

(2020) 09 DEL CK 0166
In the Delhi High Court
Case No : Bail Application No. 2075 Of 2020

Babu	Vs	APPELLANT
State (GNCT Of Delhi)		RESPONDENT

Date of Decision : 25-09-2020

Acts Referred:

Constitution Of India, 1950 — Article 21, 22(1)
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 21(B), 36A(4), 50
Code Of Criminal Procedure, 1973 — Section 167, 167(2), 167(2)(a)(ii), 173, 173(1)
(a), 173(2), 190, 190(1)(b), 293(4)
Indian Penal Code, 1860 — Section 302

Citation : (2020) 09 DEL CK 0166

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Kundan Kumar, Meenakshi Chauhan

Final Decision : Dismissed

Judgement

Mukta Gupta, J

1. The petitioner is in custody in case FIR No. 1203/2019 under Section 21(B) of the NDPS Act registered at P.S. Sultanpuri, Delhi. Case of the prosecution is that on 6th December, 2019, the petitioner was found to be in possession of 50 gms. of Heroin and 50 gms. of Heroin was recovered from the co-accused.

2. According to learned counsel for the petitioner, the alleged recovery from the petitioner being of a quantity less than the commercial quantity, the maximum punishment which could be awarded to the petitioner was upto 10 years' imprisonment besides fine and thus, the charge sheet was required to be filed within 60 days and the Special Judge had no jurisdiction to remand the petitioner without charge sheet after 4th February, 2020. The charge sheet was not filed till 4th February, 2020, hence, according to the petitioner, he was entitled to bail under Section 167(2) CrPC. The petitioner was not represented by a lawyer engaged by him and the learned Trial Court though provided him with legal aid

on the first day of remand before it i.e. 7th December, 2019, however, thereafter, no advocate appeared for the petitioner. As the petitioner was unrepresented by the legal aid counsel, he was not advised to file an application seeking statutory bail after expiry of the stipulated period of 60 days under Section 167(2)(a)(ii) CrPC and before the filing of the charge sheet. Admittedly, the charge sheet was filed on 13th February, 2020 and that too, without the FSL report which could have opined that the alleged recovery from the petitioner was of Heroin. Thereafter, the petitioner filed an application for regular bail which came up before the learned Special Judge on 22nd July, 2020 and was dismissed. Even in the said petition, from the impugned order dated 22nd July, 2020, it is not evident that the learned Trial Court considered the aspect of grant of default bail to the petitioner. Hence, the present petition seeks regular bail in view of the charge sheet not having been filed within the statutory period of 60 days under Section 167(2)(a)(ii) CrPC and no FSL report having been filed till the filing of the present bail petition, petitioner is entitled to bail as per the decisions in Ajit Singh @ Jeeta and Anr. Vs. State of Punjab, Criminal Revision No. 4659 of 2015 (Division Bench, Punjab & Haryana High Court), Gural Singh and Anr. Vs. State of Punjab, Crl.Revision 791/2016 (Punjab and Haryana High Court). The petitioner also seeks bail on merits.

3. The present petition came up for hearing before this Court on 6th August, 2020 when the grounds as noted above urged were raised by the learned counsel for the petitioner. Since proper reply was not filed on 19th August, 2020 and even on 28th August, 2020, the petition was listed and heard on 4th September, 2020. Only on 4th September, 2020, for the first time, learned APP for the State submitted that the FSL report has been received and that supplementary charge sheet has been filed on 3rd September, 2020.

4. Be that as it may, the date on which the present petition was filed and notice was issued returnable for 19th August, 2020, no FSL report had been filed before the learned Trial Court.

