

(2021) 03 DEL CK 0214

In the Delhi High Court

Case No : Criminal Revision Petition No. 340 Of 2020

Mehabub Rehman @ Empha

APPELLANT

Vs

State Through: Spl Cell, Delhi Police

RESPONDENT

Date of Decision : 22-03-2021

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 21, 29, 36A(4), 61, 85
Code Of Criminal Procedure, 1973 — Section 167(2), 167(2)(a)(ii), 173(2), 173(5), 190(l)(b), 293(4)

Citation : (2021) 03 DEL CK 0214

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Dr. Adish C. Aggarwala, Amish Aggarwala, Kuldeep Jauhari, Karan Ahuja, Anubhav Tyagi, Rajat Bhatia, Amit Chadha

Final Decision : Dismissed

Judgement

Suresh Kumar Kait, J

1. Petitioner is accused in FIR No. 160/2019, registered at police station Special Cell, Delhi for the offences under Sections 21/29/61/85 Narcotic Drugs and Psychotropic Substances Act, 1985 (henceforth referred to as the "NDPS Act") and is aggrieved of order dated 05.10.2020 passed by the learned trial court vide which his application under Section 167(2) Cr.P.C. and Section 36 A(4) of the NDPS Act has been dismissed.

2. The present petition has been preferred on the ground that the petitioner was formally arrested in this case on 11.03.2020 and thereafter, charge sheet under Section 173(2) of the Code was filed in this case, however, petitioner's name was not there in the charge sheet. Vide order dated 20.03.2020, learned Special Court had directed the petitioner to give his voice sample for getting it matched with the intercepted call recordings available with the prosecution. Thereafter, on 26.08.2019 supplementary charge sheet was filed against the petitioner without

the Central Forensic Science Laboratory (CFSL) report of the voice samples and no extension of time was sought by the prosecution for completion of investigation in terms of Section 36 A(4) of the NDPS Act. The statutory period of 180 days for completion of investigation and filing of complete charge sheet expired on 10.09.2020.

3. In aforesaid circumstances of the case, petitioner filed an application seeking bail under Section 167(2) Cr.P.C. read with Section 364(A) of NDPS Act on 23.09.2020. In the meanwhile, on 28.09.2020 report from CFSL was filed and vide impugned order dated 05.10.2020, the learned trial court dismissed petitioner's bail application while holding as under:-

"Heard. The main ground of statutory/ default bail u/s 167 (2) Cr.P.C. r/w section 36A (4) NDPS Act is that the incomplete charge-sheet was filed. The accused is alleged to be the main member of syndicate whose mobile was under interception. After the arrest of present accused, an application dated 20.03.2020 was filed by the IO to take the voice sample of the accused Mehboob Rehman, and vide order dated 20.03.2020 this court allowed the said application pursuant to which accused voice samples were recorded and report over the voice samples was prepared on 09.09.2020 and filed before this court on 28.09.2020 by the IO. Though the FSL report is found to be filed after filing of this application and completion of 180 days of investigation but the charge-sheet cannot be held to be incomplete because of the pendency of FSL report over voice sample as preparation of report on voice sample is not in the hands of IO. The judgments as relied by Ld.Addl. PP for the State are squarely applicable in present case. Accordingly, the present application has no merits and hence, dismissed. "

4. At the hearing, the learned senior counsel for petitioner submitted that the Hon'ble Supreme Court in Sanjay Kumar Kedia @ Sanjay Kedia Vs. Intelligence Officer, NCB and Anr. (2009) 17 SCC 631 has held that provisions of Section 36 A(4) NDPS warrant strict compliance and since investigation in this case was not completed in time and no extension in terms of aforesaid provisions of law was obtained, petitioner's detention in jail is illegal.

5. Learned counsel also relied upon a decision of this Court in Nitin Nagpal Vs. State 2006 SCC OnLine Del 704 wherein it is held that if Chemical Analyser's report is the foundation to a case, in the absence thereof, cognizance cannot be taken and therefore, non filing of FSL report within the statutory period mandated, gives indefeasible right to the petitioner under Section 167(2) of the Code.

