

CRM-M-18004-2023 (O&M) treated as CRR-1659-2023
RAJESH ARORA @ GOLDY V/S STATE OF HARYANA

CRR-1545-2023 (O&M)
YOGESH AGRAWAL V/S STATE OF HARYANA

Present : Mr. Himanshu Arora, Advocate
for the petitioner in CRM-M-18004-2023.

Mr. Ajay Kadyan, Advocate
for the petitioner in CRR-1545-2023.

Mr. Ranvir Singh Arya, Addl. A.G., Haryana.

CRM-23790-2023 in CRM-M-18004-2023

Prayer in the instant application is for amending the head note and prayer clause of the petition.

Learned counsel for the petitioner has prayed that since the impugned order dated 24.03.2023 vide which the default bail of the petitioner under Section 167(2) of the Cr.P.C. in FIR No.437 dated 15.09.2022 under Section 22(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') (Section 29 of the NDPS Act added lateron) registered at Police Station Saran, District Faridabad was dismissed, is a revisable order, the instant petition may kindly be treated as a revision petition against the said order.

On oral request of the learned counsel with no opposition from the State, prayer is allowed. The Registry is directed to do the needful.

The application stands disposed of accordingly.

Main Cases

Both the petitioners i.e. Rajesh Arora @ Goldy and Yogesh

Agrawal are seeking setting aside of order dated 24.03.2023 and order

dated 17.05.2023 respectively, passed by learned Additional Sessions Judge, Faridabad, whereby their applications for grant of default bail under Section 167(2) of the Cr.P.C. in case FIR No.437 dated 15.09.2022 under Section 22(C) of the NDPS (Section 29 of the NDPS Act added lateron) registered at Police Station Saran, District Faridabad were dismissed.

For the sake of convenience, facts are being taken from CRM-M-18004-2023.

Brief facts of the case in hand as set up by the prosecution may be noticed as thus. In pursuance of receipt of a secret information, qua petitioner Rajesh Arora alias Goldy indulging in sale of Narcotic Injections, a naka was laid by the police party near Sarpanch Chowk in Nangal Enclave. In compliance of the provisions of Section 50 of the NDPS Act, Duty Magistrate SDO Panchayati Raj Faridabad was called to the spot, in whose presence, the search of the accused was carried out. On search, the accused was found to be carrying a black polythene in his right hand from which 18 BI Norphine (Buprenorphine) injections 2 ml each totaling 36 ml were recovered. Since the accused failed to produce any authorized license or permit, the FIR in question was registered. Thereafter, petitioner Yogesh Agrawal was nominated in the disclosure statement of petitioner Rajesh Arora alias Goldy under Section 29 of the NDPS Act.

Status report by way of affidavit of Abhimanyu Goyat, HPS, Assistant Commissioner of Police, Badkhal, District Faridabad in CRM-M-18004-2023 has been filed in the Registry of this Court which is taken on record subject to all just exceptions.

Learned counsel for the petitioners *inter alia* submit that the petitioners have been confined in judicial custody since 17.09.2022 and the period prescribed under NDPS Act for presentation of challan in cases involving commercial quantity i.e. 180 days was to expire on 14.03.2023. No doubt, the challan was presented on 21.01.2023, however, it was a matter of record that it was not accompanied by any FSL report and was not even filed by 14.03.2023. In the absence of the FSL report it was thus impossible to determine the exact nature of the narcotic substance allegedly recovered from the petitioners. Learned counsel have, therefore, vehemently argued that in the absence of any FSL report, investigation could not have been said to be complete and an incomplete challan had been filed by the investigating agency. In support, learned counsel have placed reliance upon ***Ajit Singh @ Jeeta and another Vs. State of Punjab (CRR No.4659 of 2015 d/d 30.11.2018)***. Still further, learned counsel while drawing the attention of this Court to para 6 of the reply, contend that it was also a matter of record, and as not disputed by the State in its reply, neither any application/report had ever been made or moved by the Public Prosecutor for extension of time to file the FSL report under Section 36A(1) of the NDPS Act nor the Court below had granted any extension of time for filing of FSL report. They, therefore, submit that in the circumstances, the petitioners were entitled to be released on bail under Section 167(2) of the Cr.P.C.

Per contra, learned State counsel while controverting the prayer and submissions made by the counsel opposite, submits that the petitioners were apprehended pursuant to a secret information received

and 18 injections of BI Norphine (Buprenorphine) (2 ml each) were recovered from the petitioners. Since the contraband recovered fell under the commercial quantity, the petitioners did not deserve the concession of bail. It has further been submitted that no doubt there was no FSL report annexed with the challan, however, on 01.05.2023, FSL report had since been received, therefore, now the right of the petitioners to seek default bail under Section 167(2) of the Cr.P.C. stood extinguished.

On a pointed query put to the learned State counsel, he, on instructions, however, was unable to dispute that the FSL report was not filed within the statutory period of 180 days and further no application/report under Section 36A(1) of the NDPS Act was moved by the learned Public Prosecutor for extension of time to file the FSL report.