5. The issues urged by learned counsel for the petitioner in the present petition are that admittedly, the charge sheet was not filed within the statutory period of 60 days and the petitioner having been prevented from filing an application seeking the default bail, for the reason, he was not represented by a lawyer, it was the bounden duty of the learned Special Judge to have informed the petitioner about his right of default bail as also to provide legal aid in which the learned Special Judge failed. It is further contended that even if the so called charge sheet was filed on 13th February, 2020, the same was incomplete charge sheet as one of the essential ingredients in the charge sheet was the requirement to show that the recovery from the petitioner was of a contraband prohibited under the provisions of NDPS Act, which basic/essential ingredient of the offence was missing in the charge sheet filed on 13th February, 2020. In the absence of the report of the FSL and the said report having not been filed till the petition was filed before the learned Additional Sessions Judge/Special Judge in

July, 2020 and even till petition was filed before this Court, the petitioner was still entitled to grant of default bail.

6. It is a trite law that when a charge sheet is not filed within the statutory period, the order of remand for judicial custody passed by the learned Special Court would be an illegality and the accused would be entitled to the default bail under Section 167(2)(a)(ii) Cr.P.C. for which the accused is required to file an application seeking default bail before the charge sheet is filed.

7. Constitution Bench of the Hon'ble Supreme Court, in the decision reported as (1994) 5 SCC 410 Sanjay Dutt Vs. State Through CBI, Bombay (II), following the decision reported as AIR 1994 SC 2623 Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors. held that, if before application seeking default bail is filed by an accused, the charge sheet is filed, the accused will not be entitled to the bail under Section 167(2)(a)(ii) CrPC. It was also held that the indefeasible right of the accused to be released on bail for non filing of the charge sheet within the statutory period under Section 167(2) CrPC, is a right which enures to and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remains enforceable on the challan being filed.

8. In the present case, the petitioner could not file an application seeking indefeasible right to bail under Section 167(2) CrPC on account of inaction on the part of the learned Special Court in ensuring that the petitioner was represented by a counsel during the period of remand as well and that he was informed of the said right.

9. Hon'ble Supreme Court has repeatedly emphasized the bounden duty of the Trial Courts to inform the accused of his right to seek default bail. In the decision reported as (2017)15 SCC 67 Rakesh Kumar Paul Vs. State of Assam, expounding the duty of the Courts in providing free legal assistance to the accused as also informing him of his right to seek the statutory bail, held as under:-

"43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, it is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right. In *Khatris v. State of Bihar* the Judicial Magistrate did not provide legal representation to the accused since they did not ask for it. It was held by this Court that this was unacceptable and that the Magistrate or the Sessions Judge before whom an accused appears must be held under an obligation to inform the accused of his or her entitlement to obtain free legal assistance at the cost of the State. In *Suk Das v. Union Territory of Arunachal Pradesh* the accused was tried and convicted without legal representation, due to his poverty. He had not applied for legal representation but notwithstanding this, this Court held that the trial was vitiated and the sentence awarded was set aside, particularly since the accused was not informed of his entitlement to free

legal assistance, nor was an inquiry made from him whether he wanted a lawyer to be provided at State expense. In *Rajoo @ Ramakant v. State of Madhya Pradesh* the High Court dismissed the appeal of the accused without enquiring whether he required legal assistance at the expense of the State even though he was unrepresented. Relying on *Khatri and Suk Das* this Court remanded his appeal to the High Court for re-hearing after giving an opportunity to the accused to take legal assistance. Finally, in *Mohammed Ajmal Mohammad* 22 (1981) 1 SCC 627 23 (1986) 2 SCC 401 24 (2012) 8 SCC 553 28 *Amir Kasab v. State of Maharashtra* this Court relied on *Khatri* and held that in paragraph 474 of the Report as follows:

"474... it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."

44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to 'default bail', to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in *Nirala Yadav*.

45. On 11th January, 2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of 'default bail' since the statutory period of 60 days for filing a charge sheet had expired, no charge sheet or challan had been filed against him (it was filed only on 24th January, 2017) and the petitioner had orally applied for 'default bail'. Under these circumstances, the only course open to the High Court on 11th January, 2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him 'default bail' on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge sheet having been filed against the petitioner, he is not entitled to 'default bail' but must apply for regular bail - the 'default bail' chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4th January, 2017 and 24th January, 2017 when no charge sheet had been filed, during which period he had availed of his indefeasible right of 'default bail'. It would have been another matter altogether if the petitioner had not applied for 'default bail' for

whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for 'default bail' during the interregnum between 4th January, 2017 and 24th January, 2017 as is evident from the decision of the High Court rendered on 11th January, 2017. On the contrary, he had availed of his right to 'default bail' which could not have been defeated on 11th January, 2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of opinion that the petitioner had satisfied all the requirements of obtaining 'default bail' which is that on 11th January, 2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail".

