **Vinay Kumar @ Vicky v. State of Haryana**, (CRR-712-2021 (O&M) decided on 14.10.2021) and **Rinku v. State of Haryana** (Criminal Revision No.1150 of 20202 decided on November 03, 20202), wherein the two learned Single Judges of the said Court have held that a challan devoid of report of the FSL is an incomplete challan and when no application for extension of time for purposes of investigation was made by the investigating agency, on expiry of period of 180 days, the accused is entitled to default bail.

11) I would respectfully beg to differ with the opinion rendered by the two learned Single Judges of the Punjab & Haryana High Court because in both these cases, the learned Judges have not noticed the provisions

contained in Section 173 of Cr. P. C, which clearly vest jurisdiction with the investigating agency to undertake further investigation of the case even after presentation of the final report. The interplay of provisions contained in Section 173 and 167 of the Cr. P. C has not been considered by the High Court of Punjab & Haryana. The analysis of these two provisions clearly shows that a charge sheet is not vitiated merely because report of the FSL is not filed within the period prescribed under Section 167 of the Cr. P. C.

12) My aforesaid view is supported by a recent judgment of the Karnataka High Court in the case of **Mr. Sayyad Mohammad @ Nasim v. State of Karnataka and another**. In the said case, the learned Single Judge of the Karnataka High Court has clearly observed that that the petitioner does not get a right to demand default bail under Section 167(2) of the Cr.P.C. merely because the charge sheet/final report filed by the Police after investigation is without FSL report, as non-filing of the FSL report by itself would not make the charge sheet contrary to Section 173(2) of the Cr.P.C. While taking the aforesaid view, the learned Single Judge of the Karnataka High Court has relied upon the judgment of the Division Bench of the Bombay High Court in the case of **Mans Krishna T. K. v. State**, 2021 SCC Online Bom 2955. In the said case, the Division Bench of the High Court of Bombay, in view of conflicting views of two learned Single Judges on the same very issue of an accused becoming entitled to default bail on the ground that FSL report did not accompany the final report, answered the reference in the following manner:

81. Resultantly, we answer this reference by holding the following:

(a) Question no. (i) is answered by holding that even in an NDPS case a police report containing the details prescribed under Section 173(2) Cr.P.C. is a complete police report or a charge sheet or a challan even if it is unaccompanied by a CA/FSL report. If such police report is filed within the period stipulated under Section 167(2) Cr.P.C. r/w. Section 36-A(4) of the NDPS Act, the accused cannot insist upon a default bail.

(b) Question no. (ii) is answered by holding that in an NDPS case, a charge sheet accompanied by a field testing report as reflected in the Panchanama or otherwise also cannot be labelled as an incomplete police report/charge sheet/challan simply because the same was not accompanied by a CA/FSL report.

(c) Question no. (iii) is answered by holding that the Drug Law Enforcement Field Officers' Handbook issued by the NCB has no legal efficacy, in the sense that the handbook has no statutory flavour or the handbook is not a set of executive instructions issued by the Central Government."

Emphasis Supplied)

13) Again, the Supreme Court in the case of **Dinesh Dalmia vs. CBI, (2007) 8 SCC 770**, has held that though ordinarily all documents should accompany the charge sheet but even if all documents have not been filed, the same would not vitiate filing of the same.

14) From the foregoing enunciation of law on the subject, it is clear that merely because the FSL report did not accompany the charge sheet at the time of its presentation, before the learned Sessions Judge, it cannot be said that the charge sheet was incomplete or defective. This is particularly so, keeping in view the nature of substance which was allegedly recovered from the possession of the petitioner. Poppy Straw, the substance which is alleged to have been recovered from the petitioner in the instant case, can from its very appearance be detected by Investigating Officers who

are generally well-versed in these matters and, as such, it cannot be stated that the Investigating Officer by filing the charge sheet without waiting for the FSL report has tried to circumvent or defeat the right of the petitioner to default bail.

15) Thus, it can safely be stated that the charge sheet in the instant case has been filed within the statutory period of 180 days of arrest of the petitioner and the same without annexing with it the FSL report cannot be termed as defective or incomplete. Hence, the petitioner is not entitled to compulsive bail. Therefore, I do not find any merit in this bail application. The same is, accordingly, dismissed.

Srinagar,
20.04.2022
"Bhat Altaf, PS"

(Sanjay Dhar)
Judge

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No