6. Reliance was also placed upon decision of Constitution Bench in K. Veeraswami Vs. UOI & Ors. (1991) 3 SCC 655 to submit that if charge sheet is filed, it would be deemed to be complete if accompanied with all the statements and documents as contemplated in Section 173(5) of the Code and since the present case is solely based upon CFSL report of voice samples, it is covered under

Section 173(5) of the Code.

7. Learned senior counsel further submitted that the CFSL report was filed after filing of bail application and while passing the impugned order, learned Special Judge has ignored the ratio laid down in *K. Veeraswami* (Supra).

8. It was also submitted that various decisions cited by the prosecution have been erroneously applied by the trial court in the impugned order, as in those decisions Single Bench of different High Courts have placed reliance upon Hon'ble Supreme Court's decision in *Tara Singh v. State* AIR 1951 SC 441 and of the Punjab and Haryana High Court in *State of Haryana v. Mahal Singh and others* (1978) 80 PLR 480 which were both adjudicated well before the concerned special statute, i.e. NDPS Act 1985 (as amended) came into force and therefore provide a strict interpretation of general offences confined to IPC and procedure under Cr.P.C. and not in the context of the NDPS Act, 1985. Learned senior counsel also submitted that the impugned order is bad in law and contrary to provisions of law against the settled principles of natural justice and hence, deserves to be set aside.

9. On the other hand, learned Additional Public Prosecutor for State opposed the present petition by submitting that in this case, charge sheet was first filed on 13.03.2020 and the supplementary charge sheet was filed on 25.08.2020, which is well within the statutory period. The CFSL report regarding voice sample was received on 26.09.2020 and the same was filed before the trial court on 28.09.2020. Learned Additional Public Prosecutor submitted that obtaining CFSL report is beyond the reach of Investigating Officer and the purpose of filing supplementary charge sheet is to corroborate the evidence with the investigation and is a matter of trial and cannot be gone into at this stage.

10. Learned Additional Public Prosecutor placed reliance upon decision of a Division Bench of this Court in *Kishan Lal Vs. State* 1989 SCC OnLine Del 348 where a question was raised 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. Relevant para relied upon reads as under:-

"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*, AIR 1951 SC 441, (1) the Polka had infact filed a report dated the 2nd October, 1949 terming it as an "incomplete challan", 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."

11. Further, reliance was placed upon another decision of a Coordinate Bench of this Court in Babu Vs. The State (GNCT of Delhi) 2020 SCC OnLine Del 1229 wherein a similar question pertaining to non filing of charge sheet within the stipulated period and non filing of FSL report was considered. The relevant para relied upon are as under:-

"7. Constitution Bench of the Hon'ble Supreme Court, in the decision reported as (1994) 5 SCC 410 Sanjay Dutt v. State Through CBI, Bombay (II), following the decision reported as (1994) 4 SCC 602 : AIR 1994 SC 2623 Hitendra Vishnu Thakur v. State of Maharashtra 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."

12. At this stage, learned counsel for petitioner intervened and submitted that decision in Babu (Supra) is distinguishable on facts, as in the said case accused had not filed application for bail in default under Section 167(2) (a) (ii) Cr.P.C., whereas in the present case, petitioner had filed an application for default bail before the trial court.

13. However, learned Additional Public Prosecutor for State further argued that decision in Babu (Supra), the Hon'ble Single Bench has relied upon Hon'ble Division Bench decision in Kishan Lal (Supra) and held as under:-

"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 v. 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."

14. Learned Additional Public Prosecutor for State also placed reliance upon decision of another Coordinate Bench of this Court in Mohd.Arbaz; Abdul Rashid & Mohd. Nazim Vs. State of NCT of Delhi 275(2020) DLT 323 wherein the question "whether in a case of commission of an offence punishable under the provisions of the NDPS Act, which is founded on recovery of narcotic drugs and/or psychotropic substance, a police report under Section 173(2) of the Cr.PC can be considered as such if it is not accompanied by a Chemical Examiner's Report with regard to the substance recovered, and; whether an accused would be

entitled to bail in default under Section 167(2) of the Cr.PC where his application for such bail has been filed prior to the submission of the report under Section 173(2) of the Cr.PC but is taken up for consideration simultaneously with the said report being filed" were taken up for consideration and it was held as under:-

"24. This Court concurs with the view expressed by the Coordinate Bench of this Court in Babu (supra). Thus, the view expressed by the Division Bench of Punjab and Haryana High Court in Ajit Singh @Jeeta (supra) and the view expressed by the Bombay High Court in Sunil Vasantrao Phulbande (supra), convinced this Court that the view of the Division Bench in Kishan Lal (supra) is binding.