10. The facts of the present case are undoubtedly distinguishable from the facts in Rakesh Kumar Paul (supra) as between the period of 4th February, 2020 to 13th February, 2020, the petitioner having not been informed about his indefeasible right to default bail, he could not seek the same by filing an application and as held in a catena of decisions of the Hon'ble Supreme Court, unless the accused applies for the default bail during the said period, the accused will not be entitled to the same as a matter of right.

11. In the decision reported as AIR 1994 SC 2623 Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors., it was laid down that the default in completing the investigation within the stipulated period though gives an indefeasible right in favour of the accused, however, the accused cannot be granted bail automatically without filing any application to get benefit thereon.

12. Since in the present case, the petitioner has not applied for default bail not even orally during the period from 4th February, 2020 to 13th February, 2020, the petitioner is not entitled to the default bail on this count.

13. The second submission of the learned counsel for the petitioner is that since the charge sheet was filed without the FSL report in an offence under the NDPS Act wherein mere possession of the contraband is an offence, the same would amount to filing of an incomplete charge sheet and thus, the petitioner having exercised the right of bail before filing of the complete charge sheet, the petitioner would be entitled to default bail.

14. Learned counsel for the petitioner in this regard has relied upon the decision

of the Division Bench of the Punjab and Haryana High Court in a batch of criminal revision petitions titled as Ajit Singh alias Jeeta and Another Vs. State of Punjab and connected petitions, Criminal Revision No. 4659 of 2015 decided on 30th November, 2018 wherein, Punjab and Haryana High Court, while dealing with the issue whether a charge sheet, without the report of the Chemical Examiner/Forensic Science Laboratory, amounts to an incomplete challan and in the absence of any extension of time under Section 36-A(4) of the NDPS Act, the accused is entitled to bail under Section 167 CrPC, considered the common question which was referred to the Division Bench in seven cases i.e.:

"Whether the presentation of report under Section 173(2) Cr.P.C. by the police without the report of Chemical examiner/Forensic Science Laboratory amounts to incomplete challan and in the absence of any extension of time under Section 36-A(4) of the N.D.P.S. Act, the accused is entitled to bail under Section 167(2) Cr.P.C.?"

15. In the aforesaid case under reference, the learned Single Judge also noted that some of the contrabands like Opium could be identified through naked eyes which proposition of the learned Single Judge was rejected by the Division Bench and it was held that the only way the nature of contraband can be established is on the basis of a Chemical Examiner's report and for this reason, the Chemical Examiner's report assumes an immense significance for the Trial Court to formulate an opinion as the very cognizance of an offence would depend on it. Therefore, it was held that the non-inclusion of the Chemical Examiner's opinion in the report under Section 173 CrPC would expose the accused to unfounded dangers imperiling and endangering his liberty since the provisions of the NDPS Act in its applicability to a trial and conclusion are stringent in consequence. The Division Bench of the Punjab and Haryana High Court held that for this reason as well, it is essential that the report of the Chemical Examiner be included in the report under Section 173 CrPC and without which, it can, at best, be termed to be an incomplete challan depriving the Magistrate of relevant material to take cognizance and if it is not submitted within the statutory period, the accused will be entitled to the benefit of default bail unless an application is moved by the Investigating Agency apprising the Court about the status of investigation with a prayer for extension of time to the satisfaction of the Court. The Division Bench of the Punjab and Haryana High Court held:

'What flows from the above is that when a report is submitted by the Police to the Magistrate, he ought to apply his mind to see whether it discloses the commission of an offence, so as to enable it to subject the accused to the rigors of a trial.

What would also necessarily flow from this, would be a prima facie opinion by the Court of the commission of an offence which under the N.D.P.S. Act would revolve around establishing the possession of contraband, its nature, content and extent.

