

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE

CRM (NDPS) 1359 of 2024

In re: An application for bail under Section 439 of the Code of Criminal Procedure, 1973 / Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023.

- A n d -

In the matter of: Idul Mia.

.....Petitioner.

Before: The Hon'ble Justice Arijit Banerjee

The Hon'ble Justice Apurba Sinha Ray

For the petitioner : Mr. Md. Wasim Akram, Adv.

For the State : Mr. Antarikhya Basu, Adv.
Mr. Sandip Kundu, Adv.

CAV On : 26.09.2024

Judgment On : 08.10.2024

Arijit Banerjee, J.: -

1. The petitioner has been charged with offences punishable under Sections 21C/25/27A/29 of the NDPS Act, 1985. He was arrested on January 31, 2024. He says that he became entitled to statutory bail on the 181st day since the charge sheet that was submitted on the 177th day without the FSL report, is not a valid charge sheet. The FSL report was not submitted, whether by way of a supplementary charge-sheet or otherwise

within 180 days. He had applied for default bail on the 183rd day. The prayer for bail was rejected by the learned Trial Court. Hence, this present application for bail.

2. Learned Advocate for the petitioner relied on the following decisions: -

(i) Judgment and order dated 25/08/2023 passed in ***Rakesh Sha v. State of West Bengal, CRM (NDPS) 552 of 2023, reported at 2023 SCC OnLine Cal 2463,***

(ii) Judgment and order dated 17/01/2023 passed by a Full Bench of our Court in ***Subhas Yadav v. State of West Bengal, CRM 146 of 2021 reported at 2023 SCC OnLine Cal 313.***

(iii) Learned Advocate for the petitioner further pointed out that the issue as to whether or not a charge sheet without the FSL report in a NDPS case can be termed as an 'incomplete Report' under Section 173 Cr. P.C. is pending before the Hon'ble Supreme Court in the case of ***Mohd. Arbaz & Ors. v. State of NCT of Delhi, Petition(s) for Special Leave to Appeal (Crl.) No(s).8164-8166/2021.***

3. Learned Advocate for the state relied on a decision dated 18/07/2024 of a learned Single Judge of this Court in the case of ***Jagdish Singh v. The State of West Bengal and Anr., CRR no. 41 of 2024,*** in support of his submission that if the charge sheet contains details required under Section 173 Cr. P.C. and is filed within the period prescribed, it cannot be termed as incomplete in the absence of FSL report. Learned Counsel said that supplementary charge sheet has been filed after obtaining FSL report. The seized articles have tested positive for the presence of narcotics.

4. We have considered the rival contentions of the parties. Before proceeding any further let us note the provisions of Section 36-A (4) of the NDPS Act:-

“36-A. Offences triable by Special Courts. - (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 accused beyond the said period of one hundred and eighty days.”

5. Here, one may also note the relevant portion of Sections 167 (1) and (2) of the Code of Criminal Procedure, 1973:-

“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 no 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, - [Substituted by Act 45 of 1978, Section 13, for paragraph (a) (w.e.f. 18-12-1978).]

(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;]”

6. We see that Section 167 prescribes the maximum period for which an accused can be remanded to judicial custody without charge sheet being filed. Section 36A(4) of the NDPS Act prescribes that reference to “90 days” in Section 167(2) Cr. P.C. shall be construed as reference to “one hundred and eighty days” for the purpose of NDPS cases. However, if investigation cannot be completed within the said period of 180 days, the Special Court may grant further time up to one year on the report of the public prosecutor indicating the progress of the investigation and the reasons for detaining the accused beyond the period of 180 days.

7. Therefore, in an NDPS case, if charge sheet is filed within 180 days from the date of arrest of the accused, no right of statutory bail accrues in favour of the accused. The question is, what happens if the charge sheet is not accompanied by the Forensic Report? Would such a charge sheet satisfy the requirements of Section 36A (4) of the NDPS Act?

8. On the aforesaid issue, there is divergence of opinion. A Division Bench of this Court in the case of **Rakesh Sha (Supra)** held that a charge sheet submitted within 180 days without the Chemical Examination Report with an observation that a supplementary charge sheet will be filed in future with the FSL report is beyond the contemplation of the proviso to Section 36A(4) of the NDPS Act. The Bench observed:- “filing of a charge-sheet without the Examination Report in relation to an offence under the NDPS

Act is an exercise in futility and raises the presumption of the I.O filing a cipher only for the sake of closing the first window of the 180 days under the proviso to 36A(4) of the Act”.