25. In view of the above, the petitioners' contention that the report submitted on 27.05.2019 could not be construed as a report under Section 173(2) of the Cr.PC must be rejected. The first question is, thus, answered in the negative."

15. Lastly, learned Additional Public Prosecutor for State submitted that in view of decision of Hon'ble Division Bench in Kishan Lal (Supra), this petition deserves to be dismissed.

16. In rebuttal, learned senior counsel for petitioner submitted that the factual matrix of decisions in Babu (Supra) and Mohd. Arbas (Supra) is different from the present case, as in the case in hand no recovery has been made from the petitioner and only evidence against him is the expert opinion on the voice samples.

17. The rival contentions raised by counsel for the parties have been heard in detail and I have gone through the impugned order, material placed on record as well as decisions relied upon.

18. The question for consideration is whether rejection of petitioner's application for bail in default by the trial court, upon filing of supplementary charge sheet beyond the statutory period of 180 days, without being accompanied by voice sample report of CFSL, deserves to be upheld or set aside. Another issue raised is that the decisions relied upon by the prosecution in Tara Singh and State of Haryana (Supra), which pertain to coming into force of NDPS Act (as amended), have application to the facts of the present case. I find that the aforesaid questions raised in the present petition have already been put to rest by catena of judgments passed by this Court while relying upon Division Bench decision of this Court in Kishan Lal (Supra). The pertinent observations in the aforesaid decision are as under:-

"14. 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 ambit of Section 173(2) of the Code does not support the case of the petitioners. From the reported judgment it is not clear where 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.

15. It is unnecessary for us to notice other judgments cited by the learned Counsels 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.

16. 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 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 incharge 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(2) of the Code would be complete report but the Magistrate in his judicial discretion may not take cognizance of the offence. Thus the provisions of Section 173(2) of the Code have to be considered separate and distinct from Section 190(l)(b) of the Code.

17. As far as the expert's report is concerned, we may note that by virtue of Sub-section (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.

18. We 'thus' hold that under Section 173(2) 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."

19. Applying the ratio of decision in Kishan Lal (Supra) to the present case, I find that the learned trial court has rightly dismissed petitioner's bail application while holding that though the FSL report has been filed after filing of bail application and after completion of 180 days of investigation, but the charge-sheet cannot be held to be incomplete because of the pendency of FSL report over voice sample, as preparation of report on voice sample is not in the hands of IO. It cannot be lost sight of the fact that immediately after petitioner's arrest on 13.03.2020, prosecution filed an application seeking permission to obtain voice sample of petitioner/accused which was allowed on 20.03.2020 and on the same day voice samples were taken, but thereafter, because of lockdown due to covid pandemic, report could be obtained only on 26.09.2020.

20. Moreover, in the impugned order, the learned trial court has taken note of the fact that the case of the prosecution rests upon alleged call interception and petitioner is allegedly the main member of syndicate whose mobile was intercepted. It has been brought to the notice of this court that non bailable warrants were issued against the petitioner and he was arrested in FIR No. 91/2020, registered at police station Kalichak, Malda, West Bengal for the offence under Section 21 of NDPS Act and after issuance of production warrants, he was arrested in this case. Pertinently, 10.5 kg of heroin was recovered from his associates in the present case. Whether or not petitioner is involved in the offence in question is a matter of trial and cannot be gone into at this stage. Accordingly, I am not inclined to grant relief to the petitioner.

21. In this view of the matter, impugned order does not call for any interference. The present petition is dismissed, lest it may prejudice either side at trial.

22. A copy of this order be transmitted to the Jail Superintendent concerned and trial court for information and necessary compliance.