With respect to the question posed by the learned Single Judge regarding some of the contraband being identifiable through naked eye, inspection based on experience and knowledge, would be a great fallacy and we would respectfully state that it would be grossly unsafe to rely upon such an opinion based on naked eye inspection backed by experience or knowledge to arrive at a prima facie opinion of the commission of an offence to submit an accused to the rigors of trial by the Magistrate in the exercise of its powers under Section 190 Cr.P.C.

The only way that it can be done is to establish the nature of contraband on the basis of the Chemical Examiner's report and for this reason, the Chemical Examiner's report assumes an immense significance for the trial Court, to formulate an opinion as the very cognizance of an offence would depend on it. Non-inclusion of the Chemical Examiner's opinion in the report under Section 173 Cr.P.C. would expose the accused to unfounded dangers imperiling and endangering his liberty since the provisions of the N.D.P.S. Act in its applicability to a trial and conclusion are stringent in consequence.

For this reason as well, it is essential that the report of the Chemical Examiner be included in the report under Section 173 Cr.P.C. and without which it can at best be termed to be an incomplete challan depriving the Magistrate of relevant material take cognizance and if it is not submitted within the requisite period of 180 days, it would essentially result in a default benefit to the accused unless an application is moved by the Investigating Agency apprising the Court of status of investigation with a prayer for extension of time to the satisfaction of the Court.

We emphasize on the stringent aspect of the N.D.P.S. Act which would compellingly persuade us to take the aforesaid view. Without determining the nature and content of the contraband, it would be draconian to propel an accused into the throes of a trial. The liberty of an individual would constantly be imperiled at the hands of dubious officials of the police who may venture to falsely implicate a person.

It is for this reason that we would unhesitatingly conclude that the Chemical Examiner's report is an essential; integral and inherent part of the investigation under the N.D.P.S. Act as it would lay the foundation of an accused's culpability without which a Magistrate would not be enabled to form an opinion and take cognizance of the accused's involvement in the commission of offence under the Act.

We are conscious of the fact that these issues have arisen largely on account of the inability of the State to provide the Chemical Examiner's report in time ostensibly for the reason that it is not equipped with enough laboratories to examine the contraband but for that, it is the State which has to be faulted and it would do well to hone up its own infrastructure so that the accused who deserves punishment, does not get the benefit of law and go scot free and gain access to a undeserving liberty'.

16. However, this very question of law, whether cognizance by the Magistrate/

Special Judge could be taken on a charge sheet without the report of the Chemical Examiner/Forensic Science Laboratory under NDPS Act, was referred to the Division Bench of the High Court of Delhi. In the decision on the said reference reported as 39 (1989) DLT 392 Kishan Lal Vs. State decided on 22nd September, 1989, this Court held as under:-

"(5) The question raised by the petitioners in a nut shell is whether the investigation of a case under the NDPS Act can be said to be complete in the absence of the report of the Scientific Officer and Chemical Examiner? The contention is that where the accused person is allegedly found in possession of or transporting a prohibited drug or substance, mainly two facts have to be established by the prosecution viz., (1) that of recovery of the commodity or substance and (2) that the possession of the said recovered material is illegal under the provisions of the NDPS Act. It is submitted that the Investigating Officer would be unable to give his opinion regarding the second aspect till he obtains the report of the expert and, Therefore, the report submitted by the Investigating Officer even if purported to be under Section 173(2) of the Code, must be held to be based on incomplete investigation.

(6) The learned Single Judge in his reference order has noticed that the reported cases in which this question has been settled related to offences under the Indian Penal Code. it was urged before him that the principles enunciated in those cases are not applicable to cases involving an offence under the NDPS Act or the old Opium Act or the Excise Act. To appreciate the contentions raised in these petitions, we have to notice the case law to some extent to highlight the settled principles.