9. The Division Bench also observed as follows:-

“The petitioner, before us, on the other hand, has been charged for commission of an offence under the NDPS Act which requires the Trial Court to take cognizance of the offence committed under the Act. This means that the CFSL/Laboratory Report becomes an essential and integral part of the investigation for establishing the charges under the NDPS Act. The Chemical Examination Report therefore becomes the most vital piece of evidence which is required to be made part of the charge-sheet.”

10. The Full Bench decision referred to by learned Advocate for the petitioner is really not germane to the point involved in the present case. The issue involved in this case did not arise for consideration in that case.

11. In so far as the case of **Jagdish Singh, (supra)**, is concerned, the same was a criminal revisional application filed by the accused person for quashing of the charge sheet which was filed without the FSL report. A learned Single Judge, noting that the issue as to whether or not in an NDPS case, a charge sheet filed unaccompanied by the FSL report is a valid charge sheet, is pending before the Hon’ble Supreme Court, disposed of the revisional application without passing any order. However, the learned Judge discussed various decisions of High Courts. It appears that the view of the Jammu and Kashmir High Court is that merely because the Expert’s Report does not accompany the final report, the charge sheet cannot be said

to be defective or incomplete. If the charge sheet contains details required under Section 173 Cr. P.C. and is filed within the period prescribed, it cannot be termed as incomplete, in the absence of FSL report. In this connection one may refer to the decision of the Jammu and Kashmir and Ladakh High Court in ***Abdul Majid Bhat v. UT of J&K MANU/JK/0285/2022***. In that case reliance was placed on the decision of the Karnataka High Court passed in the case of ***Mr. Sayyad Mohammad @ Nasim v. State of Karnataka & Anr., Writ Petition No. 5934/2021 decided on 29.03.2022***. The Karnataka High Court observed that the petitioner did not get a right to default bail merely because the Charge Sheet / Final Report filed by the Police was without the FSL report.

12. The view of the Bombay High Court also appears to be the same as the Jammu and Kashmir High Court. A Division Bench of that High Court in ***Manas Krishna T.K. v. State the Police Inspector/Officer-In-Charge & Anr., reported at 2021 SCC OnLine Bom 2955*** held that 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 in Section 167(2) Cr. P.C., read with Section 36-A(4) of the NDPS Act, the accused cannot insist on default bail.

13. We, therefore, see that while Jammu and Kashmir High Court as well as Bombay High Court have taken the view that the right of statutory bail does not accrue in favour of an accused if a charge sheet containing the particulars mentioned in Section 167(2) Cr. P.C. is filed within the stipulated time period, even if the charge sheet is not accompanied by the FSL report.

However, a Division Bench of the Calcutta High Court has taken a contrary view. Judicial discipline warrants that for the time being, we follow the view taken by a Coordinate Bench of our Court. The issue is to be finally decided by the Hon'ble Supreme Court before which the matter is pending.

14. In view of the undisputed fact that in the present case the charge sheet, although filed within the period of 180 days, was not accompanied by the FSL report, and that the FSL report was filed as part of a supplementary charge-sheet filed beyond 180 days from the date of arrest of the petitioner and after he applied for statutory bail, we have to hold that upon expiry of 180 days, the petitioner became entitled to statutory bail/default bail, and the learned Trial Court erred in not extending that privilege to the petitioner.

15. This petition therefore succeeds.

16. Accordingly, we direct that the petitioner, namely, Idul Mia shall be released on bail upon furnishing a bond of Rs.25,000/- (Rupees Twenty Five Thousand) with two sureties of like amount each, one of whom must be local, to the satisfaction of the learned Judge, Special Court under NDPS Act, 3rd Court, Malda, subject to condition that the petitioner shall appear before the learned Trial Court on each and every date of substantive hearing subject to the provisions of Section 317 of the Code of Criminal Procedure, 1973 / Section 355 of Bharatiya Nagarik Suraksha Sanhita, 2023, and shall not intimidate the witnesses and/or tamper with evidence in any manner whatsoever and on further condition that the petitioner, while on bail, shall not to leave the jurisdiction of Kaliachak P.S., Malda and shall also deposit his passport, if there be any, with the Trial Court before his release from the

Correctional Home. The petitioner shall also report to the Inspector-in-Charge of Kaliachak Police Station, Malda, once in a week until further orders.

17. In the event the petitioner fails to adhere to any of the conditions stipulated above without any justifiable cause, the learned Trial Court shall be at liberty to cancel his bail in accordance with law without further reference to this Court.

18. The application for bail being CRM (NDPS) 1359 of 2024 is accordingly disposed of.

19. Criminal Section is directed to supply urgent photostat certified copies of this order to the parties, if applied for, upon compliance of all necessary formalities.

(Arijit Banerjee, J.)

I agree.

(Apurba Sinha Ray, J.)