

## Rahmat Gul Shinwari vs State (Nct Of Delhi) on 11 May, 2023

**Author: Amit Sharma**

**Bench: Amit Sharma**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

BAIL APPLN. 189/2022

RAHMAT GUL SHINWARI

..... Petitioner

Through: Mr. Asghar Khan, Mr. Abdul Tahir  
Khan, Mr. Anubhav Agrawal, Mr.  
Jamal Khan, Mr. Nishat Fatima, Mr.  
Tauseef Parvez, Advocates.

versus

STATE (NCT OF DELHI)

....

Through:

Mr. Aman Usman, APP for  
with S.I. Rajeev Parash  
NDR/Special Cell, Delhi

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

ORDER

% 11.05.2023

1. The present application under Section 167(2) of the CrPC seeks default bail in case FIR No. 117/2019, under Sections 21/25/29 of the NDPS Act, registered at PS Special Cell.

2. Learned counsel for the applicant submits that the latter was arrested on 18.07.2019 and the chargesheet in the present case was filed on 18.01.2020 without a report from the FSL which is an essential part of a report under Section 173 of the Cr.P.C. filed in a case registered under the NDPS Act. It is submitted, therefore, the chargesheet so filed was incomplete and the indefeasible right to default bail under Section 167(2) of the Cr.P.C. accrued in favour of the applicant.

3. It is further submitted that an order dated 31.05.2021 passed by coordinate bench of this Court in BAIL APPLN. 500/2021 by which the bail application filed on behalf of co-accused Mohd. Akbar was dismissed, was carried by way of SLP before the Hon'ble Supreme Court. While dismissing the said SLP (Crl.) No. 5806/2021, vide order dated 18.08.2021. The Hon'ble Supreme Court directed the concerned the Trial Court to expedite the trial and conclude the same within a period of one year from the communication of the said order. It is submitted that despite the aforesaid direction, the trial in the present case is not complete. Learned counsel for the applicant further drew the attention of this Court to an order dated 13.12.2021 passed in Special Leave to Appeal (Crl.) No(s). 8164/2021, whereby the Hon'ble Supreme Court, in a petition seeking default bail on the ground of non-filing of the FSL report, enlarged the petitioner on interim bail while listing the said petition for

final disposal.

4. The case of the prosecution, as stated in the status report dated 08.02.2022 authored by Inspector Vinod Kumar, P.S. Special Cell, is as under:

"1. That on 17/07/19, acting upon secret information, drivers of two cars were apprehended near Ashram flyover and 60 Kgs (30 Kgs in each car) of contraband (packed as 1 kg packet) was recovered from special cavity of the seat. In this regard, a case FIR No. 117/19 u/s 21/25/29 NDPS Act was registered at PS Special Cell, Lodhi Colony, New Delhi.

2. That on the basis of interrogation of accused Dheeraj @ Deepak, driver of one of the cars, search was conducted at M No. 483, Gali No. 21, Zakhir Nagar, Okhla, Delhi, and in that house, three persons were apprehended viz Vakeel Ahmad @ Rahul, Rehmat Gul & Akhtar Mohamad. Recovery of 30 kgs contraband was effected from car of Vakeel Ahmad and recovery of 60 kgs was made from M. No. 483, Zakhir Nagar, Okhla, Delhi.

3. That on the basis of disclosure of accused Rehmat Gul Shinwari (present applicant), on 22.7.2019, further search was conducted at Sonapat, Har\ana and two more persons namely Mohammad Akbar & Neda Mohammad were arrested and during search of cool house/cold storage located at Sonapat, Haryana, further recovery of approx. 49.55 kgs of contraband was made which was clandestinely embedded in card box cartons, bearing special marking for identification, containing diy fruits.

4. That, on the basis of disclosure of accused Neda Mohammad and durina investigation, on 23.7.2019, accused Ahmad Shah Alokozai @ Hazi @ Nawab was arrested by SI Manoj Kumar and on 24.7.2019, at his instance search was conducted at JWC Hub, Logistic Part, Shirdhon, Panvel, Maharashtra and a total number of contraband contaminated 264 bags jute bags were recovered. It is estimated that approximately 130 kgs of Heroin was imbibed/soaked in these jute bags, subject to its extraction by chemical and mechanical processes.

5. That approx 329.55 kgs of contraband was recovered during investigation and main culprit namely Nifal Naukhez @ Tifaley S/o Mohd. Yusuf was arrested for allowing his premises & vehicles and overall conspiracy. It is also pertinent to mention herein that two pistols were also recovered & seized on 18.7.2019 from H No. 483, Gali No. 21, Zakhir Nagar, Okhla, Delhi.

6. That open ended warrants were obtained from the Hon'ble Court against two Afghan nationals namely Nazar Mohammad S/o Wazir Mohammad R/o Helmand, Afghanistan & Baba Jaan @ Hajl Waheed R/o Afghanistan, and efforts are being made to develop information about them.

7. That two Aghan nationals namely Ahmad Shah Alokozai and Neda Mohad have already absconded the trial proceedings in this case, after enlarging on interim bail.

8. That present applicant is also an Afghan national and it is very likelihood that he may also adopt the same methodology and then never report to Hon'ble court."

5. Learned APP for the State submits that the FSL report was not filed with the main chargesheet. It was filed subsequently and delay caused was on account of the fact that 618 exhibits had to be examined by way of a chemical analysis. It is further submitted that samples drawn from the contraband recovered at the time of seizure were tested with a field testing kit. It is further submitted that coordinate benches of this Court have held that a chargesheet without FSL report in a case under the NDPS Act will not be termed as incomplete. Reliance was placed on Suleman vs. State (NCT of Delhi), 2022 SCC OnLine Del 2346.

6. Heard learned counsel for the parties and perused the record.

7. A coordinate bench of this Court in Suleman vs. 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 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 :

(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 filing of FSL report with the charge-sheet does not fall within the realms of Section 173(2)CrPC so as to consider it as "incomplete report". In the present case although FSL report has not been filed, however, the charge-sheet was already filed on 3-3-2021 within the time period as per law. Further, the amount of quantity recovered from the accused is of commercial nature baring the accused from bail under Section 37 of the NDPS Act."

8. In view of the judgment rendered by a coordinate bench of this Court in Suleman (supra), this Court is of the opinion that the chargesheet filed in the present case is not incomplete.

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

10. The applicant is at liberty to approach the concerned learned Trial Court seeking bail on merits.

11. 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.

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

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

AMIT SHARMA, J MAY 11, 2023/ab