(7) It has been held by the Supreme Court that although the police are not permitted to send an incomplete report under Section 173(2) of the Code, yet the investigation except for the report of an expert like the Serologist or Scientific Officer and Chemical Examiner is complete and, Therefore, the Magistrate is empowered to take cognizance of the offence on a police report which does not include the expert's opinion. In *Tara Singh v. State*. MANU/SC/0030/1951 : [1951]2SCR729, the Police had in fact filed a report dated the 2nd October, 1949 terming it an "incomplete challenge "and on the 5th October they filed a report which they called a "complete challan". Thereafter on the 19th October they filed yet another report which was termed as "Supplementary challan". The objection taken at the trial was that the Magistrate had no power to take cognizance of the case on 3rd October when the incomplete challan dated 2nd October, 1949 was placed before him. It was contended that the Police are not permitted to file an incomplete report under Section 173(2) of the Code.

(8) It appears from paragraph 14 of the reported judgment that the witnesses named by the police in the second report, i.e. the report of 5th October, 1949 were not the witnesses who were "Acquainted with the circumstances of the case" but merely formal witnesses who had either examined the injured or recorded the dying declaration. It further appears that vide the report dated 19th

October, 1949 which was termed as "supplementary challan", the report of the Imperial Serologist and the drawing of a sketch map of the occurrence were sought to be placed on the record- Negating the contention that the Magistrate had not taken proper cognizance, it was held that the police report dated 2nd October, 1949 was a complete report within the meaning of Section 190(1)(b) of the Code as entire investigation was complete. Thus the challan dated the 5th October, 1949 and the supplementary challan dated the 19th October, 1949 did not vitiate the first report which had been termed as an "incomplete challan". It is useful to quote paragraph 14 of the reported judgment:

"WHEN the police drew up their challan of 2-10-1949 and submitted to the court on the 3rd, they had in (act completed their investigation except for the report of the Imperial Serologist and the drawing of a 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 Section 173(1)(a) requires is that as soon as the police investigation under Chapter 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 appear 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 Section 173(1)(a) of the Code contemplates. There is no force in this argument and we hold that the Magistrate took proper cognizance of the matter."

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"15) We respectfully agree with the earlier decision of this Court in Tej Singh's case (supra). The decision in Hari Chand and Raj Pal v. State (supra) by a single Judge of this Court wherein it has been held that an "incomplete challan is not a police report within the admit of Section 173(2) of the Code does not support the case of the petitioners. From the reported judgment it is not clear whether all the witnesses or some of them "acquainted with the circumstances of the case" were yet to be examined when the report was filed The reason for calling it incomplete is not discernible. But it is safer to assume from the reading of the judgment that the investigation was not complete. Thus the report as envisaged under Section 173(2) of the Code could not have been filed.

(16) It is unnecessary for us to notice other judgments cited by the learned counsel in support of their plea that the investigation in a case like the present is to be held to be incomplete. In our view the Supreme Court decision in Tara Singh's case (supra) holding, inter alia, that a police report which is not accompanied by the expert's opinion, is to be held to be complete report as long as the witnesses who are acquainted with the circumstances of the case have been examined, continues to be law in spite of amendments in Section 173 of the Code.

(17) Now to advert to the main plea it is contended that for offences under the NDPS Act, the report under Section 173(2) of the Code, which in law is complete (the investigating officer having carried out all his mandatory duties), is to be considered "incomplete" in the absence of the opinion of the expert, in our view the submission is entirely misconceived. Apparently the power of the Magistrate to take cognizance of offences upon a police report is being related to the duty of the S.H.O. to forward a report on completion of investigation. The duty of the investigating officer under the Code is to complete the investigation without unnecessary delay. On its completion which necessarily means that the witnesses acquainted with the circumstances of the case have been examined, the officer in charge of the police station has to forward a police report in a prescribed form to a Magistrate empowered to take cognizance of the offence. However, no duty is cast on the Magistrate to take cognizance of the offence on a report which although complete except for the expert's opinion, does not make out an offence. While exercising his judicial discretion it is open to the Magistrate to seek a copy of the expert's opinion. There may even be cases under the NDPS Act where no public witnesses have been cited but that fact by itself would not show that till such time the Government expert's opinion is received, the investigation is incomplete. The police report if filed in accordance with the provisions of Section 173 of the Code would be complete report but the Magistrate in his judicial discretion may not take cognizance of the offence. Thus the provisions (if Section 173 of the Code have to be considered separate and distinct from Section 190(1)(b) of the Code.

