

Sahil Kumar vs State (Nct Of Delhi) on 6 October, 2023

Author: Amit Sharma

Bench: Amit Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 2980/2023
SAHIL KUMAR

versus
STATE (NCT OF DELHI)

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA
ORDER

% 06.10.2023

1. The present application under Section 439 of the CrPC seeks regular bail in case FIR No. 41/2023 under Sections 21/25/29 of the NDPS Act registered at PS Crime Branch.

2. The case of the prosecution is that on 15.02.2023, while patrolling, the police received specific information that the applicant and his associate Rattan would engage in supply of heroin between 04:30 PM to 05:00 PM. Thereafter, after completion of necessary formalities under the NDPS Act, a raiding team reached the spot and at about 04:45 PM, the applicant was apprehended. Personal search of the appellant was conducted and nothing incriminating was recovered. A scooty bearing registration number DL 8S CU 6540, which the applicant was riding, was searched and a black polythene bag containing two transparent polythenes was recovered. The said polythenes were found to contain a pink colored substance, which, on being tested with a field testing kit was found to be heroin. The recovered This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 06/10/2023 at 23:33:31 contraband weighted 2.5 Kg and accordingly, the present FIR was registered. The applicant was arrested on 16.02.2023 at 05:15 AM. Upon completion of investigation, chargesheet in the present case was filed on 11.08.2023.

3. Learned counsel for the applicant submits that he is pressing the present application only on the ground of incomplete chargesheet. It is submitted that the chargesheet in the present case was filed well within the stipulated time period of 180 days after arrest of the applicant, however, the same was incomplete on account of the fact that the report of the FSL was still awaited and therefore, the

applicant is entitled to default bail.

4. The law in relation to the issue raised in the present application was clarified by a learned Division Bench of this Court in *Kishan Lal v. State*, (1989) 17 DRJ 267, wherein it was held as under:

"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 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 06/10/2023 at 23:33:31 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(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."

5. A coordinate bench of this Court, in *Suleman v. State (NCT of Delhi)*, 2022 SCC OnLine Del 2346, in the background of the similar factual matrix, after discussing various judgments of this Court held as under:

"10. In the present case, the charge-sheet was filed on 3-3- 2021, however, without the FSL report. The charge-sheet was thus filed within the limitation period prescribed under law. The question in dispute narrows down as to whether the FSL report forms part of the charge-sheet and is an essential prerequisite to file with the charge-sheet.

FSL report not part of the charge-sheet

11. In *Kishan Lal v. State* [*Kishan Lal v. State*, 1989 SCC OnLine Del 348 : (1989) 39 DLT 392] , a Division Bench of this Court observed that a police report does not need to enclose an expert opinion of Government scientific expert with the charge- sheet and thus, no bail was granted under Section 167(2) as the charge-sheet was already filed within stipulated time. The observation reads as follows:

"... 5. The question raised by the petitioners in a nut shell is This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 06/10/2023 at 23:33:31 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 in complete 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 Penal Code, 1860. 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* [*Tara Singh v. State*, AIR 1951 SC 441] , (1) the Polka had infact filed a report dated the 2-10-1949 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 2-10-1949 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."

12. Further in view of the decision of Kishan Lal v. State [Kishan Lal v. State, 1989 SCC OnLine Del 348 :

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 06/10/2023 at 23:33:31 (1989) 39 DLT 392] , a Coordinate Bench of this Court in a recent judgment of Babu v. State (NCT of Delhi) [Babu v. State (NCT of Delhi), 2020 SCC OnLine Del 1229] , observed as under:

"... s18. 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 the 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 [Kishan Lal v. State, 1989 SCC OnLine Del 348 : (1989) 39 DLT 392] , 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...."

13. A similar view was followed by the Coordinate Bench of this Court in Mohd. Arbaz v. State (NCT of Delhi) [Mohd. Arbaz v. State (NCT of Delhi), 2020 SCC OnLine Del 2542 :

(2020) 275 DLT 323] , wherein it was observed that the accused should not be entitled to bail in default as the charge-sheet was already filed. The court held that the report shall not form part of the charge-sheet and hence, the bail under Section 167(2) was rejected. An appeal against the said judgment is pending before the Supreme Court in Mohd. Arbaz v. State (NCT of Delhi) [Mohd. Arbaz v. State (NCT of Delhi) SLP (Crl.) Nos. 8164-8166 of 2021 (SC)] . The observation of the High Court reads as under:

"... 24. This Court concurs with the view expressed by the Coordinate Bench of this Court in Babu case [Babu v. State (NCT of Delhi), 2020 SCC OnLine Del 1229] . Thus, the view expressed by the Division Bench of Punjab and Haryana High Court in Ajit Singh v. State of Punjab [Ajit Singh v. State of Punjab, 2018 SCC OnLine P&H 6941] and the view expressed by the Bombay High Court in Sunil Vasantrao Phulbande v. State of Maharashtra [Sunil Vasantrao Phulbande v. State of Maharashtra, 2002 SCC OnLine Bom 153] , convinced this Court that the view of the Division Bench in Kishan Lal case [Kishan Lal v. State, 1989 SCC OnLine Del 348 : (1989) 39 DLT 392] is

binding.

25. In view of the above, the petitioners' contention that the report submitted on 27-5-2019 could not be construed as a report under Section 173(2)CrPC must be rejected. The first question is, thus, answered in the negative...".

14. At present, the settled law persists in the view that non This is a digitally signed order.

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6. A similar view has been taken by a coordinate bench of this Court in judgment dated 21.09.2023 passed in BAIL APPLN. 2869/2023 titled 'Hashmat Mohammadi v. State, NCT of Delhi' (2023:DHC:6875) whereby an application seeking default bail on similar grounds, in a case under the NDPS Act was dismissed.

7. In view of the aforesaid, this Court is of the opinion that the chargesheet filed in the present case is not incomplete.

8. In the facts and circumstances of the case, the present application is dismissed and disposed of accordingly.

9. It is made clear that the present application is limited to the issue of default bail and nothing stated hereinabove is an opinion on the merits of the case.

10. A copy of this order be sent to the concerned Jail Superintendent, for necessary information.

11. Order to be uploaded on the website of this Court forthwith.

AMIT SHARMA, J OCTOBER 6, 2023/bsr This is a digitally signed order.

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