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

Before proceeding further, it would be apposite to reproduce the provisions of Section 167(2) of the Cr.P.C. which read as under:-

“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 subsection 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;

(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. 1 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;]. 2 Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

A perusal of the above provisions reveal that different time periods, depending upon the nature and gravity of the alleged offences have been provided for completion of investigation. In case on expiry of the stipulated period, the investigation is still incomplete, the accused would become entitled to the grant of default bail under Section 167(2) of the Cr.P.C.

For cases inviting the mischief of offences under the NDPS Act, the statutory period for completion of investigation has been provided under Section 36A(4) of the NDPS Act. For facility of reference the said provision is reproduced as under:-

“36A. Offences triable by Special Courts

XXXX XXXX XXXX

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27 A 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.”

A bare reading of the aforementioned provision makes it clear that in case the investigation is not complete and for some reason the challan is not presented within the prescribed period of 180 days, the Special Court concerned can extend the period for filing of the challan upto one year, however, it would be only on the basis of a report submitted by learned Public Prosecutor with regard to the progress of investigation along with specific reasons for detaining the accused beyond the stipulated period.

A conjoint reading of Section 167(2) of the Cr.P.C. and Section 36A(4) of the NDPS Act makes it abundantly clear that a great deal of emphasis has been laid on the completion of investigation within the period prescribed for various offences.

Investigation would, thus, include within its ambit all proceedings conducted by the investigating agency for collection of all such material and evidence which would facilitate in ascertaining as to whether the offences alleged have been committed or not. In cases

under the NDPS Act, without the opinion/findings of the Chemical/Forensic Examiner qua the nature of the substance recovered, investigation would be deemed to be incomplete. Unless any definite opinion is received from the Chemical Examiner qua the nature of the substance recovered and sent to it, the Court would be impaired to take cognizance of the offences alleged, merely on the basis of allegations in the FIR, and still further on 'sight and smell' of the substance recovered. Therefore, it goes without saying that the FSL report would be the decisive document to ascertain whether an offence attracting the mischief of NDPS Act has been committed or not.

The Division Bench of this Court in *Ajit Singh @ Jeeta's case (supra)* has held that challan without the FSL report with regard to nature of substance recovered would be incomplete challan and in such circumstances, the accused would be entitled to be released on default bail.

Adverting to the case in hand, it is a matter of record that challan was presented without the FSL report on 21.01.2023. The statutory period of 180 days to file challan was to expire on 14.03.2023. Admittedly, even thereafter, no FSL report was filed by the prosecution as it was received only on 01.05.2023. Therefore, there can be no manner of doubt that the challan presented by the prosecution was an incomplete one.

Furthermore, it has not been disputed by the learned State counsel that no report as envisaged under Section 36A(4) of the NDPS Act was moved by the Public Prosecutor. Hence, submissions of the learned State counsel that FSL report had been since received, would in

no manner come in the way of the petitioners being granted default bail under Section 167(2) of the Cr.P.C.

The petitioners are hereby ordered to be admitted to bail in terms of Section 167(2) of the Cr.P.C. on their furnishing bail/surety bonds to the satisfaction of the learned Trial Court/Duty Magistrate concerned.

This Court in *Saleem @ Mulla Vs. State of Haryana, CRM-M-11271-2021 (d/d 26.03.2021)* had categorically observed that in case the statutory provisions of Section 36A(1) of the NDPS Act are not complied with and the Public Prosecutor does not make a report in the said regard before the Trial Court concerned, appropriate disciplinary action should be initiated against the erring officials.

This Court expresses its deep anguish and dismay qua the lackadaisical approach of the prosecution while dealing with cases under the NDPS Act. It is evident that the observations and directions of this Court in *Saleem @ Mulla's case (supra)* have fallen on deaf ears. Time and again, it has come to the notice of this Court that in cases under the NDPS Act, involving commercial quantity, and in some cases where the accused are involved in a number of other NDPS cases, due to insouciance of the prosecution neither FSL report is being filed within the statutory period nor any report for extension of time is moved under Section 36A(4) of the NDPS Act. As a consequence, accused who in some cases may not have been otherwise entitled even to bail under Section 439 of the Cr.P.C. become eligible to be released on default bail under Section 167(2) of the Cr.P.C. No doubt, the provisions of Section 167(2) of the Cr.P.C. have to be interpreted in

consonance with the right of the accused to protection of life and liberty against unauthorized arbitrary detention, however, it must be borne in mind that cases of commercial quantity under the NDPS Act attract the stringent conditions under Section 37 of the NDPS Act in case the accused is to be released on regular bail. However, due to these lapses on the part of the prosecution, which without doubt raise eyebrows, it appears that the rationale behind the provisions of Section 37 of the NDPS Act is being defeated and accused, who in some cases may be a part of a drug syndicate are released on bail.

The despondency that the drug menace has cast all over, specially in this part of the country is not hidden. How it is devouring generation after generation is hair curling. In this backdrop, the prosecution cannot be plagued by incompetence so as to render the provisions of law virtually ineffective. This Court, therefore, refuses to be a mute spectator.

Let an affidavit be filed by the State as to why the prosecution failed to make a report under Section 36A(1) of the NDPS Act for seeking extension of time to file the FSL report.

Adjourned to 24.07.2023.

A photocopy of this order be placed on the file of other connected case.

18.07.2023

Vinay

(MANJARI NEHRU KAUL)
JUDGE