(18) As far as the expert's report is concerned, we may note that by virtue of Subsection (4) of Section 293 of the Code, any document purporting to be report under the hand of the Director or a Deputy Director or Assistant Director of a Central forensic Science Laboratory or State Forensic Science Laboratory can be used as evidence in any inquiry, trial or other proceedings under the Code. It is true that it is open to the Court where it thinks fit to summon and examine the Government Scientific expert. But he is not a formal witness and, Therefore, no duty is cast upon the investigating officer to cite him as a witness.

(19) We thus hold that under Section 173 of the Code there is no mandate that a police report must enclose the document purporting to be a report under the hand of a Government scientific expert. In the present cases, as cognizance of the offences taken by the Magistrate was proper and valid, no order releasing the

petitioners on bail under Section 167(2) of the Code was required to be passed".

17. As noted above, the Division Bench of this Court relied upon the decision of the Supreme Court in (1951) 2 SCR 729 *Tara Singh Vs. State* which did not relate to an offence punishable under NDPS Act. A distinction can clearly be drawn between the cases relating to offences under the Indian Penal Code and offences under NDPS Act, for the reason, in a charge sheet filed without a FSL report, say for example, for an offence punishable under Section 302 IPC, the prosecution cites witnesses who may be the eye witnesses or of circumstantial evidence besides the post-mortem report, MLC etc. which material in itself is sufficient to constitute the ingredients of the offence(s) alleged by the prosecution. The FSL report in the said charge sheet only supplements the material already filed by the prosecution. This is in contradistinction to an offence punishable under NDPS Act where the possession of the contraband itself is an offence and if the prosecution in the charge sheet is not able to show that the alleged recovery from the accused was prohibited under the provisions of the NDPS Act, the basic ingredient of the offence would be missing, therefore, the cognizance on such a charge sheet would suffer from total non-application of mind and would be non-est. It is trite law that Court takes cognizance of the offence and not the offender. Thus unless the ingredients which constitute the offence are established in the charge sheet, the cognizance of the offence alleged in the charge sheet by the Magistrate/Special Court would be illegal.

18. Though this Court is of the view that the decision of the Division Bench of the Punjab and Haryana High Court is an appropriate opinion in relation to cognizance of an offence under NDPS Act without the FSL report being an illegality, however, bound by the Division Bench decision of this Court, judicial discipline mandates this Court to follow the same. Consequently, in view of the decision of the Division Bench of this Court in *Kishan Lal Vs. State* (supra), it is held that the petitioner is not entitled to grant of bail under Section 167(2) CrPC for non-filing of the FSL report along with the charge sheet.

19. In the alternative petitioner also seeks bail on merits. The petitioner was apprehended by a team of Narcotics Squad on 6th December, 2019 pursuant to an information received that the petitioner along with the co-accused was supplying smack in the area of Sultanpuri and Wazirpur J.J. colony and would come for the supply at about 6.30-7 pm. On the pointing out of the informer, the petitioner and the co-accused were apprehended and a notice under Section 50 of the NDPS Act was served on the petitioner and the co-accused and they were informed about their right to be examined before a Gazetted Officer and Magistrate. Despite refusal of the petitioner and the co-accused, ACP (Operations) was present when the search was conducted and on the search of the petitioner, 50 gms of Heroin was recovered and another 50 gms of Heroin was recovered from the co-accused. Two samples of 5 gms each were drawn and kept in separate pullandas. The samples and the remaining contraband were

sealed and after performing the necessary codal formalities, the same were deposited in the Malkhana.

20. Considering the nature of drug/Heroin allegedly recovered from the petitioner and no procedural infirmity having been pointed out, this Court finds no ground to grant bail to the petitioner on merits as well. Petition is dismissed.

21. Copy of the order be uploaded on the website of this Court.